Case C-411/24

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 GmbH & Co. KG

Defendant and respondent on a point of law:

Finanzamt A

BUNDESFINANZHOF

ORDER

In the case of

D GmbH & Co. KG

Applicant and appellant on a point of law

…

v

Finanzamt A

the XI Chamber

ordered on 10 January 2024:

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 provision of parking spaces, fitness and wellness facilities and of the hotel's own wireless local network (Wi-Fi network) 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 hotels in A and B in 2011 (the year at issue).

2 Both hotels have parking spaces for motor vehicles. These could be used by guests staying at the hotels without this being charged separately, as well as by other visitors to the hotels and the public. In addition, in both hotels, the applicant offered a wireless local network (Wi-Fi network) for hotel guests, without this being charged separately. In one hotel, fitness and wellness facilities were also available for guests. The applicant did not charge separately for these either.

3 […]

4 In its turnover tax return for the year at issue, the applicant declared the supply of goods and services at the standard rate of 19% and the supply of goods and services at the reduced rate of 7%. The applicant took the view that the provision of parking spaces was a supply ancillary to the provision of accommodation that was subject to reduced taxation.

5 The defendant and respondent on a point of law ('Tax Office') did not share this view, differing on this with regard to applicant's annual turnover tax return and, consequently, issued a turnover tax assessment notice subject to review (Paragraph 164 of the Tax Code ('AO')) for the year at issue.

6 The applicant appealed, requesting taxation in accordance with its return, claiming that the provision of parking spaces free of charge is a supply ancillary to the provision of accommodation supplies which, like the latter, is subject to the reduced rate.

7 […]

8 Following a tax audit at the applicant's premises for the year at issue, the auditor held that the standard rate of was also applicable to the provision of the Wi-Fi network, parking spaces, fitness and wellness facilities.

9 The Tax Office followed the auditor's opinion and issued a turnover tax amendment notice for the year at issue, most recently on 21 November 2018 […]. This amendment notice was also appealed pursuant to the first sentence of Paragraph 365(3) AO.

10 By its appeal decision of 30 July 2019, the Tax Office rejected the applicant's appeal as unfounded. […]

11 The Finance Court dismissed the action by means of its judgment of 19 August 2021 – 5 K 174/19, which was published in *Entscheidungen der Finanzgerichte* 2022, 140. By providing the Wi-Fi network, parking spaces, fitness and wellness facilities, the applicant provided supplies for consideration within the meaning of Paragragh 1(1)(1) UStG to guests staying at the hotels (and other visitors to its hotels). […] These taxable supplies are not taxable at the reduced rate laid down in the second sentence of Paragraph 12(2)(11) UStG. By means of Paragraph 12(2)(11) UStG, the German legislator has made selective use of the authorisation provided for in Article 98(1) and (2) of the VAT Directive, read in conjunction with Category 12 of Annex III thereto. Not all 'accommodation provided in hotels and similar establishments', including the ancillary supplies provided would be subject to the reduced tax rate, but only the supplies that directly serve the letting purpose. That is not objectionable under EU law. Member States are not required to apply reduced rates to all the transactions listed in a category of Annex III to the VAT Directive. On the contrary, a 'selective choice' is permitted. The principle that a dependent ancillary supply shares the tax treatment of the principal supply is superseded by this breakdown requirement.

12 By its appeal on a point of law, the applicant submits that substantive law has been breached, arguing that the Finance Court erred in law in classifying the provision of the Wi-Fi network, parking spaces, fitness and wellness facilities as a supply for consideration within the meaning of Paragraph 1(1)(1) UStG. […] Furthermore, the Finance Court failed to recognise that the additional supply elements directly serve the accommodation purpose within the meaning of the second sentence of Paragraph 12(2)(11) UStG. In addition, the Finance Court did not take account of the principle of single supplies recognised by EU law. It is true that the Court of Justice of the European Union ('the Court') held in its judgment in *Commission* v *France* of 6 May 2010 – C-94/09, EU:C:2010:253 that

Article 98 of the VAT Directive authorises Member States to apply reduced rates selectively to certain parts of a category of Annex III of the VAT Directive. However, that case-law does not constitute a restriction on the principle of single supply arising from Article 2 of the VAT Directive. That is also apparent from the Court's judgment in *Stadion Amsterdam* of 18 January 2018 – C-463/16, EU:C:2018:22. All additional supplies are attributable to the letting of the hotel room as the clearly dominant principal supply in the view of the average consumer. According to the case-law of the Court, this requires the application of the reduced rate applicable to the letting of hotel rooms also to those additional supplies. Moreover, any additional supply has to be regarded as directly serving the letting activity, as it increases the number of overnight stays and thus promotes the letting business.

13 The applicant therefore seeks an order setting aside the preliminary decision, the appeal decision of 30 July 2019 and the turnover tax amendment notices for the year at issue.

14 The Tax Office requests that the appeal on a point of law be dismissed as unfounded.

15 It defends the contested preliminary decision, arguing, inter alia, that, by providing the Wi-Fi network, parking spaces, fitness and wellness facilities, the applicant declared that it was prepared in the long term to provide hotel guests with the additional supplies offered and that it thus met the definition of a supply for turnover tax purposes. […] The provision of the Wi-Fi network, parking spaces, fitness and wellness facilities are also not to be regarded as supplies directly serving the accommodation purpose. They are supplies which, in line with the legislator's intention, are not to be subject to the reduced tax rate. The breakdown requirement laid down in the second sentence of Paragraph 12(2)(11) UStG is not contrary to EU law. As a result, the dependent ancillary supplies do not share the tax treatment of the principal supply and are not subject to the reduced tax rate laid down in the first sentence of Paragraph 12(2)(11) UStG.

16 […][Proceedings stayed pending delivery of the decision by the Court in Case C-516/21]

17 The applicant believes its view of the law has been confirmed. When transferred to the present case, the ancillary supplies at issue here must also be subject to the reduced rate provided for in Paragraph 12(2)(11) UStG.

18 The Tax Office counters this by claiming that the Court's judgment in *Finanzamt X* of 4 May 2023 – C-516/21, EU:C:2023:372 cannot be transferred to the matter under examination here. The services supplied in that case directly served the letting purpose, whereas those at issue in the present case do not have the essential nature of the mere provision of accommodation. A direct conclusion as to whether selective application of the reduced tax rate laid down in Paragraph 12(2)(11) UStG is possible cannot be drawn from the Court's judgement.

B.

19 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.

20 I. Relevant legislation

21 1. European Union law

22 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;

23 2. National legislation

24 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;…

25 II. Assessment of preliminary questions

26 1. The Finance Court correctly held that the applicant also provided the Wi-Fi network, parking spaces, fitness and wellness facilities as supplies ancillary to the accommodation supply for consideration.

27 a) 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.

28 b) Accordingly, the provision of the Wi-Fi network, parking spaces, fitness and wellness facilities, which guests could neither book as an additional service nor opt out of and the use of which was not charged separately but as an all-inclusive price, are ancillary supplies inseparably linked to the principal supply, namely the accommodation of the guests staying in the applicant’s hotels. In this respect, there is a single supply with the accommodation.

29 c) Contrary to the applicant’s view, the fact that the applicant does not charge separately for these supplies does not mean that these ancillary supplies are provided free of charge (see Court judgment in *Deco Proteste – Editores* of 5 October 2023 – C-505/22, EU:C:2023:731).

30 2. Moreover, contrary to the applicant's view, the fact that some hotel guests did not actually use the additional services offered does not preclude the existence of a supply for consideration.

31 […]

32 […]

33 […][Details concerning the concept of supply for the purposes of turnover tax]

34 III. Referral to the Court

35 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 consistent with EU law (see, to that effect, BFH judgment of 24 April 2013 – XI R 3/11, BFHE 242, 410, BStBl II 2014, 86, paragraph 57).

36 1. The question referred for a preliminary ruling and the legal analysis of the Chamber

37 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 facilities as a dependent supply ancillary to the short-term provision of accommodation to strangers.

38 2. Relevance for the resolution of the dispute

39 The question referred for a preliminary ruling is also relevant to 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 by the referring Chamber as unfounded. If the answer to the question referred for a preliminary ruling is answered in the affirmative, the standard rate of tax would have been incorrectly applied to the provision of the Wi-Fi network, parking spaces, fitness and wellness facilities and therefore the appeal would have to be upheld in that respect.

40 […]