Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 22 October 2020[1]

Case C-581/19

Frenetikexito – Unipessoal Lda
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal))

(Reference for a preliminary ruling – Directive 2006/112/EC – Common system of value added tax – Multiple supplies – Classification as a single transaction – Complex supply – Ancillary supply to the principal supply – Two independent supplies – VAT exemption – Provision of medical care)

I. Introduction

1. Under Article 2(1) of the VAT Directive, VAT is charged on each individual transaction. Sometimes, however, individual transactions are linked ('bundles of supplies') such that it is unclear whether they should still be regarded as individual, independent transactions. The present case concerns the question, which is of practical significance, of when, in the case of multiple supplies, a single complex supply, a dependent ancillary supply or multiple supplies to be considered independently are to be taken to exist.

2. In the present case, the operator of a fitness studio offered, in addition to the fitness service, a nutrition advice service. It classified the fitness services as liable for VAT and the nutrition advice services, on the other hand, as exempt. In the view of the operator, the nutrition advice service is an independent, exempt supply consisting in provision of medical care. However, that assumption is ineffective a priori if the combination of the fitness service and nutrition advice constitute a single supply of services or the nutrition advice service is a dependent ancillary supply to the fitness service. An exemption of the transaction would then be ruled out in principle. In the case of an independent supply, however, it would have to be examined whether in fact a nutrition advice service constitutes provision of medical care within the meaning of Article 132(1)(c) of the VAT Directive.

1 Original language: German.

3. Even though the Court has dealt with similar issues a number of times,[2] in the view of the referring court clear criteria for assessing such bundles of supplies cannot be inferred from the Court's existing case-law. These proceedings therefore also give the Court an opportunity to clarify the criteria governing the VAT treatment of bundles of supplies. This could make it easier for specialised national courts to decide, with legal certainty and autonomy, whether there is a single complex supply, a dependent ancillary supply or two (principal) supplies that are to be treated distinctly.

II. Legal framework

A. EU law

4. The EU law framework in this case is defined by the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive').[3]

5. The second subparagraph of Article 1(2) of the VAT Directive provides:

'On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.'

6. Article 132(1)(c) of the VAT Directive lays down an exemption from VAT for 'the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned'.

B. Portuguese law

7. Article 9 of the Portuguese Value Added Tax Code[4] transposes Article 132 of the VAT Directive. Paragraph 1 thereof[5] exempts supplies of services made in the exercise of the professions of doctor, dentist, midwife, nurse and other paramedical professions.

III. Facts

8. Frenetikexito – Unipessoal Lda ('the applicant') is a company having its registered office in Portugal. The applicant is engaged in several lines of business. It operates fitness studios and runs fitness programmes. It also offers, among other things, nutrition advice. Nutrition advice is provided by a certified professional one day a week at the premises of the fitness studio.

2 See, for example, judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513); of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660); of 27 March 2019, *Mydibel* (C-201/18, EU:C:2019:254); of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038); of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22); of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229); of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597); of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135); of 11 June 2009, *RLRE Tellmer Property* (C-572/07, EU:C:2009:365); of 29 March 2007, *Aktiebolaget NN* (C-111/05, EU:C:2007:195); of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:649); of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93); and of 2 May 1996, *Faaborg-Gelting Linien* (C-231/94, EU:C:1996:184).

3 OJ 2006 L 347, p. 1.

4 Código do Imposto sobre o Valor Acrescentado (CIVA).

5 In the version applicable to the dispute.

9. Customers of the fitness studio have the option to subscribe to nutrition advice in addition to their fitness plans. Once subscribed, the customer pays for nutrition advice, regardless of whether it is actually used. In the general invoice the applicant indicates separately the fees payable for the fitness service and for nutrition advice. According to the Portuguese Republic, 60% of the overall monthly fee is apportionable to the fitness service and 40% to the nutrition advice service. The applicant also offers nutrition advice to external customers as a standalone service without the fitness service.

10. The applicant applies the VAT exemption for medical supplies under Article 9(1) of the Value Added Tax Code to the nutrition advice services, both for customers of the fitness studio and for external customers. It maintains that the fitness and nutrition advice services are autonomous and should therefore be assessed differently for VAT purposes. The Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal, 'the tax authority'), on the other hand, classifies the nutrition advice service merely as a dependent ancillary supply to the fitness service. The latter service is not exempt from VAT. In the view of the tax authority, this should logically also apply to the nutrition advice service, as the VAT assessment of a dependent ancillary supply is contingent only on the principal supply.

11. After the conclusion of inspection proceedings, the tax authority therefore amended the VAT assessments for the years at issue, 2014 and 2015. The applicant is challenging the amended assessments before the referring court.

IV. Preliminary ruling procedure

12. By decision of 22 July 2019, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa (CAAD), Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) referred the following two questions to the Court:

'1. Where, as occurs in this case, a company

(a) carries on, principally, fitness and physical well-being activities and, on a secondary basis, human health activities, which include nutrition services, nutrition/dietary advice, fitness assessment services and massages; and

(b) offers its customers plans that include only fitness service and plans that include nutrition services in addition to fitness service,

for the purposes of Article 2(1)(c) of Directive 2006/112/EC of 28 November 2006, must the human health activity, and the nutrition service in particular, be regarded as ancillary to the fitness and physical well-being activity, with the effect that the ancillary supply must be given the same tax treatment as the principal supply, or, on the contrary, must the human health activity, and the nutrition service in particular, be regarded as independent of and distinct from the fitness and physical well-being activity, with the effect that the tax treatment established for each of those activities will apply to that activity?

2. For the purposes of applying the exemption under Article 132(1)(c) of Directive 2006/112/EC of 28 November 2006, must the services listed in that article actually be supplied, or is it sufficient in order for that exemption to apply that they are merely made available, so that use of those services depends solely on the wishes of the customer?'

13. In the proceedings before the Court, the applicant, the Portuguese Republic and the European Commission submitted written observations.

V. Legal assessment

A. The first question

14. By the first question, the referring court wishes to know, in essence, whether the combination of the fitness service and nutrition advice is to be regarded as multiple supplies, each requiring a separate VAT assessment.

15. In principle, every supply of goods or services must be regarded as independent (see under 1.). Taking an overview of the Court's existing case-law, it is apparent that there are only a few exceptional cases where a derogation from that principle is permitted. I will highlight those situations (see under 2.) and then examine whether this is such an exceptional case (see under 3.).

1. Principle: every supply is independent

16. The Court has held in settled case-law that for VAT purposes every supply must normally be regarded as distinct and independent.[6] This follows from the second subparagraph of Article 1(2)[7] and Article 2[8] of the VAT Directive.

17. Furthermore, the VAT Directive establishes a differentiated system of rules governing the place of performance, exemptions and the tax rate. If the supplies, which are to be assessed differently in themselves, were subject globally to a uniform analysis for VAT purposes merely because there are certain geographical, temporal or substantive links between them, that would circumvent this differentiated system.

18. It follows that, in principle, each individual supply must be assessed separately for VAT purposes. This holds even where there are certain links between multiple supplies because they pursue a single economic aim.[9]

19. The contractual structure in question is likewise irrelevant.[10] The VAT assessment of a transaction cannot depend on the contractual arrangements available under national civil law. If, as is the case here to some extent, multiple supplies are made on the basis of a single contract under civil law, this does not call into question the independence of those supplies for VAT purposes.[11]

6 Judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 23); of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 22); of 10 November 2016, *Baštová* (C-432/15, EU:C:2016:855, paragraph 68); and of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraph 53).

7 For example, judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 23); of 8 December 2016, *Stock'94* (C-208/15, EU:C:2016:936, paragraph 26); and of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229, paragraph 30).

8 For example, judgments of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 22); of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraph 53); and of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:649, paragraph 20).

9 See judgment of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660, paragraph 44), and also, to that effect, judgment of 17 January 2013, *BGŻ Leasing* (C-224/11, EU:C:2013:15, paragraph 42).

10 Judgments of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660, paragraph 47), and of 6 May 2010, *Commission* v *France* (C-94/09, EU:C:2010:253, paragraph 33).

11 See judgment of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660, paragraph 47).

2. Exceptions to the principle that every supply is independent

20. However, the principle that every supply is independent is not absolute. Transactions should not be artificially split, so as not to distort the functioning of the VAT system.[12] The VAT treatment of bundles of supplies is thus caught in tension between the principle that supplies are independent, on the one hand, and the prohibition on the artificial splitting of single transactions, on the other.

21. In this connection, the Court has developed two exceptions to the principle that a supply is independent: single complex supplies (see under a.) and dependent ancillary supplies (see under b.). In addition, the VAT Directive also contains the exception for closely related activities (see under c.).

(a) First exception: single complex supply

22. Where there is a single complex supply, multiple elements of the supply form one *sui generis* supply. That is the situation, according to the Court's case-law, where the supply by the taxable person consists of two or more elements or acts which are so closely linked that they form, *objectively*, a single, indivisible economic supply, which it would be artificial to consider separately.[13] The Court determines whether this is the case by ascertaining the essential features[14] or characteristic elements of the transaction[15] from the perspective of the 'typical consumer'.[16]

23. It is therefore crucial whether the typical consumer (the typical recipient of the supply) regards the supply received as multiple distinct supplies or as a single supply. The decisive criterion is the generally accepted view, that is to say, the understanding of the general public. By having regard to the 'typical consumer', the Court applies a generalisation which it also uses in other fields of law.[17]

24. In its case-law the Court has developed various indications for the purposes of the VAT assessment of bundles of supplies. These are the indivisibility of the elements of the supply (point 25 et seq.), the separate availability of the supplies (point 29), the economic aim of the supply (points 30 and 31) and separate invoicing (points 32 and 33).

(1) Indivisibility of the elements of the supply

25. A characteristic of a single complex supply is the indivisibility of the elements of the supply.[18] In the case of a single complex supply, the individual elements of the supply merge into a new distinct supply, such that, in the generally accepted view, there is only a single supply.

12 Judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 23); of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 22); of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229, paragraph 44); of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraph 53); and of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 29).

13 Judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 23); of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 33); of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 22); of 10 November 2016, *Baštová* (C-432/15, EU:C:2016:855, paragraph 70); and of 29 March 2007, *Aktiebolaget NN* (C-111/05, EU:C:2007:195, paragraph 23).

14 Judgments of 29 March 2007, *Aktiebolaget NN* (C-111/05, EU:C:2007:195, paragraph 22), and of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:649, paragraph 20).

15 Judgments of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 30); of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597, paragraph 18); and of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 29). By contrast, the judgments always use the same term in the original (that is to say, in the French language version): 'éléments caractéristiques'.

16 Judgments of 19 July 2012, *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 21); of 2 December 2010, *Everything Everywhere* (C-276/09, EU:C:2010:730, paragraph 26); and of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 29).

17 See judgments of 23 April 2020, *Gömböc* (C-237/19, EU:C:2020:296, paragraph 44), with regard to trade mark law; of 30 January 2020, *Dr. Willmar Schwabe* (C-524/18, EU:C:2020:60, paragraph 40), with regard to foodstuffs law; and of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 78), with regard to consumer protection.

18 Judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 23); of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660, paragraph 38); of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraph 30): 'single, indivisible economic supply'; and of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 39).

26. This is clear from the example of restaurant transactions consisting of various elements of supplies, such as the provision of foodstuffs and services like the preparation of food or the making available of furniture and crockery.[19] It would be artificial to split this into a supply of goods and a provision of services. What is important to the typical visitor to a restaurant is the combination of the individual elements in the experience of 'visiting a restaurant', which is a service.[20] It is a different situation if the customer merely picks up food at a snack stall. The typical snack stall customer sees this as a single supply of foodstuffs,[21] even though the preparation and 'serving' at the snack stall is a supply of services.

27. From the perspective of the typical consumer, where there is a single complex supply the individual elements lose their independence and become secondary to a new *sui generis* supply. The object to be examined is then only that single supply as a whole. Any weighting of the individual elements of the supply is rightly irrelevant. It is also to be determined solely according to the generally accepted view whether the single complex supply constitutes a supply of goods under Article 14(1) or a supply of services under Article 24(1) of the VAT Directive.

28. It is therefore slightly misleading when the Court sometimes states that the material factor in the assessment of a single supply is whether the elements of the supply of goods or of the supply of services 'predominate'.[22] This wording suggests that the individual elements must be broken down and then weighed. In fact, this merely distinguishes between whether, in the generally accepted view, the complex (*sui generis*) supply is to be regarded as a supply of goods or a supply of services.

(2) Separate availability of the supplies

29. An indication militating against the existence of a single complex supply is the separate availability of the supplies. According to the Court's case-law, the fact that supplies are available independently of one another suggests the existence of multiple independent supplies for VAT purposes.[23] In contrast, a single complex supply is suggested where the recipient of the supply cannot receive one element of the supply without another.[24] Thus, there is a single complex supply where visitors to an aquatic park are given access to all the facilities in the park through their entrance ticket, regardless of which facilities they actually use.[25]

(3) Indispensability of the elements of the supply for the aim of the supply

30. Another indication of the existence of a single complex supply is the single economic aim of the transaction.[26] If the combination of multiple supplies is important to the typical recipient of supplies, this suggests a single complex supply. According to the Court's case-law, a single complex supply exists if all the elements of the supply are indispensable for achieving the aim of the supply.[27]

19 Judgments of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraph 64), and of 2 May 1996, *Faaborg-Gelting Linien* (C-231/94, EU:C:1996:184, paragraphs 13 and 14).

20 Judgments of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraph 64), and of 2 May 1996, *Faaborg-Gelting Linien* (C-231/94, EU:C:1996:184, paragraph 15).

21 Judgment of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraph 67 et seq.).

22 Judgments of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraphs 74, 76 and 81), and of 2 May 1996, *Faaborg-Gelting Linien* (C-231/94, EU:C:1996:184, paragraph 14).

23 Judgments of 16 July 2015, *Mapfre asistencia and Mapfre warranty* (C-584/13, EU:C:2015:488, paragraph 56), and of 17 January 2013, *BGŻ Leasing* (C-224/11, EU:C:2013:15, paragraph 43).

24 Judgments of 8 December 2016, *Stock'94* (C-208/15, EU:C:2016:936, paragraph 33), and of 21 February 2013, *Žamberk* (C-18/12, EU:C:2013:95, paragraph 32).

25 Judgment of 21 February 2013, *Žamberk* (C-18/12, EU:C:2013:95, paragraph 32).

26 See judgment of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660, paragraph 40).

27 Judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 34), and of 19 July 2012, *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 27).

31. In portfolio management, for instance, the bank typically supplies two kinds of service: the purchase/sale of securities and their management. If, in that case, the elements of the supply are necessarily mutually dependent because the asset holder has entrusted the management of the securities to the bank so that it can decide on the most opportune time for the purchase and sale of the securities, there is a single supply of services.[28] That supply relates to the growth of the assets placed under management and, unlike the mere sale of securities, is not exempt.[29]

(4) Separate invoicing as an indication that supplies are divisible

32. If an overall price is agreed for the bundle of supplies, this should also be seen as an indication of a single complex supply, according to the Court's case-law.[30] Conversely, however, agreement of separate prices for individual elements of a supply is likewise only an indication of multiple independent supplies[31] as separate pricing in a specific case may be merely based on the internal calculation by the supplier.

33. If, however, the charge attributed to the individual elements of the supply cannot be easily factored out, this suggests a single complex supply. In this case, splitting the elements would appear artificial. That is the case, for example, with off-airport park and ride services, where customers park their vehicles at a car park outside the airport and the car park operator is responsible for transportation to the airport.[32] If the charge depends solely on the parking time, without transportation being invoiced separately, that pricing suggests a single complex supply.[33]

(b) Second exception: dependent ancillary supply

34. A further derogation to the principle that every supply is independent is required if a supply constitutes a merely dependent ancillary supply to a principal supply.[34] A supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied.[35] The ancillary supply has only secondary importance compared with the principal supply, which is why it 'shares the tax treatment of the principal supply'.[36] This means that the ancillary supply is to be treated for VAT purposes in exactly the same way as the principal supply.

28 See judgment of 19 July 2012, *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 29).

29 See judgment of 19 July 2012, *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 46).

30 Order of 19 January 2012, *Purple Parking and Airparks Services* (C-117/11, not published, EU:C:2012:29, paragraph 35), and judgment of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 31).

31 Judgments of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 27); of 17 January 2013, *BGŻ Leasing* (C-224/11, EU:C:2013:15, paragraph 44); and of 2 December 2010, *Everything Everywhere* (C-276/09, EU:C:2010:730, paragraph 29).

32 Order of 19 January 2012, *Purple Parking and Airparks Services* (C-117/11, not published, EU:C:2012:29).

33 Order of 19 January 2012, *Purple Parking and Airparks Services* (C-117/11, not published, EU:C:2012:29, paragraphs 35 and 41).

34 Judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 34); of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 23); of 10 November 2016, *Baštová* (C-432/15, EU:C:2016:855, paragraph 71); of 10 March 2011, *Bog and Others* (C-497/09, C-499/09, C-501/09 and C-502/09, EU:C:2011:135, paragraph 54); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 52); of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:649, paragraph 21); of 15 May 2001, *Primback* (C-34/99, EU:C:2001:271, paragraph 45); and of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 30).

35 Judgments of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 23); of 10 November 2016, *Baštová* (C-432/15, EU:C:2016:855, paragraph 71); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 52); of 15 May 2001, *Primback* (C-34/99, EU:C:2001:271, paragraph 45); and of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 30).

36 Judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 29); of 19 July 2012, *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 19); of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:649, paragraph 21); of 15 May 2001, *Primback* (C-34/99, EU:C:2001:271, paragraph 45); and of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 32).

35. Unlike in the case of a single complex supply, dividing a bundle of supplies into a principal and an ancillary supply does not give rise to any artificial splitting. The principal supply and the ancillary supply are clearly divisible from one another. Dependent ancillary supplies, however, are merely accessory in relation to the principal supplies related to them.[37] The ancillary supply does not have a distinct function, but only an 'auxiliary' function.

36. Typical examples of ancillary supplies in the supply of goods are packaging or shipment. The latter supplies of services do not have the importance of a distinct principal supply because they serve only to fulfil the actual purpose of the contract. The same holds, for example, where the provider makes available, for consideration, different payment methods.[38]

37. In the case of such negligible ancillary supplies, dispensing with a separate VAT assessment cannot jeopardise the differentiated system of the VAT Directive. For the sake of practicability, a single transaction should therefore be taken to exist. In addition, the principle of fiscal neutrality, which precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes, does not require transactions to be split in this situation.[39] There is no competitive situation where the supplier can make the accessory ancillary supply only depending on the principal supply.

38. For this situation, indications can also be found in the Court's case-law, such as the value ratio between the individual supplies (see under points 39 and 40) or the absence of a distinct economic interest for the recipient of the supply (see under point 41 et seq.).

(1) Negligible value in relation to the other (principal) supply

39. There can be no objection to the equal treatment of the ancillary supply and the principal supply where the extent of the ancillary supply is actually negligible.[40] For this reason, the Court establishes the limit for an independent supply where the supply cannot be made without a substantial effect on the total price charged and the costs are not confined to a marginal share.[41]

40. If, for example, a hotelier offers his guests a transportation service from local airports and the cost of that service represents only a negligible proportion in comparison with accommodation, the supply is, as a rule, purely ancillary. Ultimately, transportation is a traditional task of the hotelier, which is a means of better enjoying the principal supply.[42] The situation may be assessed differently, however, in the case of a distant pick-up point or a transfer to an excursion destination, where the transport service has a substantial effect on the total price charged.[43]

37 Judgments of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597, paragraph 22), and of 2 December 2010, *Everything Everywhere* (C-276/09, EU:C:2010:730, paragraph 30).

38 Judgment of 2 December 2010, *Everything Everywhere* (C-276/09, EU:C:2010:730, paragraph 27).

39 Judgment of 2 December 2010, *Everything Everywhere* (C-276/09, EU:C:2010:730, paragraph 31).

40 Judgment of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:649, paragraph 29): 'minor or ancillary'.

41 See, in connection with travel supplies, judgment of 13 October 2005, *ISt* (C-200/04, EU:C:2005:608, paragraph 28).

42 See, expressly, judgment of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496, paragraph 24).

43 See, for example, Opinion of Advocate General Léger in *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:182, point 39).

(2) No distinct economic interest for the recipient of the supply

41. Furthermore, it is a typical characteristic of dependent ancillary supplies that the recipient of the supply does not have a distinct economic interest in them.[44] From an economic point of view, they merely serve to complement and supplement the principal supply and are therefore normally a consequence of that supply.[45] Their economic aim can be achieved, from the perspective of the typical consumer, only in combination with the principal supply.

42. In gaining an understanding of the interrelationship between multiple supplies, the relevant contractual arrangements may be a factor of importance.[46] For example, the supply of water, heating and electricity should probably be classified as dependent ancillary supplies to the principal supply of 'letting', as the recipient of the supplies has an interest in these common supplies only in connection with the transfer of the premises. It is irrelevant whether these ancillary supplies are billed on the basis of consumption, as is normally the case with water and heating.[47] Non-typical ancillary letting supplies, on the other hand, should probably be characterised as a dependent ancillary supply only in exceptional cases.[48]

43. A dependent ancillary supply is not precluded by the fact that it could also, theoretically, be made by a third party, for example where a tenant receives electricity directly from the electricity supplier.[49] Rather, the fact that a third party can theoretically make the supply is inherent in the concept of the transaction consisting of an ancillary supply and a principal supply.[50]

(c) Third exception: closely related activities

44. The final exception to the principle that every individual supply is independent follows from the VAT Directive itself. 'Closely related activities' share the exemption of an exempt supply in order to make the exemptions fully effective.

45. An example is the exemption of hospital and medical care under Article 132(1)(b) of the VAT Directive. In order to achieve the therapeutic aim, further supplies which are distinct from pure medical and hospital care may be necessary in an individual case, such as the services provided by an external laboratory.[51] Making such supplies subject to VAT would run counter to the aim of reducing costs for the health system.[52] The legislature therefore declares in Article 132(1)(b) of the VAT Directive that 'closely related activities' are also exempt alongside the care itself.

44 Judgments of 18 October 2018, *Volkswagen Financial Services (UK)* (C-153/17, EU:C:2018:845, paragraph 33), and of 8 December 2016, *Stock'94* (C-208/15, EU:C:2016:936, paragraph 29), with reference to judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229, paragraph 35).

45 See, for example, judgment of the Bundesfinanzhof (Federal Finance Court) of 15 January 2009, V R 91/07, DStRE 2009, 615: electricity supply together with long-term camping site rental is exempt.

46 Judgment of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597, paragraph 23).

47 A different view would appear to be taken, on the other hand, in the judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229, paragraph 39), although that decision was probably due to the particular features of that specific case.

48 See judgment of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597, paragraph 28), with regard to commercial premises.

49 Judgments of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597, paragraph 26); in the judgment of 11 June 2009, *RLRE Tellmer Property* (C-572/07, EU:C:2009:365, paragraph 22), the Court evidently examined only whether there was an 'indivisible economic transaction', and thus a single complex supply, which it rightly rejected on the basis of the theoretical provision of supplies by third parties and the divisibility of the supplies. It did not consider whether the cleaning of the common parts of an apartment block might be a dependent ancillary supply in relation to the letting of immovable property.

50 Judgment of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597, paragraph 26), and order of 19 January 2012, *Purple Parking and Airparks Services* (C-117/11, not published, EU:C:2012:29, paragraph 31).

51 Judgment of 11 January 2001, *Commission* v *France* (C-76/99, EU:C:2001:12, paragraph 27 et seq.).

52 Judgments of 5 October 2016, *TMD* (C-412/15, EU:C:2016:738, paragraph 30); of 26 February 2015, *VDP Dental Laboratory and Others* (C-144/13 and C-160/13, EU:C:2015:116, paragraphs 43 and 45); and of 11 January 2001, *Commission* v *France* (C-76/99, EU:C:2001:12, paragraph 23).

46. The Court sometimes employs the notions of 'principal and ancillary supply' in the context of closely related activities.[53] This is not entirely accurate from a doctrinal point of view. If closely related activities were already a dependent ancillary supply, there would be no need for the explicit exemption for those transactions. They would already be exempt by virtue of their character as a dependent ancillary supply.

47. In using this terminology, the Court is, in my view, merely seeking to make clear that, like ancillary supplies in the abovementioned sense, closely related activities are 'auxiliary', even though they are independent supplies. Unlike dependent ancillary supplies, they can thus also be provided by a taxable person other than the person who makes the exempt supply itself.[54] Nor is the identity of the recipient of the supply a condition for a closely related activity.[55]

3. Assessment of the nutrition advice service provided in this case

48. If, as in this case, the applicant offers nutrition advice alongside fitness services, both services pursue a common economic aim. Both are likely to boost physical well-being and athletic performance. Using one increases the efficiency of the other.

49. Contrary to the assertion made by Portugal, however, it does not necessarily follow that the fitness and nutrition services, which are supplied, at least predominantly, on the basis of a single contractual relationship, are to be regarded as a single transaction. The mere economic links between two supplies are not sufficient to outweigh the fundamental independence of each individual supply (see above, point 18).

50. Nor does any other conclusion follow from the fact that nutrition advice is provided at a fitness studio. Where there is a combination of a fitness service and nutrition advice, both a single complex supply (point 51 et seq.) and a dependent ancillary supply (point 55 et seq.) are ruled out.

(a) Not a case of a single complex supply

51. A single complex service exists where the supply by the taxable person consists of two or more elements which are so closely linked that they form, *objectively*, a single, indivisible economic supply, which it would be artificial to consider separately.[56] Indications are provided by the indivisibility of the elements of the supply (point 25 et seq.), the separate availability of the supplies (point 29), the indispensability of the elements of the supply for the aim of the supply (points 30 and 31) and separate invoicing (points 32 and 33). There are no such indications here.

52. Even if customers opt for the full package of the fitness service and nutrition advice, the individual elements of the supply (fitness and nutrition) are not indivisibly linked to each other. Ultimately, the services are supplied at separate times and locations by different staff. A separate VAT assessment does not therefore seem artificial, as the typical customer of the fitness studio would probably take two supplies to exist.

53 Judgments of 4 May 2017, *Brockenhurst College* (C-699/15, EU:C:2017:344, paragraph 25); of 10 June 2010, *CopyGene* (C-262/08, EU:C:2010:328, paragraph 39); of 25 March 2010, *Commission* v *Netherlands* (C-79/09, not published, EU:C:2010:171, paragraph 51); and of 1 December 2005, *Ygeia* (C-394/04 and C-395/04, EU:C:2005:734, paragraph 18).

54 Judgment of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343, paragraph 31).

55 Judgment of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343, paragraph 32).

56 Judgments of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 23); of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 33); of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 22); of 10 November 2016, *Baštová* (C-432/15, EU:C:2016:855, paragraph 70); and of 29 March 2007, *Aktiebolaget NN* (C-111/05, EU:C:2007:195, paragraph 23).

53. The fitness and nutrition advice supplies are also available to the recipient of the supplies independently of one another. Each customer is free to decide whether to subscribe to both offers in combination or each individually. It is also not essential to utilise the nutrition advice service in order to use the fitness service meaningfully. This is shown by the fact that the applicant offers fitness plans with or without nutrition advice.

54. Lastly, the separate invoicing in this case indicates the existence of two independent supplies. Although an overall monthly fee is payable in the case of a joint subscription to the fitness service and the nutrition advice service, they are priced separately, as is shown by the applicant in the invoice.

(b) Not a case of a dependent ancillary supply

55. Furthermore, the criteria for a dependent ancillary supply are not satisfied in this instance. A supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied.[57] Indications of such an auxiliary function are the value ratio between the individual supplies (points 39 and 40) or the absence of a distinct economic interest for the recipient of the supply (point 41 et seq.). There are likewise no such indications here.

56. The fact that nutrition advice is not a negligible, dependent ancillary supply is shown by the value ratio between the fitness and nutrition supplies. As Portugal asserts, 40% of the overall monthly fee is apportionable to the nutrition advice service. The amount payable for nutrition advice is not therefore merely a marginal share of the overall fee.

57. The recipient of the supply also has a distinct economic interest in nutrition advice. As has already been pointed out, the economic aim of a dependent ancillary supply can be achieved only in combination with its related principal supply. That is not quite the case here. The fitness service is not crucial to the aim of healthy nutrition pursued by the nutrition advice service. Healthy nutrition and sufficient physical activity are both elements of a healthy lifestyle but, in the generally accepted view, cover different areas of life. The nutrition advice service does not therefore merely complement the fitness service.

4. Conclusion

58. Accordingly, the nutrition advice services supplied by the applicant in the present case are independent services for the purposes of the VAT Directive, which are separate from the VAT assessment of the fitness service.

B. The second question

59. By its second question, the referring court wishes to know, in essence, whether the exemption under Article 132(1)(c) of the VAT Directive also applies where, although the nutrition advice service is paid for, it is not used. The referring court obviously assumes that the nutrition advice services supplied by the applicant come under the exemption in Article 132(1)(c) of the VAT Directive.

57 Judgments of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 23); of 10 November 2016, *Baštová* (C-432/15, EU:C:2016:855, paragraph 71); of 21 February 2008, *Part Service* (C-425/06, EU:C:2008:108, paragraph 52); and of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 30).

60. However, as the Commission maintains, this is rather doubtful. For that exemption to apply, medical care would have to be provided.[58] The concept of medical care covers only services that have as their aim the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders.[59] The necessary condition is thus a therapeutic aim.[60]

61. That condition is not met in the case of general nutrition advice. It is true that the Court has adopted a broad understanding of therapeutic aim and includes preventive measures which protect and maintain health.[61] However, they must seek to avert, avoid or prevent the occurrence of a health disorder or to detect such a disorder in a latent or incipient state.[62] A merely uncertain link without a specific risk of health impairment[63] or a purely cosmetic purpose is not sufficient.[64] It is for the referring court to examine whether the advice service is aimed at the prevention or treatment of certain diseases or is merely intended to improve general well-being or appearance.[65]

62. The question whether the supply must actually be used for the exemption under Article 132(1)(c) of the VAT Directive to apply would therefore appear to be relevant only in exceptional cases. In this regard, the Court has ruled in a different context that the VAT assessment of a service does not depend on whether the supplier merely makes that service available or actually supplies it.[66]

63. It is certainly not obvious that this case-law should also be applied to the specific exemption under Article 132(1)(c) of the VAT Directive, as it requires the supply to have a therapeutic aim, which is rather doubtful in the case of a nutrition advice service which has been paid for, but not used. However, there is no need to answer this question. It would arise only if the referring court correctly found that, and explained why, the nutrition advice service at issue actually constitutes a supply consisting in provision of medical care. That is not the case.

VI. Conclusion

64. I therefore propose that the Court should rule as follows:

1. Where a taxable person supplies nutrition, fitness and physical well-being services, as in the present case, they are independent and distinct supplies for the purposes of Directive 2006/112/EC.

2. A nutrition advice service as in the present case is an exempt supply consisting in provision of medical care for the purposes of Article 132(1)(c) of Directive 2006/112/EC at best if it pursues a therapeutic aim. It is for the referring court to determine whether that is the case.

58 Judgments of 5 March 2020, *X (VAT exemption for telephone consultations)* (C-48/19, EU:C:2020:169, paragraph 17); of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544, paragraph 19); of 27 April 2006, *Solleveld and van den Hout-van Eijnsbergen* (C-443/04 and C-444/04, EU:C:2006:257, paragraph 23); and of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 27).

59 Judgments of 5 March 2020, *X (VAT exemption for telephone consultations)* (C-48/19, EU:C:2020:169, paragraph 28); of 18 September 2019, *Peters* (C-700/17, EU:C:2019:753, paragraph 20); of 2 July 2015, *De Fruytier* (C-334/14, EU:C:2015:437, paragraph 20); of 13 March 2014, *Klinikum Dortmund* (C-366/12, EU:C:2014:143, paragraph 29); and of 6 November 2003, *Dornier* (C-45/01, EU:C:2003:595, paragraph 48).

60 Judgments of 5 March 2020, *X (VAT exemption for telephone consultations)* (C-48/19, EU:C:2020:169, paragraph 28); of 2 July 2015, *De Fruytier* (C-334/14, EU:C:2015:437, paragraph 22); of 27 April 2006, *Solleveld and van den Hout-van Eijnsbergen* (C-443/04 and C-444/04, EU:C:2006:257, paragraph 24); and of 20 November 2003, *Unterpertinger* (C-212/01, EU:C:2003:625, paragraphs 40 and 42).

61 Judgments of 2 July 2015, *De Fruytier* (C-334/14, EU:C:2015:437, paragraph 21); of 21 March 2013, *PFC Clinic* (C-91/12, EU:C:2013:198, paragraph 28); and of 10 June 2010, *Future Health Technologies* (C-86/09, EU:C:2010:334, paragraph 43).

62 Judgment of 10 June 2010, *Future Health Technologies* (C-86/09, EU:C:2010:334, paragraph 44).

63 Judgment of 10 June 2010, *Future Health Technologies* (C-86/09, EU:C:2010:334, paragraph 44).

64 Judgment of 21 March 2013, *PFC Clinic* (C-91/12, EU:C:2013:198, paragraph 29).

65 Judgment of 5 March 2020, *X (VAT exemption for telephone consultations)* (C-48/19, EU:C:2020:169, paragraph 26).

66 Judgments of 27 March 2014, *Le Rayon d'Or* (C-151/13, EU:C:2014:185, paragraph 36), and of 21 March 2002, *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraph 40).