

JUDGMENT OF THE COURT (Fifth Chamber)

21 February 2013 (*)

(Taxation – VAT – Directive 2006/112/EC – Article 132(1)(m) – Exemption – Supply of services closely linked to sport or physical education – Taking part in sporting activities of a non-organised and unsystematic nature – Municipal aquatic park)

In Case C-18/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Czech Republic), made by decision of 15 December 2011, received at the Court on 16 January 2012, in the proceedings

Město Žamberk

v

Finanční ředitelství v Hradci Králové, now Odvolací finanční ředitelství,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, A. Rosas, E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 12 December 2012,

after considering the observations submitted on behalf of:

- město Žamberk, by J. Lukáš, advokát,
- Finanční ředitelství v Hradci Králové, by E. Horáková, acting as Agent,
- the Czech Government, by M. Smolek, acting as Agent,
- the European Commission, by L. Lozano Palacios, M. Šimerdová and Z. Malášková, 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 132(1)(m) 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 město Žamberk (Municipality of Žamberk) and the Finanční ředitelství v Hradci Králové, now the Odvolací finanční ředitelství (Appellate Tax Directorate), concerning liability to value added tax ('VAT') in respect of the entrance fee in consideration for which město Žamberk allows access to its municipal aquatic park.

Legal context

European Union law

3 Article 2(1)(c) of the VAT Directive makes 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such' subject to VAT.

4 Article 132(1)(m) of that directive, set out in Chapter 2, entitled 'Exemptions for certain activities in the public interest', of Title IX, provides:

'Member States shall exempt the following transactions:

...

(m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education'.

5 Under Article 134 of the directive:

'The supply of goods or services shall not be granted exemption, as provided for in [point (m)] of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.'

Czech law

6 Paragraph 61(d) of Law No 235/2004 on value added tax in the version applicable to the facts in the main proceedings, entitled 'Other services exempt from the tax with no right of deduction', provides:

'In addition the following services are exempt from the tax:

...

(d) the supply of services closely linked to sport or physical education by legal persons not founded or established for commercial purposes to persons who take part in sport or physical education'.

7 Under Paragraph 2(1) of Law No 115/2001 on the promotion of sport, the concept of sport corresponds to all forms of physical activity which, by means of organised or non-organised participation, are aimed at harmoniously developing physical health and mental well-being, improving health and obtaining sports results in sporting competitions at all levels.

8 Paragraph 2(2) defines the expression 'sport for all' as being organised and non-organised

sport and leisure activities intended for large sections of the population.

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

9 In return for payment of an entrance fee m?sto Žamberk provides a municipal aquatic park, in which there are, in particular, a swimming pool divided into several lanes and equipped with diving boards, a paddling pool for children, water slides, a massage pool, a natural river for swimming, a beach-volleyball court, areas for table tennis and sports equipment for hire. The referring court notes that, to its knowledge, no sports club or organisation carries out its activities on the site and no school or other body use the site for physical education.

10 In its tax return for the tax period of the first quarter of 2009, m?sto Žamberk declared excess VAT of CZK 198 182. In that regard, the Finan?ní ú?ad v Žamberku (Tax Office, Žamberk) considered that the services supplied by the municipal aquatic park of m?sto Žamberk constituted exempt services without a right to deduct VAT and, consequently, by notice demanding repayment of 17 June 2009, set the excess for the tax period at issue at CZK 154 105.

11 Since that repayment notice was confirmed by a decision of the Finan?ní ?editelství v Hradci Králové (Tax Directorate, Hradec Králové) of 15 December 2009, m?sto Žamberk brought an action before the Krajský soud v Hradci Králové (Regional Court, Hradec Králové), which quashed the decision of the Finan?ní ?editelství v Hradci Králové. The latter then brought an appeal on a point of law before the Nejvyšší správní soud (Supreme Administrative Court).

12 Taking account of the definition of the concept of ‘sport’ laid down, at the national level, in Paragraph 2 of Law No 115/2001, the Nejvyšší správní soud seeks to ascertain, in essence, whether non-organised and unsystematic sporting activities may be categorised as ‘taking part in sport’ within the meaning of Article 132(1)(m) of the VAT Directive.

13 It also raises the question of whether the fact that an aquatic park such that at issue in the main proceedings offers its visitors not only the opportunity to take part in certain sporting activities but also amusement or rest, and whether the fact that the intention of all visitors is not necessarily to take part in sporting activities, may have an effect on the applicability of Article 132(1)(m) of the VAT Directive.

14 The Nejvyšší správní soud states that its request does not concern the interpretation of the concept of a ‘non-profit making organisation’ within the meaning of that provision, given that the question whether m?sto Žamberk falls within that concept is not submitted to it for assessment in the context of the dispute in the main proceedings on account of Czech procedural law. Furthermore, the questions referred do not concern the supplementary conditions for an exemption from VAT set out in Article 134 of the VAT Directive.

15 In those circumstances, the Nejvyšší správní soud decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. May non-organised, unsystematic and recreational sporting activities which can be carried on in that manner in an open-air swimming-pool complex (for instance, recreational swimming, recreational playing of ball games, etc.) be regarded as taking part in sport or physical education within the meaning of Article 132(1)(m) of [the VAT] Directive?

2. In the event of an affirmative answer to Question 1, is the supply for consideration of access to such an open-air swimming-pool complex, which offers its visitors the abovementioned opportunity to take part in sporting activities, although alongside other kinds of amusement or rest, to be regarded as a service closely linked to sport or physical education supplied to persons taking

part in sport or physical education within the meaning of that provision of [the VAT] Directive, and hence as a service exempted from [VAT] in so far as it is supplied by a non-profit-making organisation and the other conditions under that directive are satisfied?

Consideration of the questions referred

The first question

16 By its first question, the referring court asks, in essence, whether Article 132(1)(m) of the VAT Directive must be interpreted as meaning that non-organised and unsystematic sporting activities which are not aimed at participation in sports competitions may be categorised as taking part in sport within the meaning of that provision.

17 First of all, it must be noted, in the light of the concept of 'sport' contained in the national law, that it is the Court's settled case-law that the exemptions referred to in that article constitute independent concepts of European Union law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another (see, in particular, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 15; Case C-434/05 *Horizon College* [2007] ECR I-4793, paragraph 15; and Case C-253/07 *Canterbury Hockey Club and Canterbury Ladies Hockey Club* [2008] ECR I-7821, paragraph 16).

18 As shown by the title of the chapter in which Article 132 of the VAT Directive falls, exemptions provided for in that article are intended to encourage certain activities in the public interest (see Case C-357/07 *TNT Post UK* [2009] ECR I-3025, paragraph 32). However, those exemptions do not concern every activity performed in the public interest, but only those which are listed there and described in great detail (see *Horizon College*, paragraph 14; *Canterbury Hockey Club and Canterbury Ladies Hockey Club*, paragraph 18; and Case C-86/09 *Future Health Technologies* [2010] ECR I-5215, paragraph 29).

19 The terms used to specify those exemptions are to be interpreted strictly, since the exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. However, that requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive them of their intended effect (Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 17; *Horizon College*, paragraph 16; and *Canterbury Hockey Club and Canterbury Ladies Hockey Club*, paragraph 17).

20 Accordingly, those terms must be interpreted in the light of the context in which they are used and of the aims and the scheme of the VAT Directive, having particular regard to the underlying purpose of the exemption in question (see, to that effect, *Temco Europe*, paragraph 18; Case C-428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527, paragraph 28; and *Canterbury Hockey Club and Canterbury Ladies Hockey Club*, paragraph 17).

21 As regards Article 132(1)(m) of the VAT Directive, it must be pointed out that, according to its wording, that provision covers taking part in sport and physical education in general. Having regard to that wording, the provision is not intended to confer the benefit of the exemption under it only on certain types of sport (see, to that effect, *Canterbury Hockey Club and Canterbury Ladies Hockey Club*, paragraph 27).

22 Likewise, Article 132(1)(m) of the VAT Directive does not require, for it to be applicable, that the sporting activity be practised at a particular level, for example, at a professional level, or that the sporting activity at issue be practised in a particular way, namely in a regular or organised manner or in order to participate in sports competitions, provided, however, that engagement in

that activity is not in a context of pure rest and of amusement.

23 As regards the aim of Article 132(1)(m) of the VAT Directive, it must be noted that that provision has the objective of encouraging certain activities in the public interest, namely services closely linked to sport or physical education which are provided by non-profit-making organisations to persons taking part in sport or physical education. Accordingly, the provision seeks to promote such participation by large sections of the population.

24 An interpretation of that provision limiting the scope of the exemption which it lays down to sporting activities which are engaged in in an organised or systematic manner or aimed at participation in sports competitions would run counter to that objective.

25 In the light of the foregoing, the answer to the first question is that Article 132(1)(m) of the VAT Directive must be interpreted as meaning that non-organised and unsystematic sporting activities which are not aimed at participation in sports competitions may be categorised as taking part in sport within the meaning of that provision.

The second question

26 By its second question, the referring court asks, in essence, whether Article 132(1)(m) of the VAT Directive must be interpreted as meaning that access to an aquatic park which offers visitors not only facilities for engaging in sporting activities but also other types of amusement or rest may constitute a supply of services closely linked to sport.

27 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, firstly, if there are two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply falls within the exemption in question (see, to that effect, Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraph 19; Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 21; and Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 *Bog and Others* [2011] ECR I-1457, paragraph 52).

28 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 (*Levob Verzekeringen and OV Bank*, paragraph 22; Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 53; and *Bog and Others*, paragraph 53). 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 (see, in particular, *CPP*, paragraph 30; *Levob Verzekeringen and OV Bank*, paragraph 21; and *Bog and Others*, paragraph 54 and case-law cited).

29 In order to determine whether a single complex supply must be categorised as a supply closely linked to sport within the meaning of Article 132(1)(m) of the VAT Directive although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified (see, to that effect, in particular, Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraphs 12 and 14; *Levob Verzekeringen and OV Bank*, paragraph 27; and *Bog and Others*, paragraph 61).

30 It follows from the case-law of the Court that the predominant element must be determined from the point of view of the typical consumer (see, to that effect, in particular, *Levob Verzekeringen and OV Bank*, paragraph 22, and Case C-276/09 *Everything Everywhere* [2010]

ECR I-12359, paragraph 26) and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption provided for under Article 132(1)(m) of the VAT Directive in relation to those not falling within that exemption (see, to that effect, *Bog and Others*, paragraph 62).

31 In the context of the cooperation established by Article 267 TFEU, it is for the national courts to determine whether, in a particular case, the taxable person makes a single supply falling within that exemption, and to make all definitive findings of fact in that regard (see, to that effect, *CPP*, paragraph 32; *Levob Verzekeringen and OV Bank*, paragraph 23; and *Bog and Others*, paragraph 55). 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 (see *Levob Verzekeringen and OV Bank*, paragraph 23, and Case C-392/11 *Field Fisher Waterhouse* [2012] ECR, paragraph 20).

32 As regards the existence of a single complex supply in the main proceedings, it is necessary to examine whether the facilities in the aquatic park at issue form a whole so that access to the whole constitutes a single supply which it would be artificial to split. In that regard, if, as in this case, the only type of entrance ticket offered for the aquatic park gives 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 its use during the period of the entrance ticket's validity, that fact constitutes a strong indication of the existence of a single complex supply.

33 As for the question whether, in the context of such a single complex supply, the predominant element is the opportunity to engage in sporting activities falling within Article 132(1)(m) of the VAT Directive or, rather, pure rest and amusement, it is necessary to make that determination, as has been pointed out at paragraph 30 of the present judgment, from the point of view of the typical consumer, who must be determined on the basis of a group of objective factors. In the course of that overall assessment, it is necessary to take account, in particular, of the design of the aquatic park at issue resulting from its objective characteristics, namely the different types of facilities offered, their fitting out, their number and their size compared to the park as a whole.

34 As regards, in particular, aquatic areas, it is necessary for the national court to take into account, inter alia, whether they lend themselves to swimming of a sporting nature, in that they are, for example, divided into lanes, equipped with starting blocks and of an appropriate depth and size, or whether they are, on the contrary, arranged so that they lend themselves essentially to recreational use.

35 On the other hand, the fact that the intention of some visitors does not relate to the predominant element of the supply at issue determined in this way cannot call that determination into question.

36 An approach consisting in taking account of the intention of each visitor taken individually as to the use of the facilities which are made available would be contrary to the objectives of the VAT system of ensuring legal certainty and a correct and straightforward application of the exemptions provided for in Article 132 of the VAT Directive. In that regard, it should be pointed out that, to facilitate the measures necessary for the application of VAT, regard must be had, save in exceptional cases, to the objective character of the transaction in question (see, to that effect, Case C-4/94 *BLP Group* [1995] ECR I-983, paragraph 24; Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 33; and Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraph 39).

37 Having regard to the foregoing, the answer to the second question is that Article 132(1)(m) of the VAT Directive must be interpreted as meaning that access to an aquatic park offering

visitors not only facilities for engaging in sporting activities but also other types of amusement or rest may constitute a supply of services closely linked to sport. It is for the referring court to determine whether, in the light of the interpretative guidance provided by the Court of Justice in the present judgment and having regard to the specific circumstances of the case in the main proceedings, that is the position in that case.

Costs

38 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 (Fifth Chamber) hereby rules:

1. **Article 132(1)(m) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that non-organised and unsystematic sporting activities which are not aimed at participation in sports competitions may be categorised as taking part in sport within the meaning of that provision.**
2. **Article 132(1)(m) of Directive 2006/112 must be interpreted as meaning that access to an aquatic park offering visitors not only facilities for engaging in sporting activities but also other types of amusement or rest may constitute a supply of services closely linked to sport. It is for the referring court to determine whether, in the light of the interpretative guidance provided by the Court of Justice of the European Union in the present judgment and having regard to the specific circumstances of the case in the main proceedings, that is the position in that case.**

[Signatures]

* Language of the case: Czech.