

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

22 February 2018 (*)

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Article 2(1)(c), Article 9 and Article 13(1) — Treatment as a non-taxable person — Definition of ‘body governed by public law’ — Commercial company 100% owned by a municipality and responsible for performing certain public tasks incumbent on that municipality — Those tasks and their remuneration determined in a contract between the company and the municipality)

In Case C-182/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Supreme Court, Hungary), made by decision of 30 March 2017, received at the Court on 11 April 2017, in the proceedings

Nagyszénás Településszolgáltatási Nonprofit Kft.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Seventh Chamber),

composed of A. Rosas, President of the Chamber, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

- the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,
- the Spanish Government, by S. Jiménez García, acting as Agent,
- the European Commission, by L. Lozano Palacios, F. Clotuche-Duvieusart and L. Havas, 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 13(1) 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 the context of proceedings between Nagyszénás Településszolgáltatási Nonprofit Kft. ('NTN') and Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság (Appeals Division of the National Tax and Customs Authority, Hungary) ('the Office'), concerning that company's liability to value added tax (VAT) in respect of certain activities it is responsible for under a contract concluded between that company and the Municipality of Nagyszénás (Hungary) ('the contract at issue').

Legal context

EU law

3 Article 2(1)(c) of Directive 2006/112 provides:

'The following transactions shall be subject to VAT:

[...]

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

4 Under Article 9(1) of the directive:

"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

5 Article 13 of that directive provides:

'1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.

2. Member States may regard activities, exempt under Articles 132 ..., engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.'

6 Pursuant to Article 24(1) of the directive:

"Supply of services" shall mean any transaction which does not constitute a supply of goods.'

7 Article 73 of Directive 2006/112 provides:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

Hungarian law

8 Paragraph 7 of the általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax) provides:

‘(1) The activities of public authorities carried out by persons and organisations vested with public powers pursuant to the Fundamental Law of Hungary or pursuant to legislation adopted under authorisation conferred by the Fundamental Law shall not be regarded as economic activities or be subject to value added tax.

(2) Activities of public authorities includes, inter alia, legislative and judicial activities, activities related to prosecution, defence, the maintenance of order, foreign affairs, the administration of justice, enforcement of the law by the public administration, regulatory and financial control, judicial supervisory and monitoring activities, and decision-making in connection with the distribution of State aid, EU aid and other international aid.’

9 Pursuant to Paragraph 13 of the Magyarország helyi önkormányzatairól szóló 2011. évi CLXXXIX. törvény (Law No CLXXXIX of 2011 on Hungarian local authorities):

‘(1) The following are, in particular, the tasks to be carried out by local authorities in relation to local public affairs and public functions exercised locally:

...

2. municipal management (development and maintenance of public cemeteries, provision of street lighting, provision of chimney sweeping services, development and maintenance of local public roads and their accessories, development and maintenance of public parks and other public areas, provision of parking for motor vehicles);

...

5. environmental health (refuse collection, sanitation of urban environment, pest and rodent control);

...

9. housing and property management;

...

14. providing opportunities, on weekdays and weekends, for small-scale producers and agricultural producers to sell their products (as specified in legislation) directly to consumers;

(2) Legislation may assign further tasks to local authorities in relation to local public affairs and public tasks which may be performed locally.’

10 Paragraphs 41(6) and (8) of that law provide:

‘(6) For the purposes of implementing public services within the scope of its competences, the board of municipal representatives may establish, in accordance with the law, budgetary entities, economic organisations (as provided for in the Code of Civil Procedure), non-profit organisations and other organisations ... and may enter into contracts with natural and legal persons as well as entities which do not have legal personality.

...

(8) The law may require that certain specified public services may be managed only by a budgetary entity created specifically for that purpose; by a commercial company with legal personality that is fully owned by the State or in which a local authority has at least a majority participation, and in which the State or the local authority exercises at least a majority influence; by a commercial company with legal personality in which a commercial company such as that described above has at least a majority participation and in which a commercial company such as that described above exercises at least a majority influence; or by a municipal association’.

11 Under Paragraph 112(1) of Law No CLXXXIX of 2011 on Hungarian local authorities:

‘The local authority shall establish its management methods depending on its tasks and, within the framework of the economic provisions, independently approve the rules for participation. The local authority shall lay down conditions for fulfilling its tasks from its own revenues, revenues from other management bodies or aid from the central budget.’

12 Paragraphs 3/A(1) and (2) of the államháztartásról szóló 2011. évi CXCV. törvény (Law No CXCV of 2011 on public finances) state:

‘(1) A public task is a task for which the State or local authorities are responsible, as defined by law.

(2) The performance of public tasks through the creation and operation of budgetary entities or the provision of the necessary financial coverage shall be implemented, in part or in full, by providing means in accordance with the provisions of this law. Extra-budgetary entities may contribute to the performance of public tasks under the conditions laid down by law.’

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

13 On 1 July 2007, NTN, a non-profit-making limited company 100% owned by the Municipality of Nagyszénás, concluded the contract at issue with that municipality. Under that contract for the ‘performance of tasks and use of assets’, NTN, in exchange for compensation paid by the municipality and certain assets belonging to the municipality being made available to NTN, undertook to carry out certain public tasks listed in an annex to the contract.

14 Those tasks are, in particular, management of housing and other property, management of local public roads, quarantine, the control of vermin and mosquitoes, maintenance of parks, public spaces and other green areas, management of knackers’ yards and their services, and the upkeep of the local market.

15 The manner in which those tasks are to be performed is set out in the annexes to that contract. NTN is obliged to keep records concerning the performance of the various tasks in order to enable the municipality to check that the tasks are performed within the periods laid down and, if they are not, to fix a period within which that is to be put right. If those tasks have not yet been

completed when the period fixed expires, it is provided that NTN must reimburse the municipality the portion of the compensation corresponding to the non-performance.

16 Annex 6 to the contract at issue sets out the material resources required for performance of the tasks delegated to NTN.

17 For the year 2014, the Municipality paid NTN Hungarian forint (HUF) 23 850 000, approximately EUR 93 000, as compensation for the performance of those tasks.

18 NTN did not issue the municipality with an invoice for performing those tasks and did not charge VAT on the amount received as compensation for carrying out those tasks.

19 Following tax inspections, the first-instance tax authority adopted two decisions finding that NTN had a VAT debt in relation to the first three quarters of the year and imposing on NTN a tax fine and late-payment penalty.

20 The Office upheld those decisions, in essence, on the basis of the same grounds as those relied on by the first-instance tax authority.

21 Before the tax authorities, NTN claimed that, under the contract at issue, the Municipality of Nagyszénás had entrusted it with the performance of public tasks through the use of financial resources provided by the municipality and that the contract did not constitute a contract for the provision of services. NTN also maintained that it was a 'budgetary entity' since it fulfilled its responsibilities by means of 'aid', that is to say, financial resources provided by the municipality.

22 The Office took the view, in particular, that, NTN had received the compensation at issue in the main proceedings as consideration for providing specific services and that a taxable operation had therefore taken place, with the result that the amount of the compensation was taxable. It found that the fact that the Municipality of Nagyszénás could expressly request NTN to submit reports and to keep it duly informed about the performance of the contract at issue was further evidence that NTN had not received aid, but had rather been remunerated for the provision of specific services.

23 The Office also found that NTN was to be regarded as a taxable person. On the one hand, NTN did not have the status of a body authorised to exercise public powers, for it was not a body financed through the State budget, but a commercial company established by the Municipality of Nagyszénás and registered in the commercial register. On the other hand, the activity carried out by NTN was not an activity pertaining to public authorities, but rather an economic activity, that company merely contributing to the performance of municipal tasks rather than carrying them out directly. In that context, the Office also noted that it was relevant that NTN supplied services not only to the Municipality of Nagyszénás, but also to other persons, and that NTN had exercised its right to deduct VAT in that regard.

24 The court hearing the case at first instance dismissed the action brought by NTN against the decisions of the Office. It considered that there were no grounds for holding that NTN performed public tasks under the contract at issue, since NTN was not a 'budgetary entity', but a commercial company carrying on non-profit-making activity, and the Municipality of Nagyszénás remained responsible for the performance of those public tasks.

25 Furthermore, that court took the view that the compensation had been paid as consideration for the services that NTN had to perform under the contract, rather than generally financing NTN's activity, so that it constituted a taxable amount for VAT. The fact that NTN deducted the input tax on purchases relating to the performance of those tasks also supported the view that the

operations that were the object of the contract were taxable.

26 According to the Kúria (Supreme Court, Hungary), before which NTN has brought an appeal on a point of law against the first instance decision, the question that arises in the present case is whether a commercial company such as NTN falls within the scope of Article 13(1) of Directive 2006/112 and whether, in consequence, it is not liable to VAT.

27 In accordance with the Court's case-law, for the purposes of answering that question, it must be determined, in the first place, whether that company comes within the scope of the concept of 'other bod[y] governed by public law', within the meaning of Article 13(1) of Directive 2006/112, and, in the second, whether, by providing the public services at issue in the main proceedings, that company has exercised an activity as a public authority.

28 The referring court considers that the second condition appears to be satisfied since, in providing the public services specified in the contract at issue, NTN exercised, as a public authority, an activity referred to in Law No CXXVII of 2007 on value added tax as being the responsibility of public authorities.

29 However, the referring court is not certain that the first of those conditions is satisfied in a situation such as that at issue in the main proceedings, in which a not-for-profit commercial company 100% owned by a municipality is, by virtue of a contract with the latter, made entrusted with the performance of certain municipal tasks in return for compensation paid by the municipality.

30 In those circumstances, the Kúria (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the concept of 'bod[y] governed by public law' in the first subparagraph of Article 13(1) of [Directive 2006/112] include a commercial company which is 100% owned by a municipality?

(2) If the answer to question 1 is in the affirmative, may it be considered that the commercial company acts as a public authority when performing tasks that are the responsibility of the municipality but that the latter delegates to that company?

(3) If the answer to either of the previous questions is in the negative, may it be considered that the amount paid by the municipality to the commercial company for performing the tasks constitutes consideration?'

Consideration of the questions referred

The third question

31 By its third question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 2(1)(c) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company performs certain public tasks under a contract concluded between that company and a municipality, constitutes a supply of services effected for consideration and subject to VAT under that provision.

32 In that regard, it should be noted that the possibility of classifying a supply of services as a 'transaction for consideration', which, as a general rule, is subject to VAT under Article 2(1)(c) of Directive 2006/112, requires only that there be a direct link between that supply and the consideration actually received by the taxable person. Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the payment received by the provider of the service constituting the value

actually given in return for the service supplied to the recipient (judgments of 29 October 2015, *Saudaço*, C?174/14, EU:C:2015:733, paragraph 32, and of 2 June 2016, *Lajvér*, C?263/15, EU:C:2016:392, paragraph 26).

33 In that context, the Court has held that an activity is covered by the term ‘economic activity’, within the meaning of Article 9(1) of Directive 2006/112, if it is engaged in for the purposes of obtaining income on a continuing basis (judgment of 2 June 2016, *Lajvér*, C?263/15, EU:C:2016:392, paragraph 28).

34 In the circumstances of the case, it is for the referring court to establish whether it is apparent from the documents before it and, in particular, from the contract at issue that the activities of NTN are effected for consideration and, therefore, constitute an economic activity within the meaning of Article 9(1) of Directive 2006/112, thus conferring on NTN the status of a taxable person. Nonetheless, the Court may provide the referring court with points of interpretation, in the light of the information included in the order for reference, in order to enable it to give its ruling (see, to that effect, judgment of 29 October 2015, *Saudaço*, C?174/14, EU:C:2015:733, paragraph 34).

35 In that regard, it is stated in the order for reference that, under the contract at issue, NTN undertook, ‘in exchange for compensation paid by the Municipality [of Nagyszénás]’, to perform certain public tasks incumbent, under Hungarian law, on that municipality.

36 Furthermore, in its written observations, the Commission notes that both the services provided by NTN to the Municipality of Nagyszénás and the compensation paid by that municipality to NTN as consideration are of a permanent and continuous nature, as demonstrated by the fact that NTN, in exchange for the compensation provided for under the contract, has been providing the municipality with the services stipulated in that contract since 2007.

37 If that fact were to be confirmed, it would follow that the fact that that compensation was determined, as the case may be, not on the basis of individualised services but at a flat rate and annually, so as to cover the operating costs of that company, would not in itself be such as to affect the direct link between the supply of services made and the consideration received (judgment of 29 October 2015, *Saudaço*, C?174/14, EU:C:2015:733, paragraph 36).

38 The direct nature of that link could not be called into question by the fact, assuming it were to be established, that the contract at issue contained clauses allowing, in certain circumstances, the amount of compensation to be adjusted; nor by the fact that that amount was fixed at a level lower than the open market value, provided that the amount of compensation was determined in advance on the basis of well-established criteria which ensured that it was sufficient to cover the operating costs of NTN (see, to that effect, judgments of 29 October 2015, *Saudaço*, C?174/14, EU:C:2015:733, paragraph 38, and of 2 June 2016, *Lajvér*, C?263/15, EU:C:2016:392, paragraphs 45 and 46).

39 Furthermore, in determining whether the activity at issue in the main proceedings is effected ‘for consideration’, the fact that performance of the public tasks constitutes a legal obligation imposed on the Municipality of Nagyszénás is not capable of calling into question the classification of such an activity as a ‘supply of services’ or the direct link between the service provided and the consideration given in exchange (see, by analogy, judgment of 2 June 2016, *Lajvér*, C?263/15, EU:C:2016:392, paragraph 41).

40 The fact that the activity at issue consists in the performance of duties conferred and regulated by law in the public interest is irrelevant for the purposes of determining whether that activity can be classified as a supply of services effected for consideration. In that context, the

Court has held that, even when the object of the activity in question is to fulfil a constitutional obligation exclusively and directly incumbent upon the Member State concerned, the direct link between the supply of services and the consideration received cannot be called into question by that fact alone (see, *inter alia*, judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraph 42).

41 Moreover, although the public interest objective of certain services provided by, in particular, bodies governed by public law is taken into account in the common system of VAT, in so far as certain services are exempt from VAT under Article 132(1) of Directive 2006/112, it is common ground that the activity for which NTN is responsible under the contract at issue does not fall within any of those exceptions (see, by analogy, judgment of 29 October 2015, *Saudaço*, C-174/14, EU:C:2015:733, paragraph 41).

42 Having regard to the foregoing considerations, the answer to the third question is that Article 2(1)(c) of Directive 2006/112 must be interpreted as meaning, subject to verification of the relevant facts by the referring court, that an activity such as that at issue in the main proceedings, whereby a company performs certain public tasks under a contract concluded between that company and a municipality, constitutes a supply of services effected for consideration and subject to VAT under that provision.

The first and second questions

43 By its first and second questions, which it is appropriate to examine together and in the second place, the referring court asks, in essence, whether Article 13(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company performs certain public municipal tasks under a contract concluded between that company and a municipality, falls within the scope of the rule of treatment as a non-taxable person for VAT purposes laid down by that provision, if that activity constitutes an economic activity for the purpose of Article 9(1) of that directive.

44 According to the settled case-law of the Court, it is clear from analysis of Article 13(1) of Directive 2006/112 made in the light of the aims of the directive that two conditions must be fulfilled cumulatively for the rule of treatment as a non-taxable person laid down by that provision to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (judgment of 29 October 2015, *Saudaço*, C-174/14, EU:C:2015:733, paragraph 51 and the case-law cited).

45 As regards the first of those two conditions, namely, the condition that the body be governed by public law, the Court has held that, if the fact that, under the applicable national law, the body in question has powers conferred by public law is not decisive for the purposes of that classification, it does constitute, in so far as it is an essential characteristic specific to any public authority, a factor of definite importance in determining that the body must be classified as a 'body governed by public law' (judgment of 29 October 2015, *Saudaço*, C-174/14, EU:C:2015:733, paragraph 58).

46 In the circumstances of the case, it appears, subject to verification by the referring court, that, in performing the public tasks delegated to it under the contract at issue, NTN enjoys none of the rights and powers of public authorities enjoyed by the Municipality of Nagyszénás.

47 It appears that certain other characteristics of NTN also militate against it being classified as a 'body governed by public law', within the meaning of Article 13(1) of Directive 2006/112, in so far as they call into question whether that company can be considered sufficiently integrated in the organisation of the public administration of the municipality.

48 Given that it was established by the Municipality of Nagyszénás as a non-profit-making limited company, NTN is primarily a legal person governed by private law that, under the rules applicable to it, enjoys autonomy vis-à-vis the municipality with regard to its operation and day-to-day management.

49 In that context, there appears to be no organic link between NTN and the Municipality of Nagyszénás, in so far as that company was not established by a legislative act adopted by that municipality and defining the services NTN was to provide for it (see, to that effect, judgment of 29 October 2015, *Saudaço*, C-174/14, EU:C:2015:733, paragraph 67).

50 While NTN's autonomy is certainly limited by the fact that its capital, which is not open to equity investments by individuals, is 100% owned by the Municipality of Nagyszénás, there are other factors that indicate that the municipality is not in a position to exercise decisive influence over the activities of NTN.

51 First, it is common ground that the Municipality of Nagyszénás is not NTN's only 'customer' and that the services supplied by NTN to third parties are of more than marginal importance, are taxable and have indeed been taxed.

52 In addition, the contract at issue contains certain clauses enabling the Municipality of Nagyszénás to monitor performance of the tasks delegated to NTN, which suggests the municipality does not have effective control over NTN.

53 Lastly, it does not appear that that contract contains clauses enabling the municipality to lay down guidelines binding on NTN in the performance of those tasks.

54 Subject to verification by the referring court of those various matters of fact and national law, in the context of an overall assessment taking into account the principle that Article 13(1) of Directive 2006/112 must be interpreted strictly as an exception to the general rule that any activity of an economic nature be subject to VAT (judgment of 29 October 2015, *Saudaço*, C-174/14, EU:C:2015:733, paragraph 49 and the case-law cited), it appears that the company at issue cannot be classified as a 'body governed by public law' within the meaning of that provision.

55 As regards the second condition laid down in Article 13(1) of Directive 2006/112, namely, that only activities carried out by a body governed by public law acting as a public authority are to be exempt from VAT, it is sufficient to point out that, in the light of the settled case-law of the Court (judgment of 29 October 2015, *Saudaço*, C-174/14, EU:C:2015:733, paragraphs 70 and 71 and the case-law cited), it appears that that condition is not satisfied either in the circumstances of the case.

56 NTN being, subject to verification of the relevant matters of fact and national law by the referring court, governed by provisions of private law and enjoying, in the performance of the public tasks entrusted to it under the contract at issue, none of the rights and powers of a public authority held by the Municipality of Nagyszénás, as noted in paragraph 46 above, it cannot be maintained that NTN carries on activity within the framework of rules of public law.

57 In the light of the foregoing considerations, the answer to the first and second questions is that Article 13(1) of Directive 2006/112 must be interpreted as meaning that, subject to verification of the relevant matters of fact and national law by the referring court, an activity such as that at issue in the main proceedings, whereby a company performs certain public municipal tasks under a contract concluded between that company and a municipality, does not fall within the scope of the rule of treatment as a non-taxable person for VAT purposes laid down by that provision, if that

activity constitutes an economic activity within the meaning of Article 9(1) of that directive.

Costs

58 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 (Seventh Chamber) hereby rules:

1. Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning, subject to verification of the relevant facts by the referring court, that an activity such as that at issue in the main proceedings, whereby a company performs certain public tasks under a contract concluded between that company and a municipality, constitutes a supply of services effected for consideration and subject to VAT under that provision.

2. Article 13(1) of Directive 2006/112 must be interpreted as meaning that, subject to verification of the relevant matters of fact and national law by the referring court, an activity such as that at issue in the main proceedings, whereby a company performs certain public municipal tasks under a contract concluded between that company and a municipality, does not fall within the scope of the rule of treatment as a non-taxable person for VAT purposes laid down by that provision, if that activity constitutes an economic activity within the meaning of Article 9(1) of that directive.

[Signatures]

* Language of the case: Hungarian.