

JUDGMENT OF THE COURT (Sixth Chamber)

27 September 2012 (*)

(VAT – Exemption for leasing of immovable property – Leasing of commercial premises – Services connected with the leasing – Classification of the transaction for VAT purposes – Transaction consisting of a single supply or several independent supplies)

In Case C-392/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the First-tier Tribunal (Tax Chamber) (United Kingdom), made by decision of 14 July 2011, received at the Court on 25 July 2011, in the proceedings

Field Fisher Waterhouse LLP

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Sixth Chamber),

composed of U. Löhmus, President of the Chamber, A. Rosas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 20 June 2012,

after considering the observations submitted on behalf of:

- Field Fisher Waterhouse LLP, by N. Beecham, advocate, D. Goy QC, and M. Jones, barrister,
- the United Kingdom Government, by A. Robinson, acting as Agent, and R. Hill, barrister,
- the Polish Government, by M. Szpunar, acting as Agent,
- the European Commission, by C. Soulay and R. Lyal, acting as Agents,

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

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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 reference has been made in proceedings between Field Fisher Waterhouse LLP ('FFW') and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') concerning the reimbursement of value added tax (VAT) on supplies of services relating to the commercial premises leased by FFW.

Legal context

3 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.'

4 Article 2 of the VAT Directive provides:

'1. 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'.

5 Article 135 of the VAT Directive provides:

'1. Member States shall exempt the following transactions:

...

(l) the leasing or letting of immovable property.

...'

6 Article 137 of the VAT Directive provides:

'1. Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

...

(d) the leasing or letting of immovable property.

2. Member States shall lay down the detailed rules governing exercise of the option under paragraph 1.

Member States may restrict the scope of that right of option.'

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

7 FFW is a firm of solicitors which leased offices in London (United Kingdom).

8 The lease concluded between FFW and the landlord provides that the premises are let in consideration of the payment of three 'rents'. These correspond, first, to occupation of the premises, secondly, to FFW's share of the cost of insuring the building and, thirdly, to the provision of services which the landlord is obliged under the lease to provide. This third type of rent consists

in charges due in return for supplies of services ('the service charges') including among other things the supply of water, heating throughout the building, repair of the structure and machinery of the building (including the lifts), cleaning of the common parts, and the security of the building. The lease provides that if the tenant fails to pay those three rents the landlord can terminate the lease.

9 According to the referring court, the landlord has not exercised his right to opt for taxation of the leasing of the premises within the meaning of Article 137(1)(d) of the VAT Directive. The lease of the immovable property at issue in the main proceedings is therefore exempt from VAT.

10 The landlord has also not invoiced VAT on the supplies of services to FFW, as it considers that they too are exempt from VAT.

11 FFW considers that those supplies of services by the landlord constitute transactions subject to VAT. FFW accordingly made an application to the Commissioners to reclaim the VAT paid in respect of those supplies. The application was rejected by the Commissioners on the principal ground that the lease and the supplies of services in their opinion constituted a single supply which was exempt from VAT, and FFW appealed to the referring court. Before that court, FFW argues that the supplies of services which are the subject of the service charges at issue in the main proceedings must be treated as transactions subject to VAT.

12 In those circumstances, the referring court decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. The principal question in the present case is whether the services provided by landlords under a lease agreement with their tenants ("the Services") should be regarded as an element of a single exempt supply of a lease of land, either because the Services form objectively a single indivisible economic supply together with the lease or because they are "ancillary" to the lease, which forms the principal supply ("the Principal Supply"). In determining this question and in the light of the [Court of Justice's] decision in Case C-572/07 [RLRE] *Tellmer* [Property [2009] ECR I-4983], how relevant is it that the Services could be (but are not in fact) supplied by persons other than the landlords, albeit under the terms of the present leases in question the tenants had no choice but to receive the services from the landlords?

2. In determining whether there is a single supply, is it relevant that a failure by the tenant to pay the service charge would entitle the landlord not only to refuse to provide the Services but also to terminate the lease agreement with the tenant?

3. If the answer to Question 1 is that the possibility of third parties providing the Services direct to the tenant is relevant, is it merely a contributory factor in determining whether the Services are either a single, indivisible economic supply, which it would be artificial to split or an ancillary supply to the Principal Supply, or is it a determining factor? If it is merely a contributory factor or if it is not relevant at all, what other factors are relevant in determining whether the Services are an ancillary supply? In particular how relevant is it whether the Services are performed in or in respect of the demised premises which are the subject matter of the letting or in other parts of the building?

4. If the possibility of third parties providing the Services is relevant, is more particularly what is relevant whether the Services could as a legal matter be supplied by third parties, even if this would be difficult in practice to organise or agree with the landlord, or is the practical possibility or the common practice in the provision of such services the relevant consideration?

5. The Services in the present case represent a range of services provided in return for a single service charge. In the event that some of these services (e.g. cleaning of common parts, the provision of security services) are not part of a single indivisible economic supply or are to be

regarded as ancillary to the Principal Supply, but other services are, would it be correct to apportion the total consideration between the various services in order to determine the portion of the consideration chargeable to tax and that portion not so chargeable? Alternatively would it be correct to regard the range of services provided as so closely linked to each other that they form “a single indivisible economic supply which it would be artificial to split” being of itself a single supply separate from the leasing of property?’

Consideration of the questions referred

13 By its questions, which should be examined together, the referring court essentially asks whether the VAT Directive must be interpreted as meaning that, in the circumstances of the main proceedings, the leasing of immovable property and the supplies of services linked to that leasing must be regarded as constituting a single supply, entirely exempt from VAT, or several independent supplies, assessed separately as regards whether they are subject to VAT. The court seeks in particular to know what importance should be attached, in those circumstances, to the fact, first, that the lease provides that the tenant must receive the services supplied by the landlord, even though he could in principle be supplied with at least part of the services by a third party, and, secondly, that the tenant’s failure to pay the service charges gives the landlord the right to terminate the lease. The referring court further asks how one should proceed if some of those services are exempt from VAT, like the principal supply of the leasing of immovable property, while others are subject to VAT as independent supplies.

14 It should be recalled, as a preliminary point, that for VAT purposes every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (see, to that effect, Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 22; Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 35; and Case C-276/09 *Everything Everywhere* [2010] ECR I-12359, paragraph 21).

15 Where, however, a transaction comprises several elements, the question arises whether it is to be regarded as consisting of a single supply or of several distinct and independent supplies which must be assessed separately from the point of view of VAT. According to the Court’s case-law, in certain circumstances several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent (Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 51).

16 In that regard, the Court has held that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see, to that effect, Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraph 22, and *Everything Everywhere*, paragraphs 24 and 25).

17 Moreover, that is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, 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 (see, to that effect, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 30; *Part Service*, paragraph 52; and Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 *Bog and Others* [2011] ECR I-1457, paragraph 54).

18 In view of the two circumstances that, first, every supply must normally be regarded as distinct and independent and, secondly, 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, the characteristic elements of the transaction concerned must be examined in order to

determine whether the supplies constitute several distinct principal supplies or one single supply (see, to that effect, *CPP*, paragraph 29; *Levob Verzekeringen and OV Bank*, paragraph 20; *Aktiebolaget NN*, paragraph 22; *Everything Everywhere*, paragraphs 21 and 22; and *Bog and Others*, paragraph 53).

19 None the less, there is no absolute rule for determining the extent of a supply from the point of view of VAT, and consequently, to determine the extent of a supply, all the circumstances must be taken into consideration (see *CPP*, paragraph 27).

20 In the context of the cooperation established by Article 267 TFEU, it is for the national courts to determine whether the taxable person makes a single supply in a particular case and to make all definitive findings of fact in that regard (see, to that effect, *CPP*, paragraph 32; *Part Service*, paragraph 54; *Bog and Others*, paragraph 55; and order in Case C-117/11 *Purple Parking and Airparks Services* [2012] ECR, paragraph 32). However, it is for the Court to provide the national courts with all the guidance as to the interpretation of European Union law which may be of assistance in adjudicating on the case pending before them (*Levob Verzekeringen and OV Bank*, paragraph 23).

21 It may be observed that, according to the documents before the Court, in the main proceedings the lease concluded between the landlord and the tenant provides that, in addition to the leasing of the premises to the tenant, a number of services are also provided to him by the landlord. In return, the tenant is obliged to pay the landlord the rents specified in the lease. Furthermore, in default of payment of those rents by the tenant, the landlord is entitled to terminate the lease.

22 In those circumstances, for it to be possible to consider that all the supplies which the landlord makes to the tenant constitute a single supply from the point of view of VAT, it must be examined whether in the present case the supplies form a single, indivisible economic supply which it would be artificial to split, or whether they consist of a principal supply in relation to which the other supplies are ancillary.

23 For the purposes of that examination, the content of a lease may be a factor of importance in assessing whether there is a single supply. In the main proceedings, it appears that the economic reason for concluding the lease is not only to obtain the right to occupy the premises concerned, but also for the tenant to obtain a number of services. The lease accordingly designates a single supply agreed between the landlord and the tenant. Moreover, it should be observed that the leasing of immovable property and the supply of associated services, such as those mentioned in paragraph 8 above, may objectively constitute such a supply. Obtaining the services concerned cannot be regarded as constituting an end in itself for an average tenant of premises such as those at issue in the main proceedings, but constitutes rather a means of better enjoying the principal supply, namely the leasing of commercial premises.

24 It is true that, according to the Court's case-law, supplies of services such as those at issue in the main proceedings are not necessarily covered by the concept of the leasing of immovable property referred to in Article 135(1)(l) of the VAT Directive (see, to that effect, Case 173/88 *Henriksen* [1989] ECR 2763, paragraph 14, and Case C-102/08 *SALIX Grundstücks-Vermietungsgesellschaft* [2009] ECR I-4629, paragraph 38). However, that does not mean that those supplies of services, which are linked to the leasing of immovable property and are supplied in accordance with the provisions of a lease, cannot constitute ancillary supplies or be indivisible from that leasing.

25 That being so, even though in the circumstances of the main proceedings the inclusion of services in the lease in question supports the view that there is a single supply, it must be noted

that the mere fact that a supply is included in a lease cannot in itself constitute the decisive element to that effect. Thus if a lease were to provide for the inclusion of supplies which by their nature could not objectively be regarded as indivisible from or ancillary to the principal supply of the leasing of immovable property, but were independent of it, such supplies having only an artificial link to the principal supply, those supplies would not form part of a single supply of the leasing of immovable property, exempt from VAT. In the dispute in the main proceedings, as stated in paragraph 23 above, the obtaining of the services in question does not, however, appear to constitute an end in itself for the tenant.

26 As to the relevance of the fact that a third party could in principle supply certain services, it must be observed that the existence of such a possibility is not decisive in itself either. As may be seen from the Court's case-law, the possibility that elements of a single supply may, in other circumstances, be supplied separately is inherent in the concept of a single composite transaction, as explained in paragraph 15 above (see, to that effect, order in *Purple Parking and Airparks Services*, paragraph 31).

27 Finally, as regards the case in which the various services are supplied in return for an overall remuneration, but some of them are exempt from VAT, as the principal supply is, while others are subject to VAT as independent supplies, it is necessary in such a case to apportion between the various services the service charges relating to them in order to determine the proportion of those charges subject to VAT and the proportion exempt from VAT.

28 In the light of the above considerations, the answer to the questions is that the VAT Directive must be interpreted as meaning that the leasing of immovable property and the supplies of services linked to that leasing, such as those at issue in the main proceedings, may constitute a single supply from the point of view of VAT. The fact that the lease gives the landlord the right to terminate it if the tenant fails to pay the service charges supports the view that there is a single supply, but does not necessarily constitute the decisive element for the purpose of assessing whether there is such a supply. On the other hand, the fact that services such as those at issue in the main proceedings could in principle be supplied by a third party does not allow the conclusion that they cannot, in the circumstances of the dispute in the main proceedings, constitute a single supply. It is for the referring court to determine whether, in the light of the interpretative guidance provided by the Court in this judgment and having regard to the particular circumstances of the case, the transactions in question are so closely linked to each other that they must be regarded as constituting a single supply of the leasing of immovable property.

Costs

29 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:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the leasing of immovable property and the supplies of services linked to that leasing, such as those at issue in the main proceedings, may constitute a single supply from the point of view of value added tax. The fact that the lease gives the landlord the right to terminate it if the tenant fails to pay the service charges supports the view that there is a single supply, but does not necessarily constitute the decisive element for the purpose of assessing whether there is such a supply. On the other hand, the fact that services such as those at issue in the main proceedings could in principle be supplied by a third party does not allow the conclusion that they cannot, in the circumstances of the dispute in the main proceedings, constitute a single supply. It is for the referring court to determine whether, in the light of the interpretative guidance provided

by the Court in this judgment and having regard to the particular circumstances of the case, the transactions in question are so closely linked to each other that they must be regarded as constituting a single supply of the leasing of immovable property.

[Signatures]

* Language of the case: English.