Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 31 May 2017[1]

Case C-164/16

Commissioners for Her Majesty's Revenue & Customs
v
Mercedes-Benz Financial Services UK Ltd

(Request for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom))

(Reference for a preliminary ruling VAT Directive 2006/112/EC Article 14(2)(b) Supply of goods Leasing agreement with an option to purchase in return for payment of a substantial amount

1. Leasing agreements continue to cause problems of interpretation on the basis of the rules governing value added tax ('VAT'). Due to the mixed nature of such agreements it is not always evident whether they should be classed as a supply of goods or a supply of services. This in turn has significant consequences for taxpayers.

2. Although the Court has already dealt with numerous cases concerning leasing agreements, none has had a conclusive bearing on the method of classifying such transactions for VAT purposes. The present case will provide the Court with an opportunity to provide further clarification in this matter.

Legal framework

EU law

3. Article 14 of Directive 2006/112/EC[2] provides:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

…

(b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

1 Original language: Polish.

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

…’

4. Article 24(1) of the Directive provides that:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

United Kingdom law

5. Article 14(2)(b) of Directive 2006/112 was transposed into United Kingdom law in paragraph 2(b) of schedule 4 to the Value Added Tax Act 1994, in conjunction with section 5 of that Act.

6. Pursuant to section 99 of the Consumer Credit Act 1974, at any time before the final payment by the debtor under a regulated hire purchase agreement falls due, the debtor is entitled to terminate the agreement by giving notice, following payment, if required, of an amount calculated in accordance with section 100 of that Act.

7. Section 189 of the Consumer Credit Act 1974 defines a ‘hire purchase agreement’ as an agreement under which goods are bailed (hired) in return for periodical payments and the property in the goods will pass to the hirer if the terms of the agreement are complied with and if specific events occur, including the exercise by the hirer of an option to purchase the goods.

Facts, procedure and questions referred

8. Mercedes-Benz Financial Services UK Ltd (hereinafter ‘MBFS’) is a subsidiary of Daimler AG and is based in the United Kingdom. It offers financial products related to the use and acquisition of vehicles. In this respect it offers three standard types of vehicle-use agreements: leasing, hire purchase and a mixed agreement called ‘Agility’.

9. The leasing agreement excludes acquisition of the vehicle by the lessee following the expiry of the lease term. It is common ground in the main proceedings that this agreement constitutes a supply of services for VAT purposes. A hire purchase agreement, by contrast, is structured in such a way as to ensure that, as a rule, the sum of the instalments will correspond to the vehicle price, including the financing costs. While the agreement may provide for either equal instalments or a significantly higher final instalment (a so-called ‘balloon payment’), payment of all instalments by the customer is, as a rule, mandatory. The only way in which he may be relieved from this obligation is to give notice of termination of the agreement, which is possible on the basis of the abovementioned consumer credit provisions. The agreement contains an option for the customer to purchase the vehicle when the term of the agreement expires, at which time the customer will be obliged to pay a symbolic final fee (normally GBP 95). However, as the sum of the instalments corresponds to the full price of the vehicle, a decision not to exercise the option to purchase a fully paid-for vehicle makes little business sense. It is accepted in the main proceedings that a hire purchase agreement constitutes a supply of goods for VAT purposes.

10. The subject of the dispute in the main proceedings is the Agility agreement and its classification for VAT purposes.

11. This agreement is structured in such a way that, following the expiry of the lease term, the lessee has the option to purchase the vehicle, subject to payment of the final amount ('optional purchase payment') which corresponds to the mean anticipated value of the vehicle at the time of purchase (in the examples given by the referring court this amount varies from 42% to 48% of the initial price), whilst the sum of the instalments corresponds to the remaining part of the vehicle price including financing costs. According to the findings of the referring court, on average approximately half of all customers avail of the option to purchase.

12. In the opinion of Her Majesty's Revenue and Customs (the United Kingdom tax authority), an Agility agreement constitutes a supply of goods for VAT purposes. The authority confirmed this position in its tax ruling of 16 December 2008. On 23 December 2008, MBFS challenged that decision before the First-Tier Tribunal, which dismissed its challenge on 17 December 2012. That decision was, however, set aside on appeal by decision of 2 May 2014, which in turn has been the subject of an appeal by the tax authority to the referring court.

13. In those circumstances the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) What is the meaning of the words "a contract … which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment", contained in Article 14(2)(b) [of Directive 2006/112]?

(2) In particular, in the context of the present case, does the phrase "in the normal course of events" require a tax authority to do no more than to identify the existence of an option to purchase which can be exercised no later than upon payment of the final instalment?

(3) Alternatively, does the phrase "in the normal course of events" require the national authority to go further and to determine the economic purpose of the contract?

(4) If the answer to Question 3 is yes:

(a) Should the interpretation of Article 14(2) be influenced by an analysis of whether the customer is likely to exercise the option to purchase?

(b) Is the size of the price payable on exercise of the option to purchase relevant for the purposes of determining the economic purpose of the contract?'

14. The request for a preliminary ruling was received by the Court on 21 March 2016. Written observations were filed by MBFS, the United Kingdom and Netherlands Governments and the European Commission. MBFS, the United Kingdom Government and the Commission were represented at the hearing on 19 January 2017.

15. In the opinion of MBFS, the Netherlands Government and the Commission, Article 14(2)(b) of Directive 2006/112 applies to agreements which feature the option to purchase the subject of the agreement (the asset) on terms which make it certain or very likely that the lessee will exercise that option. The United Kingdom Government, by contrast, regards it as irrelevant whether the transfer of ownership of the asset occurs automatically or whether it is optional. In its opinion, Article 14(2)(b) of Directive 2006/112 applies whenever, as a result of the payment of the final instalment, the lessee becomes the owner of the asset, even when payment of that final instalment is voluntary.

Analysis

16. By the questions referred in the present case, which it is appropriate to examine jointly, the referring court essentially seeks to establish whether, and in what circumstances, a leasing agreement with an option for the lessee to purchase the subject matter of the lease following the expiry of the term of the lease should be regarded as being a supply of goods under Article 14(2)(b) of Directive 2006/112. I propose to commence this analysis by examining the wording of that provision.

Interpretation of the wording of Article 14(2)(b) of Directive 2006/112

17. The wording of Article 14(2)(b) of Directive 2006/112 indicates that that provision relates to agreements which have the purpose of transferring the right to dispose of tangible property as owner but which defer the transfer of that right until the time at which the property is released to the purchaser, that is to say, until the purchaser has paid the full price.

18. Agreements of this kind are often mixed in nature, in that they combine the features of a leasing agreement with those of a sale agreement. This is well reflected in the designations of such agreements in certain languages: in English 'hire purchase' or in French 'location vente'. Under such agreements, the lessor/seller undertakes to make the asset available to the lessee/purchaser for a defined period of time and then, following payment by the latter of all instalments, to transfer to him the ownership of the asset. Whilst the lessee has the exclusive right to use the asset and also acquires ownership, automatically or by choice, following the termination of the agreement, he is obliged to pay all the instalments stipulated in the agreement, which together constitute the purchase price of the asset which is subject matter of the agreement.

19. While under this type of agreement the transfer of ownership to the lessee/purchaser is deferred, it takes place 'in the normal course of events', as it is the outcome of the normal performance of the agreement. The only situation in which transfer of ownership would not take place is when this results from extraordinary events and in particular from withdrawal by one of the parties from the agreement. The right to withdraw from an agreement may arise from the agreement itself (e.g. in the event of failure on the part of one of the parties to fulfil its obligations) or from statutory provisions. The right to withdraw from an agreement does not, however, alter the classification of an agreement from the perspective of Article 14(2)(b) of Directive 2006/112, since the only outcome of 'the normal course of events' is the transfer of ownership.

20. Transfer of ownership under such agreements normally takes place at the time of payment by the lessee/purchaser of the full price, which may include a requirement for him to make a unilateral declaration of intent to exercise the option to purchase the subject matter of the agreement. It is in this context that the concept of the 'final instalment' used in Article 14(2)(b) of Directive 2006/112 should be understood. It refers to the payment of the final amount which the lessee/purchaser is obliged to pay under the agreement.

21. As a side note (as it does not concern the present case) it should be added that Article 14(2)(b) of Directive 2006/112 also covers, besides hire purchase agreements, contracts for the sale of goods on deferred terms, provided that those agreements specify that the subject of the agreement will be released to the purchaser before the payment of the total price but that ownership will be transferred to him only once that obligation has been fulfilled. While in such agreements the hire component is missing, they are, functionally, however, similar to hire purchase agreements.

Leasing

22. Hire purchase agreements belong to the broad category of leasing agreements. The concept of 'leasing' has no unambiguous definition and may be used to describe agreements of a very diverse legal nature. However, the characteristic of a lease is that, from the viewpoint of the lessee, a leasing agreement is normally a substitute for acquisition of the ownership of the subject matter of the leasing agreement — it allows him to use it as if he were its owner without having to pay the full purchase price immediately; on the other hand, the instalments paid by the lessee (or by several consecutive lessees) during the lease term must, as a rule, cover the costs of acquisition, depreciation and financing of the subject matter of the leasing agreement by the lessor.

23. The transfer to the lessee of ownership of the subject matter of the leasing agreement on its conclusion may, but does not have to be, an element of the agreement. Most frequently, leasing agreements contain an option to purchase. This is a unilateral undertaking by the lessor to transfer ownership of the leased asset to the lessee in the event that the latter exercises this option and satisfies the terms stipulated in the agreement for that purpose. These terms include, as a rule, the requirement to pay a specific amount, which may vary considerably, ranging from often symbolic amounts to a significant portion of the value of the subject matter of the leasing agreement.

24. According to the case-law of the Court, a leasing agreement should as a rule be regarded as a supply of services.[3] However, in the *Eon Aset Menidjmunt*[4] judgment and, by reference to that judgment, in the *NLB Leasing*[5] judgment, the Court ruled that in specific circumstances a leasing agreement may constitute a supply of goods. The Court ruled in those judgments that 'where a … leasing agreement … provides either that ownership of [the subject matter of the leasing agreement] … is to be transferred to the lessee on the expiry of that agreement or that all the essential powers attaching to ownership of [the subject matter of the leasing agreement] … are to be enjoyed by the lessee and, in particular, substantially all the rewards and risks incidental to legal ownership of [the subject matter of the leasing agreement] … are transferred to the lessee and the present value of the amount of the lease payments is practically identical to the market value of the [subject matter of the leasing agreement] …, the transaction resulting from that agreement must be treated as an acquisition of capital goods …'[6]

The International Accounting Standard relating to leases

25. The Court reached this conclusion by referring to international accounting standards incorporated in EU law by virtue of Regulation No 1126/2008.[7] The leasing agreement was described in International Accounting Standard No 17 (hereinafter 'IAS 17'). The existence of a clause relating to the transfer of ownership of the asset before the end of the lease and of the fact that the sum of instalments is as a rule equal to the market value of the asset correspond, as the Commission indicated in its observations, to two criteria which, according to paragraph 10(a)[8] and (d)[9] of IAS 17, 'individually or in combination would normally lead to a lease being classified as a finance lease'.

3 See, in particular, judgments of 17 July 1997, *ARO Lease* (C-190/95, EU:C:1997:374, paragraph 11), and of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 61).

4 Judgment of 16 February 2012, C-118/11, EU:C:2012:97.

5 Judgment of 2 July 2015, C-209/14, EU:C:2015:440.

6 Judgments of 16 February 2012, *Eon Aset Menidjmunt* (C-118/11, EU:C:2012:97, paragraph 40), and of 2 July 2015, *NLB Leasing* (C-209/14, EU:C:2015:440, paragraph 30).

7 Commission Regulation (EC) of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ 2008 L 320, p. 1).

8 Under which 'the lease transfers ownership of the asset to the lessee by the end of the lease term'.

9 Under which 'at the inception of the lease the present value of the minimum lease payments amounts to at least substantially all of the fair value of the leased asset'.

26. Finance leasing (also known as capital leasing) is regarded as a form of investment on the part of the lessee in the subject matter of the leasing agreement. The situation of the lessee is therefore similar to the situation of an owner who reaps all the rewards from using the subject matter of the leasing agreement and incurs all the risks. This is sometimes called 'economic ownership'.[10] Finance leasing does not have to necessarily mean the final transfer of formal ownership to the lessee, for example, in a situation where the lease term is equal to the period of the useful economic life of the subject matter of the leasing agreement. Finance leasing often has a trilateral dimension, in which the lessor (normally a credit institution or a specialised leasing company) plays only a financing role and the subject matter of the leasing agreement is supplied to the lessee directly by the supplier. In some legal systems finance leasing alone is regarded as 'genuine' leasing.[11]

27. The above decisions of the Court do not, however, in my view, mean that every leasing agreement which, pursuant to IAS 17, may be classified as a finance lease should be treated as a supply of goods on the basis of Article 14(2)(b).

28. The purpose of international accounting standards is to harmonise accounting entries so as to enable them to reflect, to the greatest possible extent, the economic and financial reality of a business, even if this does not correspond to the formal legal situation. In the case of a finance lease, its subject is therefore included in the assets of the lessee's business even if he has not and will not acquire the title to the asset. This is referred to directly in paragraph 21 of IAS 17.[12] Pursuant to paragraph 8 of IAS 17, a lease is to be classified as a finance lease if it transfers to the lessee 'substantially all the risks and rewards incidental to ownership'. These are, in the present context, economic concepts which refer to potential gains and losses for business purposes resulting from the use of the subject matter of the leasing agreement.

29. Furthermore, an accounting entry of a specific transaction is based on, inter alia, the knowledge that the business has of the true economic nature of the transaction and its intended effect. For this reason even paragraph 9 of IAS 17 acknowledges that '[t]he application of these definitions to the differing circumstances of the lessor and lessee may result in the same lease being classified differently by them'.

30. However, legal regulations are based on a different logic. The proper legal classification of specific contractual solutions and the ability of the authorities (administrative and judicial) to examine this classification in a foreseeable manner are more important here than is the economic outcome of the transaction. The legal classification must correspond to an objective assessment of the transaction as a concrete legal event, and the assessment should, so far as possible, be shared by all involved in the legal relations.

31. In the light of the foregoing, I conclude that legal certainty requires that lease agreements should be regarded as supplies of goods for the purpose of levying VAT only when it can be assumed with certainty that in the normal course of events, at the latest by the end of the agreement term, ownership of the subject matter of the leasing agreement will be transferred to the lessee. To my mind, the following arguments support this view.

10 See judgment of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraph 10).

11 For example, the institution of *crédit-bail* in French law or a leasing agreement regulated by the Polish Kodeks Cywilny (Civil Code) (see F. Bénédicte, 'Le crédit-bail financier en France', *Uniform Law Review*, No 1-2/2011, pp. 291-332; W.J. Katner, *Leasing in the Polish Civil Code*, pp. 401-414). See also Ch. von Bar (ed.), *Principles, Definitions and Model Rules of European Private Law*, Sellier, Munich, 2009, p. 292, in which, in accordance with the common-law legal tradition, a lease with the option to purchase (leasing) is placed on a par with an ordinary lease agreement (sometimes described as a 'true lease'), whereas, by contrast, hire purchase agreements are excluded from this category.

12 'Transactions and other events are accounted for and presented in accordance with their substance and financial reality and not merely with legal form. Although the legal form of a lease agreement is that the lessee may acquire no legal title to the leased asset, in the case of finance leases the substance and financial reality are that the lessee acquires the economic benefits of the use of the leased asset for the major part of its economic life in return for entering into an obligation to pay for that right an amount approximating, at the inception of the lease, [to] the fair value of the asset and the related finance charge.'

Lease agreements and transaction categories in Directive 2006/112

32. Directive 2006/112 contemplates, in Article 2(1), two main categories of taxable transactions: a supply of goods and a supply of services (as well as intra-Community acquisition of goods and importation of goods, which are, however, in functional terms, special forms of a supply of goods). Article 14(1) of the Directive defines a supply of goods as 'the transfer of the right to dispose of tangible property as owner.' However, no definition is provided for the supply of services. Pursuant to Article 24(1) of Directive 2006/112, a supply of services means 'any transaction which does not constitute a supply of goods'. Therefore, it would follow, in my view, that only a transaction which actually corresponds to the definition set out in Article 14(1) of Directive 2006/112 may be regarded as a supply of goods, or alternatively, one equivalent to a supply of goods, on the basis of other express provisions of the Directive. Such provisions include Article 14(2)(b) mentioned in this case. All other transactions constitute a supply of services.

33. Article 14(1) of Directive 2006/112 does not refer to the transfer of ownership but to the transfer of the right to dispose of tangible property as owner. The purpose of this provision is to make the definition of a supply of goods independent of the Member States' diverse rules regarding the time and mode of transfer of ownership as a result of a sale agreement or other legal events. Differing rules may, for instance, apply to the question of whether ownership is transferred at the time when the agreement is concluded or only at the time when the property is released, which would have a bearing on the point in time at which tax liability arises. In any event, however, acquisition by the purchaser of the right to dispose of tangible property as owner requires the transfer, at some point in time, of the right of ownership or of some other property right conferring entitlements similar to those arising out of the right of ownership.

34. The Court, it is true, has ruled on numerous occasions that the concept of a supply of goods includes not only the transfer of ownership in the form prescribed by national law but also any transfer of the control of tangible property which allows the other party to dispose of it as owner.[13]

35. However, those judgments concern either the time at which the supply of goods occurred (as in the *Shipping and Forwarding Enterprise Safe* case) or the person who supplied them (as in the *Auto Lease Holland* and *Fast Bunkering Klaipėda* cases), or finally, the question whether the transfer of the right to dispose of tangible property must arise out of a formal agreement or whether it can result from factual events, such as the acquisition of ownership of the goods in good faith (*Evita-K* case). All of these cases related to a situation in which the transfer of ownership had occurred or was to occur in future, in accordance with the agreement made by the parties, and only the specific circumstances of that transfer, essential to the determination of the tax liability of the taxpayers concerned, required clarification.

36. Only in the case of *Eon Aset Menidjmunt* did the Court find that there could be a supply of goods in a situation where it was unclear, or in any event did not result, from the description of the facts whether the leasing agreement examined in the case envisaged the transfer of ownership of the leased asset to the lessee. Despite this lack of clarity, the Court held that a lease of tangible property may be regarded as an acquisition of an investment asset if the leasing agreement stipulated the transfer of ownership of the asset to the lessee, or if the lessee possessed the essential attributes of ownership of the asset, in particular if substantially all the risks and rewards incidental to the legal title to the

13 See, in particular, judgments of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraph 7); of 6 February 2003, *Auto Lease Holland* (C-185/01, EU:C:2003:73, paragraph 32); of 16 February 2012, *Eon Aset Menidjmunt* (C-118/11, EU:C:2012:97, paragraph 39); of 18 July 2013, *Evita-K* (C-78/12, EU:C:2013:486, paragraph 33); and of 3 September 2015, *Fast Bunkering Klaipėda* (C-526/13, EU:C:2015:536, paragraph. 51).

vehicle were transferred to him and the updated sum total of the instalments was virtually the same as the market value of the subject matter of the leasing agreement. In my view, this determination needs to be made more precise in the light of the wording and purpose of Article 14(2)(b) of Directive 2006/112.

37. As I have already noted above, the method of formulating the definition of a supply of goods in Article 14(1) of Directive 2006/112 serves the purpose of making this concept independent of the procedural-law aspects of the time and mode of transfer of ownership in the legal systems of the individual Member States. In order to identify the person subject to VAT and the point in time at which liability arises, we may disregard the formal transfer of ownership and focus instead on the actual transfer of the right to dispose of an asset.

38. In my view, this is possible only on condition that at some point the legal situation is reconciled with the factual circumstances by means of a formal transfer of the right of ownership (or of another right conferring similar entitlements), or by concluding that the transfer of this right has arisen on the basis of the factual circumstances.

39. Only in the case of goods which are naturally and necessarily subject to consumption can the situation be different.[14] In this situation, the right of use means the possibility of the tangible property becoming consumed, the right thus becoming similar to ownership in a manner which justifies the right of use being regarded as constituting a supply of goods for VAT purposes.

40. On the other hand, in the case of tangible property which cannot be consumed and which its user, for example, a lessee, is as a rule obliged to return to the owner following the expiry of the term of use, we cannot talk of any transfer of the right to dispose of tangible property as owner. The release of tangible property to the lessee may be regarded as constituting a supply of goods only when there is a certainty that in the normal course of events the right of ownership of the asset will be transferred to him following the expiry of the agreed lease term. In this situation, the lessee finds himself in a position similar to that of an owner, subject to the provision that his right to dispose of the leased asset is temporarily limited.

41. This interpretation is supported in particular by Article 14(2)(b) of Directive 2006/112, which does not refer to the transfer of the right to dispose of tangible property but directly to the transfer of ownership. In my opinion, this indicates that the intention of the legislature was to include, within the scope of that provision, agreements which result in the transfer of ownership, even if the transfer is deferred to after the time at which the tangible property is released to the (future) acquirer. In formulating that provision, the legislature simply determined that the entire transaction is to be treated as a supply of goods from its inception.

42. Therefore, Article 14(2)(b) of Directive 2006/112 should in my view be interpreted as applying only to those leasing agreements which offer the certainty that in the normal course of events, following the end of the agreement term, ownership of the leased asset will generally be transferred to the lessee.

43. This is the situation which obtains primarily in the case of hire purchase agreements, in which the sum total of the instalments which the lessee is obliged to pay corresponds to the full price of the subject matter of the agreement and ownership thereof is transferred to the lessee under the terms of the agreement upon payment of the final instalment. Structuring the legal relationship in this way means that the likelihood of the lessee not obtaining ownership of the asset which is the subject matter of the leasing agreement would arise only in the event of non-performance or notice of termination of the agreement by one of the parties. This may happen with any type of agreement. The corresponding adjustment of VAT is then provided for by Article 90 of Directive 2006/112.

14 For example, fuel, as in the cases concluded by the judgments of 6 February 2003, *Auto Lease Holland* (C-185/01, EU:C:2003:73), and of 3 September 2015, *Fast Bunkering Klaipėda* (C-526/13, EU:C:2015:536).

44. To my mind, an assumption can also be made that where the sum total of the lease instalments payable by the lessee corresponds to the full price of the asset forming the subject matter of the agreement and consequently, following payment of all instalments the lessee has the option to acquire the ownership of that asset without incurring additional fees or on payment of a symbolic fee only, the likelihood of transfer of ownership of that asset borders on certainty, as otherwise the actions of the lessee would be irrational in economic terms.

45. This assumption presupposes, however, that the leasing agreement provides an option to purchase the leased asset, that is, for the transfer of ownership to be dependent exclusively upon the will of the lessee. It is only on this condition that the assumption of rational action by the lessee can be justified. Of course, in particular instances, for example when the leased asset is specialised machinery or equipment for which it is hard to find a purchaser, and the lease term covers the entire useful economic life of the asset, transfer of ownership may never take place even if the lessee has paid the total price of the asset by way of lease instalments. These are, however, exceptional situations which may be treated in an exceptional manner for purposes of VAT.

46. In the light of the foregoing, I believe that the abovementioned judgments in *Eon Aset Menidjmunt*[15] and *NLB Leasing*[16] should be interpreted to mean that both an agreement under which transfer of ownership of the leased asset to the lessee takes place by virtue of the agreement itself, following payment of all instalments payable by the lessee, and a lease agreement granting the lessee, following payment of all instalments, the option to acquire ownership of the leased asset by way of a unilateral declaration of intent, either free of charge or following payment of a symbolic fee, are to be treated as being supplies of goods. In the second instance, however, the particular circumstances of a specific agreement may indicate that the transaction constitutes a supply of services.

47. On the other hand, I do not believe that the presumption that, following the expiry of the lease term, the ownership of the leased asset will be transferred to the lessee should be extended to other situations which, according to IAS 17, should be included in finance leasing. This undoubtedly applies in regard to the situations described in paragraph 10(c)[17] and (e)[18] of ISA 17, which do not at all envisage a transfer of ownership of the leased asset following the end of the lease.[19] The position is similar in the case of the situations described in paragraph 11 of IAS 17, of which two ((a) and (b)) concern only the transfer of the contractual risk to the lessee and the third ((c)) rules out altogether the transfer of ownership, as it provides for the extension of the lease for a secondary period.

48. Contrary to the Commission's view set out in its observations in the present case, I also do not believe that a leasing agreement should be regarded as a supply of goods in the situation described in paragraph 10(b) of IAS 17.[20] The decision to acquire the leased asset as owner need not depend exclusively on its price, but is based more on an analysis of the needs of the business and the usefulness of the asset in its future business activity, or the possibility of selling it at an attractive price. If the purchase price forms a significant part of the total price of the asset, nothing, in my view, entitles us to assume in advance that the lessee will exercise the option even if that purchase price is

15 Judgment of 16 February 2012 (C-118/11, EU:C:2012:97, paragraph 40).

16 Judgment of 2 July 2015 (C-209/14, EU:C:2015:440, paragraph 30). However, this judgment dealt with a situation in which the Court itself held that the factual circumstances of the case indicated that the will of the parties required the transfer of ownership of the leased asset (see paragraph 31 of the judgment).

17 Under which 'the lease term is for the major part of the economic life of the asset even if title is not transferred'.

18 Under which 'the leased assets are of such a specialised nature that only the lessee can use them without major modifications'.

19 I am, of course, speaking of a situation in which these circumstances occur independently and not in conjunction with the circumstances discussed in point 46 of this Opinion.

20 Under which 'the lessee has the option to purchase the asset at a price that is expected to be sufficiently lower than the fair value at the date the option becomes exercisable for it to be reasonably certain, at the inception of the lease, that the option will be exercised'.

much lower than the market value of the asset at the end of the lease. On the contrary, for example, in the joint occurrence of the situations described in paragraph 10(b) and (c) of IAS 17, which it is not hard to imagine, it is my view that there is a greater likelihood that a transfer of ownership will not take place.

49. The interpretation of Article 14(2)(b) of Directive 2006/112 which I propose is consistent with the wording of that provision. I would point out that that provision covers agreements containing a clause 'which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment'.

50. An agreement must therefore, first of all, contain an ownership transfer clause. Such a clause can be either a decision automatically to transfer ownership by the end of the agreement term, or an option to purchase the leased asset. On the other hand, agreements which do not contain any decision on the transfer of ownership cannot be covered by that provision.

51. Second, transfer of ownership must follow from the normal course of events. A normal course of events should therefore be regarded as a series of events envisaged by the agreement, that is to say, the normal performance of an agreement. This concept may also be extended to include activities such as exercising a right to purchase, which, although optional in formal terms, is in practice the only economically rational course of action. This concept cannot, however, include situations in which the lessee has a genuine choice from an economic point of view, as then, 'in the normal course of events', transfer of ownership has the same chance of occurring as it has of not occurring.

52. Third and last, transfer of ownership must take place at the latest upon payment of the final instalment.[21] An instalment can, in my opinion, be taken to mean any amount which the lessee is obliged to pay under the terms of the agreement. In leasing agreements with a purchase option, the payment of the final instalment opens the opportunity to exercise that option. However, if the sum total of the (mandatory) instalments corresponds to the full price of the leased asset, and if exercising that option does not require any further significant payments to be made, it should be presumed that allowing the exercise of this option is, in practical terms, equivalent to the transfer of ownership. It is precisely this assumption which underlies the interpretation that allows such agreements to come within the scope of Article 14(2)(b) of Directive 2006/112.

53. On the other hand, where the option to purchase is a genuine choice for the lessee, the payment of all mandatory instalments cannot be regarded as the event leading to a transfer of ownership, as this event can only be the decision to exercise the option. Therefore, no agreement of this type meets the requirement that the transfer of ownership must take place at the latest upon payment of the final instalment. If the concept of the final instalment were to be interpreted as relating to the payment of the purchase price, it would lead to the absurd conclusion that all agreements with an option to purchase the leased asset following the end of the lease would come within the scope of Article 14(2)(b) of Directive 2006/112 and therefore constitute a supply of goods.

54. The application of Article 14(2)(b) of Directive 2006/112 to leasing agreements which do not contain clauses such as those indicated in point 45 of this Opinion would therefore be at variance not only with the wording and purpose of that provision but also, more generally, with the hierarchical structure and logic of the classification of the types of taxable transactions adopted in Directive 2006/112. It would mean treating as a supply of goods a transaction the main purpose of which was to hand over a specific asset in order for it to be used, and therefore constituting a service *par excellence*, while the transfer of ownership of the property would be an additional potential element.

21 The use of the term 'instalments' (and similar concepts in other language versions of Directive 2006/112, for instance. 'raty' in Polish or 'Rate' in German) — which is unusual in the context of a rental agreement, which would more normally use the term 'rent' — in itself indicates that the legislature contemplated agreements the ultimate purpose of which is to transfer ownership.

55. As noted above, a lease is often a substitute for ownership of an asset, although it is not necessarily, unlike hire purchase agreements, a means by which to acquire ownership. Economic entities prefer occasionally to make use of means of production as part of a service supplied by another entity, instead of acquiring ownership of the means of production. One of the advantages of this solution is that of not having to pay in advance the entire amount of VAT on the purchase price of means of production which will generate turnover — and thus provide the opportunity to deduct input tax — only in the future. I do not believe that this contractual freedom should be restricted (with the obvious exception of fraud and abuse) by treating as a supply of goods, without any clear justification, a legal relationship which the parties have deliberately structured as a supply of services.

Conclusion

56. In view of the foregoing, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Court of Appeal (England and Wales) (Civil Division) (United Kingdom):

Article 14(2)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax should be interpreted as meaning that a leasing agreement which provides for transfer of the ownership of the leased asset to the lessee by the end of the lease, or which provides that ownership of the leased asset may be transferred to the lessee by way of a unilateral declaration of intent by the lessee, and where the sum of the instalments payable by the lessee under the agreement, irrespective of the declaration of intent, is virtually equivalent to the purchase price of the leased asset, including financing costs, constitutes a supply of goods within the meaning of that provision.