Case C-713/21

Request for a preliminary ruling

Date lodged:

25 November 2021

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

27 July 2021

Applicant and appellant on a point of law:

A

Defendant and respondent in the appeal on a point of law:

Finanzamt X

[…] BUNDESFINANZHOF (Federal Finance Court, Germany)

[…] ORDER

In the case of

A

applicant and appellant on a point of law

[…] v

Finanzamt X

defendant and respondent in the appeal on a point of law

concerning turnover tax from 2007 to 2012

[…] Operative Part

I. The following question is referred to the Court of Justice of the European Union (‘the Court’) for a preliminary ruling:

In relation to the meaning of Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as interpreted in the judgment of the Court of Justice of the European Union of 10 November 2016, *Baštová*, C-432/15 (EU:C:2016:855):

does the owner of a competition horse training stable provide the horse owner with a single supply, consisting in the stabling and training of horses and the participation of horses in competitions, for consideration even where the horse owner remunerates that supply by assigning half of the claim to prize money to which he or she is entitled in the event of successful participation in a competition?

II. The proceedings are stayed pending the ruling of the Court.

G r o u n d s

I.

1 The applicant and appellant on a point of law ('applicant') is a horse rider and operated a 'competition horse training stable' in the years 2007 to 2012 (years at issue). At the applicant's business, the horses made available to him were professionally stabled, cared for and trained and were entered in competitions at home and abroad. The applicant concluded 'supply contracts' with the horse owners based in Germany, under which they 'made available' their horses to the applicant. Each owner waived any right to issue instructions regarding the training and use of the horses. It was further agreed that the owner had to bear the maintenance, competition, transport, farrier and veterinarian costs in respect of the horses, while the applicant had to bear the costs of participating in each competition that were attributable to him as the rider (travel, flight and hotel costs, expenses). Since only the owner of the horses was entitled to prize money at horse competitions, it was further agreed that the applicant was to receive 50% of all cash and non-cash prizes that he won for the owner with the owner's horses. In that respect, the respective owners had already, under the supply contract, assigned to the applicant half of each of their future claims against the respective competition organisers for the payment of prizes and the transfer of ownership of non-cash prizes. The applicant was entitled to set the owner's payment claims off against counterclaims.

2 The applicant entered both his own and other owners' horses in domestic and foreign competitions. He set the winnings earned at the competitions using other owners' horses off against the costs of accommodation, veterinarians, medicines, farriers, competitions and other costs in accordance with the agreements with the horse owners.

3 In an external audit, the auditor proceeded on the assumption that the proceeds acquired in domestic and foreign competitions using other owners' horses were subject to the standard tax rate. The defendant and respondent in the appeal on a point of law (the Finanzamt – Tax Office; 'the FA') subsequently issued amended

turnover tax assessment notices dated 8 October 2015 in accordance with Paragraph 164 of the Abgabenordnung (General Tax Code) and withdrew the reservation of review in each case. By decision of 6 July 2017 on the objections lodged by the applicant, the FA dismissed the objections as unfounded.

4 The action before the Finanzgericht (Finance Court; 'the FG') was also unsuccessful as regards the main point at issue. Referring to the Court's judgment of 10 November 2016 in *Baštová*, C-432/15 (EU:C:2016:855), concerning Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'), and to the case-law of the Bundesfinanzhof (Federal Finance Court; 'the BFH') concerning the Umsatzsteuergesetz (Law on turnover tax; 'the UStG'), the FG ruled in the judgment published in *Entscheidungen der Finanzgerichte* (decisions of the finance courts – EFG) 2021, p. 500, that prize money won by participating in domestic and foreign competitions with other owners' horses constitutes consideration for supplies which are subject to the standard tax rate. The FG stated that, on the basis of the contracts concluded with the horse owners, the applicant made a single supply which consisted in the stabling and training of horses and the participation of horses in competitions. For that bundle of supplies, he received from the respective horse owners reimbursement of the maintenance, competition, transport, farrier and veterinarian costs, on the one hand, and a share in the competition proceeds, on the other hand. Therefore, his supply was also made in return for the transfer of part of the prize money – to which the horse owners were entitled. This concerns the supply relationship between the applicant and the respective horse owners, which is independent of the supply relationship between the horse owner and the competition organiser. The applicant did not acquire any direct claims of his own against the competition organisers. Rather, he was able to keep half of the competition winnings solely on the basis of a separate mutual supply relationship between himself and the horse owner.

5 In the appeal on a point of law brought by the applicant against that judgment, the only question still at issue is that as to whether the applicant provided services to the horse owners that were remunerated by the transfer of half of the prize money as consideration.

II.

6 1. Legal framework

7 a) EU law

8 The second subparagraph of Article 1(2) of the VAT Directive provides as follows:

'On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.'

9 Article 2(1)(c) of the VAT Directive provides as follows:

‘The following transactions shall be subject to VAT: …

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such; …’

10 Article 9(1) of the VAT Directive provides as follows:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

11 Article 73 of the VAT Directive states as follows:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

12 b) National law

13 According to Paragraph 1(1)(1) of the UStG, the following transactions are to be subject to turnover tax:

‘supplies of goods and services effected for consideration within the territory of the country by a trader in the course of his or her business. Transactions are not excluded from taxation where they are carried out pursuant to statute or an order of an authority or are deemed to be carried out under a statutory provision’.

14 The first to third sentences of Paragraph 10(1) of the UStG stated as follows in the years at issue:

‘Turnover shall be calculated in accordance with the consideration received for supplies of goods and services (first sentence of Paragraph 1(1)(1)) and for intra-Community acquisitions (Paragraph 1(1)(5)). Consideration is everything which the recipient of the supply expends (net of turnover tax) for the purpose of obtaining the supply. The consideration also includes anything that a person other than the recipient of the supply pays to the trader for the supply.’

15 Paragraph 118(2) of the Finanzgerichtsordnung (Rules of Procedure of the Finance Courts; ‘the FGO’) states as follows:

‘The Federal Finance Court is bound by the factual findings made in the contested judgment, unless admissible and well-founded grounds of review on a point of law are raised in relation to those findings.’

16 2. Case-law to date

17 a) Case-law of the Court

18 In its judgment in *Baštová* (EU:C:2016:855, paragraph 40), the Court answered the national court by stating ‘that the supply of a horse by its owner, who is a taxable person for VAT purposes, to the organiser of a horse race for the purpose of the horse’s participation in that race does not constitute a supply of services for consideration within the meaning of that provision where it does not give rise to a payment awarded for participation or any other direct remuneration and where only the owners of horses which are placed in the race receive a prize, even if that prize is determined in advance. On the other hand, such a supply of a horse for the purposes of its participation in the race constitutes a supply of services for consideration where it gives rise to the payment, by the organiser, of remuneration irrespective of whether or not the horse in question is placed in the race.’

19 The Court thus referred to three situations, in which activities are remunerated either ‘by the payment … of entrance and declaration fees’ (first case, paragraph 35 of the Court’s judgment) or by prize money (second case, paragraph 36 et seq. of the Court’s judgment), or ‘by virtue of a payment awarded … for participation’ (third case, paragraph 39 of the Court’s judgment). The Court based its decision in that regard on three considerations.

20 According to paragraph 35 of the Court’s judgment, the service provided by the horse race organiser, consisting in enabling the owner of a horse to have his or her horse participate in the horse race, cannot be regarded as effective consideration for the participation of a horse in a horse race by way of the ‘supply of a horse’ by the owner to the race organiser. The Court justifies that by stating that the enabling of participation in the horse race is remunerated by the payment of entrance and declaration fees, by which the Court is also commenting on the first case. Furthermore, the possible increase in value of the horse as a result of its being placed, for example, is difficult to quantify and uncertain.

21 With regard to the second case, the Court states in paragraph 36 et seq. of its judgment that, ‘secondly’, it cannot be assumed that the supply of a horse gives rise to effective consideration where only the owners of horses which are placed in the race receive a prize. This is because the prize money is not awarded for the supply of the horse, but for the achievement of a certain result at the end of the race, namely the placing of the horse, and is thus subject to a degree of uncertainty. In addition, the classification of that supply as a taxable transaction subject to the result achieved by the horse at the end of the race is contrary to case-law of the Court according to which the term ‘supply of services’ is objective in nature and applies without regard to the purpose or results of the transactions.

22 The Court comments on the third case in paragraph 39 of its judgment, according to which, 'thirdly', the situation is different only where a payment is awarded for participation in the race irrespective of whether or not the horse is placed.

23 b) Subsequent case-law of the BFH

24 With regard to remuneration by way of prize money (the second case), the BFH commented on two groups of cases following the judgment in *Baštová* (EU:C:2016:855). On the one hand, the BFH followed the Court as regards cases in which prize money is awarded in the relationship between the competition organiser and the horse owner (BFH judgment of 2 August 2018 – V R 21/16, *Sammlung der Entscheidungen des Bundesfinanzhofs* (Reports of Decisions of the Federal Finance Court – BFHE – 262, 548), *Bundessteuerblatt* (Federal Tax Journal) II 2019, 339).

25 On the other hand, in its judgment of 10 June 2020 – XI R 25/18 (BFHE 270, 181, paragraph 45), the BFH applied the assessment made in the judgment in *Baštová* (EU:C:2016:855) regarding the relationship between the competition organiser and the horse owner to the relationship between the horse owner and the owner of a competition horse training stable, where the horse owner transfers half of the prize money to the owner of that training stable: 'For the reasons stated in II.2.e [= reproduction of the judgment of the Court in *Baštová*, EU:C:2016:855, paragraphs 37 to 40], the statements of the Court in any event apply *mutatis mutandis* to cases of this kind, in which the provider of the supply [= owner of the competition horse training stable] participates in the competition himself or herself and receives from a third party [= horse owner] a share of the prize money which is paid to that third party for the result that the provider of the supply achieved in the competition himself or herself (for a contrasting view, see the judgment of the Finanzgericht Münster (Finance Court, Münster) of 19 September 2019 – 5 K 2510/18 U, juris, paragraph 52). In such a case also, the payment is made for the result achieved by the provider of the supply in the competition, even though the payment is legally made by a third party who received the prize money from the organiser, and not by the organiser itself. The prize money does not constitute payment for other (possibly taxable) supplies made by the provider of the supply. Therefore, it also does not form part of the consideration for those supplies and is not included in the taxable amount for other taxable supplies.' Moreover, it is irrelevant whether the owner of a competition horse training stable has 'made separate supplies to the horse owners' (judgment of the BFH, in BFHE 270, 181, paragraphs 1 and 46).

26 3. The question of interpretation

27 a) No direct link between consideration and supply

28 In the present case, the applicant does not have any claim of his own to prize money against the competition organiser in the event of successful participation in a competition. Only the horse owner is entitled to prize money vis-à-vis the

competition organiser. Therefore, the applicant acquires a claim to the prize money only to the extent that the horse owner assigns the claim to prize money to him, which, in the present case, took place to the extent of 50% within the framework of the legal relationships existing between the applicant and the respective horse owners.

29 In accordance with the judgment of the BFH in BFHE 270, 181 (see II.2.b above), it might be assumed in this instance that the assessment in the second case in the judgment of the Court in *Baštová*, EU:C:2016:855 (see II.2.a above) not only covers the situation directly ruled on in that judgment, where the competition organiser awards the prize money to the horse owner, but is also transferable to the separate situation where the horse owner gives part of that prize money to the owner of the competition horse training stable in return for that owner's single supply (the stabling and training of horses and the participation of horses in competitions).

30 If that were the case, a supply relationship between the competition organiser and the horse owner would possibly supersede the separate supply relationship between the owner of a competition horse training stable and the horse owner in so far as the prize money which is dependent on whether the horse is placed cannot constitute consideration for the service provided by the owner of a competition horse training stable to the horse owner where the horse owner transfers the prize money to which he or she is entitled on the basis of the placing of his or her horse. In that respect, a different supply relationship would then remove the direct link between a supply of services and consideration, as required under Article 2(1)(c) of the VAT Directive, in the supply relationship at issue in the present case.

31 b) Transfer of prize money as consideration for a supply

32 Nevertheless, the present Chamber considers that there appear to be doubts as to whether the assessment of the prize money from the relationship between the competition organiser and the horse owner can be applied to the relationship between the horse owner and the owner of the competition horse training stable.

33 Those doubts arise from the fact that it is not sufficiently clear from the Court's judgment in *Baštová* (EU:C:2016:855) whether the Court bases its assessment on the absence of consideration or on the absence of a supply. If the Court's judgment in *Baštová* (EU:C:2016:855) is to be understood as meaning that the absence of a supply is the decisive factor, it follows, with regard to the present case, that it must be concluded that there is a supply of services for consideration within the meaning of Article 2(1)(c) of the VAT Directive. In the circumstances of the present dispute, the transfer of half of the prize money, which is dependent on the placing of the horse, from the horse owner to the owner of the competition horse training stable constitutes a condition to which the owner of the competition horse training stable makes his services (the stabling and training of horses and the participation of horses in competitions) subject, and which, as such, therefore

has the necessary direct link with the supply of his services (see also, to that effect, CJEU, judgment of 19 June 2003, *First Choice Holidays*, C-149/01, EU:C:2003:358, paragraphs 32 and 33).

34 In answering that question, account must be taken of the fact that, in paragraph 35 of the judgment in *Baštová* (EU:C:2016:855), the Court addressed the question of whether there is a service which is remunerated by another service as consideration (see, in relation to such situations in the case of exchange transactions and similar transactions, CJEU, judgment of 26 September 2013, *Serebryannay vek*, C-283/12, EU:C:2013:599, paragraph 38 et seq.). The Court answered that question in the negative. The Court has stated that, 'first', the service provided by the horse race organiser, consisting in enabling the owner of a horse to have his or her horse participate in the horse race, cannot be regarded as effective consideration for the participation of a horse in a horse race by way of the 'supply of a horse' by the owner to the race organiser. The Chamber takes the view that it is not possible to infer anything from this for the purposes of the assessment in the present case.

35 The further reasoning in paragraph 36 et seq. of the judgment in *Baštová* (EU:C:2016:855) appears to be ambivalent. On the one hand, the Court states that the supply of a horse does not give rise to effective consideration where only the owners of horses which are placed in the race receive a prize. This indicates that the Court considers that the absence of remuneration (as consideration) is the decisive factor.

36 On the other hand, however, the Court then justifies this with the fact that the prize money is not awarded for the supply of the horse, but for the achievement of a certain result at the end of the race, namely the placing of the horse, and is thus subject to a degree of uncertainty. This indicates that the absence of a supply of services is to be regarded as the decisive factor. This might be considered to be confirmed by the fact that the Court further justifies its conclusion by stating that the classification of that supply as a taxable transaction subject to the result achieved by the horse at the end of the race is contrary to case-law of the Court according to which the term 'supply of services' is objective in nature and applies without regard to the purpose or results of the transactions (judgment of the Court in *Baštová*, EU:C:2016:855, paragraph 38).

37 Therefore, the Chamber has doubts as to the meaning of Article 2(1)(c) of the VAT Directive as interpreted by the judgment of the Court in *Baštová* (EU:C:2016:855), rendering it necessary to make a request for a preliminary ruling from the Court.

38 4. Relevance to the decision to be given

39 The question referred is relevant to the decision to be given. On the basis of the factual findings made by the FG, which are binding in the present appeal on a point of law in the absence of any objections raised to those findings by way of

the appeal on a point of law (Paragraph 118(2) of the FGO), it is established that the applicant, as the owner of a competition horse training stable, provided a single supply which consisted in the stabling and training of the horses as well as the participation of the horses in competitions. For that bundle of supplies, he received from the respective horse owners reimbursement of the maintenance, competition, transport, farrier and veterinarian costs, on the one hand, and a half share in the competition proceeds, on the other hand. That assessment is in line with the legal principles established by the Court in relation to the delimitation of a single supply from multiple supplies (see, for example, CJEU, judgment of 4 September 2019, *KPC Herning*, C-71/18, EU:C:2019:660, paragraph 34 et seq.).

40 If the Court's judgment in *Baštová* (EU:C:2016:855) is to be understood as meaning that the absence of consideration is the decisive factor, the legal assessment by the FG in accordance with the judgment of the BFH in BFHE 270, 181 (see II.2.b above) could prove to be incorrect. The judgment of the FG would then have to be set aside, and the action upheld, upon the appeal on a point of law brought by the applicant.

41 If, on the other hand, the absence of a supply is the decisive factor in accordance with the Court's judgment in *Baštová* (EU:C:2016:855), the FG's judgment would prove to be correct, with the result that the applicant's appeal on a point of law would be unfounded. This is because, in contrast to the judgment in *Baštová* (EU:C:2016:855), the present dispute does not merely concern a supply which is made only for the achievement of a certain result at the end of the race, namely the placing of the horse, and is thus subject to a degree of uncertainty. Instead, the present dispute concerns a single overall service consisting in the stabling and training of horses as well as the participation of the horses in competitions. That supply is, as a whole, free of uncertainty, as such uncertainty relates only to the sub-category of participation in competitions. Since there is a single overall supply, the transfer of half of the prize money is effected not for the achievement of a certain result at the end of the competition, but for the overall supply, which is independent of that result (consisting in stabling, training and participation in competitions). The applicant provided that single supply irrespective of the results in the competitions. Therefore, there is a supply of services which, as required by the Court, is objective in nature. The Chamber takes the view that the extent to which the prize money is transferred is also irrelevant in that respect.

42 Consideration of the economic and commercial realities, which forms a fundamental criterion for the application of the common system of VAT (CJEU, judgments of 2 May 2019, *Budimex*, C-224/18, EU:C:2019:347, paragraph 27, and of 18 June 2020, *KrakVet Marek Batko*, C-276/18, EU:C:2020:485, paragraph 61), also militates in favour of that view. On the basis of those considerations, it must be assumed that the transfers of half of the prize money were intended to remunerate the applicant's overall supply and that the parties also assumed that prize money would be won on an ongoing basis.

43 5. Legal basis of the request for a preliminary ruling

44 The request for a preliminary ruling is made to the Court on the basis of Article 267 of the Treaty on the Functioning of the European Union.

45 6. Stay of proceedings

46 […] [national procedural law]