JUDGMENT OF THE COURT (Eighth Chamber)

27 February 2014 (*)

(Request for a preliminary ruling – VAT – Sixth VAT Directive – Article 12(3) – Annex H, category 5 – Directive 2006/112/EC – Article 98(1) and (2) – Annex III, point 5 – Principle of neutrality – Transport of passengers and their accompanying luggage – Legislation of a Member State applying different rates of VAT to transport by taxi and to transport by minicab)

In Joined Cases C?454/12 and C?455/12,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decisions of 10 July 2012, received at the Court on 10 October 2012, in the proceedings

Pro Med Logistik GmbH (C?454/12)

v

Finanzamt Dresden-Süd,

and

Eckard Pongratz, acting as the receiver appointed to deal with the bankruptcy of Karin Oertel (C?455/12)

v

Finanzamt Würzburg mit Außenstelle Ochsenfurt,

THE COURT (Eighth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, C. Toader and E. Jaraši?nas, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Pro Med Logistik GmbH, by J. Seelinger, Rechtsanwalt,

– Mr Pongratz, by T. Küffner and T. Streit, Rechtsanwälte,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by B. Tidore, avvocato dello Stato,

– the European Commission, by W. Mölls and C. Soulay, acting as Agents,

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2001/4/EC of 19 January 2001 (OJ 2001 L 22, p. 17) ('the Sixth Directive'), 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'), and of the principle of fiscal neutrality.

2 The requests have been made in two sets of proceedings between, first, Pro Med Logistik GmbH ('Pro Med') and the Finanzamt Dresden-Süd (Tax Office, Dresden South) and, second, Mr Pongratz, acting as the receiver appointed to deal with the bankruptcy of Ms Oertel, and the Finanzamt Würzburg (Würzburg Tax Office), relating to value added tax ('VAT') on transport of passengers by minicab in respect of the years 2003 to 2007.

Legal context

European Union law

The Sixth Directive

3 Article 2.1 of the Sixth Directive provides as follows:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.'

4 The first and third subparagraphs of Article 12(3)(a) of that directive state:

'The standard rate of [VAT] shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. From 1 January 2001 to 31 December 2005, this percentage may not be less than 15%.

...

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount, which may not be less than 5%, and shall apply only to supplies of the categories of goods and services specified in Annex H.'

5 Annex H to the Sixth Directive, entitled 'List of supplies of goods and services which may be subject to reduced rates of VAT', is worded as follows:

'In transposing the categories below which refer to goods into national legislation, Member States may use the combined nomenclature to establish the precise coverage of the category concerned.

Category

Description

...

5

transport of passengers and their accompanying luggage

…’

The VAT Directive

6 Article 96 of the VAT Directive provides as follows:

‘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.’

7 Under Article 97(1) of that directive:

‘From 1 January 2006 until 31 December 2010, the standard rate may not be less than 15%.’

8 Article 98(1) to (2) of that directive provides as follows:

‘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.’

9 In the lists of supplies of goods and services to which the reduced rates referred to in Article 98 may be applied, Annex III to the VAT Directive includes, at point 5 thereof:

‘transport of passengers and their accompanying luggage’.

German law

10 Under Paragraph 12(1) of the Law on Turnover Tax (Umsatzsteuergesetz), in the version applicable to the disputes in the main proceedings, published on 13 December 2006 (BGBl. 2006 I, p. 2878) (‘the UStG’), tax was payable on every taxable transaction at 16% in respect of the years 2003 to 2006 and at 19% in respect of 2007.

11 Paragraph 12(2), point 10(b), of that Law provided as follows:

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

(b) the transport of passengers by rail, other than mountain railway, transport by trolleybus, licensed regular transport by motor vehicle, and transport by taxi and ferry

(aa) within a municipality or

(bb) where the journey does not exceed 50 km.

...’

12 Paragraph 1 of the Law on the transport of passengers (Personenbeförderungsgesetz; ‘the PBefG’) in the version published on 8 August 1990 (BGBl. 1990 I, p. 1690), as amended and applicable to the disputes in the main proceedings, provides as follows:

‘Material scope:

(1) The present Law is applicable to transport for consideration or commercial transport of passengers by tram, trolleybus and motor vehicle. The economic benefits which any such commercial activity seeks indirectly to procure with a view to its profitability are also considered to constitute remuneration.

(2) The present Law does not apply to transport

1. by private motor vehicle, where the total remuneration does not exceed the costs of operating that service;

2. by ambulance, where that service is used for the transport of persons who are ill, injured or otherwise in need of care, who require specialised medical care during transport or special adaptation of the ambulance, or for whom that must be envisaged by reason of their state of health.’

13 Paragraph 2(1), point 4, of the PBefG provides as follows:

‘Anyone who transports passengers within the meaning of Paragraph 1(1),

...

4. by means of motor vehicles used on an ad hoc basis (Paragraph 46),

must possess a licence to do so. He is an operator within the meaning of the present Law.’

14 The first sentence of Paragraph 13(4) of the PBefG is worded as follows:

‘In the case of transport by taxi, the licence must be refused where the provision of the transport activity for which the application has been made is detrimental to the public interest in transport by threatening the viability of the local taxi trade.’

15 Paragraph 21(1) to (3) of the PBefG provides:

‘(1) The operator is required to undertake the activity for which he has obtained a licence and to maintain it in accordance with the public interest in transport and the state of technology for the duration of the validity of the licence.

(2) The licensing authority may set a time-limit by which the operator must have commenced the activity.

(3) The licensing authority may enjoin the operator to extend or to alter his transport activity, where the public interest in transport so requires and where this is not contrary to the legitimate

interests of the operator, having regard to his economic situation and taking account of the interest produced and his ability to recoup a reasonable amount of the capital invested, and having regard to the necessary state of technical development in that regard.'

16 Under Paragraph 22 of the PBefG:

'The operator is required to provide transport in the case where

1. the conditions for the transport are met,

2. the transport is possible using the means normally employed, and

3. the transport is not precluded by circumstances which the operator cannot prevent or remedy.'

17 Pursuant to points 1 and 3 of Paragraph 46(2) of the PBefG, transport by taxi and transport by minicab are different forms of 'ad hoc service' for which a licence is required in accordance with Article 2(1), point 4, of that Law.

18 Paragraph 47 of the PBefG provides as follows:

'(1) Transport by taxi is the transport of passengers by private motor vehicles which the operator places on standby at officially approved locations and by means of which he provides transport to a destination determined by the customer. The operator may also take bookings during a journey or at the undertaking's place of business.

(2) Taxis may be placed on standby only in the municipality in which the operator has its place of business. Pre-booked transport may also be provided from other municipalities. The licensing authority may, in agreement with other licensing authorities, allow taxis to be placed on standby at officially approved locations in municipalities other than that in which the operator has its place of business and provide for a larger area of operation.

(3) The government of the *Land* is authorised to restrict, by way of order, the scope of the obligation to carry on business, the rules applicable to taxi ranks and the details governing the performance of the service. It may delegate that power by way of order. The order may make provision, inter alia, for the following:

1. keeping taxis on standby in specific cases, including in the provision of an on-call service,

2. the taking of bookings for transport by telephone and the implementation of those bookings,

3. the transport activity and the radiocommunication system,

4. the transport of handicapped passengers, and

5. the transport of passengers who are ill, in so far as this does not constitute transport under Paragraph 1(2), point 2.

(4) The obligation to provide the transport exists only for transport provided within the zone of application of the fares set in accordance with Paragraph 51(1), first and second sentences, and Paragraph 51(2), first sentence (mandatory service zone).

(5) The hiring of taxis to persons for self-drive purposes is prohibited.'

19 Paragraph 49(4) of the PBefG is worded as follows:

‘Transport by minicab is the transport of passengers by private motor vehicles which are hired in their entirety only for purposes of transport and by means of which the operator provides transport the purpose, destination and conduct of which are determined by the hirer, and which is not transport by taxi within the meaning of Paragraph 47. Bookings for transport by minicab may be implemented only if they are received at the place of business or at the home of the operator. After the transport service has been performed, the minicab must return immediately to the place of business, unless it has received a further booking from the place of business or from the operator’s home before the journey or by telephone during the journey. The booking made at the place of business of the minicab undertaking or at the home of the operator must be recorded by the operator in a register and that record must be retained for one year. The taking, placing and implementation of bookings for transport, the placing of minicabs on standby and the advertising of transport by minicab must not be such, either individually or in combination, as to lead to confusion with transport by taxi. The signs and characteristics reserved for taxis may not be used for minicabs. Paragraphs 21 and 22 shall not apply.’

20 Paragraph 51 of the PBefG provides as follows:

‘(1) The government of the *Land* is authorised to fix, by way of order, the remuneration for and the conditions of transport by taxi. The order may make provision, in particular, for the following:

1. the basic fare, the fare per kilometre and time-related rates,

2. supplements,

3. advance payments,

4. invoicing,

5. the methods of payment,

6. the permissibility of specific agreements relating to the mandatory service zone.

The government of the *Land* may delegate that power by way of order.

(2) Specific agreements relating to the mandatory service zone shall be lawful only if

1. a specified period, a minimum number of journeys or a minimum monthly turnover is set,

2. the organisation of the transport market is not adversely affected,

3. the remuneration for and conditions of transport are laid down in writing, and

4. the order adopted by the *Land* provides for a mandatory licence or declaration.

(3) The remuneration for and conditions of transport are fixed by application, *mutatis mutandis*, of Paragraphs 14(2) and (3) and 39(2).

(4) The competent authorities may agree, jointly, on uniform fares for and conditions of transport in respect of a zone which falls outwith the jurisdiction of the authority responsible for fixing the fares for and the conditions of transport.

(5) Paragraph 39 shall apply, *mutatis mutandis*, to the application of the remuneration for and

conditions of transport.’

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

Case C?454/12

21 Pro Med is a limited company under German law which holds, inter alia, a licence under Paragraph 2(1), point 4, of the PBefG for minicab services but has no licence for taxi services under Paragraph 47 of the PBefG.

22 In 2006 and 2007, Pro Med transported patients on behalf of sickness insurance funds by means of vehicles not specifically adapted for that purpose.

23 On 27 November 2007, Pro Med accepted all of the conditions provided for by the agreement concluded on 1 October 2007 between Sickness Insurance Fund A and the Association of Taxi and Minicab Undertakings (Taxi- und Mietwagenunternehmerverband; ‘the Association’) on the transport, by taxi undertakings, of patients insured with Sickness Insurance Fund A. Pursuant to the first sentence of Article 1(1) of that agreement, the object of that agreement is the participation of taxi undertakings which belong to the Association in the transport of patients insured with Sickness Insurance Fund A. Under Article 5(1) of that agreement, the remuneration for the transport of patients is in accordance with the fare agreement in Annex 1 thereto.

24 Following a tax investigation carried out by the Finanzamt Dresden-Süd, Pro Med was ordered to declare the transport services which it had provided pursuant to the agreement concluded between Sickness Insurance Fund A and the Association at the standard rate of VAT laid down in Paragraph 12(1) of the UStG. Its objections, by which it sought, inter alia, application of the reduced rate established by Paragraph 12(2), point 10, of the UStG, were unsuccessful.

25 Pro Med brought the matter before the Finanzgericht (Finance Court). That court held that Pro Med did not have the right to apply the reduced rate for the transport services at issue on the ground that it had not provided taxi services as it was not licensed to do so. However, the Finanzgericht expressed uncertainty as to whether the difference in treatment between the two categories of undertakings could be justified. It found that taxi undertakings are permitted to provide transport services for sickness insurance funds which are not subject to the fare rates applicable to local public transport services and which are based on agreements concluded with those sickness insurance funds. Those transport services do not, however, have the essential characteristics of local public transport which constitute the basis for the favourable tax treatment.

26 Pro Med brought an appeal on a point of law against that decision by which the Finanzgericht refused to allow it to apply the reduced tax rate to the turnover from the patient transport services which it had carried out.

27 The referring court raises the issue of whether the selective national provision in Paragraph 12(2), point 10(b), of the UStG is compatible with the principle of fiscal neutrality as interpreted by the Court of Justice. On the one hand, that court takes the view that, from the consumer's point of view, both taxis and minicabs are used for passenger transport, which suggests that the services so provided are comparable. On the other hand, according to that court, there are significant differences between those two modes of passenger transport, having regard to the respective conditions governing their performance, even in the case of a special agreement between a taxi undertaking and major customers, so far as concerns, inter alia, the fixing of the price for the journey and the obligation to carry on business and to provide transport, differences which might rule out any infringement of that principle.

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

'1. Having regard to the principle of neutrality, do the third subparagraph of Article 12(3)(a) of [the Sixth Directive], read in conjunction with Annex H, category 5, thereto, and Article 98(1) of [the VAT Directive], read in conjunction with Annex III, point 5, thereto, preclude national rules which provide for a reduced rate of [VAT] for local passenger transport by taxi, whereas local passenger transport by minicab is subject to the standard rate of tax?

2. For the answer to the first question, is it relevant whether operators of taxis and operators of minicabs perform journeys on the basis of special agreements with major customers under almost identical conditions?'

Case C?455/12

29 From the end of December 1994, Ms Oertel ran a minicab undertaking in city A. The services provided included passenger transport, transport of seated patients, transport of patients for dialysis treatment, transport of schoolchildren, courier services and transport of materials, hotel and airport transfers, city tours and the organisation of transfers from one place to another.

30 In addition to private individuals, Ms Oertel's clientele included many regular customers and a number of customers generating significant turnover. Bookings were taken by telephone, fax or e?mail. The price of a journey was determined according to a map divided into zones with fixed rates which allowed the final price charged to the customers to be calculated. During the period concerned, Ms Oertel had 10 company vehicles.

31 In her VAT returns for the financial years 2003 to 2006, Ms Oertel applied the reduced rate of VAT (7%) to her turnover from the minicab service in respect of journeys not exceeding 50 km or within city A.

32 The Finanzamt Würzburg rejected the returns and applied the standard rate of VAT (16%) to the transactions at issue.

33 Ms Oertel brought an action before the Finanzgericht. That court essentially dismissed her application seeking to have the reduced rate of tax applied to the turnover in question. It held that, as a minicab undertaking, Ms Oertel's business did not meet the conditions for the application of the reduced rate and that the legislation limiting the application of that rate to taxi undertakings was constitutional. Nor, it held, could Ms Oertel seek application of that rate under the Sixth Directive or rely on the principle of fiscal neutrality. According to the Finanzgericht, although the application of two different rates admittedly restricts competition between the two categories of undertakings inasmuch as they provide the same type of services, that restriction was justified,

inter alia by the public interest, namely, in this case, the provision by taxi undertakings of a well-organised and comprehensive local transport service.

34 Ms Oertel brought an appeal on a point of law against that decision refusing her application of the reduced rate of VAT.

35 Harbouring the same doubts as regards the compatibility of Paragraph 12(2), point 10(b), of the UStG with the principle of fiscal neutrality as in Case C?454/12, the Bundesfinanzhof decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

‘Having regard to the principle of neutrality, does the third subparagraph of Article 12(3)(a) of [the Sixth Directive], read in conjunction with Annex H, category 5, thereto, preclude national rules which provide for a reduced rate of turnover tax for local passenger transport by taxi, whereas local passenger transport by minicab is subject to the standard rate of tax?’

36 By letter of 30 October 2013, the referring court was informed that the action which had been brought before it by Ms Oertel was being taken over by Mr Pongratz in his capacity as receiver appointed to deal with the liquidation of Ms Oertel’s business.

37 By order of 20 November 2012, the President of the Court of Justice ordered that the two cases should be joined for the purposes of the written and oral procedures and also for judgment.

Consideration of the questions referred

The first question in Case C?454/12 and the single question in Case C?455/12

38 By the first question in Case C?454/12 and the single question in Case C?455/12, which should be examined together, the referring court asks, in essence, whether the third subparagraph of Article 12(3)(a) of the Sixth Directive, read in conjunction with Annex H, category 5, thereto, and Article 98(1) and (2) of the VAT Directive, read in conjunction with Annex III, point 5, thereto, together with the principle of fiscal neutrality, preclude two types of local passenger transport, namely transport by taxi and transport by minicab, from being subject to different rates of VAT, one a reduced rate and the other the standard rate.

39 Article 96 of the VAT Directive provides that the same rate of VAT – the standard rate – is applicable to supplies of goods and supplies of services.

40 As a derogation from that principle, Article 98(1) of that directive confers on Member States the possibility to apply one or two reduced rates of VAT. According to Article 98(2), the reduced rates of VAT may be applied only to supplies of goods or services in the categories set out in Annex III to that directive.

41 Annex III, point 5, to the VAT Directive authorises the application of a reduced rate to supplies of services relating to the transport of passengers and their accompanying luggage.

42 The rules defined by those provisions are, in essence, identical to those set out in Article 12(3)(a), first and third subparagraphs, of the Sixth Directive and in Annex H, category 5, thereto.

43 The Court has already held, with regard to the third subparagraph of Article 12(3)(a) of the Sixth Directive, that there is nothing in the text of that provision which requires that it be interpreted as meaning that the reduced rate can be charged only if it is applied to all aspects of a category of supplies covered by Annex H to that directive, with the result that a selective application of the reduced rate cannot be excluded provided that no risk of distortion of competition results (see Case C?94/09 *Commission* v *France* [2010] ECR I?4261, paragraph 25 and the case?law cited).

The Court has also held that, since Article 98(1) and (2) of the VAT Directive in essence repeats the wording of Article 12(3)(a) of the Sixth Directive, the interpretation given by the Court to the earlier provision should be extended to the provision replacing it (*Commission* v *France*, paragraph 27).

44 The Court has consequently decided that, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, Member States may apply a reduced rate of VAT to concrete and specific aspects of a category of supplies covered by Annex III to the VAT Directive and Annex H to the Sixth Directive respectively (see, to that effect, *Commission* v *France* , paragraphs 26 and 27 and the case?law cited).

45 It follows that the exercise of the possibility granted to the Member States to apply selectively the reduced rate of VAT is subject to the twofold condition, first, that they isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply at issue and, secondly, that they comply with the principle of fiscal neutrality. Those conditions seek to ensure that Member States make use of that possibility only under conditions which ensure the correct and straightforward application of the reduced rate chosen and the prevention of any possible evasion, avoidance or abuse (see *Commission* v *France*, paragraph 30).

46 Consequently, it is necessary to ascertain whether the transport of passengers by taxi, in respect of which national legislation, such as that at issue in the main proceedings, provides for the application of a reduced rate of VAT, constitutes a concrete and specific aspect of the category of services of ‘transport of passengers and their accompanying luggage’, referred to in both Annex III, point 5, to the VAT Directive and Annex H, category 5, to the Sixth Directive, and, as the case may be, whether the application of that rate solely to that activity of passenger transport by taxi undermines the principle of fiscal neutrality.

The notion of ‘concrete and specific aspect’

47 In order to determine whether the local transport of passengers by taxi constitutes a concrete and specific aspect of the supply of services by undertakings for the transport of passengers and their accompanying luggage, it is necessary to consider whether this involves a service which is, as such, identifiable separately from the other services in that category (see, by analogy, *Commission* v *France*, paragraph 35).

48 In this regard, it is apparent from the information provided in the orders for reference that taxi operators are considered in their own right as suppliers of a public passenger transport service, the performance of that activity requiring a licence issued by a competent authority and being subject to significant obligations. Those obligations include the obligation to maintain their activity in accordance with the public interest in transport (Paragraph 21 of the PBefG), the obligation to carry out the transport (Paragraph 22 of the PBefG) and the obligation to comply with the rules on fares (Paragraphs 47(4) and 51(1) of the PBefG).

49 A legal framework which, unlike that for minicab services, obliges taxi operators to be on call in order to provide a transport service, which prohibits them from refusing to provide transport in the expectation, in particular, of a more profitable journey or from taking advantage of situations in which they could request a different fare from the official fare is likely to be indicative of separate supplies.

50 In such circumstances, the activity of local passenger transport by taxi could be considered to be a supply of services which is, as such, identifiable separately from the other supplies covered by the category at issue, namely the transport of passengers and their accompanying luggage.

That activity could, therefore, constitute a concrete and specific aspect of that category.

51 It is, however, for the national court to establish, in the light of the national legislation and the factual circumstances before it, whether that is the case in the disputes in the main proceedings.

Observance of the principle of fiscal neutrality

52 According to well-established case-law, the principle of fiscal neutrality precludes, in particular, treating similar goods or supplies of services, which are thus in competition with each other, differently for VAT purposes (see Joined Cases C?259/10 and C?260/10 *The Rank Group* [2011] ECR I?10947, paragraph 32 and the case-law cited).

53 In order to determine whether two supplies of services are similar within the meaning of that case-law, account must primarily be taken of the point of view of a typical consumer, avoiding artificial distinctions based on insignificant differences (see *The Rank Group*, paragraph 43 and the case-law cited).

54 Two supplies of services are therefore 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 such service or the other (see *The Rank Group*, paragraph 44 and the case-law cited).

55 In addition, it must be observed that the assessment of the comparability of the services supplied hinges not only on the comparison of individual services, but also on the context in which those services are supplied (see Case C?357/07 *TNT Post UK* [2009] ECR I?3025, paragraph 38).

56 In that regard, the Court has accepted that, in certain exceptional cases, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services at issue may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs (see, to that effect, *The Rank Group*, paragraph 50 and the case-law cited).

57 It is thus necessary also to take account of the different statutory requirements to which the two types of transport mentioned in paragraph 48 of the present judgment are subject and, therefore, of their respective characteristics by which they are distinguished from one another in the eyes of the average consumer.

58 In the present cases, the referring court has stated that minicab operators can respond only to bookings for transport which are received at their place of business or at the home of the operator, whereas taxi operators are authorised to respond on request, which implies that vehicles are stationed at specific locations or placed on call to respond. It also pointed out that there were differences between those two types of transport as regards the taking, placing and implementation of bookings for transport and so far as concerns the placing of cars on standby and advertising. According to that court, those differences, individually or in combination, are such as to prevent any risk of confusion between transport by taxi and transport by minicab. Finally, it stated that the signs and characteristics reserved for taxis may not be used for minicabs.

59 Such differences at the level of the statutory requirements to which the two types of transport concerned are subject, where they are proven – this being a matter which it is for the referring court to ascertain – are liable to create, in the eyes of the average user, a difference between those types of transport, each of them being likely to address separate needs of that user

and, consequently, to have a decisive influence on his decision to opt for one or other of those types of transport, with the result that the principle of fiscal neutrality does not preclude them from being treated differently for tax purposes.

60 In the light of the foregoing considerations, the answer to the first question referred in Case C?454/12 and to the single question in Case C?455/12 is that, having regard to the principle of fiscal neutrality, the third subparagraph of Article 12(3)(a) of the Sixth Directive, read in conjunction with Annex H, category 5, thereto, and Article 98(1) and (2) of the VAT Directive, read in conjunction with Annex III, point 5, thereto, must be interpreted as not precluding two types of services for the local transport of passengers and their accompanying luggage, namely transport by taxi and transport by minicab, from being subject to different rates of VAT, one a reduced rate and the other the standard rate, in so far as, first, by reason of the different statutory requirements to which those two types of transport are subject, the activity of local transport of passengers by taxi constitutes a concrete and specific aspect of the category of services of transport of passengers and their accompanying luggage, covered by category 5 and point 5 of the respective annexes to those directives and, second, those differences have a decisive influence on the decision of the average user to use one such service or the other. It is for the referring court to determine whether that is the position in the cases in the main proceedings.

The second question in Case C?454/12

61 By its second question in Case C?454/12, the referring court asks whether it is necessary to have regard, for the purposes of the answer to the first question in Case C?454/12 and the single question in Case C?455/12, to the fact that taxi undertakings and minicab undertakings are required to supply their services under a special agreement which applies to those different undertakings indiscriminately and under almost identical conditions.

62 As stated in paragraph 46 of the present judgment, in order to establish whether, in such circumstances, it is possible for a Member State to apply a reduced rate of VAT to the local transport of passengers by taxi, whereas it charges VAT at the standard rate on such transport by minicab, it is necessary to ascertain whether that supply of services constitutes a concrete and specific aspect of the category of services of ‘transport of passengers and their accompanying luggage’, referred to in both Annex III, point 5, to the VAT Directive and Annex H, category 5, to the Sixth Directive, and, as the case may be, whether the application of that rate undermines the principle of fiscal neutrality.

63 In that regard, it must be observed that the services at issue in the main proceedings consist, essentially, in the transport of patients carried out pursuant to an agreement such as the agreement between Sickness Insurance Fund A and the Association, which applies indiscriminately to the taxi undertakings and minicab undertakings which are parties to it. It is apparent from the documents before the Court that the transport fare is fixed in that agreement and that it applies in the same way to the two categories of transport. In addition, that agreement does not give rise to any obligation for those two categories of transport to carry on business or to provide transport other than that already existing under the agreement, namely the obligation that the transport is in fact carried out. Taxi undertakings are thus not subject, in the context of such an agreement, to the statutory requirements imposed on them outside the scope of that agreement.

64 If those facts should be borne out – this being a matter for the referring court to determine – that court would then have to take the view that, under the agreement between Sickness Insurance Fund A and the Association, the transport of passengers by taxi is not a concrete and specific aspect of the category of service of transport of passengers and their accompanying luggage. Furthermore, that activity would therefore have to be considered to be similar, from the point of view of the average user, to the activity of local transport of passengers by minicab.

However, this cannot preclude the activity of the transport of patients under agreements concluded between sickness insurance funds and passenger transport undertakings from being able to constitute, as a whole, a concrete and specific aspect of the services supplied by undertakings for the transport of passengers and their accompanying luggage, within the meaning of the case-law cited in paragraph 44 of the present judgment.

65 Consequently, the answer to the second question in Case C?454/12 is that, by contrast, having regard to the principle of fiscal neutrality, the third subparagraph of Article 12(3)(a) of the Sixth Directive, read in conjunction with Annex H, category 5, thereto, and Article 98(1) and (2) of the VAT Directive, read in conjunction with Annex III, point 5, thereto, must be interpreted as precluding two types of services for the local transport of passengers and their accompanying luggage, namely transport by taxi and transport by minicab, from being subject to different rates of VAT in the case where, under a special agreement which applies indiscriminately to the taxi undertakings and minicab undertakings which are parties to it, the transport of passengers by taxi is not a concrete and specific aspect of the transport of passengers and their accompanying luggage, and where that activity carried out under that agreement is considered to be similar, from the point of view of the average user, to the activity of local transport of passengers by minicab, this being a matter for the referring court to determine.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are 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 (Eighth Chamber) hereby rules:

1. **Having regard to the principle of fiscal neutrality, the third subparagraph of Article 12(3)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2001/4/EC of 19 January 2001, read in conjunction with Annex H, category 5, thereto, and Article 98(1) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Annex III, point 5, thereto, must be interpreted as not precluding two types of services for the local transport of passengers and their accompanying luggage, namely transport by taxi and transport by minicab, from being subject to different rates of value added tax, one a reduced rate and the other the standard rate, in so far as, first, by reason of the different statutory requirements to which those two types of transport are subject, the activity of local transport of passengers by taxi constitutes a concrete and specific aspect of the category of services of transport of passengers and their accompanying luggage, covered by category 5 and point 5 of the respective annexes to those directives and, secondly, those differences have a decisive influence on the decision of the average user to use one such service or the other. It is for the referring court to determine whether that is the position in the cases in the main proceedings.**

2. **By contrast, having regard to the principle of fiscal neutrality, the third subparagraph of Article 12(3)(a) of Sixth Directive 77/388, as amended by Directive 2001/4, read in conjunction with Annex H, category 5, thereto, and Article 98(1) and (2) of Directive 2006/112, read in conjunction with Annex III, point 5, thereto, must be interpreted as precluding two types of services for the local transport of passengers and their accompanying luggage, namely transport by taxi and transport by minicab, from being subject to different rates of value added tax in the case where, under a special agreement which applies indiscriminately to the taxi undertakings and minicab undertakings which are parties to it, the transport of passengers by taxi is not a concrete and specific aspect of the**

transport of passengers and their accompanying luggage, and where that activity carried out under that agreement is considered to be similar, from the point of view of the average user, to the activity of local transport of passengers by minicab, this being a matter for the referring court to determine.

[Signatures]

* Language of the cases: German.