Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 27 February 2020[1]

Case C-331/19

Staatssecretaris van Financiën
v
X

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Article 98 — Reduced rates — Point 1 of Annex III — Foodstuffs for human consumption and products normally used to supplement foodstuffs or as a substitute for foodstuffs — Libido stimulants)

Introduction

1. Value added tax ('VAT') is an indirect tax, that is to say, its economic burden is entirely passed on to consumers of goods and services, thereby increasing their price. In order to limit the effect of this tax on the price of certain goods and services considered to be of particular public importance, the legislature has provided for a number of VAT exemptions as well as for the possibility of applying a reduced VAT rate. The latter possibility concerns, inter alia, foodstuffs as well as goods used in their production, supplements for them and their substitutes.

2. However, it appears that the classification of certain goods in these categories is difficult, as evidenced by the Court's case-law on the subject.[2] In the present case, the Court will have the opportunity to clarify these concepts, which should reduce the number of such disputes in the future, although it will certainly not prevent them entirely.

1 Original language: Polish.

2 See, in particular, judgments of 3 March 2011, *Commission* v *Netherlands* (C-41/09, EU:C:2011:108); of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135); and of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846).

Legal framework

EU law

3. The first sentence of Article 1(1) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety[3] provides:

'This Regulation provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market.'

4. Under Article 2 of that regulation:

'For the purposes of this Regulation, "food" (or "foodstuff") means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be, ingested by humans.

"Food" includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. …

"Food" shall not include:

(a) feed;

(b) live animals unless they are prepared for placing on the market for human consumption;

(c) plants prior to harvesting;

(d) medicinal products within the meaning of Council Directives 65/65/EEC … and 92/73/EEC …;

(e) cosmetics within the meaning of Council Directive 76/768/EEC …;

(f) tobacco and tobacco products within the meaning of Council Directive 89/622/EEC …;

(g) narcotic or psychotropic substances within the meaning of the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances, 1971;

(h) residues and contaminants.'

5. Under Article 96 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,[4] Member States have to apply a standard rate of VAT, which must be fixed by each Member State as a percentage of the taxable amount and which must be the same for the supply of goods and for the supply of services.

6. Article 98(1) and the first subparagraph of Article 98(2) of that directive provides:

'1. Member States may apply either one or two reduced rates.

3 OJ 2002 L 31, p. 1.

4 OJ 2006 L 347, p. 1.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

…'

7. Annex III to Directive 2006/112 lists the following in point 1:

'Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs.'

Netherlands law

8. Netherlands law provides for the application of a reduced rate of VAT to the products listed in point 1 of Annex III to Directive 2006/112 under Article 9(2)(a) of Wet houdende vervanging van de bestaande omzetbelasting door een omzetbelasting volgens het stelsel van heffing over de toegevoegde waarde (Law on replacing turnover tax by the system of taxing added value) of 28 June 1968, read in conjunction with points 1(a), (b) and (c) of Table I annexed to that law.

Facts, procedure and the questions referred

9. X, a VAT taxable person, manages a sex shop. The articles sold in the shop include capsules, drops, powders and sprays that are intended to be taken orally and are designed to stimulate libido (aphrodisiacs). The ingredients of these products are natural in origin.

10. Between 2009 and 2013, the taxable person applied the reduced VAT rate for foodstuffs to those goods. However, the tax authorities challenged the application of that rate, taking the view that the goods in question did not constitute foodstuffs within the meaning of the relevant VAT legislation, and decided that the standard rate must be applied to them.

11. The taxable person lodged an appealed against that decision before the Rechtbank den Haag (District Court and court of first instance, The Hague, Netherlands). At second instance, the Gerechtshof den Haag (Court of Appeal, The Hague, Netherlands) agreed with the taxable person that the use of the goods in question as aphrodisiacs did not preclude them from being taxed at the rate for foodstuffs. That court took into account the fact that the goods were intended to be taken orally and were made from ingredients that may be found in foodstuffs. Furthermore, the court noted that the definition of foodstuffs adopted by the legislature was so broad that it included goods not clearly associated with food, such as sweets, chewing gum or cakes.

12. The Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) lodged an appeal on a point of law against that judgment to the referring court.

13. In those circumstances the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the term "foodstuffs for human consumption" used in point 1 of Annex III to [Directive 2006/112] be interpreted as covering, in accordance with Article 2 of [Regulation No 178/2002], any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be, ingested by humans?

If this question is answered in the negative, how must that term then be defined?

(2) If edible or potable products cannot be regarded as foodstuffs for human consumption, on the basis of which criteria must it then be assessed whether such products can be regarded as products normally used to supplement foodstuffs or as a substitute for foodstuffs?'

14. The request for a preliminary ruling was lodged at the Court on 23 April 2019. Written observations were submitted by the Netherlands Government and the European Commission. The Court decided to give a ruling on the case without a hearing.

Analysis

15. The referring court has submitted two questions to the Court for a preliminary ruling concerning the interpretation of the concepts of 'foodstuffs for human consumption' and 'products normally used to supplement foodstuffs or as a substitute for foodstuffs' within the meaning of point 1 of Annex III to Directive 2006/112. This interpretation is intended to clarify whether those terms, or one of them, cover products designed to be taken orally for the stimulation of libido (aphrodisiacs).

The first question

16. The first question referred for a preliminary ruling concerns the interpretation of the term 'foodstuffs for human consumption'. In particular, the referring court seeks to determine whether that interpretation should be based on the definition of the term 'foodstuff' set out in Article 2 of Regulation No 178/2002. The answer to this question requires a linguistic and teleological interpretation of point 1 of Annex III to Directive 2006/112, read in conjunction with Article 98(1) and (2) of that directive, and also an interpretation of the aforementioned Article 2 of Regulation No 178/2002.

Linguistic interpretation

17. As the Netherlands Government and the Commission rightly point out in their observations, and as the referring court itself notes in its order for reference, Directive 2006/112 neither defines the concept of 'foodstuffs for human consumption' nor does it refer in that regard to the national law of the Member States. Therefore, this concept must be interpreted by considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part. [5]

18. The common understanding is that foodstuffs for human consumption should be equated with the term 'food', that is to say, products which are ingested by humans in the process of nutrition. The purpose of this process is to provide the body with nutrients which serve as building blocks, generate energy and regulate its functions, as well as to provide it with water. These nutrients keep the human body alive and enable it to function and develop.

19. Therefore, the definition of the term 'foodstuffs for human consumption' will cover all products, whether processed or unprocessed, which provide nutrients to the human body and which are consumed in order to provide those nutrients.

5 See, most recently, judgment of 29 July 2019, *Spiegel Online* (C-516/17, EU:C:2019:625, paragraph 65).

20. I therefore do not share the concern of the referring court, as expressed in its order for reference, that including a teleological element in the definition of the concept in question would pose a threat to legal certainty. According to that court, certain food products are consumed for purposes other than maintaining the body's vital functions, yet there is no doubt that they fall under the concept of 'foodstuffs for human consumption'. Therefore, the purpose of their consumption cannot be decisive as regards their classification. This was also the argument underlying the ruling of the court of second instance in the main proceedings.

21. I believe that this argument is based on a misunderstanding.

22. Satisfying basic human needs does not have to be limited to the simplest means of achieving that purpose. On the contrary, the pursuit of sophistication and luxury has accompanied humanity since the dawn of history, and where that pursuit is limited, it is most often for want of material means. This is clearly visible in the case of houses or clothes; apart from their basic protective function, they also serve other purposes, such as aesthetic or prestigious ones. Nevertheless, they remain what they are in essence: a rococo palace is still a house, and a dress designed by a famous designer is still a garment — to the same extent as, respectively, a wooden cabin and a raw linen shirt.

23. The same goes for food. The fact that some dishes are more sophisticated and more expensive than others does not change the fact that they serve the same basic need of providing the body with the nutrients necessary for life. It is a completely separate matter that, apart from their nutritional values, they also have other qualities such as taste. This idea is perfectly reflected by the words uttered in an entirely different context and attributed to the French Queen Marie Antoinette: if the peasants have no bread, let them eat cake.

24. It should also be borne in mind that, in addition to nutrients, food products may contain a number of other substances, whether naturally occurring or added in order to preserve them, improve their taste, and so on. There is obviously no reason why these substances or products containing these substances should not be classified as foodstuffs within the meaning of the provision in question.

25. It is irrelevant in this regard, as the Netherlands Government rightly points out in its observations, that people do not always eat optimally from the point of view of their health, for example, by eating too much fat or sugar. Misuse of foodstuffs, from a health point of view, does not deprive those foodstuffs of their essential nutritional characteristics.

26. Similarly, the circumstances in which foodstuffs are consumed are irrelevant. Human culture has given rise to a number of customs and rituals which accompany inherently simple activities such as eating. However, we should not put the cart before the horse. The social functions of food, even where very extensive, are secondary to its nutritional function. Even the most sumptuous banquet primarily serves to satisfy hunger, and its other purposes are merely secondary. [6]

27. For the foregoing reasons, I consider that foodstuffs for human consumption should include all those products which contain nutrients and are consumed principally to provide the human body with those nutrients, notwithstanding the fact that those products may also have other functions, such as maximising the pleasure resulting from taste sensations, and that their consumption may be associated with social events.

6 According to a well-known aphorism, 'The Creator, who made man such that he must eat to live, incites him to eat by means of appetite, and rewards him with pleasure.' ('Le Créateur, en obligeant l'homme à manger pour vivre, l'y invite par appétit et l'en récompense par le plaisir'; Brillat-Savarin, J.A., *Physiologie du goût*, Paris 1825; English version: *idem*, *The Physiology of Taste*, translated by Anne Drayton, London, Penguin Books, 1994).

28. By contrast, products such as those referred to in the request for a preliminary ruling, namely hallucinogenic mushrooms or chewing gum, when they are consumed by humans, are not intended to supply the body with nutrients and as such are not to be classified as foodstuffs within the meaning of point 1 of Annex III to Directive 2006/112.

29. The same applies to the aphrodisiacs at issue in the main proceedings. These are consumed, not to provide the body with nutrients, but rather to stimulate sex drive, and thus, while they may affect certain bodily functions, they do not have a nutritional purpose.

30. This is not altered by the fact, which is referred to in the order for reference, that the ingredients of those aphrodisiacs are substances which may also be included in food products. This is because if a product is a complex one, then its classification as a foodstuff within the meaning of the provisions in question should depend on the nature of the product as a whole rather than on that of its individual ingredients. The ingredients of aphrodisiacs are selected and combined because of their effect on sex drive, not because of their nutritional value.

31. This characteristic distinguishes these aphrodisiacs from foodstuffs, including those foodstuffs which are said to have an aphrodisiac effect in addition to their nutritional value, such as certain kinds of seafood.

Teleological interpretation

32. The foregoing analysis is confirmed by the teleological interpretation of the aforementioned provisions of Directive 2006/112.

33. The Court has already had the opportunity to rule that the purpose of Article 98 of Directive 2006/112 and of Annex III thereto is to make less expensive, and thus more accessible for the final consumer, who ultimately pays the VAT, certain goods regarded as being particularly necessary.[7] As regards the foodstuffs listed in point 1 of that annex, the Court has classified them as essential commodities.[8]

34. In my opinion, this purpose of the provisions in question supports an interpretation that limits the application of a reduced rate of VAT to products that are consumed in order to satisfy one of the basic human needs, namely, the need for nutrition, understood as providing the body with nutrients.

35. As regards the claim that not all products normally classed as food are essential from the nutritional point of view, I would like to repeat the arguments set out in points 22 to 26 of this Opinion: the fact that some food products have additional qualities apart from purely nutritional ones, such as taste, and that they can be misused, does not alter the fact that the primary purpose of their consumption is to address nutritional needs.

36. Additionally, it would be difficult to draw an objective line between the foodstuffs necessary for nutritional purposes and those that should be classed as luxuries, since plain buttered bread can also be eaten for its taste, and not merely to satisfy hunger.

7 See, most recently, judgment of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 22), and also, as regards foodstuffs, judgment of 3 March 2011, *Commission* v *Netherlands* (C-41/09, EU:C:2011:108, paragraph 53).

8 Judgment of 3 March 2011, *Commission* v *Netherlands* (C-41/09, EU:C:2011:108, paragraph 53).

37. Furthermore, it should be noted that the application of a reduced rate of VAT under Article 98 of Directive 2006/112 is exceptional and optional. Member States therefore have the option to apply a reduced rate only to certain categories of goods or services listed in individual points of Annex III to Directive 2006/112 or to exclude its application to certain categories of those goods or services. The only condition here is that these categories of goods or services must be precisely defined and the principle of fiscal neutrality respected. [9]

38. Therefore, Member States have the option of excluding certain categories of food products from the application of a reduced VAT rate if they consider that those products do not serve needs that would justify the application of such a rate.

39. The EU legislature has itself exercised this option by excluding alcoholic beverages from the scope of point 1 of Annex III to Directive 2006/112. That legislature apparently considered that such beverages, although they are commonly classified as foodstuffs, may also cause addiction and numerous diseases, and therefore their consumption should not be encouraged by reducing the VAT rate.

40. Therefore, the teleological interpretation of Article 98 of Directive 2006/112, read in conjunction with point 1 of Annex III thereto, does not allow products which serve to satisfy needs other than nutritional needs, such as the aphrodisiacs at issue in the main proceedings, to be covered by that provision.

Principle of fiscal neutrality

41. Finally, it should be added, as the Netherlands Government rightly points out in its observations, that an interpretation according to which aphrodisiacs that are intended to be taken orally, such as those at issue in the main proceedings, should come within the material scope of point 1 of Annex III to Directive 2006/112, and therefore be subject to a reduced rate of VAT, could lead to a breach of the principle of fiscal neutrality.

42. That principle precludes similar goods or services which are in competition with each other from being treated differently for VAT purposes. [10]

43. As is well known, apart from aphrodisiacs intended to be taken orally, there are also products with a similar effect that are meant to be administered in different ways. Those products must be regarded as being in competition with the aphrodisiacs intended to be taken orally that are at issue in the main proceedings. However, they cannot benefit from a reduced VAT rate since they do not come under any of the categories listed in Annex III to Directive 2006/112.

44. Consequently, treating different categories of products designed to stimulate sex drive differently on the basis of how they are administered would be contrary to the principle of fiscal neutrality.

Impact of Article 2 of Regulation No 178/2002

45. The question posed by the referring court concerns, in particular, whether the term 'foodstuffs for human consumption' used in point 1 of Annex III to Directive 2006/112 must be interpreted with reference to the definition of the term 'foodstuff' set out in Article 2 of Regulation No 178/2002.

9 See, with respect to a specific category of foodstuffs, judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraphs 23 and 24).

10 See, in particular, judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 30).

46. In my view, that question should be answered in the negative. As the Netherlands Government and the Commission rightly point out in their observations, that regulation serves completely different purposes from those of Article 98 of Directive 2006/112 and Annex III thereto.

47. According to Article 1 of Regulation No 178/2002, its purpose is to ensure a high level of protection of human health and consumers' interest in relation to food. Therefore, the definition of the term 'foodstuff' for the purposes of that regulation covers all products and substances 'intended to be, or reasonably expected to be, ingested by humans', as all products and substances which may be reasonably expected to be ingested by humans may also have an effect (including an adverse effect) on human health irrespective of the purpose for which they are consumed. The only exceptions in this regard are products subject to other regulations that ensure their safety for human health, such as medicinal products. By contrast, the definition in the regulation does not cover products which do not have a direct effect on human health because they are not normally consumed by humans, such as animal feed, live animals or plants prior to harvesting. [11]

48. However, the material scope of point 1 of Annex III to Directive 2006/112 is different, since that annex serves to determine the scope of application of a reduced rate of VAT under Article 98 of that directive. The purpose of reducing the VAT rate is to lower the price of certain goods and services which, according to the legislature, meet the basic needs of consumers. [12] Consequently, point 1 of Annex III to Directive 2006/112 covers not only products intended for human consumption but also goods used in their production, such as feed and live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs. [13] On the other hand, the EU legislature excluded alcoholic beverages from the scope of that provision, since they did not meet the criteria for a reduction in the VAT rate from the teleological point of view.

49. Point 1 of Annex III to Directive 2006/112 and Article 2 of Regulation No 178/2002 thus serve different purposes, and this is reflected in their different respective material scopes. For that reason, Article 2 of the regulation cannot serve as a reference point for the interpretation of point 1 of Annex III to Directive 2006/112.

50. As the Commission rightly points out in its observations, the Court reached similar conclusions when examining the relationship between the concept of 'live animals normally intended for use in the preparation of foodstuffs' within the meaning of point 1 of Annex III to Directive 2006/112 and the material scope of Regulation (EC) No 504/2008 [14] with regard to horses. [15]

51. In view of the foregoing, Article 2 of Regulation No 178/2002 does not, in my opinion, have any bearing on the interpretation of the concept of 'foodstuffs for human consumption' within the meaning of point 1 of Annex III to Directive 2006/112.

52. I propose, therefore, that the answer to the first question referred for a preliminary ruling should be that point 1 of Annex III to Directive 2006/112 must be interpreted as meaning that the term 'foodstuffs for human consumption' contained therein means products which contain nutrients and which are consumed principally in order to provide the human body with those nutrients.

11 See the exclusions listed in points (a), (b) and (c) of the third subparagraph of Article 2 of Regulation No 178/2002.

12 See point 33 of this Opinion.

13 This purpose of including live animals in point 1 of Annex III to Directive 2006/112 was confirmed by the Court in its judgment of 3 March 2011, *Commission* v *Netherlands* (C-41/09, EU:C:2011:108, paragraphs 54 to 57).

14 Commission Regulation of 6 June 2008 implementing Council Directives 90/426/EEC and 90/427/EEC as regards methods for the identification of equidae (OJ 2008 L 149, p. 3).

15 Judgment of 3 March 2011, *Commission* v *Netherlands* (C-41/09, EU:C:2011:108, paragraphs 61 to 64).

The second question

53. By its second question, the referring court seeks to determine how the concept of 'products normally used to supplement foodstuffs or as a substitute for foodstuffs' is to be interpreted. That question has been raised in the context of the possible classification of the aphrodisiacs referred to in the first question as such products.

54. I would like to reiterate that, in line with my proposed answer to the first question, foodstuffs within the meaning of the provision in question should include products consumed because of the nutrients which they contain or because of their role in the nutritional process.

55. Similar reasoning may be applied to the interpretation of the concept of 'products normally used to supplement foodstuffs or as a substitute for foodstuffs'. If it is an essential characteristic of foodstuffs that they contain nutrients and that they are consumed in order to provide the body with those nutrients, foodstuff supplements and substitutes should have the same characteristics.

56. In particular, foodstuff substitutes should, in my opinion, be understood to mean products that are not foodstuffs but that contain nutrients and are consumed instead of foodstuffs in order to provide the body with those nutrients when the normal diet is deficient in them.

57. In addition, foodstuff supplements may include products which are consumed in order to enhance the nutritional functions of foodstuffs, for example by improving nutrient absorption. Obviously, these are products which differ from pharmaceutical products, since the latter are subject to separate regulation in point 3 of Annex III to Directive 2006/112.

58. Such a conclusion is also in line with the purposes of Article 98 of Directive 2006/112 as discussed in point 33 of this Opinion.

59. This means excluding from the scope of the concept of 'products normally used to supplement foodstuffs or as a substitute for foodstuffs' those products which, although they may be consumed by humans, are unconnected with the consumption of foodstuffs in the foregoing sense as they are consumed for purposes other than that of providing nutrients to the body. This applies, inter alia, to the aphrodisiacs at issue in the main proceedings.

Conclusion

60. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands):

Point 1 of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the term 'foodstuffs for human consumption' contained therein means products which contain nutrients and which are consumed principally in order to provide the human body with those nutrients, whereas the term 'products normally used to supplement foodstuffs or as a substitute for foodstuffs' means products which are not foodstuffs but which contain nutrients and are consumed in place of foodstuffs in order to provide the body with those nutrients, and also products consumed with a view to enhancing the nutritional functions of foodstuffs or their substitutes.