62015CJ0699
JUDGMENT OF THE COURT (First Chamber)

4 May 2017 (*1)

?Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Exemptions — Supply of restaurant and entertainment services by an educational establishment to a limited public in return for consideration’

In Case C?699/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 2 December 2015, received at the Court on 24 December 2015, in the proceedings

Commissioners for Her Majesty’s Revenue & Customs

v

Brockenhurst College,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan (Rapporteur), A. Arabadjiev, C.G. Fernlund and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2016,

after considering the observations submitted on behalf of:

—

Brockenhurst College, by L. Poots, Barrister, instructed by R.J. Finlayson, Solicitor,

—

the United Kingdom Government, initially by V. Kaye, and subsequently by S. Brandon, acting as Agents, assisted by M. Jones, Barrister,

—

the European Commission, by R. Lyal and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 December 2016

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Article 132(l)(i) 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 Brockenhurst College ('the College') concerning the exemption from value added tax (VAT) of the restaurant and entertainment services supplied by the College.

Legal context

EU 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

Title IX of Directive 2006/112 is entitled 'Exemptions'. That title contains, inter alia, Chapter 1, headed 'General provisions', which includes Article 131 of the directive, and Chapter 2, headed 'Exemptions for certain activities in the public interest', which contains Articles 132 to 134 of the directive.

5

Article 131 of Directive 2006/112 is worded as follows:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

6

Article 132 of Directive 2006/112 provides:

'1. 'Member States shall exempt the following transactions:

...

(i)

the provision of children’s or young people’s education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;

...’

7

Article 133 of that directive 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.

...’

8

Under Article 134 of Directive 2006/112:

‘The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) 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

9

The exemptions laid down in Article 132 of the Directive 2006/112 have been implemented into UK law by section 31 of the Value Added Tax Act 1994 which provides that a supply of services is an exempt supply if it is of a description for the time being specified in Schedule 9 to that Act.

10

Items 1 and 4 in Group 6 of Part II of Schedule 9 to the Value Added Tax Act provides that the following are exempt:

‘1.

The provision by an eligible body of—

(a)

education;

...

(c)

vocational training;

...

4.

The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided—

(a)

the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and

(b)

where the supply is to the eligible body making the principal supply, it is made by another eligible body.’

11

An ‘eligible body’ is defined in Note 1 to Group 6 of Part II of Schedule 9.

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

12

The College is a higher education establishment which offers courses in catering and hospitality and in the performing arts.

13

For the purpose of enabling the students enrolled in those courses to learn skills in a practical context, the College, through its students acting under the supervision of their tutors, runs a restaurant and stages performances aimed at persons not connected to the establishment. The restaurant and the performances are open to a limited public composed of people who take an interest in the events organised by the College and have registered in a database in order to receive newsletters informing them of such events. Those people are informed that the events are offered as part of the students' education and at a reduced price which, in relation to the meals, covers approximately 80% of the cost. If the restaurant bookings do not meet a minimum of 30 servings, the meal is cancelled.

14

It is apparent from the file submitted to the Court that obtaining additional income for the College through those supplies of services, which are in direct competition with commercial enterprises, is not the basic purpose of those transactions.

15

The referring court states that the practical training was designed as part of the courses and that the students were aware of this at the time they registered for the respective qualifications.

16

During the relevant period, the College paid VAT at the standard rate on the price charged for the meals and entertainment services supplied.

17

However, the College considered that those supplies and services should have been exempt, under Article 132(1)(i) of Directive 2006/112, on the basis that they are 'closely related' to the provision of education. Its claim for reimbursement was rejected by the Commissioners; therefore the College brought an appeal before the First-tier Tribunal (Tax Chambers) (United Kingdom).

18

By judgment of 5 November 2012, that court of first instance held that those supplies of services were exempt from VAT, as they are closely related to the provision of education. That decision was upheld on appeal by a judgment of the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom) of 30 June 2014.

19

The Commissioners challenged that judgment before the referring court, which considers that the outcome of the proceedings before it depends on the interpretation of Directive 2006/112.

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In those circumstances, the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court for a preliminary

ruling:

‘1.

With regard to Article 132(1)(i) of Directive [2006/112], are supplies of restaurant services and entertainment services made by an educational establishment to paying members of the public (who are not recipients of the principal supply of education) “closely related” to the provision of education in circumstances where the making of those supplies is facilitated by the students (who are the recipients of the principal supply of education) in the course of their education and as an essential part of their education?

2.

In determining whether the supplies of restaurant services and entertainment services are within the exemption in Article 132(1)(i) [of Directive 2006/112], as services “closely related” to the provision of education:

a)

is it relevant that the students benefit from being involved in the making of the supplies in question rather than from the subject matter of those supplies;

b)

is it relevant that those supplies are not received or consumed either directly or indirectly by the students but are received and consumed by those members of the public who pay for them and who are not recipients of the principal supply of education;

c)

is it relevant that, from the point of view of the typical recipients of the services in question (that is to say the members of the public who pay for them), the supplies do not represent a means of better enjoying any other supply but are an end in themselves;

d)

is it relevant that, from the point of view of the students, the supplies in question are not an end in themselves but participating in the making of the supplies represents a means of better enjoying the principal supply of education services;

e)

to what extent should the principle of fiscal neutrality be taken into account?’

Consideration of the questions referred

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By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 132(1)(i) of Directive 2006/112 must be interpreted as meaning that activities carried out in circumstances such as those at issue in the main proceedings, consisting in students of a higher education establishment supplying, for consideration and as part of their education, restaurant and entertainment services to third parties, may be regarded as supplies ‘closely related’ to the supply of education within the meaning of that provision and accordingly be exempt from VAT.

22

Article 132 of Directive 2006/112 provides for exemptions which, as indicated by the title of the chapter in which that provision is contained, are intended to encourage certain activities in the public interest. However, those exemptions do not cover every activity performed in the public interest, but only those listed in that provision and described in great detail (judgment of 25 February 2016, Commission v Netherlands, C?22/15, not published, EU:C:2016:118, paragraph 19 and the case-law cited).

23

The terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle, arising from Article 2 of Directive 2006/112, 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 (judgment of 25 February 2016, Commission v Netherlands, C?22/15, not published, EU:C:2016:118, paragraph 20 and the case-law cited).

24

The term ‘closely related’, contained in Article 132(1)(i) of Directive 2006/112, is not defined therein. Nevertheless, it is clear from the wording of that provision that it relates to the supply of services which are closely linked to ‘children’s or young people’s education, school or university education, vocational training or retraining’. Thus, a supply of services can be regarded as ‘closely related’ to those latter services only where they are actually supplied as services ancillary to the education provided by the relevant establishment, which constitutes the principal supply (see, to that effect, judgments of 14 June 2007, Horizon College, C?434/05, EU:C:2007:343, paragraphs 27 and 28 and the case-law cited, and 25 March 2010, Commission v Netherlands, C?79/09, not published, EU:C:2010:171, paragraph 50).

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In accordance with the Court’s case-law, a service may be regarded as ancillary to a principal supply if it does not constitute an end in itself, but a means of better enjoying the principal supply (judgment of 25 March 2010, Commission v Netherlands, C?79/09, not published, EU:C:2010:171, paragraph 51 and the case-law cited).

26

In that regard, the application of the exemption for activities ‘closely related’ to education is, in any event, subject to three conditions, laid down, in part, in Articles 132 and 134 of Directive 2006/112. In essence, first, both the principal supply and the supplies of services closely related to it must be provided by bodies referred to in Article 132(1)(i) of that directive; secondly, those supplies of

services must be essential to the exempt activities; and, thirdly, the basic purpose of those supplies of services must not be to obtain additional income for those bodies by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT (see, to that effect, judgments of 14 June 2007, Horizon College, C?434/05, EU:C:2007:343, paragraphs 34, 38 and 42, and 25 March 2010, Commission v Netherlands, C?79/09, not published, EU:C:2010:171, paragraph 61).

27

In the case in the main proceedings, it is common ground, as regards the first of those conditions, that the College is a body governed by public law with an educational objective and is therefore eligible for the exemption provided for in Article 132(1)(i) of Directive 2006/112.

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As regards the second condition, it follows from paragraph 39 of the judgment of 14 June in Horizon College (C?434/05, EU:C:2007:343), that, in order to be classified as supplies of services essential to the exempt activities, those supplies must be of a nature and quality such that, without recourse to them, there could be no assurance that the education provided by the body referred to in Article 132(1)(i) of Directive 2006/112 and, consequently, the education from which their students benefit, would have an equivalent value.

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In the present case, it is apparent from the order for reference that the practical training was designed to form an integral part of the student’s curriculum and that, if it were not provided, students would not fully benefit from their education.

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In that regard, the order for reference notes that the catering functions of the restaurant are all undertaken by students of the College, under the supervision of their tutors, and that the purpose of operating the College’s training restaurant is to enable the students enrolled in catering and hospitality courses to learn skills in a practical context.

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The same applies to the performing arts courses. The College, through the students enrolled on those courses, stages concerts and performances to enable the students to acquire practical experience.

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It must be stated that, without these practical aspects, the education provided by the College in the fields of catering and hospitality and of the performing arts would not have an equivalent value.

33

That finding is corroborated by the assertion of the United Kingdom of Great Britain and Northern Ireland that the College’s training restaurant is tantamount to a classroom for the students, and the assertion of the European Commission that students benefit from preparing meals and performing table service in a real-life setting, which is an important part of their education.

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In those circumstances, it appears that the supplies of restaurant and entertainment services at issue in the main proceedings must be regarded as essential to guaranteeing the quality of the principal supply of education provided by the College.

35

As regards the third condition, it must be noted that that condition is an express enunciation of the principle of fiscal neutrality, which precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see, to that effect, judgment of 14 June 2007, Horizon College, C?434/05, EU:C:2007:343, paragraph 34 and the case-law cited).

36

In the main proceedings, it is common ground, first of all, that the restaurant and entertainment services provided by the College are open only to people previously registered on a mailing list held by that establishment. In particular, the referring court has stated that, for the performances, the audience usually consists of the friends and family of the College students, as well as people previously registered on the College’s database.

37

Further, the College’s training restaurant is available only by reservation and upon the condition that it be fully booked, with a minimum of thirty covers being required for the students to obtain maximum benefit from their supply of services. Thus, meals are cancelled if the required threshold is not reached, unlike in a commercial restaurant where reservations are in principle unconditionally honoured.

38

Lastly, it is clear from the information provided by the referring court that the concerts, performances and restaurant services are entirely organised, carried out and supplied by students enrolled at the College, a situation which is fundamentally different from that of students undertaking an internship in a commercial entity, where they join a professional team supplying such services in the competitive conditions prevailing in the respective markets.

39

It thus appears that the services offered by the College, as part of the courses taught to its students, to a limited number of third parties, are substantially different from those habitually offered by a commercial theatre or restaurant and are aimed at a different public, in that they do not meet the same needs of the consumer.

40

Furthermore, it is not disputed that the prices charged by the College cover only 80% of the cost of the meals. It does not therefore appear that the services at issue in the main proceedings are intended to generate additional income for the College by carrying out transactions in direct competition with those of commercial enterprises subject to VAT, such as restaurants or theatres.

41

Consequently, the services offered by the College to a limited number of third parties do not appear to be comparable to those offered by commercial restaurants and theatres, and the exemption from VAT for services supplied by the College does not amount to a difference in tax treatment.

42

Lastly, it must be borne in mind that it is for the national court to ascertain, on the basis of the guidance provided by the Court, that those conditions are indeed satisfied in the light of the factual circumstances of the case before it.

43

In the light of all the foregoing considerations, the answer to the questions referred is that Article 132(1)(i) of Directive 2006/112 must be interpreted as meaning that activities carried out in circumstances such as those at issue in the main proceedings, consisting in students of a higher education establishment supplying, for consideration and as part of their education, restaurant and entertainment services to third parties, may be regarded as supplies ‘closely related’ to the principal supply of education and accordingly be exempt from VAT, provided that those services are essential to the students’ education and that their basic purpose is not to obtain additional income for that establishment by carrying out transactions in direct competition with those of commercial enterprises liable for VAT, which it is for the national court to determine.

Costs

44

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 (First Chamber) hereby rules:

Article 132(1)(i) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as meaning that activities carried out in circumstances such as those at issue in the main proceedings, consisting in students of a higher education establishment supplying, for consideration and as part of their education, restaurant and entertainment services to third parties, may be regarded as supplies ‘closely related’ to the principal supply of education and accordingly be exempt from value added tax (VAT), provided that those services are essential to the students’ education and that their basic purpose is not to obtain additional income for that establishment by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT, which it is for the national court to determine.

Silva de Lapuerta

Regan

Arabadjiev

Fernlund

Rodin

Delivered in open court in Luxembourg on 4 May 2017.

A. Calot Escobar

Registrar

R. Silva de Lapuerta

President of the First Chamber

(*1) Language of the case: English.