

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

3 February 2022 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 122 – Reduced rate for supplies of wood for use as firewood – Differentiation on the basis of the objective characteristics and properties of the goods – Types of wood intended for use as fuel which serve the same consumer need and are in competition with each other – Principle of fiscal neutrality)

In Case C-515/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 10 June 2020, received at the Court on 14 October 2020, in the proceedings

B AG

v

Finanzamt A,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, Vice-President of the Court, acting as President of the Sixth Chamber, N. Jääskinen and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- B AG, by T. Hammer, Wirtschaftsprüfer and Steuerberater, and C. Hammer, Steuerberater,
- the German Government, by J. Möller and S. Costanzo, acting as Agents,
- the European Commission, by L. Lozano Palacios and R. Pethke, acting as Agents,

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

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 98 and 122 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between B AG and Finanzamt A (Tax Office A, Germany; ‘the tax authority’) concerning the application of the reduced rate of value added tax (VAT) to supplies of wood chips.

Legal context

European Union law

The VAT Directive

3 According to recital 4 of the VAT Directive:

‘The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of [VAT], such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.’

4 Recital 7 of that directive is worded as follows:

‘The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.’

5 Article 96 of that directive provides:

‘Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.’

6 Article 98 of the VAT Directive provides:

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

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

...

3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature to establish the precise coverage of the category concerned.’

7 Annex III to that directive, which sets out the list of supplies of goods and services to which the reduced rates referred to in Article 98 thereof may be applied, does not include a category of goods ‘wood for use as firewood’.

8 Articles 109 to 122 of that directive lay down the conditions under which Member States may apply reduced rates of VAT, until such time as the definitive arrangements have been

adopted.

9 Article 122 of that directive states:

‘Member States may apply a reduced rate to the supply of ... wood for use as firewood.’

The CN

10 The Combined Nomenclature (‘the CN’) is set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Implementing Regulation (EU) No 1101/2014 of 16 October 2014 (OJ 2014 L 312, p. 1).

11 It includes, inter alia, the following tariff headings:

CN code

Description

4401

Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms:

4401 10 00

– Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms

– Wood in chips or particles:

4401 21 00

– – Coniferous

4401 22 00

– – Non-coniferous

– Sawdust and wood waste and scrap, agglomerated in logs, briquettes, pellets or similar forms:

4401 31 00

– – Wood pellets

4401 39

– – Other:

4401 39 20

– – – Agglomerated (for example, briquettes)

– – – Other:

4401 39 30

– – – – Sawdust

German law

12 Paragraph 12 of the Umsatzsteuergesetz (Law on Turnover Tax) provides:

‘(1) The rate of tax shall be 19% of the taxable amount in respect of every taxable transaction (Paragraphs 10 and 11, Paragraph 25(3) and Paragraph 25a(3) and (4)).

(2) The rate of tax shall be reduced to 7% in respect of the following transactions:

1. supplies, imports and intra-community acquisitions of the goods described in Annex 2 save for those goods referred to in point 49(f) and points 53 and 54;

...’

13 Point 48 of Annex 2 to that law is worded as follows:

[Order No]

Description of the goods

Customs tariff (chapter, heading, subheading)

48

Wood, namely:

(a) Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms

Subheading 4401 10 00

(b) Sawdust and wood waste and scrap, agglomerated in logs, briquettes, pellets or similar forms

Subheading 4401 30

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

14 The dispute concerns the application of the reduced rate of VAT to supplies of wood chips.

15 In 2015, the applicant in the main proceedings traded in wood chips bearing the protected

designations '*Flokets weiss*' ('industrial' wood chips) and '*Flokets natur*' ('forest' wood chips) and ensured the maintenance of heating installations using wood chips as fuel.

16 Industrial wood chips are made by cutting logs, the sawmill residue of which is reduced to wood chips with the help of shredding machines. Forest wood chips are made from top wood and small-diameter wood from forest maintenance. The residual wood is mechanically shredded in the forest and subsequently dried by the applicant in the main proceedings.

17 During the 2015 tax year, the applicant in the main proceedings supplied forest and industrial wood chips to municipality A and parish B. During that period, it also supplied wood chips as fuel, under an agreement concluded with municipality C concerning the 'operation of a wood chip heating installation including maintenance and cleaning'.

18 In the provisional VAT return for the 2015 financial year, the applicant in the main proceedings applied the standard rate (19%) to the abovementioned supplies, in accordance with the tax authority's opinion as indicated during an earlier tax inspection.

19 The applicant in the main proceedings challenged that rate before the Finanzgericht (Finance Court, Germany), which upheld the action in part. That court held that the supplies of wood chips to municipality A and parish B must be subject to the reduced rate, but that the package of services supplied to municipality C must be taxed at the standard rate, since it constituted a single overall supply.

20 Both the applicant in the main proceedings and the tax authority lodged an appeal on a point of law against the judgment of the Finanzgericht (Finance Court) before the Bundesfinanzhof (Federal Finance Court, Germany).

21 That court is uncertain, in the first place, about the concept of 'wood for use as firewood' in Article 122 of the VAT Directive, in particular as to whether that concept encompasses wood chips.

22 In the second place, the referring court asks whether, in exercising the option provided for in Article 122 of the VAT Directive, Member States are empowered to establish the precise scope of a reduced rate of tax for supplies of wood for use as firewood by having recourse to the CN or whether the empowerment to that effect provided for in Article 98(3) of that directive is limited to cases where a reduced rate of tax is applied to the supply of goods falling within the categories listed in Annex III to that directive.

23 In the third place, supposing that Member States are empowered to establish the precise scope of the reduced rate of VAT for supplies of wood for use as firewood by means of the CN, the referring court seeks clarification as to whether the principle of fiscal neutrality precludes the application of different rates of tax to different types of wood for use as firewood.

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

'(1) Is the term "wood for use as firewood" in Article 122 of [the VAT Directive] to be interpreted as meaning that it includes any wood which, on the basis of its objective properties, is intended exclusively for burning?

(2) Can a Member State which introduces a reduced rate for supplies of wood for use as firewood on the basis of Article 122 of [the VAT Directive] establish its precise coverage using the [CN] in accordance with Article 98(3) of [the VAT Directive]?

(3) If the answer to Question 2 is in the affirmative: May a Member State exercise the power

conferred on it by Article 122 of [the VAT Directive] and Article 98(3) of [the VAT Directive] to establish the coverage of the reduced rate for supplies of wood for use as firewood using the [CN] in keeping with the principle of tax neutrality, in such a way that supplies of various forms of wood for use as firewood, which differ in terms of their objective characteristics and properties but which, from the point of view of the average consumer, address the same need (in this case, heating), on the basis of the criterion of comparability in terms of use, and are thus in competition with each other, are subject to different rates of taxation?’

Consideration of the questions referred

The first question

25 By its first question, the referring court asks, in essence, whether Article 122 of the VAT Directive must be interpreted as meaning that the concept of ‘wood for use as firewood’ encompasses any wood which, on the basis of its objective properties, is intended exclusively for burning.

26 It must be borne in mind that, in accordance with the Court’s settled case-law, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, irrespective of its treatment in the Member States (judgment of 9 September 2021, *Bundesamt für Fremdenwesen und Asyl (Subsequent application for international protection)*, C-18/20, EU:C:2021:710, paragraph 32).

27 It follows from that that, in the absence of any reference to Article 122 of the VAT Directive, the concept of ‘wood for use as firewood’ in that provision must be regarded as an autonomous concept of EU law, the meaning and scope of which must be identical in all Member States. Accordingly, it is for the Court to give that concept a uniform interpretation throughout the legal order of the European Union.

28 In that regard, in the absence of a definition of ‘wood for use as firewood’ in that directive, reference should be made, first, to the usual meaning of the phrase in everyday language (see, to that effect, judgment of 9 September 2021, *Phantasialand*, C-406/20, EU:C:2021:720, paragraph 29), namely wood intended for burning for the purpose of heating public or private spaces.

29 Second, it must be noted that Article 122 of the VAT Directive is in the nature of a derogation. According to Article 96 of the VAT Directive, the same rate of VAT, namely the standard rate fixed by each Member State, is applicable to the supply of goods and the supply of services. It is therefore by way of exception to that rule that the possibility of provisionally applying a reduced rate of VAT, inter alia, to wood for use as firewood is provided for in Article 122 of that directive.

30 As a derogating provision, that article must be interpreted strictly (judgments of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 147, and of 16 July 2020, *JE (Law applicable to divorce)*, C-249/19, EU:C:2020:570, paragraph 23), and, consequently, the concept of ‘wood for use as firewood’, which determines its scope, must be interpreted strictly. It is therefore appropriate to regard as ‘wood for use as firewood’, in accordance with the definition proposed by the referring court, any wood which, on the basis of its objective properties, such as a predetermined degree of dryness, is intended exclusively for burning.

31 It follows from the foregoing that Article 122 of the VAT Directive must be interpreted as

meaning that the concept of wood for use as firewood, within the meaning of that article, designates any wood which, on the basis of its objective properties, is intended exclusively for burning.

The second question

32 By its second question, the referring court asks, in essence, whether Article 122 of the VAT Directive must be interpreted as meaning that a Member State which, in applying that provision, establishes a reduced rate of VAT for supplies of wood for use as firewood, may limit its scope, in accordance with Article 98(3) of that directive, with reference to the CN.

33 It must be borne in mind that, as regards the categories of supplies of goods listed in Annex III to the VAT Directive, which may be subject to a reduced rate of VAT under Article 98(1) and (2) of that directive, paragraph 3 of that article expressly allows Member States to establish those categories more precisely with reference to the CN.

34 By contrast, the same possibility cannot be inferred from the actual wording of Article 122 of the VAT Directive, which merely states that Member States may apply a reduced rate, *inter alia*, to the supply of wood for use as firewood, until such time as the definitive arrangements have been adopted.

35 However, it must be pointed out, first, that, as stated in paragraph 30 of this judgment, Article 122 of the VAT Directive is a derogating provision and must, consequently, be interpreted strictly. Accordingly, it is not open to Member States to grant the benefit of a reduced rate to supplies of wood other than the supply of wood for use as firewood pursuant to that provision.

36 Second, since Article 122 of the VAT Directive gives Member States the option, during a transitional period, to apply a reduced rate to supplies of wood for use as firewood, those States may waive the application of such a rate to those supplies and choose to apply to them the standard rate provided for in Article 96 of that directive. Such an option also includes the possibility of applying a reduced rate to only some supplies of wood for use as firewood, provided that that option is exercised within the strict limits of the derogation, as noted in the preceding paragraph.

37 As is apparent from the Court's settled case-law concerning Article 98 of the VAT Directive (judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others*, C-597/17, EU:C:2019:544, paragraph 44), it should be noted that, in Article 122 of that directive, the EU legislature has merely provided Member States the option to apply, by way of derogation and on a temporary basis, a reduced rate of VAT to supplies of, *inter alia*, wood for use as firewood. Accordingly, Member States have the possibility of reserving the benefit of that reduced rate to only a part of those supplies.

38 Thus, it is for Member States aiming to make limited and therefore selective use of the option granted to them by Article 122 of the VAT Directive to establish by any means, in their national law, precisely the supplies of wood for use as firewood to which they choose to grant the benefit of a reduced rate. No provision of EU law prohibits them from having recourse to an instrument of EU law to that end and, in particular, from referring to the CN, even though Article 122, unlike Article 98 of that directive, does not expressly make provision for that.

39 However, the option arising from Article 122 of the VAT Directive to reserve the benefit of a reduced rate to only some supplies of wood for use as firewood is subject to compliance with the principle of fiscal neutrality. As is apparent from settled case-law, it is permissible for the Member States to determine more precisely the categories of supplies of goods or services to which that directive allows them to apply a reduced rate, subject to compliance with the principle of fiscal

neutrality inherent in the common system of VAT (judgments of 22 April 2021, *Dyrektor Izby Administracji Skarbowej w Katowicach*, C-703/19, EU:C:2021:314, paragraph 38, and of 9 September 2021, *Phantasialand*, C-406/20, EU:C:2021:720, paragraph 25 and the case-law cited).

40 In the light of the foregoing considerations, the answer to the second question is that Article 122 of the VAT Directive must be interpreted as meaning that a Member State which, in applying that article, establishes a reduced rate of VAT for supplies of wood for use as firewood, may limit its scope as regards some categories of supplies of wood for use as firewood with reference to the CN, subject to compliance with the principle of fiscal neutrality.

The third question

41 By its third question, the referring court asks, in essence, whether the principle of fiscal neutrality must be interpreted as precluding the supply of wood chips from being excluded from the benefit of the reduced rate applicable to the supply of other types of wood for use as firewood.

42 As has been set out in paragraph 40 of this judgment, where a Member State chooses to apply selectively the reduced rate of VAT to supplies of goods or services for which the VAT Directive allows the application of such a rate, that Member State must comply with the principle of fiscal neutrality.

43 The principle of fiscal neutrality precludes treating similar goods or supplies of services, which are thus in competition with each other, differently for VAT purposes (judgment of 9 September 2021, *Phantasialand*, C-406/20, EU:C:2021:720, paragraph 37 and the case-law cited).

44 According to settled case-law, in order to determine whether goods or services are similar, account must primarily be taken of the point of view of a typical consumer. Goods or services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or the other of those goods or services (judgment of 9 September 2021, *Phantasialand*, C-406/20, EU:C:2021:720, paragraph 38 and the case-law cited).

45 In other words, it is necessary to determine whether the goods and services at issue are interchangeable from the point of view of an average consumer. If that is the case, the application of different VAT rates might affect the consumer's choice which, in turn, would indicate an infringement of the principle of fiscal neutrality (judgment of 9 September 2021, *Phantasialand*, C-406/20, EU:C:2021:720, paragraph 39 and the case-law cited).

46 It is therefore for the referring court to carry out a specific examination in order to determine whether wood chips are interchangeable with other types of wood for use as firewood from the point of view of an average consumer.

47 Consequently, the answer to the third question is that the principle of fiscal neutrality must be interpreted as not precluding national law from excluding from the benefit of the reduced rate of VAT the supply of wood chips, even though it grants that benefit to supplies of other types of wood for use as firewood, subject to wood chips not being interchangeable, from the point of view of the average consumer, with other types of wood for use as firewood, which it is for the referring court to ascertain.

Costs

48 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 (Sixth Chamber) hereby rules:

1. **Article 122 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the concept of wood for use as firewood, within the meaning of that article, designates any wood which, on the basis of its objective properties, is intended exclusively for burning.**
2. **Article 122 of Directive 2006/112 must be interpreted as meaning that a Member State which, in applying that article, establishes a reduced rate of value added tax for supplies of wood for use as firewood, may limit its scope as regards some categories of supplies of wood for use as firewood with reference to the Combined Nomenclature, subject to compliance with the principle of fiscal neutrality.**
3. **The principle of fiscal neutrality must be interpreted as not precluding national law from excluding from the benefit of the reduced rate of value added tax the supply of wood chips, even though it grants that benefit to supplies of other types of wood for use as firewood, subject to wood chips not being interchangeable, from the point of view of the average consumer, with other types of wood for use as firewood, which it is for the referring court to ascertain.**

[Signatures]

* Language of the case: German.