Case C-344/22

Request for a preliminary ruling

Date lodged:

27 May 2022

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

15 December 2021

Applicant and appellant on a point of law:

Gemeinde A

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

Finanzamt

BUNDESFINANZHOF (FEDERAL FINANCE COURT)

ORDER

In the case of

Gemeinde A

Applicant and appellant on a point of law

represented by:

[…]

v

Finanzamt

Defendant and respondent in the appeal on a point of law

concerning turnover tax 2009 to 2012

Chamber XI

ordered as follows further to the hearing held on 15 December 2021:

Operative part

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

1. In circumstances such as those in the main proceedings, does a municipality which, on the basis of municipal bylaws, imposes a 'spa tax' (of a certain amount per day's stay) on visitors staying in the municipality (spa guests) for the provision of spa facilities (for example a spa park, a spa building, footpaths) carry out, by providing the spa facilities to the spa guests in return for a spa tax, an economic activity for the purposes of Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax if the spa facilities are in any event freely accessible to everyone (and therefore also, for example, to residents not subject to the spa tax or to other persons not subject to the spa tax)?

2. If the answer to Question 1 is in the affirmative: In the circumstances in the main proceedings described above, is the municipal territory alone the relevant geographic market for the purpose of examining whether treating the municipality as a non-taxable person would lead to 'significant distortions of competition' within the meaning of the second subparagraph of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax?

II. […].

Reasons

I.

1 The dispute concerns whether the applicant and appellant on a point of law (applicant), which is a legal entity governed by public law, carried out an economic activity as a trader in the years 2009 to 2012 ('the disputed years') and therefore has a right of deduction.

2 The applicant, which is a municipality, is a state-recognised air spa town. The applicant's spa administration has been run since 1 January 1997 (most recently

under the name ‘B’) as a government-operated business under municipal law and qualifies as a commercial business for the purposes of corporation tax laws (hereinafter ‘the spa business’).

3 The applicant imposes a spa tax pursuant to Paragraph 4 of the Gemeindeordnung für Baden-Württemberg (Municipal Code for Baden-Württemberg, ‘the GemO’) […], read in combination with the applicant’s by-laws […] (local laws of Gemeinde A […]):

‘Paragraph … Imposition of a spa tax

The municipality shall impose a spa tax to cover the costs of erecting and maintaining the facilities provided for spa and leisure purposes and for the events organised for that purpose.

Paragraph … Persons subject to the spa tax

(1) Anyone staying in the municipality who is not resident in the municipality (non-local persons) and who is offered the opportunity to use facilities and participate in events [within the meaning] of Paragraph … shall be subject to the spa tax.

(2) Residents of the municipality, the focal point of whose life is in a different municipality, shall also be subject to the spa tax (annual spa tax), as shall non-local persons staying in the spa municipality for professional reasons to attend conferences or other events.

(3) Non-local persons working or undergoing training in the municipality shall not be subject to the spa tax. …

Paragraph … Basis for and rate of spa tax

(1) A spa tax in the amount of … shall be imposed per person, per day’s stay.

(3) The day of arrival and the day of departure shall be counted as one day’s stay.

(4) Residents of the municipality subject to the spa tax shall pay an annual spa tax, irrespective of the duration, frequency and time of year of their stay. This tax shall be imposed in the amount of … .

Paragraph … Compulsory notification

(1) Anyone who provides paid accommodation, operates a camping site or lets out their apartment as a holiday home to non-local persons shall notify the arrival/departure of persons staying with them within 3 days. …

> (2) Travel agencies shall also notify the arrival/departure of tourists whose payment to the trader includes the spa tax. …
>
> Paragraph … Collection and payment of spa tax
>
> (1) The persons subject to the notification requirement under Paragraph … (…) and … shall, unless a spa tax notice is issued in accordance with Paragraph … (…), collect the spa tax from the persons liable for the spa tax and pay it to the municipality. They shall be liable towards the municipality for full and correct collection of the spa tax. …'.

4 The applicant used this revenue to finance the erection, maintenance and renovation of spa facilities (e.g. spa park, spa building, footpaths) in the disputed years. These facilities are freely accessible to everyone; there is no need to present a spa card in order to gain admittance.

5 The applicant reported the spa tax as remuneration for an activity subject to turnover tax (the spa business) on its turnover tax returns for the disputed years and claimed a deduction for all tourism-related inputs.

6 The Finanzamt ('the Tax Office'), the defendant and respondent in the appeal on a point of law, carried out a tax audit. The auditor […] applied […] extensive reductions to the input tax claimed. The input tax which did not relate to the spa business was not recognised. Furthermore, input tax relating to the spa building was only allowed where the spa building was leased for a fee. The auditor did not allow input tax for footpaths, hiking trails and other facilities outside the spa park to be deducted.

7 The Tax Office agreed with those findings and issued VAT amendment notices on 20 March 2015. Following unsuccessful appeal proceedings […], the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) dismissed the action by judgment of 18 October 2018, 1 K 1458/18, Municipal Finances Journal 2019, 36. It held that, in acting to impose a spa tax, the applicant was not engaged in a business activity, aside from when it (occasionally) hired out the spa building for catering and other events; that it had not in that respect provided spa guests with services as a trader, as treating the applicant as a non-taxable person does not give rise to any significant distortions of competition; that the services as a whole could not be provided by private suppliers, as they are not in a position to satisfy the same need of the spa guests; and that, as the 'operation of the spa facilities' in return for the spa tax does not constitute a business activity, the transactions declared for the spa tax imposed are not otherwise subject to VAT and, consequently, the deductions already allowed by the Tax Office should be reversed, although it is prohibited from issuing a revised tax assessment which is less favourable to the applicant.

8 In the alternative, the Finance Court held that, even if the 'operation of the spa facilities' by the applicant in return for the spa tax does constitute a business activity, the (further) deduction sought would fall foul of the lack of any

connection between the costs incurred in the erection, maintenance and operation of the facilities and its (supposed) economic activity (‘the spa business’).

9 By its appeal on a point of law, the applicant alleges infringement of substantive and procedural law and requests, in addition to its original request, that further deductions be taken into account.

10 […].

II.

11 The Chamber stays the proceedings and refers the questions set out in the operative part to the Court of Justice of the European Union (‘the Court’) for a preliminary ruling pursuant to the third paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU).

12 1. Provisions relied on

13 a) National law

14 Paragraph 1(1), point 1, of the Umsatzsteuergesetz (Law on Turnover Tax, ‘the UStG’)

(1) The following transactions are 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 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 statutory provisions.

15 Paragraph 2(1) and (3) of the UStG, in the version in force in the disputed years

(1) A trader is any person who independently carries out a commercial or professional activity. An undertaking comprises the whole of a trader’s commercial or professional activity. Commercial or professional activity means any sustained activity carried out for the purpose of obtaining income, even where there is no intention to make a profit or an association carries out its activities only in relation to its members.

…

(3) Legal entities governed by public law are commercially active only in the course of their commercial operations (Paragraph 1(1), point 6, and Paragraph 4 of the Körperschaftsteuergesetz (Law on corporation tax)) and of their agricultural or forestry operations. …

16 Paragraph 12(2), point 9, of the UStG

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

…

9. transactions directly connected with the operation of swimming pools and the administration of health spas. The same shall apply to the provision of spa facilities, inasmuch as a consideration is payable in the form of a spa tax; …

17 Paragraph 15(1), first sentence, point 1, first sentence, of the UStG.

(1) A trader may deduct the following as input tax:

the tax lawfully payable on goods and services provided to his business by another trader. …

18 Paragraph 13(1), first sentence, of the Strassengesetz für Baden-Württemberg (Law on the roads of Land Baden-Württemberg, 'the StrG') in the version in force from 11 May 1992 (Law Gazette BW 1992, 329)

(1) Public roads which are intended for general use may be used by everyone within the customary limits in accordance with road traffic regulations (public use).

19 Paragraph 4(1) of the Gemeindeordnung (Municipal Code, 'the GemO')

(1) Municipalities may regulate in by-laws matters not subject to directives, unless they are regulated by law. […].

20 Paragraph 10(2) and (3) of the GemO

(2) Municipalities shall establish the public facilities necessary for the economic, social and cultural well-being of their inhabitants within the limits of their capacity. Residents shall be entitled under the applicable law to use municipal facilities in accordance with the same principles. They shall bear the costs to the municipality.

(3) Persons who own land or carry on a trade but do not live in the municipality shall have equal rights to use the public facilities provided in the municipality for landowners or traders and shall contribute to the costs to the municipality for their land or business.

21 Paragraph 2(1) of the Kommunalabgabengesetz (Law on Municipal Charges, 'the KAG')

(1) Municipal charges shall be imposed on the basis of by-laws. The by-laws shall stipulate, in particular, who is liable for the charge, the purpose, basis for and rate of the charge, and the accrual and due dates of the charge.

22 b) European Union law

23 Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive)

(1) ‘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. …

24 Article 168(a) of the VAT Directive

In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person; …

25 2. The first question referred

a) The Chamber considers that it is not impossible in the present dispute that, contrary to the concurring views of the two parties, there is no economic activity for the purposes of Article 2(1)(c) of the VAT Directive.

26 aa) The right of deduction depends upon there being a connection between the disputed inputs and a supply for consideration. When interpreted in conformity with the Directive, Paragraph 15(1), first sentence, point 1, of the UStG presupposes that the trader intends to use services for his business (Paragraph 2(1) of the UStG, Article 9 of the VAT Directive) and thus for his economic activities, for the purpose of supplying goods and services for consideration (Paragraph 1(1), point 1, of the UStG, Article 2(1)(a) and (c) of the VAT Directive) (settled case-law, see, for example, judgments of the Bundesfinanzhof (Federal Finance Court) of 9 February 2012, V R 40/10, BFHE 236, 258, BStBl II 2012, 844, paragraph 19 et seq.; of 15 April 2015, V R 44/14, BFHE 250, 263, BStBl II 2015, 679, paragraph 10; of 21 October 2015, XI R 28/14, BFHE 252, 460, BStBl II 2016, 550, paragraph 28; of 2 December 2015, V R 15/15, BFHE 252, 472, BStBl II 2016, 486, paragraph 14; and of 18 September 2019, XI R 19/17, BFHE 267, 98, BStBl II 2020, 172, paragraph 15).

27 bb) The question of whether the requirements for reciprocal performance have been fulfilled has to be examined in that regard solely by reference to the turnover tax rules enacted in EU law, not by reference to civil law (see judgments of the Federal Finance Court of 17 December 2009, V R 1/09, BFH/NV 2010, 1869, paragraph 17, and of 16 January 2014, V R 22/13, BFH/NV 2014, 736, paragraph 22; of the Bundesgerichtshof (Federal Court of Justice) of 18 May

2011, VIII ZR 260/10, Umsatzsteuer-Rundschau 2011, 813, paragraph 11, with further citations; and of the Federal Finance Court of 22 May 2019, XI R 20/17, BFH/NV 2019, 1256, paragraph 18). The question of whether a fee is paid in consideration for the services supplied is a question that has to be decided under EU law, irrespective of how it is regarded under national law (see judgments of the Court of 22 November 2018, *Meo Serviços de Comunicações e Multimédia*, C-295/17, EU:C:2018:942, paragraph 68, and of the Federal Finance Court of 21 December 2016, XI R 27/14, BFHE 257, 154, BStBl II 2021, 779, paragraph 29, with further citations, and of 13 February 2019, XI R 1/17, BFHE 263, 560, BStBl II 2021, 785, paragraph 18, in BFH/NV 2019, 1256, paragraph 18).

28 cc) For a service to be supplied for consideration, there must be a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the identifiable service provided to the recipient (see, for example, judgments of the Court of 18 July 2007, *Société thermale d'Eugénie-les-Bains*, C-277/05, EU:C:2007:440, paragraph 19; of 23 December 2015, *Air France-KLM and Hop!-Brit Air SAS*, C-250/14 and C-289/14, EU:C:2015:841, paragraph 22; of 22 June 2016, *Český rozhlas*, C-11/15, EU:C:2016:470, paragraph 21; of 18 January 2017, *SAWP*, C-37/16, EU:C:2017:22, paragraph 25; and [of 22 November 2018], *Meo Serviços de Comunicações e Multimédia*, C-295/17, EU:C:2018:942, paragraph 39; and judgments of the Federal Finance Court in BFHE 257, 154, BStBl II 2021, 779, paragraph 16; BFHE 263, 560, BStBl II 2021, 785, paragraph 16; and BFH/NV 2019, 1256, paragraph 15). The recipient of the service must be identifiable. He must gain a benefit that gives rise to consumption within the meaning of common VAT law (see, for example, judgments of the Federal Finance Court of 7 July 2005, V R 34/03, BFHE 211, 59, BStBl II 2007, 66, under II.1., paragraph 14, with further citations on the case-law of the Court; in BFH/NV 2014, 736, paragraph 20; and in BFH/NV 2019, 1256, paragraph 16).

29 dd) According to the case-law of the Federal Finance Court, the existence of a consumable benefit depends upon whether the individual recipient receives a specific benefit from the service (see judgments of the Federal Finance Court of 18 December 2008, V R 38/06, BFHE 225, 155, BStBl II 2009, 749, under II.3.b, paragraph 38, and of 28 May 2013, XI R 32/11, BFHE 243, 419, BStBl II 2014, 411, paragraph 49). A service financed by (mandatory) charges is not a service for consideration if the benefits received from the service (only) derive indirectly from the benefits which accrue generally to the industry as a whole or a similar industry (see judgments of the Court of 8 March 1988, *Apple and Pear Development Council* C-102/86, EU:C:1988:120, and of the Federal Finance Court of 23 September 2020, XI R 35/18, BFHE 271, 243, paragraph 53 et seq., with further citations).

30 ee) On that basis, it may be that there is no service for consideration in this case. That is because the applicant's spa facilities are available to the general public

free of charge and a spa card is not required in order to gain admittance. Thus, the spa facilities can also be used free of charge by persons not subject to the spa tax (e.g. residents of the municipality or day guests staying overnight in neighbouring municipalities). From that perspective, the recipient is not identifiable as, according to the findings in fact of the Finance Court, the taxable person has not received a specific consumable benefit which goes beyond the benefit received by the general public, who are also allowed to use the applicant's spa facilities. The Finance Court did not find that payment of the spa tax gives rise to the right to any services not available to the general public. The Federal Finance Court has previously ruled in a similar case (on footpaths and hiking trails) that, if the spa facility is intended for general use, it ceases to be a facility for which a spa charge can be imposed for its use (see judgments of the Federal Finance Court of 26 April 1990, V R 166/84, BFHE 161, 182, BStBl II 1990, 799, and of the Finanzgericht München (Finance Court, Munich) of 24 July 2013, 3 K 3274/10, Deutsches Steuerrecht/Entscheidungsdienst 2014, 1065, 1067).

31 b) However, that perspective is open to doubt under EU law within the meaning of the third paragraph of Article 267 TFEU.

32 As the applicant rightly notes, if the legal relationship between it and its spa guests is taken in isolation, the spa guests pay a spa tax of a specified amount per day's stay for the spa facilities provided (e.g. spa park, spa building, footpaths), meaning that, if that legal relationship is taken in isolation, the payments represent the consideration for the opportunity to use the spa facilities. Whether that changes where residents not subject to the spa tax or other persons not subject to the spa tax also have free access to the spa facilities is open to doubt under EU law in the opinion of the Chamber, notwithstanding the case-law cited under II.2.a. For example, the Court examined reciprocal performance in connection with school transport in *Gemeente Borsele* (see judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C-520/14, EU:C:2016:334, paragraph 27), even though only one-third of the parents in question paid a contribution towards the transport costs. The Chamber therefore has doubts as to whether, if the spa tax by-laws are taken in isolation, it should find that there is no reciprocal performance between the applicant and the respective spa guests taken overall, as anyone, that is even persons not subject to the spa tax, can make similar unrestricted use of the facilities and, therefore, the spa guests do not receive a consumable benefit compared to the general public.

33 That gives rise to the first question referred.

34 c) The Chamber notes in connection with Question 1 that the Finance Court, which (like the parties) found that an economic activity exists, did not, in its opinion logically, establish the percentage by which the spa tax imposed by the applicant covers the costs of providing the spa facilities. It may be that this is a loss-making activity, as the spa tax does not cover the operating costs of the spa facilities (see, with regard to the significance of coverage of operating costs as a criterion for economic activity, the judgments of 29 October 2009, *Commission* v

Finland, C-246/08, EU:C:2009:671, paragraph 50; [of 12 May 2016], *Gemeente Borsele and Staatssecretaris van Financiën*, [C-520/14], EU:C:2016:334, paragraph 33; of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft*, C-182/17, EU:C:2018:91, paragraph 38; and of 15 April 2021, *EQ and Administration de l'Enregistrement, des Domaines et de la TVA*, C-846/19, EU:C:2021:277, paragraph 49). If, contrary to the view taken by the referring Chamber, the answer to Question 1 depends upon whether the spa tax covers the operating costs, the Chamber would be obliged if that could be stated in the answer.

35 **3. The second question referred**

If the answer to Question 1 is in the affirmative, it might be possible to argue that, as a legal entity governed by public law, the applicant did not act as a trader, as its treatment as a non-taxable person does not lead to significant distortions of competition. However, that too is open to doubt under EU law.

36 a) The legal basis is Paragraph 2(3) of the old version of the UStG (Paragraph 27(22) and (22a) of the UStG). Paragraph 2b(1) of the UStG (which is broadly identical to Article 13 of the VAT Directive) had not entered into force in the disputed years (Paragraph 27(22), second sentence, of the UStG).

37 b) However, even where Paragraph 2(3) of the old version of the UStG was interpreted in conformity with EU law (notwithstanding the fact that its wording differs considerably from Article 13 of the VAT Directive), a legal entity governed by public law was only a trader within that framework if it carried out an economic and thus a sustained activity to provide services for consideration (economic activity). If it was acting on a private-law basis under contract, no other requirements applied. If, however, its activity was carried out on a public-law basis, it was only a trader if its treatment as a non-trader would have led to significant distortions of competition (see, for example, judgments of the Federal Finance Court of 15 April 2010, V R 10/09, BFHE 229, 416, BStBl II 2017, 863, paragraphs 14 to 48, with further citations on EU case-law; of 3 March 2011, V R 23/10, BFHE 233, 274, BStBl II 2012, 74, paragraph 21; of 1 December 2011, V R 1/11, BFHE 236, 235, BStBl II 2017, 834, paragraph 15; of 14 March 2012, XI R 8/10, BFH/NV 2012, 1667, paragraph 28; of 13 February 2014, V R 5/13, BFHE 245, 92, BStBl II 2017, 846, paragraph 15; and of 3 August 2017, V R 62/16, BFHE 259, 380, BStBl II 2021, 109, paragraph 23).

38 c) In that regard, there is no doubt under EU law that the applicant has carried out an activity within the meaning of the first subparagraph of Article 13(1) of the VAT Directive which is incumbent upon it within the framework of powers conferred by public law (see, in that regard, judgments of 29 October 2015, *Saudacor*, C-174/14, EU:C:2015:733, paragraph 70 et seq., and of 25 February 2021, *Gmina Wroclaw*, C-604/19, EU:C:2021:132, paragraph 76 et seq.). In providing the spa facilities, it carried out an activity under special public-law regulations (Paragraph 13(1) of the StrG; Paragraph 10(2) and (3) of the GemO),

in the course of which it exercised its sovereign power to impose municipal charges (Paragraph 4 of the GemO, read in combination with Paragraphs 2, 8(2) and 43 of the KAG).

39 d) That the applicant acts as a trader is not precluded by the fact that it imposes charges in connection with its activity, (Article 13(1), first subparagraph, last clause, of the VAT Directive), as explained under point c). If the Court answers Question 1 in the affirmative, the transactions do not cease to be taxable because they are carried out pursuant to statute or an order of an authority (Paragraph 1(1), point 1, second sentence, of the UStG).

40 e) In the proceedings concerning the appeal on a point of law, the view can be taken based on the relevant criteria that there is no objection under the law on appeals on a point of law to the finding in fact by the Finance Court that the classification of the applicant as a non-trader does not lead to significant distortions of competition. That is corroborated in essence by the judgments of 16 September 2008, *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505; of [29 October 2015], *Saudacor*, [C-174/14,] EU:C:2015:733, paragraph 74; and of 19 January 2017, *National Roads Authority*, C-344/15, EU:C:2017:28, paragraph 44; and by the judgment of the Federal Finance Court in BFHE 259, 380, BStBl II 2021, 109, paragraph 24, and the findings in fact of the Finance Court. The Finance Court held that the applicant's services as a whole in the applicant's territory could not be provided by private suppliers, as private suppliers are not in a position to satisfy the same need of the spa guests. Even if private suppliers could, like the applicant, provide (at least some) comparable facilities for spa and leisure purposes, they could not impose a spa tax in return, as such charges can only be introduced and imposed by persons with powers conferred by public law. The Finance Court therefore examined the competition in the applicant's territory, disregarding the situation in neighbouring municipalities, in the federal state of Baden-Württemberg and in the country as a whole, and found that there was no potential competition in the applicant's territory. However, the Finance Court did not make any finding as to whether distortions of competition might arise in relation, for example, to neighbouring municipalities.

41 The applicant has now submitted during the hearing that it competes with neighbouring municipalities X and Y, both of which are about 10 km from the applicant. It argues that both those municipalities are spa towns, although the spa services are provided by a private limited liability company (GmbH) on a private-law basis, and that the Finance Court's legal starting point of limiting the market to the applicant's territory alone is therefore incorrect.

42 f) The Chamber has doubts, based on those objections, as to whether the Finance Court based its appraisal of the facts on the correct legal principles of EU law.

43 (1) In the opinion of the referring Chamber, this dispute is similar to an extent to the dispute in *Isle of Wight Council and Others* (EU:C:2008:505).

44 The Isle of Wight Council, which administers the island, charged parking fees on the island which, in the opinion of the Isle of Wight Council, are not subject to VAT. The English court of first instance admitted the action and, taking account of each individual authority case by case, found for each of them, and thus including the Isle of Wight Council, that there were significant distortions of competition.

45 However, the Grand Chamber of the Court found that account should have been taken of the activity in question as such, rather than by reference to any one local market. It held that the liability of bodies governed by public law for VAT results from the carrying-on, as such, of a given activity, irrespective of whether or not those bodies face competition at the level of the local market on which they engage in that activity (judgment in *Isle of Wight Council and Others*, EU:C:2008:505, paragraph 40); that that conclusion is supported by the principles of fiscal neutrality and legal certainty (judgment in *Isle of Wight Council and Others*, EU:C:2008:505, paragraph 41); that the argument put forward by the local authorities concerned amounts to treating only certain local authorities as taxable persons to the exclusion of others, according to whether distortions of competition are or are not produced on each of the local markets, although the supply of services in question is substantially the same; that that argument also means there is different treatment among bodies governed by public law (judgment in *Isle of Wight Council and Others*, EU:C:2008:505, paragraph 45); that, if those distortions are analysed, on the other hand, by reference to the activity as such, irrespective of the conditions of competition prevailing on a given local market, compliance with the principle of fiscal neutrality is ensured, given that all bodies governed by public law are either taxable or non-taxable persons (judgment in *Isle of Wight Council and Others*, EU:C:2008:505, paragraph 46); that the argument that distortions of competition must be evaluated having regard to each of the local markets assumes a systematic re-evaluation, on the basis of often complex economic analyses, of the conditions of competition on a multitude of local markets, the determination of which may prove particularly difficult since the markets' demarcation does not necessarily coincide with the areas over which the local authorities exercise their powers; in addition, several local markets may exist within the territory of the same local authority (judgment in *Isle of Wight Council and Others*, EU:C:2008:505, paragraph 49); that this is capable of giving rise to numerous disputes (judgment in *Isle of Wight Council and Others*, EU:C:2008:505, paragraph 50); that neither the local authorities nor the private operators will be in a position to provide, with the required certainty, for the conduct of their affairs if, on a given local market, the service provided by the local authorities will or will not be subject to VAT; and that that situation is likely to jeopardise the principles of fiscal neutrality and legal certainty (judgment in *Isle of Wight Council and Others*, EU:C:2008:505, paragraphs 51 and 52).

46 These findings of the Court may suggest, in circumstances such as those in the main proceedings, in which a municipality, as a legal person governed by public law, provided a service under public law which is possibly provided in neighbouring municipalities by a limited liability company, as a legal person

governed by private law, and despite the fact that a spa tax is imposed, that the Finance Court may have wrongly limited its examination of significant distortions of competition to the territory of the municipality.

47 (2) On the other hand, in its judgments of 13 December 2007, *Götz*, C-408/06, EU:C:2007:789, and [of 19 January 2017,] *National Roads Authority*, [C-344/15,] EU:C:2017:28, on which the Finance Court relied, the Court found that there were no significant distortions of competition in certain 'monopoly' situations in a particular area of the Member State concerned, raising doubts under EU law within the meaning of the third paragraph of Article 267 TFEU. That gives rise to the second question referred.

48 4. Relevance

Both questions referred are relevant.

49 a) If the answer to Question 1 is in the negative, the action will have to be dismissed. The same applies if the answer to Question 2 is that the municipal territory alone is the relevant geographic market, as assumed by the Finance Court with reference to the judgment of the Court in *National Roads Authority* (EU:C:2017:28) and the judgment of the Federal Finance Court in BFHE 259, 380, BStBl II 2021, 109.

50 b) If, however, the answer to Question 1 is in the affirmative and the answer to Question 2 is in the negative, the Chamber will have to refer the dispute back to the Finance Court, so that the Finance Court can examine the competition for the activity in question as such (without restricting it to the applicant's municipal territory). With regard to the alternative reasoning of the Finance Court, that the applicant is not entitled to the deduction claimed because there is no connection between the cost of erecting, maintaining and operating the facilities and the (supposed) economic activity (the spa business), the Chamber would have to order the Finance Court to repeat that examination with due regard for the legal principles established in the judgments of 22 October 2015, *Sveda*, C-126/14, EU:C:2015:712; of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* C-132/16, EU:C:2017:683; and of 16 September 2020, *Mitteldeutsche Hartstein-Industrie* C-528/19, EU:C:2020:712.

51 5. Legal basis for the reference, incidental judgments

The legal basis for the reference to the Court is the third paragraph of Article 267 TFEU. […].