

Case C-615/23

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:

6 October 2023

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

16 June 2023

Appellant:

Dyrektor Krajowej Informacji Skarbowej

Respondent:

P. S.A.

Subject matter of the main proceedings

An advance tax ruling that includes in the VAT taxable amount the compensation paid to the operator of public transport services by a local authority for the provision of those services

Subject matter and legal basis of the request

Interpretation of Article 73 of Directive 2006/112 with respect to the inclusion in the VAT taxable amount of the compensation paid to the operator of public transport services by a local authority for the provision of those services; Article 267 TFEU

Question referred for a preliminary ruling

Must Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, as amended) be interpreted as meaning that compensation, such as that described in the application

for an advance tax ruling, paid to a separate entity (operator) by a local authority for the provision of public transport services, is included in the taxable amount referred to in that provision?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Article 73

Provisions of national law cited

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on the Tax on Goods and Services, *Dziennik Ustaw* (Journal of Laws) of 2018, item 2174, as amended; ‘the Law on VAT’):

In principle, Article 29a(1) provides that the taxable amount comprises everything constituting consideration which the supplier of goods or services has received or is to receive on account of a sale from the purchaser, customer or a third party, including subsidies, subventions and other similar amounts received which have a direct effect on the price of the goods or services supplied by the taxable person.

Ustawa z dnia 16 grudnia 2010 r. o publicznym transporcie zbiorowym (Law of 16 December 2010 on Public Transport, *Dziennik Ustaw* (Journal of Laws) of 2018, item 2016, as amended; ‘the LPT’):

Article 50(1)(2)(c) provides that funding for public utility transport may consist, in particular, in compensating the operator for the costs incurred in connection with its provision of public transport services.

Succinct presentation of the facts and procedure in the main proceedings

- 1 P. S.A. (‘the applicant’ or ‘the company’) applied to the tax authority for an advance tax ruling in regard to tax on goods and services (VAT).
- 2 The applicant is an undertaking engaged in economic activity. It is not an entity with capital or personal ties to any local authorities, that is to say, it is not an internal operator within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and No 1107/70. The company has a full accounting system, is subject to corporate income tax, and is an active VAT taxable person. Its core business is passenger transport. In connection with the entry into force of Regulation No 1370/2007 and the LPT, the applicant is considering the possibility of entering into contracts for the provision of public road transport services, which contracts would allow the applicant to be compensated under Article 50(1)(2)(c) of the LPT. The applicant would act as the operator, while the other party to the

contract would be the organiser of public transport, that is to say, the local authority ('the LA').

- 3 As part of its public transport activities, the applicant would generate revenue from ticket sales, which revenue would cover the costs of transport operations. Ticket prices would be set either by: (1) the organiser of the public transport by way of resolutions adopted by the competent authorities; or (2) the organiser in the form of a model contract for the provision of public road transport services.
- 4 The applicant would generate revenue from the following sources: (1) revenue from ticket sales and other fares, which is subject to VAT (in principle at the 8% rate); (2) compensation for lost revenue due to the application of statutory concessionary fares, which is subject to VAT (at the 8% rate); (3) compensation for lost revenue due to the application of concessionary fares applicable within the area for which the organiser is competent; (4) other revenue (for instance, from the provision of advertising space); however, the sources of revenue listed in items 2–4 may all be present, or may be present only in part or not at all, depending on the provisions of the relevant contract or on statutory provisions.
- 5 The above sources of revenue would not cover the entire cost of the public transport services provided, and thus the applicant would receive compensation from the organiser to cover the losses incurred while providing those services. The amount of compensation may not exceed the amount corresponding to the net financial effect of the provision of urban transport services calculated in accordance with Regulation No 1370/2007.
- 6 The contract with the organiser would stipulate the detailed rules for calculating the net financial effect of service provision, the manner in which compensation is paid, and the maximum amount of compensation for a given period. A negative financial effect would form a basis for compensation. The compensation would not affect ticket prices, that is to say, the price of the service provided, since it is of a general nature and is meant to subsidise the overall cost of transport services provided under the contract.
- 7 The applicant asked the tax authority, among other things, whether such compensation constituted turnover subject to VAT within the meaning of Article 29a(1) of the Law on VAT.
- 8 According to the applicant, the compensation would not increase the taxable amount within the meaning of Article 29a(1) of the Law on VAT, as it does not directly affect the price of the public transport services provided.
- 9 In an advance tax ruling issued on 14 May 2019, the tax authority found that position to be incorrect and stated that, when it is engaging in the activities described in the application, which are business activities as defined in Article 15(2) of the Law on VAT, the applicant is acting as a VAT taxable person.

- 10 The tax authority stated that, for the purposes of Article 29a(1) of the Law on VAT, such compensation constitutes a subsidy that would directly affect the price of the services provided.
- 11 By judgment of 26 November 2019, the court of first instance set aside the contested advance tax ruling.
- 12 In its reasoning, that court, citing the case-law of the Court of Justice (judgments of 22 November 2001, *Office des produits wallons*, C-184/00, EU:C:2001:629, and of 13 June 2002, *Keeping Newcastle Warm*, C-353/00, EU:C:2002:369), stated that it follows from the application that the compensation would not affect the price of tickets (the price of the service provided) as ticket prices are set by the organiser. The court disagreed with the tax authority's position that, from an economic point of view, the company could not provide public transport services at the prices set forth in the contract if it were not for the compensation received, which means that the compensation affects the price. That reasoning cannot be considered correct in light of the necessary requirements highlighted by the Court of Justice, including, in particular, that the relationship between the price of the transport services provided and the compensation must be unambiguous and clearly discernible.
- 13 The tax authority challenged that judgment on a point of law before the referring court.

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

- 14 The referring court intends to ask the Court of Justice whether Article 73 of the VAT Directive is to be interpreted as meaning that the compensation paid by a local authority for the provision of public transport services by an operator in order to enable the transportation of passengers, calculated on a vehicle-km basis, constitutes consideration for the provision of transport services and is thus subject to VAT.
- 15 The tax authority takes the view that the compensation received by the operator (transport company) may constitute remuneration for the transport services provided and may thus be subject to VAT. The tax authority argues that there is a direct link between the compensation received and the services provided by the operator, since the transport company could not have provided the services in question if it were not for the subsidy.
- 16 In national case-law to date, it has been accepted that compensation is not included in the taxable amount for the following reasons:
 - (1) The ability clearly to attribute the amount of the subsidy to a specific transaction is crucial to recognising the subsidy amount received by a taxable person as being included in the taxable amount. The subsidy must be clearly provided by a third party as part of the taxable person's remuneration for entering

into a specific transaction. Where there is no such direct link, the view should be taken that the subsidy is not included in the VAT taxable amount, even if, owing to taxation, the taxable person is effectively able to reduce the price of the goods or services offered;

(2) That compensation does not directly affect the prices of the services provided. Its purpose is primarily to cover the losses associated with the activity in question (or to ensure a reasonable profit) and to make it viable. Furthermore, the manner in which the compensation is granted indicates that it is a subsidy for a specific company related to the operating costs it incurs when providing public utility transport services rather than to the prices of transport services, which are not affected by that compensation.

- 17 In order to determine whether the compensation in question is included in the taxable amount, it is necessary to point to its nature under the LPT, namely, owing to that compensation, the price of the service provided is significantly lower, since, were it not for the subsidy, the operator would not be able to provide services at a price that does not reflect the costs it has incurred with an appropriate margin. Although compensation is paid only in the event of a negative net financial effect, this allows the organiser to set the ticket price at the maximum.
- 18 National case-law to date has relied on the case-law of the Court of Justice, which it has understood to mean that the mere fact that a subsidy may affect the price of goods or services supplied by a taxable person is insufficient for that subsidy to be included in the taxable amount. This is because it is necessary that the subsidy be paid specifically to the subsidised body in order to enable it to provide particular goods or services (the judgment in Case C-184/00, to which the Court of Justice also refers in other judgments, such as that of 15 July 2004, *Commission v Sweden*, C-463/02, EU:C:2004:455). Furthermore, the price payable by the purchaser must be fixed in such a way that it diminishes in proportion to the subsidy granted to the seller or supplier of the goods or services, which therefore constitutes an element in determining the price demanded by the latter. It is thus necessary to examine, objectively, whether the fact that a subsidy is paid to the seller or supplier allows the latter to sell the goods or supply the services at a price lower than that which he would have to demand in the absence of subsidy (the aforementioned judgment in Case C-184/00, paragraphs 12 to 14).
- 19 However, the referring court has doubts as to whether the position of the Court of Justice has been interpreted correctly, and it is unsure whether the existence of a direct link between ticket prices and the compensation received, consisting in the fact that the compensation is a direct subsidy that proportionally reduces ticket prices, is crucial to answering the question posed, or whether determining that tickets would necessarily be more expensive without the compensation is sufficient to establish such a direct link.
- 20 The referring court also seeks clarification as to whether the existence of such a direct link between the compensation paid and the service provided can be

inferred from the fact that the party receiving the compensation (the operator) provides its services on a continuous basis and is at all times ready to provide them. The tax authority sees a reciprocity here, since it considers that the operator provides a service to the public transport organiser.

- 21 The referring court's doubts stem indirectly from the case-law of the Court of Justice. In particular, the Court of Justice has already ruled that a 'healthcare lump sum' constitutes the consideration for the healthcare provided for consideration by a residential care home for the elderly to its residents and, on that basis, comes within the scope of value added tax (judgment of 27 March 2014, *Le Rayon d'Or SARL*, C-151/13, EU:C:2014:185). In that judgment, the Court of Justice held that subsidies directly linked to the price of a taxable transaction are only one situation amongst others referred to in Article 11A(1)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, and that, irrespective of the particular situation in question, the taxable amount in respect of a supply of services is everything which makes up the consideration for the service (paragraph 30 and the case-law cited therein). The Court observed that it is not a requirement of the directive that, for a supply of goods or services to be effected 'for consideration', within the meaning of that directive, the consideration for that supply must be obtained directly from the person to whom those goods or services are supplied (paragraph 34 and the case-law cited therein). Additionally, the Court stated that the fact that, in the main proceedings, the direct beneficiary of the services in question was not the national sickness insurance fund which paid the lump sum but the insured person, was not such as to break the direct link between the supply of services made and the consideration received.
- 22 In the present case, there is no doubt that the compensation does not relate to the individual transport service provided to the service recipient. That is because the compensation cannot be attributed to a specific ticket purchaser, passenger or ticket, as it serves to cover the negative net financial effect of the public service activity. On the other hand, the price paid by passengers is lower thanks to that compensation.
- 23 Moreover, the compensation in question is not related to the operator's activities in general, but only to its public transport activities, because, if the operator also engages in other business activities in addition to providing public transport services, it is then obliged to keep separate accounts for the public transport services it provides.
- 24 In light of the judgment in Case C-151/13, it also appears that the fact that the direct recipients of the public transport services are the passengers and not the LA that pays the compensation is irrelevant to determining the existence of a direct link between the service and the consideration. That is because the consideration does not have to be obtained directly from the service recipient but can also come from a third party. The Court of Justice (inter alia in its judgment in Case

C-151/13) also confirms that the consideration does not have to be received in full from the person to whom the goods or services are supplied, since it may also be obtained in part or even in full from a third party.

- 25 It also appears that the fact that the operator provides its services on a continuous basis and is at all times ready to provide them is relevant to establishing a direct link between ticket prices and compensation. Thus, in order to recognise that there is a direct link between those services and the consideration (compensation) received in exchange for them, there is no need for the payment to be related to an individualised, specific public transport service provided to a specific passenger (the Court of Justice held similarly in Case C-151/13 and in its judgment of 29 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733). The existence of a direct link between the compensation paid and the services provided is also confirmed by the fact that the contracts under which transport services are ordered contain specific provisions concerning the adjustment of the amount of compensation if, as a result of a change in circumstances, the amount granted turns out to be insufficient to perform the services stipulated in the contract.
- 26 It also appears that the fact that the compensation is set annually on a lump sum basis in order to cover the operator's operating costs (rather than being based on specific services) does not pose an obstacle to recognising such a direct link. The Court of Justice has already allowed a subsidy provided on a lump sum basis or compensation paid to cover an entity's operating costs to be taxed (in Case C-174/14 and in its judgment of 22 February 2018, *Ntp. Nagyszénás*, C-182/17, EU:C:2018:91). As indicated above, transport services are provided on a continuous and uninterrupted basis, and therefore this does not affect the direct link between the provision of services and the remuneration granted for them, the amount of which is determined in advance according to certain rules.
- 27 It also appears that the fact that the ticket prices and any concessions are determined by the LA rather than by the operator in question is not of crucial importance to the case at hand, since those matters are also specified in the contract concluded with the operator and affect the calculation of compensation. The Court of Justice has ruled that, provided that the consideration is identifiable, it is not necessary for the subsidy to correspond exactly to the diminution in the price of the goods or services supplied; it is, by contrast, sufficient if the relationship between the diminution in price and the subsidy is significant (judgment of 15 July 2004, *Commission v Germany*, C-144/02, EU:C:2004:444, paragraph 30).