Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 17 September 2020[1]

Case C-288/19

QM
v
Finanzamt Saarbrücken

(Request for a preliminary ruling
from the Finanzgericht des Saarlandes (Finance Court of the Saarland, Germany))

Reference for a preliminary ruling – Taxation – Value added tax – Directive 2006/112/EC – Article 2(1)(c) – Supply of services for consideration – Article 45 – Place of supply of services – Article 56 – Place of supply of the hiring of a means of transport – Provision of company vehicles to employees

Introduction

1. Is the provision by a taxable person of a vehicle forming part of the assets of the taxable person's business for his employee's private use subject to value added tax ('VAT')? What, if any, are the conditions for such taxation and does such a transaction constitute the hiring of a means of transport? The Court will have the opportunity to answer these questions in the present case, while at the same time clarifying its case-law on both the provision by taxable persons of their business assets and the supply by such persons of services for private use and the definition of hire in the light of that case-law.

[1] Original language: Polish.

Legal context

European Union law

2. Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,[2] as amended by Directive 2008/8/EC of 12 February 2008[3] ('Directive 2006/112'), provides:

'1. The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…'.

3. Under Article 26(1) of that directive:

'1. Each of the following transactions shall be treated as a supply of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;

(b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business'.

4. Pursuant to the first sentence of Article 45 of the same directive:

'The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. …'.

5. Lastly, Article 56(2) and (3) of Directive 2006/112, in the wording applicable from 1 January 2013,[4] provides:

'2. The place of hiring, other than short-term hiring, of a means of transport to a non-taxable person shall be the place where the customer is established, has his permanent address or usually resides.

…

3. For the purposes of paragraphs 1 and 2, "short-term" shall mean the continuous possession or use of the means of transport throughout a period of not more than thirty days and, in the case of vessels, not more than 90 days'.

[2] OJ 2006 L 347, p. 1.

[3] OJ 2008 L 44, p. 11.

[4] See Article 4 of Directive 2008/8.

German law

6. Directive 2006/112 was transposed into German law by the provisions of the Umsatzsteuergesetz (Law on Turnover Tax; 'the UStG'). Paragraph 3a of the UStG lays down general rules for determining the place of taxable transactions. By way of derogation from those provisions, pursuant to Paragraph 3f of the UStG, in the wording applicable to the facts in the main proceedings, the place of supply of services provided by a taxable person free of charge for purposes unrelated to his business or for the private use of employees is deemed to be the place of establishment of that taxable person.

Facts, procedure and the question referred for a preliminary ruling

7. QM is an investment fund management company based in Luxembourg. The company provided company vehicles, among other things, to two of its employees who are resident in Germany. The employees in question could use those vehicles for both business and private purposes.

8. In the case of one of the employees, the vehicle was provided free of charge, while the other employee covered the cost of its use: EUR 5 688 per year was deducted from his remuneration.

9. QM mainly engages in VAT-exempt transactions and settles its VAT in Luxembourg, using a simplified system. That system does not allow for the deduction of input VAT on goods and services acquired at an earlier stage of marketing. In particular, QM did not enjoy the right to deduct input tax on the two vehicles at issue in the main proceedings.

10. In November 2014 QM registered as a taxable person for the purposes of VAT in Germany and submitted tax returns for 2013 and 2014 in which it accounted for the provision of the vehicles in question. On the basis of those returns, the Finanzamt Saarbrücken (the tax authority in Saarbrücken, Germany) issued tax decisions. However, in July 2015, QM appealed against those decisions. That appeal was dismissed on 2 May 2016.

11. On 2 June 2016, QM brought an action before the referring court against that decision. QM argues that the provision of the vehicles in question is not taxable, since it is not a supply for consideration or, in any event, not to the full extent, and that it does not constitute the hiring of a means of transport for the purposes of Article 56 of Directive 2006/112.

12. In those circumstances, the Finanzgericht des Saarlandes (Finance Court of the Saarland, Germany) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 56(2) of [Directive 2006/112] to be interpreted as meaning that "hiring of a means of transport to a non-taxable person" should also be understood as referring to the provision of a vehicle (company car) forming part of the assets of the business of a taxable person to his staff, if the employee does not provide consideration for it that does not consist in (part of) the work performed by him, and thus does not make any payment, does not use any of his cash remuneration for it, and also does not choose between various benefits offered by the taxable person under an agreement between the parties according to which the entitlement to use the company car is contingent on the forgoing of other benefits?'

13. The request for a preliminary ruling was lodged at the Court on 9 April 2019. Written observations were submitted by QM, the German Government and the European Commission. Following the cancellation of the hearing due to the Covid-19 pandemic, the parties replied in writing to the Court's additional questions.

Analysis

Preliminary observations

14. By the question referred for a preliminary ruling, the referring court seeks to ascertain whether the concept of 'hiring of a means of transport to a non-taxable person' set out in Article 56(2) of Directive 2006/112 covers the provision by a taxable person of a vehicle free of charge to his employee for both business and private purposes.

15. As is apparent from the information included in the reference for a preliminary ruling, the dispute in the main proceedings concerns two situations. In one case, the car is actually provided free of charge, while in the second case, the employee bears a cost of EUR 5 688 per year, which is deducted from his remuneration. The wording of the question referred for a preliminary ruling appears to concern only the former situation, but I consider that in order to give a full and useful answer to the referring court, both cases must be analysed. This is all the more so as the case-law of the Court concerning, on the one hand, the use of a taxable person's business assets for purposes unrelated to his business and, on the other hand, the definition of a lease agreement, may result in divergent assessments.

Provision of a vehicle to an employee free of charge

16. As a rule, transactions carried out for consideration are subject to VAT. That consideration may be in the form of cash or other consideration.[5] As regards the relationship between a taxable person and his staff, the case-law of the Court provides a number of indications which make it possible to determine whether a benefit provided to an employee is for consideration.

17. Contrary to the German Government's assertion in its written observations, it is quite clear from that case-law that in the relationship between a taxable person and his employees, a transaction for consideration takes place only if the employee renders payment for the goods or services, if he gives up part of his remuneration or if a certain part of his work can be regarded as consideration for the goods or services received from the employer.[6] In this context, it is irrelevant that, under national law, the benefit provided by the employer to the employee is considered to be part of the latter's income for income tax purposes.[7]

18. A similar position was taken by the VAT Committee in the guidelines adopted at its 101st meeting on 20 October 2014, Document H.[8] Although those guidelines are not binding, they confirm such an understanding of the case-law of the Court referred to above.

[5] See, in particular, judgment of 10 January 2019, *A* (C-410/17, EU:C:2019:12, paragraphs 35 and 36).

[6] See, in particular, judgments of 16 October 1997, *Fillibeck* (C-258/95, EU:C:1997:491, paragraphs 15 to 17); of 29 July 2010, *Astra Zeneca UK* (C-40/09, EU:C:2010:450, paragraphs 29 to 31); and of 18 July 2013, *Medicom and Maison Patrice Alard* (C-210/11 and C-211/11, EU:C:2013:479, paragraph 30).

[7] Judgment of 18 July 2013, *Medicom and Maison Patrice Alard* (C-210/11 and C-211/11, EU:C:2013:479, paragraph 28).

[8] Taxud.c.1[2016]1136484–832 REV; available on the Commission's website.

19. As is apparent from the information contained in the reference for a preliminary ruling and from the wording of the question referred itself, in the view of the referring court in the present case, in any event with regard to one of QM's employees, none of the above conditions for establishing the existence of a transaction for consideration is satisfied.

20. It is therefore not possible to agree with the German Government's assertion that the remuneration of that employee 'should be assumed' to be reduced by the value of the benefit resulting from the provision of the vehicle by the employer to the employee.

21. According to the case-law of the Court, only remuneration actually received by a taxable person is considered to be remuneration for a benefit provided for consideration, and there must be a direct link between that consideration and the remuneration received.[9] Therefore, the existence of such a link between the work performed by an employee and a specific benefit from the employer would have to be established in a specific situation by the court hearing the case. Nothing can be 'assumed' or presumed.[10]

22. Accordingly, it must be concluded that in a situation such as that described in the question referred for a preliminary ruling there is no supply of a service for consideration for the purposes of Article 2(1)(c) of Directive 2006/112.

23. On the other hand, the German Government raises the additional argument that, in the present case, it is irrelevant whether the vehicle was provided to the employee for consideration or free of charge, since Article 26(1)(b) of Directive 2006/112 should apply. Pursuant to that provision, a supply of services for consideration also includes, inter alia, the supply of services carried out free of charge by a taxable person for the private use of staff. Since the provision of a vehicle in a situation such as that in the main proceedings is undoubtedly a service,[11] it should, in the view of the German Government, be subject to VAT pursuant to Article 2(1)(c) of Directive 2006/112, read in conjunction with Article 26(1)(b) thereof. Additionally, that service must be regarded as the hiring of a means of transport other than short-term hiring, such that, under Article 56(2) of that directive, the place of supply of that service is the place of residence of the customer. This argument requires more careful consideration.

24. Under Article 26(1) of Directive 2006/112, two types of situation must be treated as a supply of services for consideration. First, the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or for other purposes unrelated to his business. However, this applies only where the VAT paid on the acquisition of those goods was deductible (letter (a)). Second, the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or for other purposes unrelated to his business (letter (b)). In the latter situation, it is irrelevant whether or not the tax paid on the acquisition of goods or services used for the provision of services free of charge for the private use of the taxable person or of his staff was deductible.

25. The German Government assumes that it is indisputable that Article 26(1)(b) of Directive 2006/112 applies when a taxable person provides a vehicle to his employee free of charge, since it takes the view that such provision constitutes the hiring of a means of transport for the purposes

[9] Judgment of 10 January 2019, *A* (C-410/17, EU:C:2019:12, paragraph 32).

[10] See judgment of 18 July 2013, *Medicom and Maison Patrice Alard* (C-210/11 and C-211/11, EU:C:2013:479, paragraph 30).

[11] Pursuant to Article 24(1) of Directive 2006/112, a supply of services is any transaction which does not constitute a supply of goods.

of Article 56(2) of that directive, the place of supply (and taxation) of which is the customer's place of residence, and, where that service is supplied free of charge, Article 26(1)(b) of Directive 2006/112 must apply in accordance with its literal wording as separated from its context.

26. However, this is placing the cart before the horse, because that reasoning, which starts from an assumption that at most could have been its result, completely disregards the existence of Article 26(1)(a) of Directive 2006/112 and the question as to which of the two provisions of that paragraph (letter (a) or (b)) is applicable to a situation where a taxable person provides a vehicle free of charge to his employee.

27. This issue is not clearly resolved by Directive 2006/112. The literal wording of those provisions could suggest that they overlap in terms of their scope. Thus, if the use of goods for the private use of a taxable person or of his staff cannot be taxed pursuant to Article 26(1)(a) of that directive, in particular where those goods have not given rise to a right to deduct input tax, that use can always be regarded as a service and taxed under Article 26(1)(b) of that directive.

28. However, such an interpretation would, in my view, be incompatible with the purpose of those provisions and with the principle of fiscal neutrality. Moreover, it would render Article 26(1)(a) essentially meaningless.

29. Although the Court of Justice has not ruled in its case-law on how the scope of those two provisions should be delimited,[12] it has ruled on their purpose and function.

30. With reference to Article 6(2) of Sixth Directive 77/388/EEC,[13] the wording of which is essentially identical to the wording of Article 26(1) of Directive 2006/112, the Court has ruled that the purpose of that provision is to ensure equal treatment of taxable persons and consumers. It is designed to prevent the non-taxation of goods included in the assets of a business that are used for private purposes and of services provided free of charge for private purposes.[14]

31. In particular, with regard to Article 6(2)(a) of Directive 77/388 (now Article 26(1)(a) of Directive 2006/112), the Court has found that, since it is designed to prevent the non-taxation of goods forming part of the assets of a taxable person's business and used for private purposes, the provision in question requires such use to be regarded as a service for consideration and to be taxed only where the taxable person has exercised the right to deduct input tax on the acquisition of those goods. On the other hand, the taxation of the private use of goods which, although they are part of the taxable person's business assets, have not given the taxable person the right to deduct input tax on their acquisition, would constitute double taxation contrary to the principle of fiscal neutrality.[15] Moreover, the reason preventing the taxable person from exercising the right to deduct input tax on the acquisition of those goods is irrelevant.[16]

[12] One could even get the impression that the Court has deliberately avoided this question (see judgment of 16 October 1997, *Fillibeck*, C-258/95, EU:C:1997:491, paragraph 20).

[13] Council Directive 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 directive was repealed and replaced by Directive 2006/112.

[14] Judgment of 16 October 1997, *Fillibeck* (C-258/95, EU:C:1997:491, paragraph 25).

[15] Judgment of 25 May 1993, *Mohsche* (C-193/91, EU:C:1993:203, paragraphs 8 and 9).

[16] This may be the case, for instance, where the taxable person acquired the goods in question from a non-taxable person (see judgment of 27 June 1989, *Kühne*, 50/88, EU:C:1989:262, paragraph 9).

32. This is precisely the situation of a taxable person who, like QM, engages only in exempt activities and does not have the right to deduct input tax on the acquisition of goods and services for the purposes of those activities. From the point of view of the VAT system, such a taxable person is in a similar situation to a consumer, that is, he bears the burden of input VAT accrued at earlier stages of marketing.

33. Consequently, the application of Article 26(1)(b) of Directive 2006/112 where such a taxable person uses for private purposes, free of charge, goods forming part of his business assets, would amount to a circumvention of the restriction in Article 26(1)(a) thereof, pursuant to which only the private use of goods upon the acquisition of which the taxable person has exercised the right to deduct input tax is deemed to be a taxable service. This would lead to the double taxation of those goods and thus to infringement of the principle of fiscal neutrality.

34. It would also be incompatible with the purpose of Article 26(1) of Directive 2006/112, which, according to the case-law of the Court cited above, is to prevent the non-taxation of goods and services intended for private purposes and to ensure equal treatment of consumers and taxable persons, because where a taxable person has not exercised the right to deduct input tax on the acquisition of goods, the transaction of acquiring those goods is and remains taxed, and in terms of VAT the taxable person is in the same situation as a consumer.

35. I therefore consider that Article 26(1) of Directive 2006/112 must be interpreted as meaning that letter (b) of that provision does not concern services consisting in the provision by a taxable person, for private purposes or for other purposes unrelated to his business, of goods which form part of that taxable person's business assets, since letter (a) of that provision is applicable to such services, according to which such provision is considered to be a service supplied for consideration, but only if the taxable person has exercised the right to deduct input tax on the acquisition of the goods in question.

36. Therefore, contrary to the view of the German Government, I consider that where a taxable person provides an employee with a vehicle which forms part of the taxable person's business assets, for which that employee does not pay a fee or give up part of his remuneration or other benefits due to him from the taxable person, and he does not perform additional work directly related to the provision of that vehicle, that provision cannot be regarded as a supply of services for consideration under either Article 2(1)(c) of Directive 2006/112 or Article 26(1)(b) thereof. The question concerning the application of Article 56(2) of that directive is therefore irrelevant.

37. Therefore, I propose that the answer to the question referred should be that Article 2(1)(c) and Article 26(1)(b) of Directive 2006/112 must be interpreted as meaning that the provision by a taxable person of a vehicle forming part of his business assets for the private use of an employee does not constitute a supply of services for consideration for the purposes of those provisions where that employee does not pay a fee or give up part of his remuneration or other benefits due to him from the taxable person, and he does not perform additional work in exchange for the provision of that vehicle.

Provision of a vehicle to an employee for consideration

38. As I mentioned at the outset, although the question referred for a preliminary ruling directly refers only to the situation where a vehicle is provided to an employee free of charge, the proceedings before the national court concern two cases, and in the second case the employee

pays a fee, which is deducted from his remuneration, for the vehicle provided to him. For the sake of the completeness of the answer given to the referring court, this second situation should, in my view, be analysed as well.

39. Where an employee of a taxable person pays a fee for the provision of a vehicle to him for his private use by that taxable person, this constitutes, in my view, a supply of services for consideration for the purposes of Article 2(1)(c) of Directive 2006/112. Therefore, there is no need to refer to Article 26(1)(a) of that directive. In my view, the latter provision concerns situations where goods included in a taxable person's business assets are provided free of charge.

40. This has two consequences. First, the reservation contained in Article 26(1)(a) of Directive 2006/112, according to which that provision applies only to goods on the acquisition of which the taxable person has exercised the right to deduct input tax, is not applicable. Where a taxable person provides goods, for instance a vehicle, which form part of his business assets, to his employee and this is done within the framework of an employment relationship, he should, in my view, be regarded as acting as a taxable person. Such a transaction is therefore, in principle, taxable. On the other hand, at the same time, the taxable person becomes entitled, as a rule, to deduct input tax on the acquisition of the goods in question and where, like QM, it does not engage in activities taxed in the Member State concerned, it becomes entitled to recover that tax.

41. Second, in such a case the taxable amount must, in principle, be the amount actually received by the taxable person from his employee for the provision of the goods and not, as is the case in practice where the goods are provided free of charge, the cost of acquiring those goods.

42. Obviously, the competent national authorities must establish whether the fee paid by the employee actually constitutes payment for the provision of the goods, because the purpose of the common system of VAT is not to tax all financial flows. It is transactions, that is, supplies of goods and services, carried out for consideration which are subject to taxation. The financial flows associated with those transactions only serve to determine the taxable amount thereof, as they are deemed to reflect their value. They must, however, constitute reciprocal and equivalent benefits in order for the transactions with which those flows are connected to be regarded as carried out for consideration for the purposes of Article 2 of Directive 2006/112. [17]

43. In the present case, QM, in reply to a question from the Court, states that the employee concerned bears part of the cost of the provision of the car to him because the cost of its acquisition (leasing) by QM exceeds the amount allocated for that purpose in the company's budget. Thus, the employee makes up that difference. In my view, it is doubtful whether in such a situation there is an exchange of reciprocal and equivalent benefits and the payment received by the supplier actually reflects the value of the service provided to the customer for the purposes of the case-law of the Court cited above. However, in order to resolve this doubt, the legal relationship that exists between the taxable person and his employee must be analysed, which is the task of the referring court.

44. If that court comes to the conclusion that the provision to an employee of a means of transport at issue in the main proceedings took place for consideration for the purposes of the provisions on VAT, the question of determining the place of supply of such a service will arise. As a general rule, since an employee of a taxable person is normally a non-taxable person, Article 45 of Directive 2006/112 should apply, pursuant to which the place of supply of a service

[17] See, to that effect, judgment of 10 January 2019, *A* (C-410/17, EU:C:2019:12, paragraph 32 and the case-law cited).

is the supplier's place of establishment, place of business or place of residence. However, if the provision concerns a means of transport, it is necessary to answer the question of whether such provision may be regarded as hiring other than short-term hiring for the purposes of Article 56(2) of that directive, since in that case, the place of supply of the service would be the place of residence of the employee as the customer.

45. Directive 2006/112 does not define the concept of 'hiring', nor does it refer in that regard to the national law of the Member States, and thus that term must be interpreted as an autonomous concept of EU law.

46. However, the Court has commented on the meaning of this concept. Although the case-law in question concerns the letting of immovable property in the context of the exemption of such activity from VAT, I consider that it can also be applied to the hiring of movable property, including vehicles, since the framework defined by the Court for the concept of 'hiring' or 'letting' does not go beyond the generally accepted meaning of those terms in legal language.

47. According to that case-law, in order for there to be a letting [of immovable property], all the conditions characterising such a transaction must be satisfied, that is to say, the landlord of the property being let grants the tenant, in return for rent and for an agreed period, the right to use the property being let and to exclude other persons from it.[18] It is therefore necessary to examine whether those conditions are satisfied where a taxable person provides for consideration, for his employee's private use, a vehicle included in the taxable person's business assets.

48. At the outset, it should be noted that although the Court refers to the landlord of the property being let in the judgment in *Medicom and Maison Patrice Alard*,[19] this should be understood as any lessor. Therefore, the fact that QM does not own but rather leases the vehicle at issue in the main proceedings does not preclude the provision of that vehicle by that company from being classified as a lease agreement.

49. Next, I consider that in a situation where a vehicle is provided for consideration, the condition that rent be paid should in principle be regarded as satisfied.

50. As far as the duration of the hire period is concerned, I do not consider that this has to be determined by a specific date or specific number of units of time (days, months or years). The duration of the hire period may also be determined by a certain event or condition such as the duration of the employment relationship of the employee in question or the period during which the lease agreement for the vehicle concluded by the taxable person is in force.[20] Moreover, it is not generally accepted in the legal traditions of the Member States that a lease agreement must be concluded for a fixed term; it may also be in force for an indefinite period,[21] with the parties being able to terminate it, for example if the employment relationship is terminated.

51. In my view, such methods of determining the duration of the hire period also satisfy the condition of an 'agreed period', as that condition is intended only to distinguish hiring from transferring ownership or other similar rights *in rem*, and from the point of view of the VAT system it serves to distinguish between the supply of services and the supply of goods.

[18] See, to that effect, judgment of 18 July 2013, *Medicom and Maison Patrice Alard* (C-210/11 and C-211/11, EU:C:2013:479, paragraph 26).

[19] Judgment of 18 July 2013, *Medicom and Maison Patrice Alard* (C-210/11 and C-211/11, EU:C:2013:479).

[20] Similar arrangements can also be found in areas other than employment relationships. For instance, it is common practice to rent a set-top box for the duration of a cable or satellite TV contract.

[21] See, for instance, Article 659 of the Polish Kodeks Cywilny (Civil Code).

52. Therefore, contrary to QM's position set out in its observations, I do not consider that because the provision of the vehicle to the employee is limited to the duration of the employment relationship that provision is precluded from being regarded as a hire service.

53. Of course, whether or not the duration of use of the vehicle intended by the parties exceeds 30 days is important, as this determines the application of Article 56(1) or (2) of Directive 2006/112, and thus the place of any taxation of the transaction. In my view, an agreement concluded for an indefinite period should be considered to be concluded for more than 30 days.

54. Lastly, as far as the condition of use to the exclusion of other persons is concerned, this is a characteristic normally associated with property rights and certain other rights *in rem*. It results from the *erga omnes* effectiveness of those rights *in rem*.

55. The Court considered that condition to be an essential feature of a lease transaction for the purposes of the provisions on VAT for the first time in its judgment of 4 October 2001, '*Goed Wonen*' (C-326/99, EU:C:2001:506). The question at issue in that case was whether the exemption from tax of 'the leasing or letting of immovable property' provided for in the first subparagraph of Article 13(B)(b) of Directive 77/388 [22] covers the establishment of a right of usufruct over immovable property. That question was put in the context of combating abusive arrangements consisting in the artificial establishment of such a right in order to obtain the undue right to deduct input tax on the supply of the immovable property in question. [23]

56. In those circumstances, Advocate General Jacobs concluded that a lease agreement is characterised, inter alia, by the fact that the tenant becomes entitled to use the property being let as if it were his own and to exclude or admit others (the context being immovable property). [24] It appears that Advocate General Jacobs was inspired by the meaning of the term 'leasing', which is also used in the provision of the directive in question and which in common law jurisdictions may also mean rights similar to limited rights *in rem* in civil law systems. [25]

57. In the judgment referred to above, the Court put it somewhat differently, stating that the fundamental characteristic of a transaction consisting in the establishment of a right of usufruct over immovable property, *which this transaction has in common with leasing*, is that it confers on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and *to exclude any other person from enjoyment of such a right.* [26]

58. It follows that, firstly, the Court thus characterised the right of usufruct, mentioning only in passing that a lease agreement has similar characteristics. Secondly, in the Court's view, the exclusion of other persons concerns the right to use the thing as owner rather than any other actions relating to the subject of the right of usufruct (and possibly of letting).

59. It was only in subsequent judgments that the Court applied that condition directly to a lease agreement for the purposes of the provisions on VAT exemption, at the same time greatly simplifying the wording of the judgment in '*Goed Wonen*'. According to that new wording, the

[22] Currently, this rule is enshrined in Article 135(1)(l) of Directive 2006/112.

[23] See judgment of 4 October 2001, '*Goed Wonen*' (C-326/99, EU:C:2001:506, paragraph 31).

[24] Opinion of Advocate General Jacobs in '*Goed Wonen*' (C-326/99, EU:C:2001:115, points 79 and 84).

[25] See the Opinion of Advocate General Jacobs in '*Goed Wonen*' (C-326/99, EU:C:2001:115, points 60 and 74).

[26] See judgment of 4 October 2001, '*Goed Wonen*' (C-326/99, EU:C:2001:506, paragraph 55).

letting of immovable property for the purposes of the provisions on VAT exemption essentially involves the landlord of immovable property assigning to the tenant, in return for rent and for an agreed period, the right to occupy that property and to exclude other persons from it.[27]

60. However, I do not think that, in so doing, the Court wished to establish particularly stringent requirements for lease agreements for the purposes of the provisions on VAT. Those requirements do not go beyond the tenant's usual rights included in such agreements: to use the property being let and to be protected against any interference with that right (and the exercise thereof) by unauthorised third parties. However, this does not exclude the rights that the landlord of the property being let (or, more broadly, the lessor) has either by operation of law or under an agreement concluded between the parties. Moreover, this likewise does not preclude the tenant from having certain obligations relating to the property being let which arise from other sources, such as his employment relationship with the lessor.

61. Therefore, while I am inclined to conclude, as I mentioned earlier, that the case-law discussed above may also apply to the interpretation of the concept of the 'hiring of a means of transport' for the purposes of Article 56 of Directive 2006/112, I do not agree with QM's assertion that the criteria resulting from that case-law, and in particular the criterion of using the property being let to the exclusion of other persons, preclude the recognition of the existence of a lease agreement where a vehicle is provided to an employee in a situation such as that in the main proceedings.

62. That company claims that, since the vehicle is also provided for business purposes, the employee does not use it to the exclusion of other persons, since the use of the vehicle *by the employee for business purposes* (by implication: in the interest of the employer) in fact means use thereof *by the employer*.

63. It is impossible to agree with that statement. The fact that the ability to use a car makes it easier for an employee to carry out his professional duties and that this was, inter alia, the purpose of the employer providing him with the vehicle does not change the fact that he has that particular vehicle at his disposal on an exclusive basis under the agreement with that employer. This is likewise not affected by the fact that the employer may give instructions to the employee, the execution of which calls for the use of the vehicle provided.[28] This could also be the case if the employee owned the vehicle in question. On the other hand, things would be different if the employer had a fleet of vehicles that employees could use according to their needs (and depending on the availability of those vehicles), but where no vehicle was permanently assigned to a particular employee.

64. The fact that a taxable person provides a vehicle to an employee under an employment contract and not pursuant to a separate civil law contract is also irrelevant for the purpose of assessing the existence of a hire transaction for the purposes of Article 56 of Directive 2006/112, since within the framework of the VAT system, a functional definition of transactions is adopted

[27] See judgments of 9 October 2001, *Mirror Group* (C-409/98, EU:C:2001:524, paragraph 31); of 8 May 2003, *Seeling* (C-269/00, EU:C:2003:254, paragraph 49); and lastly of 18 July 2013, *Medicom and Maison Patrice Alard* (C-210/11 and C-211/11, EU:C:2013:479, paragraph 26).

[28] Similarly, employees have often recently (that is, in the spring of 2020) been instructed to work from home, but this does not mean that the employer infringes on the employee's ownership of the immovable property that is his home.

rather than a definition resulting from their formal and legal characteristics. Therefore, if a transaction fulfils the functional criteria for the hiring of a means of transport, the type of contract in which it is set out is irrelevant.[29]

65. In view of the above, I am of the view that where a taxable person provides for consideration, for the private use of his employee, a vehicle forming part of his business assets for more than 30 days, this constitutes the hiring of a means of transport for the purposes of Article 56(2) of Directive 2006/112.

66. Such a ruling will also be consistent with the objective of Directive 2008/8, which is taxation at the place where the actual consumption takes place,[30] because in the case of means of transport provided to a taxable person's employees for private purposes, the place of actual consumption of the service must be considered to be those employees' place of residence.

67. I therefore propose that the answer to the question referred should be supplemented with the statement that, if the national court finds that the provision by a taxable person of a vehicle forming part of that taxable person's business assets for his employee's private use for more than 30 days takes place for consideration for the purposes of Article 2(1)(c) of Directive 2006/112 and the case-law of the Court related thereto, Article 56(2) of that directive must be interpreted as meaning that the concept of 'hiring of a means of transport other than short-term hiring' covers such provision.

Conclusions

68. In the light of all of the foregoing, I propose that the Court's answer to the question referred for a preliminary ruling by the Finanzgericht des Saarlandes (Finance Court of the Saarland, Germany) should be as follows:

(1) Article 2(1)(c) and Article 26(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Directive 2008/8/EC of 12 February 2008, must be interpreted as meaning that the provision by a taxable person of a vehicle forming part of his business assets for the private use of an employee does not constitute a supply of services for consideration for the purposes of those provisions where that employee does not pay a fee or give up part of his remuneration or other benefits due to him from the taxable person, and he does not perform additional work in exchange for the provision of that vehicle.

(2) If the national court finds that the provision by a taxable person of a vehicle forming part of that taxable person's business assets for his employee's private use for more than 30 days takes place for consideration for the purposes of Article 2(1)(c) of Directive 2006/112 and the case-law of the Court related thereto, Article 56(2) of that directive must be interpreted as meaning that the concept of 'hiring of a means of transport other than short-term hiring' covers such provision.

[29] See, by analogy, in the context of the differences between the right of usufruct and the letting of immovable property, judgment of 4 October 2001, '*Goed Wonen*' (C-326/99, EU:C:2001:506, paragraph 58).

[30] Recital 3 of Directive 2008/8.