Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

18 January 2018*

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 77/388/EEC — Third subparagraph of Article 12(3)(a) — Reduced rate of VAT — Annex H, category 7 — Single supply comprised of two distinct elements — Selective application of a reduced rate of VAT to one of those elements — 'World of Ajax' tour — Visit to the AFC Ajax museum)

In Case C-463/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 12 August 2016, received at the Court on 17 August 2016, in the proceedings

Stadion Amsterdam CV

v

Staatssecretaris van Financiën,

THE COURT (Ninth Chamber),

composed of C. Vajda (Rapporteur), President of the Chamber, E. Juhász and K. Jürimäe, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Stadion Amsterdam CV, by J. F. Kijftenbelt and T. J. Kok, acting as belastingadviseurs,

– the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

– the European Commission, by L. Lozano Palacios and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12(3)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2001/4/EC of 19 January 2001 (OJ 2001 L 22, p. 17; 'the Sixth Directive').

2 The request has been made in proceedings between Stadion Amsterdam CV and the Staatssecretaris van Financiën (Secretary of State for Finances, Netherlands) concerning the latter's refusal to allow the applicant in the main proceedings to apply a reduced rate of value added tax (VAT) to the tourist services that the applicant offers.

Legal context

EU law

3 The Sixth Directive was repealed and replaced, with effect from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, given the material time in the main proceedings, the case is still governed by the Sixth Directive.

4 Article 2 of the Sixth Directive provided:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…'

5 Under Article 12(3)(a) of that directive:

'The standard rate of [VAT] shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. From 1 January 2001 to 31 December 2005, this percentage may not be less than 15%.

…

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount, which may not be less than 5%, and shall apply only to supplies of the categories of goods and services specified in Annex H.'

6 Annex H to the Sixth Directive, entitled 'List of supplies of goods and services which may be subject to reduced rates of VAT', was worded as follows:

'In transposing the categories below which refer to goods into national legislation, Member States may use the combined nomenclature to establish the precise coverage of the category concerned.

Category	Description
...	...
7	Admissions to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities.
...	...'

Netherlands law

7 Article 9 of the Wet op de Omzetbelasting (Law on turnover tax) of 28 June 1968 (Stb. 1968, No 329), in the version applicable to the facts at issue in the main proceedings ('the Law on turnover tax'), provides:

'The tax is set at 21%.

2. By way of derogation from paragraph 1, the tax is set at:

(a) 6% for the supply of goods and services appearing in Table I appended to this law;

...'

8 Table I appended to the Law on turnover tax lists the supplies of goods and services to which the reduced rate provided for in Article 9(2)(a) of that law may be applied. Heading b.14 of that table states:

'admission to:

...

(c) public museums or collections, including the supply of goods closely associated therewith, such as catalogues, photos and photocopies;

...

(g) theme parks, playgrounds and ornamental gardens, and other similar facilities primarily and permanently intended for entertainment and daytime recreation.'

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

9 Stadion Amsterdam is a company operating a multi-purpose building complex, known as the Arena, consisting of a stadium and associated facilities. The museum of the football club AFC Ajax ('AFC Ajax') is also housed in that complex.

10 Stadion Amsterdam hires the stadium out to third parties as a venue for sports competitions and (occasionally) for performances by performing artists. Furthermore, when there are no sports or music events taking place, Stadion Amsterdam offers visits to the Arena in the form of tours with an admission charge, the so-called 'World of Ajax', consisting of a guided tour of the stadium and a visit, without a guide, to the AFC Ajax museum. On the tour, the participants, accompanied by a guide who provides them with miscellaneous information about AFC Ajax, the stadium and musical performances, visit the stands, the football pitch, the press room and the control room of the stadium. At the end of the guided tour, the participants are free to visit the AFC Ajax museum. During the period at issue in the main proceedings, namely between 1 January 2001 and 30 June 2005, it was not possible to visit the museum without participating in the guided tour of the stadium.

11 Since Stadion Amsterdam was of the view that the tour should be treated as the supply of a cultural service, covered by Heading b.14(c) of Table I of the Law on turnover tax or as recreation or entertainment, covered by Heading b.14(g) of that table, it applied the reduced rate of VAT provided for by that Law to the revenue received in respect of that service.

12 Following a tax inspection, the inspector of the tax authority took the view that the supply of that service should have been subject to VAT at the standard rate. Consequently, he issued a notice of additional assessment to tax in respect of the periods from 1 January 2001 to 30 June 2002 and from 1 July 2002 to 30 June 2005.

13 Stadion Amsterdam brought an action against that notice before the Rechtbank Haarlem (Haarlem District Court, Netherlands). An appeal was brought against the judgment delivered by that court before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam, Netherlands). The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), on an appeal on a point of law brought by the Secretary of State for Finance, set aside, in a judgment of 10 August 2012, the judgment delivered by the regional court of appeal and referred the case to the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague, Netherlands). Following a fresh appeal on a point of law against the judgment of the regional court of appeal, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) set aside, in a judgment of 14 November 2014, that judgment. It referred the case to the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch, Netherlands), which delivered a ruling on 16 July 2015.

14 The Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) based its judgment on the fact, found also in the judgment of the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam), that a tour was a single supply of services which could not be divided for the purposes of applying VAT at a special rate to one of the components of that supply. The Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) therefore held that the revenue received as consideration for the tours should, in its entirety, be subject to VAT at the standard rate.

15 An appeal on a point of law having been brought against the judgment of the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch), the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) states that it is clear from the national proceedings that the supply of services at issue is comprised of two elements, namely the guided tour of the stadium and the visit to the AFC Ajax museum, the former being the principal component, the latter the ancillary component, those components thereby giving rise to a single supply. It states, in that regard, that the price must be paid for both elements and that, during the period relevant to the notice of additional assessment to tax that was challenged before it, the visitors did not have the possibility of visiting only the AFC Ajax museum.

16 That court asks whether the fact that the guided tour of the stadium and the visit to the AFC Ajax museum are so closely connected to each other that they should be regarded as a single supply of services for VAT purposes means that the same VAT rate must necessarily be applicable to that supply. According to that court, although that interpretation seems to follow from the Court's

case-law, and in particular from the judgments of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93), of 11 February 2010, *Graphic Procédé* (C-88/09, EU:C:2010:76), and of 17 January 2013, *BGŻ Leasing* (C-224/11, EU:C:2013:15), Stadion Amsterdam's interpretation that various elements of a single supply may, in certain circumstances, be subject to different rates of VAT could be justified by other judgments of the Court, inter alia the judgments of 6 July 2006, *Talacre Beach Caravan Sales* (C-251/05, EU:C:2006:451), and of 6 May 2010, *Commission* v *France* (C-94/09, EU:C:2010:253).

17 The referring court finds it conceivable that the judgments of 6 July 2006, *Talacre Beach Caravan Sales* (C-251/05, EU:C:2006:451), and of 6 May 2010, *Commission* v *France* (C-94/09, EU:C:2010:253), might be interpreted as meaning that, where it is possible to distinguish a concrete and specific element within a single supply, to which the reduced rate of VAT would be applied if it were supplied separately, that reduced rate of VAT would therefore apply to that identified concrete and specific element of the supply, to the exclusion of the other aspects of that supply. A selective application of the reduced rate of VAT to a single component of a single supply would nevertheless be subject to the condition that there should be no resulting distortion of competition between the suppliers of services or of the functioning of the VAT system. In concrete terms, it must be ensured that the price of that concrete and specific element of the supply can be determined and that that price reflects the actual value of that element, so as to exclude an artificial increase in the price allocated to that element.

18 The referring court adds in that regard that, in the event that the two elements composing the supply of services at issue need to be separated, the full price of that supply amounts to EUR 10 per person, of which EUR 3.50 corresponds to the price of the visit to the AFC Ajax museum.

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

'Must Article 12(3)(a) of the Sixth Directive be interpreted as meaning that where the supply of a service, which for VAT purposes constitutes one single supply, comprises two or more concrete and specific constituent elements to which, if they had been provided as separate services, different VAT rates would apply, the levying of VAT in respect of that composite service should take place according to the separate rates applicable to those elements if the fee for the service can be split in correct proportion to those constituent elements?'

Consideration of the question referred

20 By its question, the referring court asks, in essence, whether the Sixth Directive must be interpreted as meaning that a single supply, such as that at issue in the main proceedings, comprised of two distinct elements, one principal, the other ancillary, which, if they were supplied separately, would be subject to different rates of VAT, must be taxed according to the rates of VAT applicable to those elements where the price of each component of the full price paid by a consumer in order to be able to receive that supply can be identified.

21 As a preliminary point, it should be noted that, according to the Court's case-law, where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether that operation gives rise, for the purposes of VAT, to two or more distinct supplies or to one single supply (see, to that effect, 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 52 and the case-law cited, and of 21 February 2013, *Žamberk*, C-18/12, EU:C:2013:95, paragraph 27 and the case-law cited).

22 The Court has also held, first, that it follows from Article 2 of the Sixth Directive that every transaction must normally be regarded as being distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (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 53 and the case-law cited, and of 10 November 2016, *Baštová*, C-432/15, EU:C:2016:855, paragraph 70 and the case-law cited).

23 There is also a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a service 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 (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 54 and the case-law cited, and of 10 November 2016, *Baštová*, C-432/15, EU:C:2016:855, paragraph 71 and the case-law cited).

24 In that regard, as to whether access to an aquatic park offering visitors not only facilities for engaging in sporting activities but also other types of recreation or relaxation amounted to a single supply falling within Article 132(1)(m) of Directive 2006/112, the Court has held that the fact that the aquatic park offers only a single entrance ticket granting access to all of the facilities, without any distinction according to the type of facility actually used and to the manner and to the duration of use during the period of the entrance ticket's validity, constitutes a strong indication of the existence of a single supply (judgment of 21 February 2013, *Žamberk*, C-18/12, EU:C:2013:95, paragraph 32).

25 In the case in the main proceedings, in accordance with the case-law set out in paragraphs 21 to 23 of the present judgment, the referring court characterised the tour, which is comprised of the two elements mentioned in paragraph 15 above, as a single supply and found that the visit to the AFC Ajax museum amounted to an element that was ancillary to the guided tour of the stadium at issue.

26 As to whether the two elements comprising that single supply, of which one is the principal and the other ancillary, may be subject to different rates of VAT, which would be those applicable to those elements if they were supplied separately, to interpret the Sixth Directive as allowing such taxation would run counter to the case-law referred to in paragraphs 21 to 23 of the present judgment, and as Stadion Amsterdam, the Netherlands Government and the Commission accepted in their respective written observations, it follows from the characterisation of an operation comprising several elements as a single supply that that operation will be subject to one and the same rate of VAT (see, to that effect, judgments of 17 January 2013, *BGŻ Leasing*, C-224/11, EU:C:2013:15, paragraph 30 and the case--law cited, and of 10 November 2016, *Baštová*, C-432/15, EU:C:2016:855, paragraph 71 and the case-law cited). The option, left to the Member States, to subject the various elements comprising a single supply to the various rates of VAT applicable to those elements would mean artificially splitting that supply and risk distorting the functioning of the VAT system, in disregard of the case-law referred to in paragraph 22 of the present judgment.

27 That also holds good even in the situation referred to by the referring court, in which it is possible to identify the price corresponding to each distinct element forming part of the single supply. The fact that such identification is possible or that the parties agree on those prices is not capable of justifying an exception to the principles arising from the case-law cited in paragraphs 22 and 23 of the present judgment.

28 Furthermore, the principle of fiscal neutrality might be jeopardised since two single supplies, comprised of two or more distinct elements which are, in all respects, similar, may need to be subject, in such a situation, to distinct rates of VAT applicable to those elements, according to whether or not it is possible to identify the price corresponding to those various elements.

29 It remains to be ascertained whether, in the situation described in the question referred for a preliminary ruling, an exception from the principles set out in paragraphs 21 to 23 of the present judgment can be derived from the judgments of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93), of 8 May 2003, *Commission* v *France* (C-384/01, EU:C:2003:264), of 6 July 2006, *Talacre Beach Caravan Sales* (C-251/05, EU:C:2006:451), and of 6 May 2010, *Commission* v *France* (C-94/09, EU:C:2010:253), cited by the referring court in its order for reference or by Stadion Amsterdam in its observations to the Court.

30 As regards, first, the judgment of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93), the Court held, in paragraph 29 of that judgment, that the essential features of the transaction concerned must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical customer, with several distinct principal services or with one single service. According to the Court, such a method takes into account the fact, indeed recalled in paragraph 22 above, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. Accordingly, paragraph 29 of that judgment cannot be interpreted as allowing the application of a separate rate of VAT to a concrete and specific element of a single supply. On the contrary, it follows from that paragraph that such an assessment would mean artificially splitting a single supply.

31 As regards, second, the judgment of 8 May 2003, *Commission* v *France* (C-384/01, EU:C:2003:264), it should be made clear, first, that that judgment concerns the conformity with Article 12(3)(a) and (b) of the Sixth Directive of a Member State's legislation which limited the reduced rate of VAT to a certain category of s*upplies of gas and electricity* set out in that directive, namely the fixed part of the prices of such supplies through public networks. Second, it is to be noted that, within the framework of proceedings for a declaration that a Member State had failed to fulfil its obligations, the Court found that the Commission had not adduced evidence that the application of that reduced rate to a single aspect of the supply of gas and electricity infringed the principle of fiscal neutrality inherent in the Sixth Directive, and did not address the issue of whether there was a single supply. Therefore, no conclusion can be drawn from that judgment regarding any possibility of applying a separate rate of VAT to separate elements of a single supply.

32 As regards, third, the judgment of 6 July 2006, *Talacre Beach Caravan Sales* (C-251/05, EU:C:2006:451), that judgment, as is clear from paragraph 14 thereof, concerns the question of whether the fact that certain goods are the subject of a single supply, including both a principal item which is by virtue of a Member State's legislation subject to an exemption with refund of the tax paid, within the meaning of Article 28(2)(a) of the Sixth Directive, and goods which that legislation excludes from the scope of that exemption, prevents the Member State concerned from levying VAT at the standard rate on the supply of those excluded items.

33 The Court, which answered that question in the negative, underlined that, in the situation at issue in the case having given rise to that judgment, to exempt the delivery of goods supplied together with the principal item, those goods being specifically excluded from an exemption by the national legislation, would run counter to the wording and purpose of Article 28(2)(a) of the Sixth Directive, according to which the scope of the derogation laid down by that provision is restricted to what was expressly covered by the national legislation on 1 January 1991 (see, to that effect, judgment of 6 July 2006, *Talacre Beach Caravan Sales*, C-251/05, EU:C:2006:451, paragraphs 20 to 22). In that judgment, the Court expressly held that the case-law on the taxation of single supplies did not apply to the

exemptions with refund of the tax paid with which Article 28 of the Sixth Directive is concerned (see, to that effect, judgment of 6 July 2006, *Talacre Beach Caravan Sales*, C-251/05, EU:C:2006:451, paragraph 24).

34 As regards, fourth, the judgment of 6 May 2010, *Commission* v *France* (C-94/09, EU:C:2010:253), that judgment concerns the compatibility, with Directive 2006/112, of national legislation providing for a selective application of the reduced rate of VAT by a Member State to the transportation of corpses by undertaker's vehicles, separately from the other services provided by that firm and the supply of goods related thereto. In order to determine whether the selective application of a reduced rate of VAT complied with Articles 96 to 99(1) of Directive 2006/112, the Court held that the question whether a transaction including several elements must be considered to be a single supply was not decisive for the purpose of the exercise by the Member States of the discretion left to them by Directive 2006/112 as regards the application of the reduced rate of VAT (see, to that effect, judgment of 6 May 2010, *Commission* v *France*, C-94/09, EU:C:2010:253, paragraph 33). Those were the circumstances in which the Court held that it was not necessary to examine whether or not the supply of services by undertakers was to be regarded as a single transaction, but that it was, however, necessary to ascertain whether the transportation of corpses by vehicles constituted a concrete and specific aspect of that category of supply, as set out in Annex III, point 16, to Directive 2006/112, and, if so, to examine whether or not the application of that rate undermines the principle of fiscal neutrality (judgment of 6 May 2010, *Commission* v *France*, C-94/09, EU:C:2010:253, paragraph 34).

35 In that judgment, the Court thus ruled, as is apparent from paragraph 33 thereof, on, inter alia, the scope of the discretion left to the Member States by Directive 2006/112 as regards the application of a reduced rate. However, the case in the main proceedings concerns a problem of a different nature.

36 In the light of all the foregoing, the answer to the question referred is that the Sixth Directive must be interpreted as meaning that a single supply, such as that at issue in the main proceedings, comprised of two distinct elements, one principal, the other ancillary, which, if they were supplied separately, would be subject to different rates of VAT, must be taxed solely at the rate of VAT applicable to that single supply, that rate being determined according to the principal element, even if the price of each element forming the full price paid by a consumer in order to be able to receive that supply can be identified.

Costs

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

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

The Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2001/4/EC of 19 January 2001, must be interpreted as meaning that a single supply, such as that at issue in the main proceedings, comprised of two distinct elements, one principal, the other ancillary, which, if they were supplied separately, would be subject to different rates of value added tax, must be taxed solely at the rate of value added tax applicable to that single supply, that rate being determined according to the principal element, even if the price of each element forming the full price paid by a consumer in order to be able to receive that supply can be identified.

[Signatures]