

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

19 December 2018 (*)

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Articles 19 and 29 and Article 135(1)(l) — Transfer of a totality of assets or part thereof — Exemption for lettings of immovable property — Rental contract concerning an immovable property used for commercial purposes and the movable property necessary for that use — Supply of services relating to that immovable property which gave rise to the deduction of VAT — Adjustment)

In Case C-17/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Mureş (Regional Court, Mureş, Romania), made by decision of 20 December 2017, received at the Court on 9 January 2018, in the proceedings

Virgil Mailat,

Delia Elena Mailat,

Apcom Select SA,

THE COURT (Tenth Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, acting as President of the Tenth Chamber, E. Levits and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Mailat, by L. Chiriac and O.D. Crăciun, avocaţi,
- Mrs Mailat, by S. Bogdan and D.-S. Chertes, avocaţi,
- the Romanian Government, initially by R.-H. Radu, and subsequently by C.-R. Căţăr, O.C.-M. Florescu and E. Gane, acting as Agents,
- the European Commission, by A. Armenia and R. Lyal, 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 Articles 19 and 29 and Article 135(1)(l) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, ‘the VAT Directive’).

2 The request has been made in criminal proceedings brought against Mr Virgil Mailat, Mrs Delia Elena Mailat and the commercial company Apcom Select SA, of which they were the managers, for tax avoidance, on the ground that, after having deducted input value added tax (VAT) on works carried out in the immovable property used for their commercial activity, they did not adjust the VAT at the time of letting the building in question together with the movable property necessary to pursue that activity.

Legal context

EU law

3 Article 19 of the VAT Directive is worded as follows:

‘In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.

Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition. They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this Article.’

4 Article 29 of that directive provides:

‘Article 19 shall apply in like manner to the supply of services.’

5 Article 135(1)(l) of that directive is worded as follows:

‘Member States shall exempt the following transactions:

...

(l) the leasing or letting of immovable property.’

Romanian law

6 Article 149 of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code) of 23 December 2003 (*Monitorul Oficial al României*, Part I, No 927 of 23 December 2003), in the version in force in December 2007, provides:

‘(1) For the purposes of this article:

...

(d) the deductible tax relating to capital goods represents the tax paid or payable relating to any transactions connected with the acquisition, manufacture, construction, transformation or modernisation of those goods, excluding the tax paid or payable relating to the repair or maintenance of such goods or relating to the purchase of spare parts for the repair or maintenance

of capital goods.

...

(4) The adjustment of the deductible tax provided for in paragraph (1)(d) shall be carried out:

(a) in cases where the capital goods are used by the taxable person:

1. in whole or in part, for purposes other than economic activities;
2. in order to carry out transactions that do not give rise to a deduction of VAT;
3. in order to carry out transactions that give rise to a deduction of VAT to the extent that it differs from the initial deduction;

...'

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

7 Apcom Select, managed by Mr and Mrs Mailat, received and approved, in May 2007, certain capital works carried out in 2006 to 2007 on a building in which it operated a restaurant. That company deducted VAT for those works and the fixed assets and property connected with the operation of that restaurant.

8 In December 2007, the company concluded, under a VAT exemption regime, a lease contract with another commercial company concerning the building in question, the fixed assets and the property connected with the operation of the restaurant. The lessee continued to operate the restaurant under the same name. When the lease contract was concluded, Mr and Mrs Mailat did not adjust VAT in respect of VAT deducted for the works carried out and for the fixed assets and the property connected with the operation of the restaurant although, pursuant to national legislation, they were required to do so.

9 In those circumstances, Mr and Mrs Mailat and Apcom Select are being prosecuted before the referring court, on the initiative of the National Anticorruption Directorate, for tax avoidance.

10 In the present case, Mr and Mrs Mailat submit that the letting to another company, via Apcom Select, of the building in which they operated a restaurant, including the capital equipment and the equipment connected to the operation of the restaurant, constitutes a transfer of a business within the meaning of Articles 19 and 29 of the VAT Directive and that Apcom Select therefore had the right to deduct the VAT related to the modernisation works carried out in 2006 to 2007, without being obliged to adjust the VAT in favour of the State at the time of concluding the lease contract.

11 In those circumstances, the Tribunalul Mureş (Regional Court, Mureş, Romania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the conclusion of an agreement whereby a company leases a building in which specific catering activities had previously been carried on in a restaurant to another company, together with all capital equipment and inventory items, where the tenant company continues the same catering activities in a restaurant with the same name as was used previously, constitute a transfer of a business within the meaning of Articles 19 and 29 of [the VAT Directive]?’

(2) In the event that Question 1 is answered in the negative, is the transaction described above

a supply of services that may be regarded as the “letting of immovable property” within the meaning of Article 135(1)(l) of [the VAT Directive], or a supply of complex services that may not be regarded as the “letting of immovable property” and that is taxable by operation of the law?”

Consideration of the questions referred

The first question

12 By its first question, the referring court asks, in essence, whether the concept of ‘transfer of a totality of assets or part thereof’, within the meaning of Article 19 of the VAT Directive, must be interpreted as covering the transaction by which a building which was used for commercial purposes is let with all the capital equipment and inventory items used for those purposes, when the lessee pursues those activities under the same name.

13 In order to answer that question, it must be noted that the wording of the first paragraph of Article 19 of the VAT Directive is identical to that of Article 5(8) 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 154, p. 1) and the Court’s case-law relating to that provision can be transposed *mutatis mutandis* to the first paragraph of Article 19 of the VAT Directive. In accordance with that case-law, the purpose of that provision is to facilitate transfers of undertakings by making such transfers simpler and by preventing the cash resources of the recipient from being overburdened by a disproportionate charge to tax which, in any event, would ultimately be recovered through deduction of the input VAT paid (see, to that effect, judgments of 27 November 2003, *Zita Modes*, C?497/01, EU:C:2003:644, paragraph 39, and of 10 November 2011, *Schriever*, C?444/10, EU:C:2011:724, paragraph 23).

14 As regards the concept of a ‘transfer of a totality of assets or part thereof’, the Court has held that it must be interpreted as covering the transfer of a business or an independent part of an undertaking, including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products (see, to that effect, judgments of 27 November 2003, *Zita Modes*, C?497/01, EU:C:2003:644, paragraph 40, and of 10 November 2011, *Schriever*, C?444/10, EU:C:2011:724, paragraph 24).

15 It is apparent from the same case-law that, in order to find that there has been a transfer of a business, or of an independent part of an undertaking, all of the elements transferred must, together, be sufficient to allow an independent economic activity to be carried on and the question whether there must be both movable and immovable assets among those elements must be assessed in the light of the nature of the economic activity at issue (see, to that effect, judgment of 10 November 2011, *Schriever*, C?444/10, EU:C:2011:724, paragraphs 25 and 26).

16 The Court has also held that particular importance must be attached to the nature of the economic activity which it is sought to continue in the context of an overall assessment of the factual circumstances of the transaction at issue that it is necessary to carry out in order to determine whether it is covered by the concept of the ‘transfer of a totality of assets’ within the meaning of the VAT Directive (see, to that effect, judgment of 10 November 2011, *Schriever*, C?444/10, EU:C:2011:724, paragraph 32).

17 Thus, where an economic activity does not require the use of particular premises or of premises equipped with fixtures necessary for the pursuit of the economic activity, there may be a transfer of a totality of assets within the meaning of the first paragraph of Article 19 of the VAT

Directive even without the transfer of ownership of an immovable asset (see, to that effect, judgment of 10 November 2011, *Schrieffer*, C-444/10, EU:C:2011:724, paragraph 27).

18 Regarding economic activity that entails the use of an inseparable bundle of movable and immovable property, the Court has, in addition, considered that there is no transfer of a totality of assets within the meaning of the first paragraph of Article 19 of the VAT Directive if the transferee has not taken possession of the business premises. In particular, if the business premises are equipped with fixtures necessary for the pursuit of the economic activity, these items of immovable property must form part of the elements transferred in order for the transaction to qualify as the transfer of a totality of assets, or of a part thereof, within the meaning of the VAT Directive (see, to that effect, judgment of 10 November 2011, *Schrieffer*, C-444/10, EU:C:2011:724, paragraph 28).

19 As regards the activity at issue in the main proceedings, that is, the operation of a restaurant, it must be stated that it is an activity that, in principle, cannot be pursued without business premises. Aside from mobile catering services, in order to pursue a catering activity, the operator must have premises that can be used as a kitchen, in which the equipment, utensils and ingredients necessary to prepare dishes can be stored. However, the case in the main proceedings concerns, not a mobile catering activity, but the operation of an establishment at a fixed address with both a kitchen and a dining area.

20 It should be borne in mind that, even if the economic activity at issue is one which cannot be carried out without business premises, it is not necessary, in order to ensure the continuation of some business activities transferred, for the owner of that business also to be the owner of the building within which it is operated (see, to that effect, judgment of 10 November 2011, *Schrieffer*, C-444/10, EU:C:2011:724, paragraph 34). Thus, the Court has held that, where the continuation of the economic activity in question requires that the transferee use the same premises as were used by the transferor, there is no reason in principle why possession of those premises may not be transferred by means of a lease contract (judgment of 10 November 2011, *Schrieffer*, C-444/10, EU:C:2011:724, paragraph 36).

21 However, it must be stated that the case that resulted in the judgment of 10 November 2011, *Schrieffer* (C-444/10, EU:C:2011:724), in the context of which the Court set out those considerations, concerned the transfer to the new operator of the commercial activity at issue in that case, of the ownership of stock and of the equipment used for that activity, which were held to constitute a bundle of movable property sufficient to enable the activity to be pursued.

22 By contrast, in the present case, it is apparent from the request for a preliminary ruling that all the items necessary to pursue the economic activity at issue in the main proceedings were merely let and no related property rights were transferred.

23 However, making all of these items available does not constitute a transfer of a totality of assets or part thereof within the meaning of the first paragraph of Article 19 of the VAT Directive.

24 In order to provide the referring court with a helpful answer, it should nonetheless be noted that, according to the observations submitted to the Court, a certain number of movable assets were not let but rather sold to the transferee. It ultimately falls to the national courts to determine whether those assets alone enabled the transferee to continue to pursue autonomously the economic activity in question, or whether the immovable property that is the subject of the lease contract in question in the main proceedings was equipped with fixtures necessary to pursue that economic activity.

25 In addition, it is necessary to add, first, that, in order to be covered by the concept of 'transfer of a totality of assets or part thereof' within the meaning of the first paragraph of Article 19

of the VAT Directive, the transferee must have had the intention to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any (see, to that effect, judgment of 27 November 2003, *Zita Modes*, C?497/01, EU:C:2003:644, paragraph 44).

26 In that regard, it is apparent from the Court's case-law that the buyer's intentions can or, in some circumstances, must be taken into account in the overall assessment of the circumstances of a transaction, provided that they are supported by objective evidence (judgment of 10 November 2011, *Schriever*, C?444/10, EU:C:2011:724, paragraph 38).

27 However, even though, in the case in the main proceedings, it is not disputed that the lessee pursued for over two years the autonomous economic activity previously carried out by the lessor and, as is apparent from the observations submitted to the Court, took over the employees, kept the same suppliers and honoured the business commitments previously entered into by the lessor towards its customers, the fact remains that the lessee was never in a position, as such, to liquidate the activity concerned, in so far as, not having taken ownership of a large part of the items necessary to pursue that activity, it was not entitled to dispose of them.

28 Secondly, even though matters such as the duration of the lease granted and the procedure agreed for terminating it must be taken into account in the overall assessment of the transfer of the assets for the purposes of the first paragraph of Article 19 of the VAT Directive, the fact remains that neither the length of the lease nor the possibility of terminating it on short notice decisively support of themselves the inference that the transferee intended immediately to liquidate the business, or the part of the undertaking, transferred (see, to that effect, judgment of 10 November 2011, *Schriever*, C?444/10, EU:C:2011:724, paragraphs 42 and 43). However, since, in the present case, as is apparent from the previous paragraph, the lessee of Apcom Select could not in any event liquidate the economic activity concerned, the fact that the application of the first paragraph of Article 19 of the VAT Directive cannot be refused solely on the basis of one of those grounds (see, to that effect, judgment of 10 November 2011, *Schriever*, C?444/10, EU:C:2011:724, paragraphs 42 to 44) is irrelevant for the classification of the transaction at issue in the main proceedings in the light of that provision.

29 Moreover, it should be borne in mind that the fact that the first paragraph of Article 19 of the VAT Directive provides that the transferee is to be treated as the successor to the transferor does not mean that the succession is a condition for the application of that provision (see, to that effect, judgment of 27 November 2003, *Zita Modes*, C?497/01, EU:C:2003:644, paragraph 43). Consequently, the fact that, in the present case, the transferee continued to pursue the activity under the same name as the transferor is also irrelevant for the purpose of determining whether the transaction at issue in the main proceedings comes within the scope of the first paragraph of Article 19 of the VAT Directive.

30 Having regard to the foregoing, the answer to the first question is that the concept of 'transfer of a totality of assets or part thereof', within the meaning of Article 19 of the VAT Directive, must be interpreted as not covering the transaction by which an immovable property which was used for commercial purposes is let with all capital equipment and inventory items necessary for that use, even if the lessee pursues the activity of the lessor under the same name.

The second question

31 By its second question, the referring court asks, in essence, whether Article 135(1)(l) of the VAT Directive must be interpreted as meaning that a lease contract for an immovable property which was used for commercial purposes and for all capital equipment and inventory items necessary for that use constitutes a 'letting of immovable property' within the meaning of that

provision, or that such contract should be treated as a supply of complex services.

32 In order to answer that question, it should be borne in mind that, according to the Court's case-law, in certain circumstances several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent (judgment of 27 June 2013, *RR Donnelley Global Turnkey Solutions Poland*, C?155/12, EU:C:2013:434, paragraph 20 and the case-law cited).

33 In this context, the Court has held that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (judgment of 27 June 2013, *RR Donnelley Global Turnkey Solutions Poland*, C?155/12, EU:C:2013:434, paragraph 21 and the case-law cited).

34 That is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (judgment of 27 June 2013, *RR Donnelley Global Turnkey Solutions Poland*, C?155/12, EU:C:2013:434, paragraph 22 and the case-law cited).

35 Although it is for the national court to determine whether the taxable person supplies a single service in a particular case and to make all definitive findings of fact in that regard, the Court may, however, provide it with any guidance as to interpretation that will be helpful to it in disposing of the case (judgment of 27 June 2013, *RR Donnelley Global Turnkey Solutions Poland*, C?155/12, EU:C:2013:434, paragraph 23).

36 Thus, as regards the concepts of 'leasing' and 'letting' in Article 135(1) of the VAT Directive, it should be borne in mind that, failing any definition of those concepts in that provision, the Court has defined the 'letting of immovable property', within the meaning of that provision, as an arrangement whereby the lessor assigns to the lessee, in return for rent and for an agreed period, the right to occupy his property and to exclude any other person from it (see, inter alia, judgments of 4 October 2001, '*Goed Wonen*', C?326/99, EU:C:2001:506, paragraph 55, and of 6 December 2007, *Walderdorff*, C?451/06, EU:C:2007:761, paragraph 17).

37 Furthermore, according to the Court's case-law, the terms used to describe the exemptions envisaged by Article 135(1) of the VAT Directive, including the concepts of 'leasing' and 'letting of immovable property', are to be interpreted strictly since these exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (judgment of 6 December 2007, *Walderdorff*, C?451/06, EU:C:2007:761, paragraph 18 and the case-law cited).

38 In the present case, it is therefore necessary to examine whether the transaction at issue in the main proceedings, that is, the letting of immovable property which was used for commercial purposes at the same time as that of capital equipment and inventory items necessary for that use, must be considered to be a single supply or several distinct and independent supplies that must be assessed separately in the light of VAT.

39 In that regard, it is apparent from the case file before the Court that the letting of the movable property included in the lease contract does not appear to be dissociable from the letting of the immovable property in question in the main proceedings. Moreover, it is not disputed that some of the movable property, such as the equipment and kitchen appliances, are incorporated in that immovable property and must, at this stage, be considered to be an integral part of that

property. In so far as the movable property that was let, or, as regards some of it, transferred, at the same time as the immovable property, was also used for the operation of the restaurant in the same way as that immovable property, that letting/transfer cannot be regarded as having its own purpose either, but must be treated as a means of better enjoying the principal service supplied, that is, the letting of the immovable property.

40 Accordingly, the letting of the immovable property must be regarded as constituting the principal service supplied to which the other services, that is, the letting of capital equipment and inventory items, are merely ancillary.

41 Having regard to those considerations, the answer to the second question is that Article 135(1)(l) of the VAT Directive must be interpreted as meaning that a lease contract for an immovable property which was used for commercial purposes and for all capital equipment and inventory items necessary for that use constitutes a single supply in which the letting of the immovable property is the principal supply.

Costs

42 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 (Tenth Chamber) hereby rules:

1. The concept of ‘transfer of a totality of assets or part thereof’, within the meaning of Article 19 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as not covering the transaction by which an immovable property which was used for commercial purposes is let with all capital equipment and inventory items necessary for that use, even if the lessee pursues the activity of the lessor under the same name.

2. Article 135(1)(l) of Directive 2006/112 must be interpreted as meaning that a lease contract for an immovable property which was used for commercial purposes and for all capital equipment and inventory items necessary for that use constitutes a single supply in which the letting of the immovable property is the principal supply.

[Signatures]

* Language of the case: Romanian.