JUDGMENT OF THE COURT (Fifth Chamber)

19 December 2013 (*)

(Taxation – VAT – Directive 2006/112/EC – Exemptions – Article 132(1)(m) – Supply of services closely linked to sport – Access to a golf course – Payment of golf club access charge (‘green fee’) by visiting non-members – Exclusion from the exemption – Article 133(d) – Article 134(b) – Additional income)

In Case C?495/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), made by decision of 19 October 2012, received at the Court on 5 November 2012, in the proceedings

Commissioners for Her Majesty’s Revenue and Customs

v

Bridport and West Dorset Golf Club Limited,

THE COURT (Fifth Chamber),

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

Advocate General: M. Wathelet,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 2 October 2013,

after considering the observations submitted on behalf of:

– Bridport and West Dorset Golf Club Limited, by A. Brown, Advocate,

– the United Kingdom Government, by C. Murrell, acting as Agent, and R. Hill, Barrister,

– the European Commission, by R. Lyal 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 This reference for a preliminary ruling concerns the interpretation of Articles 132(1)(m), 133(d) and 134(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between the Commissioners for Her Majesty’s Revenue and Customs (‘the Commissioners’) and Bridport and West Dorset Golf Club Limited

(‘Bridport’) concerning the exemption from value added tax (VAT) of the green fee paid by players who are not members of that club in order to have access to Bridport’s golf courses.

Legal context

European Union law

3 Article 2(1)(c) of Directive 2006/112 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, ‘Exemptions for certain activities in the public interest’, of Title IX of Directive 2006/112, 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 That provision reproduces the exemption provided for in Article 13A(1)(m) of the 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, ‘the Sixth Directive’).

6 The first paragraph of Article 133 of Directive 2006/112 provides:

‘Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.’

7 Article 134 of that directive provides:

‘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.'

United Kingdom law

8 Item 3 of Group 10 in Schedule 9 to the Value Added Tax Act 1994 provides for the exemption of:

'The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part.'

9 Note 2 to that Group 10 provides:

'An individual shall only be considered to be a member of an eligible body for the purpose of Item 3 where he is granted membership for a period of three months or more.'

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

10 Bridport is a private golf club, the objects of which include the maintenance and management of the golf club for the use and accommodation of its members and visitors, as well as, inter alia, the running of a golf school and the provision of golf instructors and equipment.

11 In September 2009, approximately half of Bridport's 737 members were full members with access to the club's course allowing them to play at any time, seven days per week, for a standard annual fee of GBP 657.20. It was also possible for visiting non-members to play on the course on payment of an access charge ('green fee') of GBP 32 to GBP 38 per round, or a higher rate per day. The prices of the annual subscriptions and the green fees were set by Bridport taking into account the prices charged by neighbouring non-profit-making clubs and also by one commercial golf course operator.

12 For the financial year ending on 30 September 2009, the income from green fees represented 18.7% of Bridport's income and annual subscriptions from members 56.4%, the balance coming largely from the operation of the bar.

13 Having, for several years, accounted for and paid to the Commissioners VAT on its green fee income, Bridport brought a claim, relying on Case C?253/07 *Canterbury Hockey Club and Canterbury Ladies Hockey Club* [2008] ECR I?7821, for reimbursement of the amount of VAT overpaid, which it calculated to be GBP 140 359.16. Following the Commissioners' rejection of that claim, Bridport appealed against that rejection to the First-tier Tribunal (Tax Chamber).

14 The First-tier Tribunal (Tax Chamber) allowed the appeal, holding that there was no difference in the right to play golf on Bridport's course whether that right was granted to members of the club or to non-members paying the green fees and that those fees were exempt from VAT under Directive 2006/112. The Commissioners appealed against that judgment to the Upper Tribunal (Tax and Chancery Chamber).

15 According to the Upper Tribunal (Tax and Chancery Chamber), it is not in dispute that Bridport is a non-profit-making organisation as referred to in Article 132(1)(m) of Directive 2006/112. It is also not in dispute that the supply consisting of granting visiting non-members the right to use the golf course is closely linked to sport, that it is provided to persons taking part in sport and that it is essential to the transactions exempted, as referred to in Article 134(a).

16 The dispute in the main proceedings thus essentially concerns whether, in those circumstances, it is lawful to exclude that supply from the exemption at issue on the basis of Article

134(b) or Article 133(d) of Directive 2006/112.

17 In those circumstances, the Upper Tribunal (Tax and Chancery Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. When applying the mandatory provisions of Article 134 [of Directive 2006/112] to the provisions of Article 132(l)(m) [of that directive] in the circumstances of a body accepted to be a non-profit-making organisation making supplies of the right to play golf, what supplies, if any, constitute “the transactions exempted”?

2. Is it legitimate to restrict exemption under Article 132(l)(m) [of Directive 2006/112] by reference to whether the services of granting a right to play golf are made to a member of the non-profit-making organisation?

3. Are the provisions of Article 134 [of Directive 2006/112] to be interpreted as restricting exemption only to supplies which are “closely linked” (in the sense of peripheral) to the “transactions exempted” or to any supply falling within Article 132(1)(m) [of that directive]?

4. In circumstances where the non-profit-making organisation by reference to its publicly stated aims, regularly and consistently permits non-members to play golf, what is the interpretation to be placed on the “basic purpose” of making the charge to non-members?

5. For the purposes of Article 134(b) [of Directive 2006/112] to what must the “additional income” be additional?

6. If income derived from providing access to sporting facilities to non-members is not to be treated as “additional income” for the purposes of Article 134(b) [of Directive 2006/112], does Article 133(d) [of that directive] permit a Member State to exclude such income from exemption if it is likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT, whilst not at the same time withdrawing the exemption from income derived from providing membership to members of the same non-profit-making organisations if the members’ subscriptions are themselves likely to cause at least some distortion of competition?

7. In particular, is it necessary for any condition implemented under Article 133(d) [of Directive 2006/112] to apply to all services supplied by the non-profit-making organisation otherwise falling within the exemption or is it permissible to allow a partial restriction i.e. permitting exemption for the supply of the right to play golf to members but not to non-members where both membership and non-membership supplies are in competition with commercial organisations?

8. What, if any, is the difference in requirement between Article 133(d) [of Directive 2006/112] which requires a “likely distortion of competition” and that in Article 134(b) [of that directive] which envisages only the existence of direct competition?’

Consideration of the questions referred

Questions 1 to 5

18 By its first five questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 134(b) of Directive 2006/112 must be interpreted as excluding from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the right to use that golf course to visiting non-members of that body.

19 It should be observed that Article 132(1)(m) of Directive 2006/112 covers, according to its

wording, taking part in sport and physical education in general and does not require, for it to be applicable, that the sporting activity in question be practised at a particular level, for example at a professional level, nor that the activity be practised in a particular way, namely in a regular or organised manner or in order to participate in sports competitions (see Case C?18/12 *M?sto Žamberk* [2013] ECR, paragraphs 21 and 22).

20 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 (see *M?sto Žamberk*, paragraph 23).

21 Given that access to a course is necessary in order to play golf, the supply consisting in the grant of the right to use a golf course is closely linked to sport within the meaning of Article 132(1)(m) of Directive 2006/112, regardless of whether the person concerned plays golf on a regular or organised basis or in order to participate in sports competitions.

22 It follows that if that supply is provided by a non-profit-making body, it is covered by the exemption from VAT provided for in Article 132(1)(m), it being immaterial whether it is provided to a member of the body or to a visiting non-member.

23 Under Article 134(a) and (b) of Directive 2006/112, a supply of services is not to be granted the exemption provided for in Article 132(1)(m) of that directive where the supply is not essential to the transactions exempted or where its basic purpose is to obtain additional income for the body in question through the carrying out of transactions which are in direct competition with those of commercial enterprises subject to VAT.

24 So far as concerns the supply at issue in the main proceedings, namely the grant of the right to use a golf course, it is common ground that it is essential to the transactions exempted, for the purposes of Article 134(a) of Directive 2006/112, given that the grant of that right is necessary for golf to be played.

25 However, the referring court raises the question whether, in the case of a body that manages a golf course and offers a membership scheme while also permitting visiting non-members to use the golf course in return for payment, the green fees those visitors have to pay constitute ‘additional income’, for the purposes of Article 134(b) of Directive 2006/112, to the revenue deriving from the subscriptions paid by the members of that body.

26 It should be pointed out that the distinction above turns solely on the status of the recipient of the supply in question as a member or non-member.

27 However, the Court has held, regarding the provision that preceded Articles 133 and 134 of Directive 2006/112, namely Article 13A(2) of the Sixth Directive, that since that provision does not lay down restrictions as regards the recipients of the services in question, the Member States have no power to exclude a certain group of recipients of those services from the benefit of the exemption in question (*Canterbury Hockey Club and Canterbury Ladies Hockey Club*, paragraph 39).

28 In addition, it must be borne in mind that, unlike the exemption in Article 132(1)(l) of Directive 2006/112 that is expressly limited to supplies of services and goods by the bodies referred to therein ‘to their members’, the exemption for supplies of services closely linked to sport in Article 132(1)(m) of that directive is not so limited, even though under the European Commission’s original proposal for the Sixth Directive the latter exemption was also restricted to

supplies of services and goods to members of the bodies concerned, as is apparent from Article 14A(1)(j) of the Proposal of 20 June 1973 for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes – Common system of value added tax: uniform basis of assessment (COM(73) 950 final).

29 Accordingly, the term ‘additional income’ within the meaning of Article 134(b) of Directive 2006/112 cannot be construed in such a way as to lead to a restriction of the scope of the exemption in Article 132(1)(m) of that directive on the basis of the status of the recipients of the supply in question as members or non-members, a criterion that was deliberately excluded when the exemption was defined.

30 An interpretation of the term ‘additional income’ so as to cover the green fees paid for the use of a golf course by visiting non-members of a non-profit-making body managing that golf course and also offering a membership scheme, on the ground that those green fees are additional to the income from the subscriptions paid by the members of that body, would lead precisely to such a restriction of the scope of the exemption in Article 132(1)(m) of Directive 2006/112.

31 It follows that the green fees paid for the use of a golf course by visiting non-members of a non-profit-making body managing that golf course and also offering a membership scheme do not constitute additional income within the meaning of Article 134(b) of Directive 2006/112.

32 Having regard to the foregoing considerations, the answer to the first five questions is that Article 134(b) of Directive 2006/112 must be interpreted as not excluding from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the right to use that golf course to visiting non-members of that body.

Questions 6 and 7

33 By questions 6 and 7, which it is appropriate to examine together, the referring court asks, in essence, whether Article 133(d) of Directive 2006/112 must be interpreted as allowing the Member States to exclude from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant of the right to use the golf course managed by a non-profit-making body offering a membership scheme when that supply is provided to visiting non-members of that body.

34 Article 133(d) of Directive 2006/112 permits the Member States to make the granting to bodies other than those governed by public law of the exemptions provided for in Article 132(1)(b), (g), (h), (i), (l), (m) and (n) of Directive 2006/112 subject in each individual case to the condition that those exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

35 None the less, the above power conferred on the Member States – the scope of which falls to be determined in the context of the conditions set out in Article 133(a) to (c) of Directive 2006/112 – does not extend to the adoption of general measures such as the measure at issue in the main proceedings limiting the scope of those exemptions. According to the case-law of the Court on the corresponding provisions of the Sixth Directive, a Member State may not, by making the exemption in Article 132(1)(m) of that directive subject to one or more of the conditions laid down in Article 133 of the directive, alter the scope of that exemption (see, to that effect, Case C?124/96 *Commission* v *Spain* [1998] ECR I?2501, paragraph 21).

36 In this connection, it should be observed that the scope of the exemptions in Article 132(1)(b), (g), (h), (i), (l), (m) and (n) of Directive 2006/112 is defined not only by reference to the

substance of the transactions covered, but also by reference to certain criteria that the suppliers must satisfy. In providing for exemptions from VAT defined by reference to such criteria, the common system of VAT implies the existence of divergent conditions of competition for different operators.

37 Accordingly, Article 133(d) of Directive 2006/112 cannot be construed in such a way as would enable the difference in the conditions of competition stemming from the very existence of the exemptions provided for under European Union law to be eliminated, since such a construction would call in question the scope of those exemptions.

38 National legislation such as that at issue in the main proceedings does not comply with those limits on the power conferred by Article 133(d) of Directive 2006/112. That legislation is not limited to preventing distortions of competition stemming from the conditions under which, in accordance with the national legislation implementing that directive, the exemption is to be granted, but results in the difference in the conditions of competition stemming from the very existence of the exemption in Article 132(1)(m) of Directive 2006/112 being called in question. The exclusion from that exemption is made on the basis of the status of the recipient of the supply of the service in question even though that status does not alter the substance of the supply, namely, the grant of access to the golf course in order to play golf.

39 Having regard to the foregoing considerations, the answer to questions 6 and 7 is that Article 133(d) of Directive 2006/112 must be interpreted as not allowing the Member States, in circumstances such as those in the main proceedings, to exclude from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant of the right to use the golf course managed by a non-profit-making body offering a membership scheme when that supply is provided to visiting non-members of that body.

Question 8

40 In view of the answers given to questions 1 to 7, there is no need to answer question 8.

Costs

41 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 (Fifth Chamber) hereby rules:

1. **Article 134(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not excluding from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the right to use that golf course to visiting non-members of that body.**

2. **Article 133(d) of Directive 2006/112 must be interpreted as not allowing the Member States, in circumstances such as those in the main proceedings, to exclude from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant of the right to use the golf course managed by a non-profit-making body offering a membership scheme when that supply is provided to visiting non-members of that body.**

[Signatures]

* Language of the case: English.