Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

10 December 2020*

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 132(1)(m) – Exemption for 'certain services closely linked to sport or physical education' – Direct effect – Concept of 'non-profit-making organisations')

In Case C-488/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 21 June 2018, received at the Court on 25 July 2018, in the proceedings

Finanzamt Kaufbeuren mit Außenstelle Füssen

v

Golfclub Schloss Igling eV,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra (Rapporteur), D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: G. Hogan,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2019,

after considering the observations submitted on behalf of:

– Golfclub Schloss Igling eV, by J. Hoffmann and M. Mühlbauer, tax advisors,

– the German Government, initially by T. Henze and S. Eisenberg, and subsequently by J. Möller and S. Eisenberg, acting as Agents,

– the Netherlands Government, by M. Bulterman and M. de Ree, acting as Agents,

– the European Commission, by J. Jokubauskaitė and R. Pethke, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 7 November 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 132(1)(m) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between Finanzamt Kaufbeuren mit Außenstelle Füssen (Tax Office, Kaufbeuren, Füssen Branch, Germany) ('the tax office') and Golfclub Schloss Igling eV ('Golfclub'), concerning the refusal by the tax office to exempt from value added tax (VAT) certain services closely linked to the practice of golf provided by Golfclub to golfers.

Legal context

EU law

3 Under Article 2(1)(c) of the VAT Directive, 'the supply of goods for consideration within the territory of a Member State by a taxable person acting as such' is subject to VAT.

4 Title IX of that directive, relating to exemptions, includes a Chapter 2, entitled 'Exemptions for certain activities in the public interest', included in which are Articles 132 to 134 of the directive.

5 Article 132(1)(m) and (n) of the same directive provides as follows:

'Member States shall exempt the following transactions:

…

(m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education;

(n) the supply of certain cultural services, and the supply of goods closely linked thereto, by bodies governed by public law or by other cultural bodies recognised by the Member State concerned'.

6 The first paragraph of Article 133 of the VAT Directive provides as follows:

'Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points … (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

…’

7 Article 134 of the same directive is worded as follows:

‘The supply of goods or services shall not be granted exemption, as provided for in points … (m) and (n) of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

…’

German law

The UStG

8 According to Paragraph 1(1)(1) of the Umsatzsteuergesetz (Law on turnover tax), in the version applicable to the dispute in the main proceedings (‘the UStG’), VAT is chargeable on supplies of goods and services which an operator, in the course of his business, makes for consideration within Germany.

9 According to Paragraph 4 of the UStG:

‘Among the transactions covered by Paragraph 1(1)(1), the following shall be exempt:

…

22. (a) conferences, courses and other events of a scientific or educational nature organised by legal persons governed by public law, higher schools of administration and economics, Volkshochschulen [adult education centres] or bodies pursuing objectives of public benefit or those of a professional organisation, if the major part of the revenue is used to cover expenses,
(b) other cultural and sporting events organised by the operators referred to in (a), where the fee consists of participation fees.’

The AO

10 Paragraph 52 of the Abgabenordnung (General Tax Code), in the version applicable to the dispute in the main proceedings (‘the AO’), entitled ‘Public-benefit purposes’, provides as follows:

‘(1) A corporation shall serve public-benefit purposes if its activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects …

(2) Subject to the provisions of subparagraph (1) above, the following shall be recognised as advancement of the general public:

…

21. the advancement of sport …

…’

11 Paragraph 55 of the AO, entitled ‘Altruistic activity’, provides, in subparagraph 1:

‘Advancement or support shall be provided altruistically if it does not primarily serve the corporation’s own economic purposes, for instance commercial or other gainful purposes, and the following requirements are met:

…

2. On termination of their membership or on dissolution or liquidation of the corporation, members may not receive more than their paid-up capital shares and the fair market value of their contributions in kind.

…

4. Where the corporation is dissolved or liquidated or where its former purpose ceases to apply, the assets of the corporation in excess of the members’ paid-up capital shares and the fair market value of their contributions in kind may be used only for tax-privileged purposes (the principle of dedication of assets). This requirement shall also be met if the assets are to be assigned to another tax-privileged corporation or to a legal person under public law for tax-privileged purposes.

…’

12 Under Paragraph 58 of the AO, entitled ‘Activities having no detrimental effect on tax privilege’:

‘Tax-privileged status shall not be precluded in the event that …

…

8. a corporation holds social events which are of secondary significance in comparison with its tax-privileged activities,

9. a sports association promotes paid in addition to unpaid sporting activities,

…’

13 Paragraph 59 of the AO, entitled ‘Preconditions for tax privileges’, provides as follows:

‘Tax privileges shall be granted if it is stated in the statutes, the act of foundation or other articles of association (statutes for the purposes of these provisions) describing the purpose the corporation pursues that this purpose fulfils the requirements of Paragraphs 52 to 55 and that it is pursued exclusively and directly; actual management activity must conform to these statutes.’

14 Under Paragraph 61(1) of the AO, entitled ‘Dedication of assets in the statutes’:

‘A sufficient dedication of assets for tax purposes (Paragraph 55(1)(4)) shall be deemed to exist if the purpose for which the assets are to be used if the corporation is dissolved or liquidated or if its former purpose ceases to apply is so precisely defined in the statutes as to ensure that it can be ascertained on the basis of the statutes whether such purpose is tax-privileged.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Golfclub is a private law association whose purpose is to nurture and promote the sport of golf. To this end, it manages a golf course and its associated facilities, which it leases to Golfplatz-Y-Betriebs-GmbH. Golfclub's funds may only be used for purposes allowed under its statutes, which provide that, in the event of voluntary or forced dissolution, its assets are to be transferred to a person or institution designated by the general meeting.

16 On 25 January 2011, Golfclub acquired all of the shares of Golfplatz-Y-Betriebs-GmbH, for the sum of EUR 380 000. In order to finance this operation, Golfclub contracted loans from its members with an annual interest rate of 4%, repayable at a rate of 5% per year.

17 During the same year, Golfclub collected a total of EUR 78 615.02 revenue from the following activities:

(i) use of the golf course;

(ii) the rental of golf balls;

(iii) the hiring of caddies;

(iv) the sale of golf clubs;

(v) organising the holding of golf tournaments and golf events for which Golfclub received registration fees.

18 The tax office refused to exempt those activities from VAT. It considered that, under Paragraph 4(22) of the UStG, only registration fees for golf events were exempted, subject to the applicant being a public-benefit organisation within the meaning of Paragraphs 51 et seq. of the AO. According to the tax office, that was not the case with Golfclub as its articles of association did not provide sufficiently precise rules as regards the statutory allocation of its assets in the event of a dissolution. It claimed that the acquisition of Golfplatz-Y-Betriebs-GmbH demonstrated that Golfclub did not pursue an exclusively non-profit-making objective.

19 The tax office therefore issued a VAT notice, making all of the said activities subject to tax.

20 That VAT notice was annulled by the Finanzgericht München (Finance Court, Munich, Germany), which found that Golfclub was a non-profit-making organisation within the meaning of Article 132(1)(m) of the VAT Directive, and that that provision had direct effect, requiring Member States to exempt all activities closely linked to the practice of a sport carried out by such an organisation.

21 The tax office brought an appeal on a point of law against that judgment before the Bundesfinanzhof (Federal Finance Court, Germany). That court believes that the outcome of the dispute depends, first, on whether Article 132(1)(m) of the VAT Directive has direct effect, meaning that it may be relied upon directly before the national courts by non-profit-making organisations if the directive has not been transposed into national law or if it has been incorrectly transposed and, secondly, on the definition of the concept of 'non-profit-making organisations' within the meaning of that provision.

22 The referring court's doubts as to whether Article 132(1)(m) of the VAT Directive has direct effect stem from the judgment of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117, paragraphs 23 and 24), by which the Court held that Article 13A(1)(n) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'), the wording of which is similar to that of Article 132(1)(m) of the VAT Directive, does not have direct effect.

23 The referring court also wonders whether the concept of 'non-profit-making organisation' used in Article 132(1)(m) of the VAT Directive should be regarded as an autonomous concept of EU law and, if it does, whether that concept should be interpreted as only covering organisations whose articles of association state, that in the event of a transfer to another organisation, the latter must also pursue a non-profit-making purpose.

24 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 132(1)(m) of [the VAT Directive], under which Member States are to exempt "the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education", have direct effect, with the result that, in the absence of transposition, that provision may be relied on directly by non-profit-making organisations?

(2) If the first question is answered in the affirmative: Is "non-profit-making organisation" within the meaning of Article 132(1)(m) of [the VAT Directive]

– a concept that must be interpreted under EU law autonomously, or

– are the Member States authorised to make the existence of such an organisation subject to conditions such as Paragraph 52, in conjunction with Paragraph 55, of the [AO] (or Paragraph 51 et seq. of the [AO] in their entirety)?

(3) If it is a concept that must be interpreted under EU law autonomously: Must a non-profit-making organisation within the meaning of Article 132(1)(m) of [the VAT Directive] have rules that apply in the event that the organisation is dissolved, under which it has to transfer its existing assets to another non-profit-making organisation in order to promote sport and physical education?'

Consideration of the questions referred

The first question

25 By its first question, the referring court asks, in essence, whether Article 132(1)(m) of the VAT Directive must be interpreted as having direct effect, meaning that, if the legislation of a Member State transposing that provision exempts from VAT only a limited number of services closely linked to sport or physical education, that provision may be directly relied upon before the national courts by a non-profit-making organisation in order to obtain an exemption for other services closely linked to sport or physical education that are provided by that organisation to persons taking part in those activities and that are not exempt under that legislation.

26 According to settled case-law, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the Member State where the Member State has failed to implement the directive in domestic law within the period prescribed or where it has failed to implement the directive correctly (judgment of 15 February 2017, *British Film Institute*, C-592/15, EU:C:2017:117, paragraph 13 and the case-law cited).

27 A provision of EU law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 49 and the case-law cited).

28 It is sufficiently precise where it sets out an obligation in unequivocal terms (judgment of 1 July 2010, *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 45 and the case-law cited).

29 In the present case, it is clear from the wording of Article 132(1)(m) of the VAT Directive that Member States must exempt 'the supply of certain services' as activities in the public interest, on condition, first, that those services are 'closely linked to sport or physical education' and, secondly, that they are supplied to 'persons taking part in sport or physical education' by 'non-profit-making organisations' (see, to that effect, judgment of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club*, C-253/07, EU:C:2008:571, paragraphs 21 and 22).

30 The expression 'certain services' indicates that that provision does not impose an obligation on Member States to make a general exemption for all supplies of services that are closely linked to sport or physical education.

31 Accordingly, since that provision does not set out an exhaustive list of supplies of services closely linked to sport or physical education that Member States are required to exempt, nor an obligation on Member States to exempt all supplies of services of that nature, it must be interpreted as conferring a certain discretion on Member States in the matter, as the Advocate General stated, in essence, in points 35 and 38 of his Opinion.

32 The Netherlands Government considers that the word 'certain' in Article 132(1)(m) of the VAT Directive implies that the exemption contained in that provision applies only to supplies of services that satisfy both of the conditions thereunder, outlined in paragraph 29 of the present judgment, as well as the condition in Article 134(a) of the same directive, according to which the supplies of services must be essential to the transactions exempted.

33 However, as the Advocate General noted in point 42 of his Opinion, that interpretation is not apparent from the wording of Article 132(1)(m) of the VAT Directive, which clearly refers to the supply of 'certain' services and not the supply of 'the' or 'all' services which satisfy the two conditions set out in that provision. The fact that Article 134(a) of that directive, referred to by the Netherlands Government, excludes the supply of services closely linked to sport or physical education from the benefit of the exemption allowed under Article 132(1)(m) of that directive 'where the supply is not essential to the transactions exempted' has no bearing on that interpretation. The former provision does not remove, but merely limits, the discretion conferred on Member States by Article 132(1)(m) of the same directive in determining which supplies of services closely linked to sport or physical education made by a non-profit-making organisation are to be exempt from VAT under the latter provision.

34 To interpret Article 132(1)(m) of the VAT Directive as meaning that, notwithstanding the use of the word 'certain' to describe the supplies constituting the transaction to be exempted, Member States are obliged to exempt 'all' services closely linked to sport or physical education would be liable to extend the material scope of the exemption beyond that word, contrary to the Court's case-law stating that the terms used to specify the exemptions in Article 132(1) of that directive are to be interpreted strictly (see, by analogy, judgment of 15 February 2017, *British Film Institute*, C-592/15, EU:C:2017:117, paragraph 17 and the case-law cited).

35 It is all the more appropriate to give that literal interpretation to Article 132(1)(m) of the VAT Directive in view of the fact that, out of the 17 transactions exempted under points (a) to (q) of Article 132(1) of the VAT Directive, it is only those described in points (m) and (n) of that paragraph that apply to only some of the services referred to, none of the other points in the paragraph using the term 'certain' or any similar word. Therefore, unless the wording of the other points is to be disregarded, that term cannot be interpreted as a simple reference to the conditions for the application of the exemption which derive from the wording of Article 132(1)(m) and (n) of that directive.

36 In the judgment of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117), it was precisely the use of the term 'certain' in the wording of Article 13A(1)(n) of the Sixth Directive – which corresponds to Article 132(1)(n) of the VAT Directive – which led the Court to consider that that provision allowed the Member States a discretion in determining the cultural services to be exempted and to deduce that the provision did not satisfy the conditions for being capable of being relied on directly before the national courts (see, to that effect, judgment of 15 February 2017, *British Film Institute*, C-592/15, EU:C:2017:117, paragraphs 14, 16, 23 and 24).

37 Given the similarity of the respective wording of points (m) and (n) of Article 132(1) of the VAT Directive, that same reasoning must be applied to the interpretation of the exemption under Article 132(1)(m) of that directive.

38 A consistent interpretation of those two provisions is all the more warranted given that the supply of services linked to sport or physical education and the supply of cultural services, to which the exemptions under points (m) and (n) of Article 132(1) of the VAT Directive respectively apply, are both public-interest entertainment and leisure activities, which distinguishes them from the public-interest activities covered by the 15 other exemptions under Article 132(1) of that directive.

39 That interpretation of Article 132(1)(m) of the VAT Directive is also consistent with the *travaux préparatoires* for that provision. In the original proposal for the Sixth Directive, the European Commission had suggested a global VAT exemption for transactions directly linked to the amateur practice of sport or physical education. However, by introducing the expression 'certain services closely linked to sport or physical education' into Article 13A(1)(m) of the Sixth Directive, to which Article 132(1)(m) of the VAT Directive corresponds, the EU legislature gave Member States a margin of discretion to specify the material content of that exemption.

40 Furthermore, no other conclusion can be inferred from the judgments of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571); of 21 February 2013, *Žamberk* (C-18/12, EU:C:2013:95); and of 19 December 2013, *Bridport and West Dorset Golf Club* (C-495/12, EU:C:2013:861).

41 First, those judgments do not deal with the question of whether Article 132(1)(m) of the VAT Directive has direct effect. Secondly, even though, in those judgments, the Court set limits on the discretion of the Member States to determine, inter alia, the status of the beneficiaries and the manner in which the services exempted by that provision are supplied, the Court did not have to address the question of the discretion that Member States have to determine the services that may be exempted under that provision. It follows that those judgments cannot be relied upon in support of the argument that the provision in question has direct effect.

42 In the light of the foregoing considerations, the answer to the first question is that Article 132(1)(m) of the VAT Directive must be interpreted as not having direct effect, meaning that, if the legislation of a Member State transposing that provision exempts from VAT only a limited number of services closely linked to sport or physical education, that provision may not be directly relied upon before the national courts by a non-profit-making organisation in order to obtain an exemption for other services closely linked to sport or physical education that are provided by that organisation to persons taking part in those activities and that are not exempt under that legislation.

The second and third questions

43 By its second and third questions, which fall to be examined together, the referring court asks, in essence, whether Article 132(1)(m) of the VAT Directive must be interpreted as meaning that the concept of 'non-profit-making organisation', within the meaning of that provision, is an autonomous concept of EU law, which requires that, in the event that the organisation is dissolved, the organisation cannot distribute to its members any surpluses it has made exceeding the capital shares paid up by those members and the market value of any contributions in kind made by them.

44 The referring court asks for these questions to be answered in the event that the Court should find that Article 132(1)(m) of the VAT Directive has direct effect. However, even though that provision does not have direct effect, it should be recalled that, in the context of the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the legislation and the principles of European Union law that require interpretation in view of the subject matter of the dispute in the main proceedings (see, in particular, judgment of 27 March 2014, *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraphs 25 and 26).

45 In the present case, it appears from the order for reference that the referring court does not only have to assess whether Golfclub can directly rely on Article 132(1)(m) of the VAT Directive before the national court to obtain a VAT exemption for the supply of services closely linked to sport or physical education that are not exempt under the UStG. It must also determine whether, in relation to the supply of services consisting of the organisation of golf events for which a registration fee is payable, which fall within the exemption under Paragraph 4(22)(b) of the UStG, Golfclub is a non-profit-making organisation, within the meaning of Article 132(1)(m) of the VAT Directive and may thus benefit from such an exemption.

46 In accordance with the case-law, according to which the exemptions referred to in Article 132(1) of the VAT Directive constitute autonomous concepts of EU law, the purpose of which is to avoid divergences in the application of the VAT system as between one Member State and another (see,

in particular, judgment of 21 February 2013, *Žamberk*, C-18/12, EU:C:2013:95, paragraph 17), it must be held that the concept of 'non-profit-making organisations' used in Article 132(1)(m) of that directive constitutes an autonomous concept of EU law.

47 The referring court asks the Court more specifically whether, under Article 132(1)(m) of the VAT Directive, the classification of an organisation as non-profit-making, within the meaning of that provision, is subject to the condition that, in the event that the organisation is dissolved, it has to transfer its assets to another non-profit-making organisation for the promotion of sport or physical education.

48 The Court has held, with regard to Article 13A(1)(m) of the Sixth Directive, to which Article 132(1)(m) of the VAT Directive corresponds, that an organisation is to be classed as 'non-profit-making', within the meaning of the former provision, by having regard to the aim which the organisation pursues, that is to say that the organisation must not have the aim, unlike a commercial undertaking, of achieving profits for its members. Where the competent national authorities have found that an organisation satisfies that requirement, having regard to the objects set out in its constitution, the fact that the organisation subsequently achieves profits, even if it seeks to make them or makes them systematically, will not affect the original categorisation of the organisation as long as those profits are not distributed to its members (see, to that effect, judgment of 21 March 2002, *Kennemer Golf*, C-174/00, EU:C:2002:200, paragraphs 26 to 28).

49 Similarly, point (a) of the first subparagraph of Article 133 of the VAT Directive provides that Member States may make the granting of the exemption in Article 132(1)(m) of that directive to bodies other than those governed by public law subject in each individual case to the condition that the bodies in question must not 'systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied'. The condition set out in point (a) of the first subparagraph of Article 133 corresponds to the constituent elements of the concept of 'non-profit-making organisation', within the meaning of Article 132(1)(m) of that directive (see, to that effect, judgment of 21 March 2002, *Kennemer Golf*, C-174/00, EU:C:2002:200, paragraph 33).

50 The non-profit-making objective of those organisations presupposes that they must not achieve profits for their members, throughout their existence, including at the time of their dissolution. If that were not the case, such an organisation could, in effect, circumvent that requirement by distributing to its members, after its dissolution, all the surpluses made from all of its activities, despite having benefited from tax and other advantages as a result of its classification as a 'non-profit-making organisation'.

51 It follows that the only organisation that can be classed as a 'non-profit-making organisation', within the meaning of Article 132(1)(m) of the VAT Directive, is an organisation whose assets are assigned on an ongoing basis to the realisation of its constitutional objects and cannot be transferred to its members after the dissolution of the organisation where those assets exceed the capital shares paid up by those members and the market value of any contributions in kind made by them.

52 Accordingly, the answer to the second and third questions is that Article 132(1)(m) of the VAT Directive must be interpreted as meaning that the concept of a 'non-profit-making organisation', within the meaning of that provision, constitutes an autonomous concept of EU law, which

requires that, in the event that such an organisation is dissolved, it may not distribute to its members any surpluses that it has made that exceed the capital shares paid up by those members and the market value of any contributions in kind made by them.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 132(1)(m) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not having direct effect, meaning that, if the legislation of a Member State transposing that provision exempts from value added tax only a limited number of services closely linked to sport or physical education, that provision may not be directly relied upon before the national courts by a non-profit-making organisation in order to obtain an exemption for other services closely linked to sport or physical education that are provided by that organisation to persons taking part in those activities and that are not exempt under that legislation.**

2. **Article 132(1)(m) of Directive 2006/112 must be interpreted as meaning that the concept of a 'non-profit-making organisation', within the meaning of that provision, constitutes an autonomous concept of EU law, which requires that, in the event that such an organisation is dissolved, it may not distribute to its members any surpluses that it has made that exceed the capital shares paid up by those members and the market value of any contributions in kind made by them.**

[Signatures]