

JUDGMENT OF THE COURT (First Chamber)

17 November 2022 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 26(1)(b) – Supply of services free of charge – Award of retail vouchers free of charge to staff of the taxable person’s business as part of an employee recognition and reward scheme – Transactions treated as supplies of services for consideration – Scope – Principle of fiscal neutrality)

In Case C-607/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the First-tier Tribunal (Tax Chamber), United Kingdom, made by decision of 11 November 2020, received at the Court on 17 November 2020, in the proceedings

GE Aircraft Engine Services Ltd

v

The Commissioners for His Majesty’s Revenue and Customs,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the First Chamber, P.G. Xuereb (Rapporteur), A. Kumin and I. Ziemele, Judges,

Advocate General: T. Žapeta,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2021,

after considering the observations submitted on behalf of:

- GE Aircraft Engine Services Ltd, by L. Allen, Barrister, and W. Shah, Solicitor,
- the European Commission, by J. Jokubauskaitė, X. Lewis and V. Uher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 26(1)(b) 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 GE Aircraft Engine Services Ltd (‘GEAES’) and the Commissioners for His Majesty’s Revenue and Customs (‘HMRC’) concerning a tax adjustment, for the period from December 2013 to October 2017, in respect of undeclared

output value added tax (VAT) on the value of retail vouchers offered by GEAES to its employees, under a recognition and reward programme established by that company.

Legal context

European Union law

The Withdrawal Agreement

3 By Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1) ('the Withdrawal Agreement'), the Council of the European Union approved, on behalf of the European Union and the European Atomic Energy Community, the Withdrawal Agreement, which was attached to that decision.

4 Article 86 of the Withdrawal Agreement, entitled 'Pending cases before the Court of Justice of the European Union', provides in paragraphs 2 and 3 thereof:

'2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.

3. For the purposes of this Chapter, proceedings shall be considered as having been brought before the Court of Justice of the European Union, and requests for preliminary rulings shall be considered as having been made, at the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice ...'

5 In accordance with Article 126 of the Withdrawal Agreement, the transition period began on the date of entry into force of that agreement and ended on 31 December 2020.

The VAT Directive

6 Article 26(1) of the VAT Directive provides:

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

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

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

United Kingdom law

7 The provisions of Article 26 of the VAT Directive were transposed into United Kingdom law by Article 3 of the Value Added (Supply of Services) Order 1992, which is worded as follows:

'... where a person carrying on a business puts services which have been supplied to him to any private use or uses them, or makes them available to any person for use, for a purpose other than a purpose of the business he shall be treated for the purposes of the Act as supplying those services in the course or furtherance of the business.'

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

8 GEAES, a company incorporated under the laws of England and Wales which belongs to the international group General Electric ('the GE Group'), operates in the United Kingdom in the aircraft engine manufacturing sector.

9 The GE Group set up a programme known as 'Above & Beyond', the purpose of which was to recognise and reward the most deserving and high-performing employees. Under that programme, any employee could nominate a colleague for acts which he or she considered to be deserving of reward, in accordance with that programme's eligibility conditions and the ranking system for prizes provided for by the programme.

10 Under the reward scheme thus introduced, an employee nominated for a prize ranked at the highest level could, under certain conditions, receive a cash payment, an employee nominated for an award ranked at an intermediate level was offered retail vouchers ('the retail vouchers at issue'), whilst an employee nominated for a prize ranked at the lowest level received a reward in the form of a certificate of recognition.

11 In the case of a prize of retail vouchers, the employee had to go to a website containing a list of duly referenced retailers ('the referenced retailers'), in order to choose one of those retailers from whom he or she could redeem his or her retail voucher.

12 The website in question was managed by a company which was responsible for purchasing the retail vouchers at issue directly from those retailers in order to sell them to General Electric United States. That company subsequently transferred them to another entity in the GE Group, also established in the United States, namely GE HQ, which in turn resold them to the various entities in the GE Group, in particular to GEAES.

13 GEAES and 19 other members of the GE Group were the subject of a VAT assessment by HMRC, relating to the transaction consisting in offering the retail vouchers at issue to employees nominated under the 'Above & Beyond' programme. HMRC took the view that GEAES and the other members of the GE Group had to declare the output tax on the value of those vouchers.

14 GEAES and the 19 other members of the GE Group concerned brought an action against that assessment before the referring court, namely the First-tier Tribunal (Tax Chamber), United Kingdom, having designated GEAES as the lead case for all 20 sets of proceedings.

15 The referring court notes that the dispute in the main proceedings relates exclusively to the prizes ranked at an intermediate level, in respect of the award ranking referred to in paragraph 10 above. In particular, the parties disagree as to whether GEAES's award, free of charge, of retail vouchers to its employees constitutes a transaction which must be treated as a supply of services for consideration, within the meaning of Article 26(1)(b) of the VAT Directive, and whether that transaction must therefore be subject to VAT.

16 In that regard, the referring court states that, according to GEAES, the award of the retail vouchers at issue to employees under the 'Above & Beyond' programme does not constitute a taxable supply for the purposes of Article 26(1)(b) of the VAT Directive, since that programme is linked to the economic activities of that company and the resulting advantage for the employees is secondary. A distinction must be drawn between the economic aim pursued by that company by means of the award of retail vouchers, free of charge, and the private use made of them by employees.

17 Such an interpretation is, in GEAES's view, consistent with the Court's case-law resulting, inter alia, from the judgments of 16 October 1997, *Fillibeck* (C-258/95, EU:C:1997:491), and of 11

December 2008, *Danfoss and AstraZeneca* (C-371/07, EU:C:2008:711).

18 By contrast, according to HMRC, in so far as the retail vouchers at issue are provided free of charge to employees and for personal use outside the context of GEAES's commercial activity, it must be held that the conditions for the application of Article 26(1)(b) of the VAT Directive are satisfied. The fact that GEAES has a business purpose for awarding the retail vouchers at issue is irrelevant in that regard.

19 The referring court also states, first, that on the acquisition of the retail vouchers at issue from GE HQ, GEAES pays VAT on that acquisition, on a reverse-charge basis, and subsequently recovers the corresponding input tax.

20 Secondly, the referring court points out that, during the final transaction, in which the employee nominated under the 'Above & Beyond' programme uses his or her retail vouchers to purchase goods or services from one of the referenced retailers, the retailer declares the output tax on the value of those retail vouchers.

21 Furthermore, according to that court, the offer of retail vouchers constitutes a supply of services carried out free of charge and it is therefore necessary to determine whether that supply of services is made for the private use of the taxable person or for that of his or her staff or, more generally, for purposes other than those of his or her business. In particular, the referring court considers that there are reasonable doubts as to the interpretation of the expression 'for his private use or for that of his staff or, more generally, for purposes other than those of his business', within the meaning of Article 26(1)(b) of the VAT Directive, and the application of that provision in circumstances such as those of the main proceedings.

22 In those circumstances, the First-tier Tribunal (Tax Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the issue of vouchers for third-party retailers to employees by a taxable person as part of a recognition programme for high-performing employees constitute a supply "for his private use or for that of his staff or, more generally, for purposes other than those of his business" within the meaning of Article 26(1)(b) of the ... VAT Directive?

(2) Does it have any significance in answering question 1 that the taxable person has a business purpose for the issuing of the retail vouchers to staff?

(3) Does it have any significance in answering question 1 that the retail vouchers issued to staff members are for their own use and can be used for the staff members' private purposes?'

Consideration of the questions referred

23 As a preliminary point, it should be noted that it follows from Article 86(2) of the Withdrawal Agreement, which entered into force on 1 February 2020, that the Court of Justice is to continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period set at 31 December 2020, which is the case in respect of this request for a preliminary ruling.

24 By its three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 26(1)(b) of the VAT Directive must be interpreted as meaning that a supply of services consisting, for a business, in offering retail vouchers to its employees, as part of a programme set up by that company, intended to recognise and reward the most deserving and high-performing employees, falls within its scope.

25 It should be noted at the outset that Article 26(1) of the VAT Directive treats certain transactions for which no consideration is actually received by the taxable person as a supply of services for consideration. The purpose of that provision is to ensure equal treatment as between a taxable person who applies goods or services for his or her own private use or for that of his or her staff, on the one hand, and a final consumer who acquires goods or services of the same type, on the other. In pursuit of that objective, Article 26(1)(a) of that directive prevents a taxable person who has been able to deduct VAT on the purchase of goods used for his or her business from escaping payment of that tax when he or she applies those goods from his or her business for his or her own private use or that of his or her staff and from thereby enjoying advantages to which he or she is not entitled by comparison with an ordinary consumer who buys goods and pays VAT on them. Similarly, Article 26(1)(b) of that directive prevents a taxable person or members of his or her staff from obtaining, free of tax, services provided by the taxable person for which a private individual would have to have paid VAT (see, to that effect, judgment of 20 January 2005, *Hotel Scandic Gåsabäck*, C-412/03, EU:C:2005:47, paragraph 23 and the case-law cited).

26 In order to determine whether a supply which consists, for a business, in offering its employees retail vouchers under a programme intended, inter alia, to recognise and reward the most deserving and high-performing employees constitutes a supply of services within the meaning of Article 26(1)(b) of the VAT Directive, it is necessary to assess all the circumstances in which that programme takes place and, in particular, the nature and objectives of that programme.

27 In the present case, it is apparent, in essence, from the documents before the Court that, first of all, the 'Above & Beyond' programme and, in particular, the prizes ranked at an intermediate level, in respect of the reward ranking referred to in paragraph 10 of this judgment, were designed by GEAES with the aim of improving the performance of its employees and, therefore, of contributing to better profitability of the business. Thus, the setting up of that programme was dictated by considerations relating to the proper conduct of that undertaking's business activities and the pursuit of additional profits, the resulting advantage for employees being merely incidental to the needs of the business. By helping to reinforce the motivation of employees, that programme has positive effects in terms of performance and profitability.

28 Also, the retail vouchers at issue give effect to the right of the employees who benefit from them to obtain goods or services from one of the referenced retailers (see, by analogy, judgment of 27 March 1990, *Boots Company*, C-126/88, EU:C:1990:136, paragraph 12). Thus, in accordance with the scheme put in place by GEAES by means of the 'Above & Beyond' programme, the obtaining of such a retail voucher, by an employee nominated under that programme, by its nature is no more than a document evidencing the obligation assumed by the referenced retailers to accept that retail voucher, instead of money, at its face value (see, by analogy, judgment of 24 October 1996, *Argos Distributors*, C-288/94, EU:C:1996:398, paragraph 19 and the case-law cited).

29 Lastly, GEAES, as the employer, does not intervene in the choice of goods or services made by the employees from those retailers.

30 Therefore, it is clear that, if account had to be taken only of the use made of them, the retail vouchers at issue would have to be regarded as being for the employees' private use.

31 However, it should be noted that the award of those retail vouchers does not take place for the employees' private use, since they have no means of ensuring with certainty that they will receive them. As is apparent from paragraph 9 above, the initiative for awarding them lies with other employees of the undertaking and is made on the basis of strictly professional criteria and only where the employees appointed are considered to merit a prize classified at the intermediate

level of prizes, in respect of the reward ranking referred to in paragraph 10 above.

32 Furthermore, it is common ground that GEAES awarded the retail vouchers at issue without remuneration or in return for any consideration on the part of the recipient employees, the cost of those vouchers being borne by GEAES itself. That supply of services gives GEAES an advantage in the form of the prospect of increasing its turnover as a result of the greater motivation of its employees and, as a result, an improvement in their performance (see, by analogy, judgment of 27 March 1990, *Boots Company*, C-126/88, EU:C:1990:136, paragraph 13). Therefore, the personal advantage which employees derive from such a supply appears to be merely incidental to the requirements of the business.

33 In the light of the foregoing and subject to the checks which it is for the referring court to carry out, it should be noted that GEAES's award free of charge of the retail vouchers at issue to employees nominated under the 'Above & Beyond' programme is intended to increase the performance of its employees and, therefore, leads to the proper functioning and profitability of the business, with the result that it must be found that that supply of services is not carried out for purposes other than those of the business and, therefore, does not fall within the scope of Article 26(1)(b) of the VAT Directive.

34 That finding is corroborated, moreover, by the fact that, in a situation relating to a supply of services comparable, in essence, to that at issue in the main proceedings, the Court held that that supply had been made for business purposes, since the purpose of that supply was to increase the volume of sales of the company in question (see, to that effect, judgment of 27 April 1999, *Kuwait Petroleum*, C-48/97, EU:C:1999:203, paragraph 19).

35 Lastly, having regard to the fact, noted in paragraph 20 above, that the referenced retailers declare output VAT on the value of the retail vouchers at issue, it must be held that, in so far as the supply of services consisting, for GEAES, in offering its employees retail vouchers in the context of a programme intended, inter alia, to recognise and reward the most deserving and high-performing employees does not fall within the scope of Article 26(1)(b) of the VAT Directive, the principle of fiscal neutrality is not infringed.

36 In the light of the foregoing considerations, the answer to the questions referred is that Article 26(1)(b) of the VAT Directive must be interpreted as meaning that a supply of services consisting, for a business, in offering retail vouchers to its employees, in the context of a programme set up by that business, designed to recognise and reward the most deserving and high-performing employees, does not fall within its scope.

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 (First Chamber) hereby rules:

Article 26(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a supply of services consisting, for a business, in offering retail vouchers to its employees, in the context of a programme set up by that business, designed to recognise and reward the most deserving and high-performing employees, does not fall within its scope.

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Delivered in open court in Luxembourg on 17 November 2022.

A. Calot Escobar

A. Arabadjiev

Registrar

President of the Chamber

* Language of the case: English.