Case C-733/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

29 November 2022

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

18 November 2022

Appellant in cassation:

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia pri Tsentralno upravlenie na NAP

Respondent in cassation:

'Valentina Heights' EOOD

Subject matter of the main proceedings

The appeal in cassation is directed against a judgment of the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria) annulling a tax audit notice issued by the tax authorities at the Teritorialna direktsia na Natsionalnata agentsia po prihodite – Sofia (Local Directorate of the National Revenue Agency – Sofia) and, so far as concerns the findings reached therein, confirmed by decision of the Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" – Sofia (Director of the 'Appeals and Tax/Social Insurance Practice Directorate' – Sofia), in accordance with the Zakon za danaka varhu dobavenata stoynost (Law on Value Added Tax), in respect of the taxation periods of March 2019, June 2019 and August 2019 to February 2020, plus accrued interest.

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Subject matter and legal basis of the request

Request under Article 267 TFEU for an interpretation of Article 98(2) of, in conjunction with point 12 of Annex III to, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

Questions referred for a preliminary ruling

1 Must Article 98(2) of, in conjunction with point 12 of Annex III to, Council Regulation 2006/112/EC of 28 November 2006 on the common system of value added tax be interpreted as meaning that the reduced rate made available in that provision for accommodation provided in hotels and similar establishments may be applied where those establishments have not been categorised in accordance with the national legal provisions of the Member State requesting the preliminary ruling[?]

2 If that question is answered in the negative, must Article 98(2) of, in conjunction with point 12 of Annex III to, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax be interpreted as meaning that it allows the reduced rate to be applied selectively to concrete and specific aspects of a given category of supply, in the case where the application of the reduced rate is subject to the condition that 'accommodation provided in hotels and similar establishments' may take place only in accommodation facilities which have been categorised in accordance with the national legal provisions of the Member State requesting the preliminary ruling, or in respect of which a provisional certificate attesting to the commencement of categorisation proceedings has been issued[?]

Provisions of European Union law and case-law

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Articles 96, 98(1) and (2) and 135 of that directive, in conjunction with point 12 of Annex III thereto ('the VAT Directive')

Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax

Judgment of the Court of Justice of 6 May 2010, *Commission* v *France*, C-94/09, EU:C:2010:253, paragraphs 28, 29 and 30

Judgment of the Court of Justice of 3 April 2008, *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien*, C-442/05, EU:C:2008:184, paragraphs 41 and 43

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Provisions of national law

Zakon za danak varhu dobavenata stoynost (Law on Value Added Tax: 'the ZDDS'), Article 66 und Paragraph 1, point 45, of the Additional Provisions

Zakon za turizma (Law on Tourism, 'the ZT'), Articles 111, 113[,] 114, 119 and 133 and Paragraph 1, points 19 and 27, of the Additional Provisions

Zakon za izmenenie i dopalnenie na zakona za turizma (Law amending the Law on Tourism), Article 121

Pravilnik za prilagane na zakona za danaka varhu dobavenata stoynost (Regulation implementing the Law on Value Added Tax), Article 40

Succinct presentation of the facts and procedure

3 The respondent in cassation is a company ('the company') which was entered in the Targovski registar (Commercial Register) at the Agentsia po vpisvania (Registration Agency) on 9 November 2011. On 13 December 2016, it was registered in accordance with the ZDDZ. According to the information in the Commercial Register, its fields of activity include, inter alia, tourism, catering, accommodation, tour operating and a wide variety of other activities the carrying on of which is subject, under Bulgarian law, to the fulfilment of, and compliance with, licensing, registration or other requirements.

4 It was found in the course of a tax audit that, within the period under audit, from 13 December 2016 to 29 February 2020, the company had taken over from a number natural persons (the owners) the rental of a holiday apartment complex by the name of 'Valentina Heights' in the town of Bansko. This has not been disputed by the parties in the proceedings. According to the contracts for management of the private properties comprising the holiday apartment complex which have been submitted to the court, all of which are dated 1 May 2018, it was agreed with the owners of those properties (apartments, studio flats and other premises) that 'Valentina Heights' EOOD would manage and maintain their properties and rent them out to third parties on their behalf. During the period under audit, the company provided guest accommodation in the 'Valentina Heights' holiday rental apartment complex. The revenue generated was recorded by means of registered electronic cash registers and bank transfers. The company charged VAT at a rate of 9% on completed transactions.

5 A certificate of 15 February 2013, issued by the mayor of the municipality of Bansko and attesting to the categorisation of the 'Valentina Heights' establishment in the town of Bansko as a 'guest house' with a capacity of 9 bedrooms and 19 beds, was submitted.

6 On 18 November 2016, the company filed with the Ministry of Tourism an application to register the 'Valentina Heights' holiday apartment complex located

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in the town of Bansko under the category of ‘three-star’ establishment with 23 bedrooms and 46 beds.

7 By order of the mayor of the municipality of Bansko of 7 March 2019, the ‘guest house’ categorisation which had been granted by the aforementioned certificate was revoked. That order was not challenged by the company.

8 On 27 September 2019, the company filed with the Ministry of Tourism an application to register a snack bar belonging to the ‘Valentina Heights’ holiday apartment complex under the ‘two-star’ category. In 2019 and 2020, the company submitted documents supplementing the categorisation applications it had filed.

9 On 21 September 2020, the Deputy Minister for Tourism made an order for the institution of proceedings for the categorisation of tourist establishments in the course of which provisional certificates attesting to the commencement of categorisation proceedings, which were valid until 21 January 2021, were issued in respect of the ‘Valentina Heights’ holiday apartment complex. The Ministry of Tourism informed the company that an expert working group would be carrying out an on-site inspection to verify that the type and the category of the aforementioned establishments were entirely as described in the company’s applications, in accordance with the requirements of the Law on Tourism and the Naredba za iziskvaniyata kam kategoriziranite mesta za nastanyavane i zavedenia za hranene i razvlechenia, za reda za opredelyane na kategoriyata, kakto i za usloviyata i reda za registrirane na stai za gosti i apartamenti za gosti (Regulation on the requirements governing the categorisation of accommodation facilities and catering and entertainment establishments, on the categorisation procedure and on the conditions governing applications to register guest rooms and guest apartments.

10 In the contested tax audit notice, the tax authorities found that the company held a certificate, attesting to the categorisation of the ‘Valentina Heights’ residential property located in the town of Bansko and having a capacity of 9 bedrooms and 19 beds, which had been issued by the mayor of the municipality of Bansko on 15 February 2013 for the period from 15 February 2013 to 7 March 2019. The tax authorities stated in that notice that the company did not possess a certificate attesting to the categorisation of a tourist establishment for the period after 7 March 2019, and that it had wrongly charged VAT at 9%. In the light of those findings, and on the basis of Article 66(1) of the ZDDS (in the version applicable), the tax authorities retrospectively levied the difference between the amount of VAT paid and the full amount of VAT owed, that is to say at 20% on the supplies declared, in respect of which the conditions laid down in Article 40(1), point 2, of the Regulation implementing the Law on VAT were not met.

The essential arguments of the parties in the main proceedings

11 The Director of the ‘Appeals and Tax/Social Insurance Practice Directorate’ for the city of Sofia, at the Central Administration of the NAP [Natsionalna agentsia

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po prihodite, National Revenue Agency], responsible for hearing and determining the administrative appeal brought against the tax audit notice confirmed that notice and endorsed in full the tax authorities' reasoning.

12 In its action before the court of first instance against the tax audit notice, 'Valentina Heights' EOOD relied on the judgment of the Court of Justice of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496), and argued that the special scheme for the taxation of tourist services was to be applied on account of the nature of the activity carried on, and did not depend on the existence of registration under a special law.

13 The court of first instance, the Administrative Court, Blagoevgrad, endorsed in full the line of argument put forward by 'Valentina Heights' EOOD. Its assessment of the facts in the present case was that 'Valentina Heights' EOOD had taken all the measures necessary to obtain a categorisation certificate, but the authority responsible for categorisations, that is to say the Ministry of Tourism, had not issued the classification certificates in good time. In 2016 and 2019, the company concerned had submitted two applications for registration but the Ministry of Tourism did not issue the provisional classification certificates until 23 September 2020. The Administrative Court held that the absence of a certificate attesting to the categorisation of a tourist establishment, such as that which the company concerned did not possess for the period from 7 March 2019 to 29 February 2020 (the latest period under audit), is not such as to form the basis for not applying the special scheme for the taxation of tourist services. In this regard, the court of first instance, referring to the case-law of the Court of Justice, in particular the judgment of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496), expressed the view that the special scheme for the taxation of tourist services was to be applied on account of the nature of the activity carried on, and did not depend on registration under a special law such as, in this case, the Law on Tourism.

14 Before the court of cassation, the Director of the 'Appeals and Tax/Social Insurance Practice Directorate' – Sofia, at the Central Administration of the NAP, submitted that the provision of tourist services in lodgings, accommodation facilities and guest cabins which have not been categorised in accordance with the law, as well as in establishments which do not possess a provisional certificate attesting to the commencement of categorisation proceedings, is not to be treated as accommodation within the meaning of Article 66(2) of the ZDDS and is not subject to a reduced rate of tax. The appellant in cassation is of the view that the relations between the company and the Ministry of Transport are irrelevant to the treatment of services for tax purposes. What is more, since the legislature has provided a remedy at law for cases of failure to act by an administrative authority, any failure to act cannot be regarded as an obstacle precluding the tax authorities from applying tax law. If the categorisation of an establishment were irrelevant to the application of the reduced rate of tax, accommodation services (or tourist services as a whole) could, in its view, be provided in any establishment at all and

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any activity involving the provision of such services would be regarded as a tourist activity.

Succinct presentation of the reasoning in the request for a preliminary ruling

15 The Varhoven administrativen sad (Supreme Administrative Court) is not aware of any judgments of the Court of Justice concerning the interpretation of EU law which answer all of the questions raised in connection with the interpretation of that law and might be relevant to the decision to be given in the present case. In this regard, it has taken into account both the judgment of the Court of Justice of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496), which 'Valentina Heights' EOOD has cited, and the judgments of 6 May 2010, *Commission* v *France* (C-94/09, EU:C:2010:253), of 27 February 2014, *Pro Med Logistik and Pongratz* (C-454/12 and C-455/12, EU:C:2014:111), of 11 September 2014, *K [Oy]* (C-219/13, EU:C:2014:2207), of 9 March 2017, *Oxycure Belgium*, C-573/15, EU:C:2017:189, of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846), of 17 June 2021, *M.I.C.M.* (C-597/17, EU:C:2021:492), of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138), of 22 September 2022, *The Escape Center* (C-330/21, EU:C:2022:719). The Supreme Administrative Court takes the view that, while the grounds of all of those judgments provide valuable guidance on the interpretation of the VAT Directive that is relevant to the decision to be given in the present dispute, the facts established as being relevant to the decision to be given in the main proceedings concerned are different.

16 Article 96 of the VAT Directive provides that the same standard rate of VAT is to be applied to the supply of goods and to the supply of services. Then, Article 98(1) and (2) of that directive, in derogation from the principle of the standard rate of VAT, allows Member States to apply one or two reduced rates of VAT. In accordance with that provision, the reduced rates of VAT may be applied only to supplies of goods or services falling under the categories referred to in Annex III to that directive. Point 12 of Annex III to Directive 2006/112 allows a reduced rate of tax to be applied to accommodation provided in hotels and similar establishments, including the provision of holiday accommodation and the letting of places on camping or caravan sites.

17 At the same time, the Court of Justice has repeatedly held that the wording of Article 98(1) and (2) of Directive 2006/112 does not, however, necessarily have to be interpreted as meaning that the reduced rate can be charged only if it is applied to all aspects of a particular category of supply covered by Annex III to that directive, so that a selective application of the reduced rate cannot be excluded provided that no risk of distortion of competition results. The Court of Justice has concluded from this that, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, Member States may apply a reduced rate of VAT to concrete and specific aspects of a particular category of supply covered by Annex III to Directive 2006/112.

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18 The Court of Justice has also held that, where a Member State decides to make use of the possibility given by Article 98(1) and (2) of Directive 2006/112 to apply a reduced rate of VAT to a category of supply in Annex III to that directive, it has, subject to the requirement to observe the principle of fiscal neutrality inherent in the common system of VAT, the possibility of limiting the application of that reduced rate of VAT to concrete and specific aspects of that category. The possibility thus granted to Member States of applying the reduced rate of VAT selectively is justified, inter alia, by the fact that, since the rate is the exception, the restriction of its application to concrete and specific aspects is consistent with the principle that exemptions or derogations must be interpreted restrictively. The Court has consistently emphasised that the exercise of that possibility is subject to the twofold condition, first, to isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply at issue and, secondly, to comply with the principle of fiscal neutrality. Those conditions seek to ensure that the Member States make use of that possibility only under conditions ensuring the correct and straightforward application of the reduced rate chosen and the prevention of any possible evasion, avoidance or abuse.

19 The VAT Directive does not contain a definition of the expression ‘accommodation provided in hotels and similar establishments, including the provision of holiday accommodation and the letting of places on camping or caravan sites’; neither is that expression defined in Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1). Article 135(2) of the VAT Directive reads: ‘The following shall be excluded from the exemption provided for in point (l) of paragraph 1: the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites’. This means that accommodation must be provided in accordance with the legal provisions of the Member States.

20 In accordance with Paragraph 1, point 45, of the Additional Provisions of the ZDDS, ‘accommodation’ is one of the basic tourist services within the meaning of point 69 of the Additional Provisions of the Law on Tourism, other than in the case of the provision of a general tourist service. In accordance with Paragraph 1, point 69, of the Additional Provisions of the Law on Tourism, the expression ‘basic tourist services’ refers to accommodation, catering and transport.

21 Since a reduced rate is an exception, the restriction of its application to concrete and specific aspects is consistent with the principle that exemptions or derogations must be interpreted restrictively. This raises the question as to whether the fact that the national law of the Republic of Bulgaria attaches additional requirements to the categorisation of accommodation facilities may be regarded as a restriction of the application of the reduced rate to concrete and specific aspects, or whether the reduced rates granted for accommodation provided in hotels and similar establishments are to be applied on account of the nature of the activity carried on

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and do not depend on registration under a special law such as, in the present case, the Law on Tourism.

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