

**Case C-410/24 [Blapp]<sup>i</sup>**

**Request for a preliminary ruling**

**Date lodged:**

12 June 2024

**Referring court:**

Bundesfinanzhof (Germany)

**Date of the decision to refer:**

10 January 2024

**Applicant and appellant on a point of law:**

D

**Defendant and respondent on a point of law:**

Finanzamt F

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**BUNDESFINANZHOF**

**ORDER**

In the case of

D

Applicant and appellant on a point of law

...

v

Finanzamt F

the XI Chamber

ordered on 10 January 2024:

<sup>i</sup> The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

## Operative part of the judgment

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

Are Article 24(1) and Article 98(1) and (2) of Directive 2006/112/EC, read in conjunction with Category 12 of Annex III thereto, to be interpreted as meaning that they preclude a national provision such as the second sentence of Paragraph 12(2)(11) of the Umsatzsteuergesetz (Law on Turnover Tax; ‘the UStG’), under which a Member State may exclude, by means of a national requirement to break down transactions for tax purposes, supplies from the reduced tax rate provided for by the Member State for the letting of living and sleeping spaces offered by a trader for the short-term provision of accommodation to strangers, which supplies do not directly serve the letting purpose but are remunerated by the consideration for such letting, even if those supplies are dependent supplies ancillary to the short-term provision of accommodation to strangers, such as the supply of breakfast as in this case?

II. The proceedings are stayed pending delivery of the decision by the Court of Justice of the European Union.

### Grounds

#### A.

- 1 The applicant and appellant on a point of law (‘the applicant’) operated a guesthouse for strangers in 2013 (the year at issue). The applicant offered guests only accommodation which included breakfast, at an all-inclusive price. Accommodation guests were not able to opt out of breakfast. In respect of the supplies provided, the applicant issued invoices showing gross amounts for the accommodation including breakfast. Rates or amounts of tax were not shown.
- 2 In the turnover tax return filed with the defendant and appellant (‘Tax Office’) for the year at issue, the applicant declared both supplies at a rate of 7% and supplies at the standard rate of 19%. The tax return was equivalent to a tax assessment subject to review (first sentence of Paragraph 168 of the German Fiscal Code (‘AO’)).
- 3 By letter dated 19 December 2018, the applicant requested the amendment of the tax assessment in accordance with Paragraph 164(2) AO, stating as grounds for this the fact that, following the judgment of the Court of Justice of the European Union (‘the Court’) in *Stadion Amsterdam* of 18 January 2018 – C-463/16, EU:C:2018:22 on the single taxation of principal and ancillary supplies, all turnover generated in association with the guesthouse is to be subject to the reduced tax rate of 7%. [...]
- 4 The Tax Office rejected the request for amendment by notice of 8 February 2019. The appeal failed (appeal decision of 17 April 2019).

- 5 The Hesse Finance Court dismissed the action by means of its judgment of 16 September 2020 – 1 K 772/19 (juris). It was of the opinion that the breakfast supplies provided by the applicant were not subject to the reduced tax rate, but to the standard rate laid down in Paragraph 12(1) UStG. The reduced tax rate laid down in the first sentence of Paragraph 12(2)(11) UStG is limited to pure letting or accommodation supplies. The second sentence of Paragraph 12(2)(11) lays down a requirement to break down, for tax purposes, supplies not directly serving the letting purpose ('breakdown requirement'). The principle that a (dependent) ancillary supply shares the tax treatment of the principal supply is superseded by this breakdown requirement. This is consistent with EU law because, under Article 98(1) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive), Member States may apply a reduced rate of VAT to (only) concrete and specific aspects of a category of supply as set out in Annex III to the VAT Directive, provided that the principle of fiscal neutrality inherent in the common system of VAT is observed. The fact that an all-inclusive price was agreed in the case at issue gives rise to no other assessment. [...].
- 6 By its appeal on a point of law, the applicant submits that substantive law and formal law has been breached, arguing that breakfast is a dependent supply ancillary to the provision of accommodation. [...] Guests who did not take breakfast also paid the full price, with one single exception. The statutory breakdown requirement laid down in the second sentence of Paragraph 12(2)(11) is impermissible following the Court's judgment in *Stadion Amsterdam* of 18 January 2018 – C-463/16, EU:C:2018:22, because a single supply must be subject to a single tax rate which is determined on the basis of the principal supply. Nothing to the contrary follows from Article 98 of the VAT Directive, which provides for a right to select the application of reduced rates.
- 7 The applicant therefore seeks an order setting aside the preliminary decision, the appeal decision of 17 April 2019 and the rejection notice of 8 February 2019 and obligating the Tax Office to amend the turnover tax assessment for 2013 such that supplies amounting to EUR 61 405 are taxed at the reduced rate of 7%.
- 8 The Tax Office requests that the appeal on a point of law be dismissed as unfounded.
- 9 [...]
- 10 [...] [Proceedings stayed pending delivery of the decision by the Court in Case C-516/21]
- 11 ...
- 12 The Tax Office counters this by claiming that the Court, in its judgment in *Finanzamt X* of 4 May 2023 – C-516/21, EU:C:2023:372, did not have to rule on a national, statutory breakdown requirement, since point (a) of the first sentence and the second sentence of Paragraph 4(12) UStG does not lay down such a

statutory breakdown requirement. However, such a statutory breakdown requirement is laid down in the second sentence of Paragraph 12(2)(11) UStG. That judgment cannot therefore be applied analogously to the reduced rate provided for in Paragraph 12(2)(11) UStG. Since the statutory breakdown requirement laid down in the second sentence of Paragraph 12(2)(11) UStG supersedes the principle of single supply, it is irrelevant whether the breakfast supply at issue is to be assessed as an ancillary supply or an independent supply. The fact that the breakdown requirement is consistent with EU law (as also confirmed by the Federal Finance Court ('BFH')) is not unsettled by the Court's judgment in *Finanzamt X* of 4 May 2023 – C-516/21, EU:C:2023:372.

**B.**

13 The Chamber has stayed proceedings and referred the question set out in the operative part to the Court for a preliminary ruling pursuant to Article 267(3) of the Treaty on the Functioning of the European Union.

14 I. Relevant legislation

15 1. European Union law

16 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) in the version applicable to the dispute in the main proceedings

Article 2

1. 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;

Article 24

1. 'Supply of services' shall mean any transaction which does not constitute a supply of goods.

Article 98

1. Member States may apply either one or two reduced rates.

2. The reduced rates shall only apply to the supply of goods and services in the categories set out in Annex III. The reduced rates shall not apply to electronically supplied services.

3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature to establish the precise coverage of the category concerned.

## Annex III:

List of supplies of goods and services to which the reduced rates referred to in Article 98 may be applied

12. accommodation provided in hotels and similar establishments, including the provision of holiday accommodation and the letting of places on camping or caravan sites;

17 2. National legislation

18 Umsatzsteuergesetz (Law on Turnover Tax; 'the UStG') of 21 February 2005 (BGBl I 2005, 386) in the version applicable to the dispute in the main proceedings

Paragraph 1(1)(1)

(1) The following transactions shall be subject to turnover tax:

1. the supply of goods or services effected for consideration within the national territory by a trader in the course of his or her business. ...

Paragraph 12

(1) The rate applicable to taxable transactions shall be 19% of the basis of assessment ...

(2) The rate of tax shall be reduced to 7% in respect of the following transactions:

11. the letting of living and sleeping spaces offered by a trader for the short-term provision of accommodation to strangers, and the short-term letting of camping places. The first sentence shall not apply to supplies not directly serving the letting purpose, even if these supplies are remunerated by the consideration for such letting; ...

19 II. Assessment of preliminary questions

20 1. In order to avoid repetition, the referring Chamber refers to its statements under B.II.1. in the request for a preliminary ruling of 10 January 2024 – XI R 11/23 (XI R 34/20) with regard to the principles for determining the principal and ancillary supply.

21 2. On that basis, the breakfast in the case at issue, unlike in the referral procedure XI R 11/23 (XI R 34/20), is a dependent ancillary supply because guests could neither book it as an additional service nor opt out of it, except with one single exception. ...

22 III. Referral to the Court

- 23 The referring Chamber has doubts as to whether, following the Court’s judgments in *Stadion Amsterdam* of 18 January 2018 – C-463/16, EU:C:2018:22 and *Finanzamt X* of 4 May 2023 – C-516/21, EU:C:2023:372, it can maintain its case-law, according to which the breakdown requirement laid down in the second sentence of Paragraph 12(2)(11) UStG is also consistent with EU law in this respect (see, to that effect, BFH judgment of 24 April 2013 – XI R 3/11, BFHE 242, 410, BStBl II 2014, 86, paragraph 57).
- 24 1. The question referred for a preliminary ruling and the legal analysis of the Chamber
- 25 In order to avoid repetition, the referring Chamber refers to its reasoning under B.III.1. and 2. in the request for a preliminary ruling of 10 January 2024 – XI R 11/23 (XI R 34/20) concerning the provision of parking as a dependent supply ancillary to the short-term provision of accommodation to strangers.
- 26 In addition, the Chamber points out that the dispute demonstrates that the breakdown requirement laid down in the second sentence of Paragraph 12(2)(11) UStG serves to safeguard the principle of fiscal neutrality. Breakfast is taxed at the standard rate, irrespective of whether it is, as in procedure XI R 11/23 (XI R 34/20), an independent principal supply or, as in the present case, a dependent ancillary supply.
- 27 2. Relevance for the resolution of the dispute
- 28 The question referred for a preliminary ruling is relevant to the resolution of the dispute. If the question referred for a preliminary ruling is answered in the negative, the applicant’s appeal on a point of law would have to be dismissed as unfounded, because the Finance Court would have been correct to dismiss the action. If the answer to the question referred for a preliminary ruling is in the affirmative, the standard rate would have been applied incorrectly to the breakfast and therefore the action would have to be upheld in that respect.
- 29 [...]