Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

13 July 2023 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Supply of services for consideration – Bodies governed by public law – Municipality collecting a spa tax for the provision of spa facilities accessible to everyone)

In Case C?344/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 15 December 2021, received at the Court on 27 May 2022, in the proceedings

Gemeinde A

v

Finanzamt,

THE COURT (Tenth Chamber),

composed of D. Gratsias, President of the Chamber, I. Jarukaitis and Z. Csehi (Rapporteur), Judges,

Advocate General: T. ?apeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Gemeinde A, by G. Burret and N. Katemann, Rechtsanwältinnen,

– the German Government, by J. Möller and N. Scheffel, acting as Agents,

– the European Commission, by J. Jokubauskait? and B. Martenczuk, 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 Article 2(1)(c) and the second subparagraph of Article 13(1) 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 the Gemeinde A (municipality A,

Germany) and the Finanzamt (Tax Office, Germany) concerning the right of municipality A to deduct input value added tax (VAT).

Legal context

European Union law

3 Article 2(1) of the VAT Directive provides:

‘The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…’

4 According to Article 9(1) of that directive:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

5 Article 13(1) of the VAT Directive provides:

‘States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

…’

6 Article 168 of the VAT Directive is worded as follows:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…’

German law

7 Paragraph 1(1) of the Umsatzsteuergesetz (Law on turnover tax), in the version applicable

to the dispute in the main proceedings (‘the UStG’), provides:

‘The following transactions are subject to turnover tax:

1. the supply of goods or services effected for consideration within the national territory by a trader in the course of his business. Transactions are not excluded from taxation where they are carried out pursuant to statute or an order of an authority or are deemed to be carried out under statutory provisions;

…’

8 Under Paragraph 2 of the UStG:

‘(1) A trader is any person who independently carries out a commercial or professional activity. An undertaking comprises the whole of a trader’s commercial or professional activity. Commercial or professional activity means any sustained activity carried out for the purpose of obtaining income, even where there is no intention to make a profit or an association carries out its activities only in relation to its members.

…

(3) Legal entities governed by public law are commercially active only in the course of their commercial operations … and of their agricultural or forestry operations. …’

9 Paragraph 12(2) of the UStG provides:

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

…

9. transactions directly connected with the operation of swimming pools and the administration of health spas. The same shall apply to the provision of spa facilities, inasmuch as a consideration is payable in the form of a spa tax; …’

10 Under Paragraph 4(1) of the Gemeindeordnung für Baden-Württemberg (Code of Municipalities of Baden-Württemberg), in the version applicable to the dispute in the main proceedings (‘the GemO’):

‘Municipalities may, by means of by-laws, regulate matters of municipal autonomy, unless they are regulated by law. …’

11 Paragraph 10(2) and (3) of the GemO is worded as follows:

‘(2) Municipalities shall establish the public facilities necessary for the economic, social and cultural well-being of their inhabitants within the limits of their financial capacity. Residents shall be entitled under the applicable law to use municipal facilities in accordance with the same principles. They shall bear the costs to the municipality.

(3) Persons who own land or carry out a trade but do not live in the municipality shall have equal rights to use the public facilities provided in the municipality for landowners or traders and shall contribute to the costs to the municipality for their land or business.’

12 Paragraph 2(1) of the Kommunalabgabengesetz für Baden-Württemberg (Law on municipal taxes of Baden-Württemberg), in the version applicable to the dispute in the main proceedings, provides:

‘Municipal charges shall be imposed on the basis of by-laws. The by-laws shall stipulate, in particular, who is liable for the charge, purpose, basis for and rate of the charge, and the accrual and due dates of the charge.’

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

13 The applicant in the main proceedings is a state-recognised air spa town. Its spa administration is managed as a government-operated business under municipal law and qualifies as a commercial business for the purposes of corporation tax laws.

14 On that basis, the applicant in the main proceedings collects a spa tax, in accordance with Paragraph 4 of the GemO, read in conjunction with the by-laws referred to in Paragraph 2 of the Law on municipal taxes of Baden-Württemberg (‘the municipal by-laws’), in order to cover the costs of erecting and maintaining the facilities provided for spa and leisure purposes and for the events organised for that purpose.

15 The following are subject to the spa tax: first, persons staying in the municipality who are not resident in the municipality and who are offered the opportunity to use those facilities and to participate in those events; second, residents of the municipality, the focal point of whose life is in a different municipality; and, third, non-local persons staying in the municipality for professional reasons to attend conferences or other events (together, ‘persons liable to pay the spa tax’). By contrast, the spa tax is not collected from day visitors, non-local persons or residents working or undergoing training in the municipality.

16 The spa tax is set, for non-local persons, at a certain amount per day of stay and, for resident persons subject to it, at an annual flat-rate amount payable irrespective of the duration, frequency and season of their stay.

17 The request for a preliminary ruling states that anyone who provides paid accommodation, operates a camping site or lets out their apartment as a holiday home to non-local persons is to notify the arrival and departure of those persons within three days following their arrival and their departure. Furthermore, travel agencies are required to make a declaration for the purposes of the spa tax where that tax is included in the consideration to be paid by the tourist.

18 In the years 2009 to 2012 (‘the years at issue’), the applicant in the main proceedings financed the erection, maintenance and renovation of the spa park, spa building and footpaths (together, ‘the spa facilities’) with the revenue from the collection of that tax. Those facilities are freely accessible to everyone; there is no need to present a spa card in order to gain admittance.

19 Taking the view, in its VAT returns for the years at issue, that the spa tax constituted remuneration for an activity subject to VAT, namely the operation of a spa establishment, the applicant in the main proceedings claimed a deduction of the VAT paid on all the input services which had been provided to it and which were connected with tourism.

20 In the context of an on-the-spot tax audit carried out by the defendant in the main proceedings, the auditor inter alia disregarded the amounts of input VAT paid which were not linked to the operation of the spa business and took into account the amounts of input VAT paid which related to the spa building only in so far as that building was leased for a fee. On 20 March

2015, the defendant in the main proceedings issued VAT amendment notices in accordance with those findings.

21 Following an administrative rejection decision adopted in the context of a prior complaint procedure, the applicant in the main proceedings brought an action before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany).

22 By judgment of 18 October 2018, that court dismissed that action, holding, in essence, that the applicant in the main proceedings had not acted as a trader in the course of its activity which gave rise to the collection of the spa tax. It observed that, since the operation of the spa facilities in return for the spa tax did not constitute a business activity, the transactions declared for the spa tax imposed were not liable to be subject to VAT and that, consequently, the deduction of the input VAT initially granted by the defendant in the main proceedings had to be refused. However, that court referred to the prohibition on issuing a revised tax assessment which is less favourable to the applicant (*reformatio in pejus*).

23 The applicant in the main proceedings brought an appeal on a point of law against that judgment before the Bundesfinanzhof (Federal Finance Court, Germany), which is the referring court.

24 In the first place, that court wonders whether or not it is appropriate to conclude that services have been provided for consideration in this case, while making it clear that it is inclined to answer in the negative. The spa facilities may also be used free of charge by persons who are not subject to the spa tax. From that perspective, the recipient of the service received in return for the spa tax is not identifiable, since the person liable to that tax has not received, in relation to the general public who can also use those facilities free of charge, any specific consumable benefit which goes beyond the benefit received by the general public. However, that court has doubts as to whether the legal relationship between the applicant in the main proceedings and the spa guests should be taken in isolation. Under the municipal by-laws, the latter pay a specified amount of spa tax per day's stay for the spa facilities provided. Thus, the payments represent the consideration for the opportunity to use the spa facilities. Finally, the referring court observes that the possibility remains that this is a long-term loss-making activity, in view of the fact that the spa tax does not cover the costs of providing the spa facilities.

25 In the second place, in so far as the question set out in the preceding paragraph of the present judgment should be answered in the affirmative, the referring court asks the Court of Justice whether, in order to determine the existence of 'significant distortions of competition' within the meaning of the second subparagraph of Article 13(1) of the VAT Directive, the examination should concern not only the territory of the applicant in the main proceedings, but also neighbouring municipalities, the Land Baden-Württemberg (Germany) or the federal territory.

26 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) In circumstances such as those in the main proceedings, does a municipality which, on the basis of municipal by-laws, imposes a "spa tax" (of a certain amount per day's stay) on visitors staying in the municipality (spa guests) for the provision of spa facilities (for example[,] a spa park, a spa building, footpaths) carry out, by providing the spa facilities to the spa guests in return for a spa tax, an economic activity for the purposes of Article 2(1)(c) of [the VAT Directive] if the spa facilities are in any event freely accessible to everyone (and therefore also, for example, to residents not subject to the spa tax or to other persons not subject to the spa tax)?

(2) If the answer to [the first question] is in the affirmative: In the circumstances in the main

proceedings described above, is the municipal territory alone the relevant geographic market for the purpose of examining whether treating the municipality as a non-taxable person would lead to “significant distortions of competition” within the meaning of the second subparagraph of Article 13(1) of [the VAT Directive]?’

Consideration of the questions referred

The first question

27 In so far as the referring court refers, in the wording of the first question, to the concept of ‘economic activity’, it must be recalled that, under the first subparagraph of Article 9(1) of the VAT Directive, ‘taxable person’ means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. In accordance with the first sentence of the second subparagraph of Article 9(1), ‘economic activity’ means any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions.

28 According to settled case-law, an activity may be regarded as an economic activity, within the meaning of the second subparagraph of Article 9(1) of the VAT Directive, only where the activity corresponds to one of the chargeable events defined in Article 2(1) of the VAT Directive (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 32 and the case-law cited).

29 Therefore, in order to determine whether the provision of spa facilities under conditions such as those described in the main proceedings constitutes an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive and, consequently, whether the applicant in the main proceedings is a taxable person within the meaning of the first subparagraph of Article 9(1) of that directive, it must first be established whether, in the context of that provision, it supplied a service for consideration for the purposes of Article 2(1)(c) of the VAT Directive (see, to that effect, judgment of 12 May 2016, *Geemente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 22).

30 In so far as the information provided by the referring court in its request for a preliminary ruling permits the inference that a supply of services is indeed involved in the main proceedings, it is necessary to verify whether those services may be regarded as being provided by the applicant in the main proceedings for consideration, as required by Article 2(1)(c) of the VAT Directive (see, to that effect, judgment of 12 May 2016, *Geemente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 23).

31 It must therefore be held that, by its first question, the referring court asks, in essence, whether Article 2(1)(c) of the VAT Directive must be interpreted as meaning that the provision of spa facilities by a municipality constitutes a ‘supply of services for consideration’ within the meaning of that provision, where, on the basis of municipal by-laws, that municipality imposes a spa tax of a certain amount per day’s stay on visitors staying in the municipality, when those facilities are freely and gratuitously accessible to everyone.

32 Article 2(1)(c) of the VAT Directive provides that the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

33 A supply of services is carried out ‘for consideration’, within the meaning of Article 2(1)(c) of the VAT Directive, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for an identifiable service supplied to

the recipient. That is the case if there is a direct link between the service supplied and the consideration received (judgment of 20 January 2022, *Apcoa Parking Danmark*, C?90/20, EU:C:2022:37, paragraph 27 and the case-law cited).

34 However, it does not appear that there is a legal relationship in which there is reciprocal performance between (i) a municipality which, on the basis of municipal by-laws, imposes a spa tax of a certain amount per day's stay on visitors staying in the municipality and (ii) those visitors, who are entitled to use the spa facilities made available by that municipality, which are freely accessible to everyone, including persons not subject to that tax.

35 The payment received by the municipality, namely the spa tax, cannot be regarded as resulting from the provision of a service, namely the provision of the spa facilities, of which it constitutes the direct consideration.

36 In that regard, it follows from the Court's case-law that there is a direct link where two services are mutually dependent on each other, that is to say, that one is made only on condition that the other is also made, and vice versa (judgment of 11 March 2020, *San Domenico Vetraria*, C?94/19, EU:C:2020:193, paragraph 26 and the case-law cited).

37 The obligation to pay the spa tax is owed by persons liable to pay that tax by virtue of the municipal by-laws which also determine the amount of that tax (see, to that effect, judgment of 18 January 2017, *SAWP*, C?37/16, EU:C:2017:22, paragraph 28).

38 Above all, the obligation to pay the spa tax is linked not to the use by the persons subject to that obligation of the spa facilities provided by the municipality, but to the stay in the territory of the municipality, irrespective of the reasons which justify it. Thus, visitors staying in the municipality are obliged to pay that fee, even when they are staying there for other reasons, such as visiting family members or acquaintances residing there, and do not intend to use the spa facilities (see, by analogy, judgment of 22 June 2016, *?eský rozhlas*, C?11/15, EU:C:2016:470, paragraphs 25 and 26).

39 Furthermore, although the persons liable to pay the spa tax are able to use the spa facilities, those facilities are, however, freely and gratuitously accessible to everyone, including to residents and day visitors, regardless of whether or not they are required to pay the spa tax. Thus, persons liable to pay the spa tax do not enjoy any advantages other than those enjoyed by persons using those spa facilities who are not subject to the same tax.

40 Having regard to the foregoing considerations, the answer to the first question is that Article 2(1)(c) of the VAT Directive must be interpreted as meaning that the provision of spa facilities by a municipality does not constitute a 'supply of services for consideration', within the meaning of that provision, where, on the basis of municipal by-laws, that municipality imposes a spa tax of a certain amount per day's stay on visitors staying in the municipality, when the obligation to pay that tax is linked not to the use of those facilities but to the stay in the municipal territory and those facilities are freely and gratuitously accessible to everyone.

The second question

41 In so far as the referring court states that, first, if the answer to the first question referred for a preliminary ruling is in the negative, the action will have to be dismissed and, second, the second question referred for a preliminary ruling is to be submitted only if the answer to the first question is in the affirmative, there is no need to answer the second question referred for a preliminary ruling.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Tenth Chamber) hereby rules:

Article 2(1)(c) 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 provision of spa facilities by a municipality does not constitute a 'supply of services for consideration', within the meaning of that provision, where, on the basis of municipal by-laws, that municipality imposes a spa tax of a certain amount per day's stay on visitors staying in the municipality, when the obligation to pay that tax is linked not to the use of those facilities but to the stay in the municipal territory and those facilities are freely and gratuitously accessible to everyone.

[Signatures]

* Language of the case: German.