Provisional text

JUDGMENT OF THE COURT (First Chamber)

20 January 2021 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Supplies of services for consideration – Article 26(1) – Transactions treated as supplies of services for consideration – Article 56(2) – Determination of the point of reference for tax purposes – Hiring of means of transport – Making cars available to employees)

In Case C?288/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht des Saarlandes (Finance Court, Saarland, Germany), made by decision of 18 March 2019, received at the Court on 9 April 2019, in the proceedings

QM

v

Finanzamt Saarbrücken,

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan, and N. Jääskinen, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– QM, by G. Hagemeister, A. Pogodda-Grünwald and F. Schöter, Steuerberater, and by F.-J. Müller and F. von Itter, Rechtsanwälte,

– the German Government, by J. Möller and S. Eisenberg, acting as Agents,

– the European Commission, by R. Pethke and N. Gossement, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p.

11) (‘Directive 2006/112’).

2 The request has been made in proceedings between the company QM and the Finanzamt Saarbrücken (Tax Office, Saarbrücken, Germany), concerning the latter’s decision whereby the former’s act of making cars available to two of its employees working in Luxembourg and resident in Germany was made subject to value added tax (VAT).

Legal context

European Union law

The Sixth Directive

3 Under point (b) of Article 13B of Sixth Council Directive 77/388/EC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) (‘the Sixth Directive’), the Member States are to exempt ‘the leasing or letting of immovable property’ from VAT.

4 The first subparagraph of Article 6(2) of the Sixth Directive provides:

‘The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the [VAT] on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.’

Directive 2006/112

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

‘1. 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’.

6 According to Article 14(1) of that directive, a ‘supply of goods’ means the transfer of the right to dispose of tangible property as owner.

7 Under Article 24(1) of that directive, a ‘supply of services’ means ‘any transaction which does not constitute a supply of goods’.

8 Article 26(1) of that directive defines the transactions to be treated as supplies of services for consideration as follows:

‘(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;

(b) the supply of services carried out free of charge by a taxable person for his private use or

for that of his staff or, more generally, for purposes other than those of his business.'

9 Article 56 of that directive states:

'1. The place of short-term hiring of a means of transport shall be the place where the means of transport is actually put at the disposal of the customer.

2. The place of hiring, other than short-term hiring, of a means of transport to a non-taxable person shall be the place where the customer is established, has his permanent address or usually resides.

…

3. For the purposes of paragraphs 1 and 2, "short-term" shall mean the continuous possession or use of the means of transport throughout a period of not more than thirty days and, in the case of vessels, not more than 90 days.'

The Implementing Regulation

10 Under Article 38 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2001 L 77, p. 1) ('the Implementing Regulation'):

'1. "Means of transport" as referred to in Article 56 and point (g) of the first paragraph of Article 59 of [Directive 2006/112] shall include vehicles ….

2. The means of transport referred to in paragraph 1 shall include, in particular, the following vehicles:

(a) land vehicles, such as cars …

…'

German law

11 Paragraph 1(1) of the Umsatzsteuergesetz (Law on turnover tax), as amended by the Gesetz zur Umsetzung der Amtshilferichtlinie sowie zur Änderung steuerlicher Vorschriften (Amtshilferichtlinie-Umsetzungsgesetz) (Law on the Implementation of the Mutual Assistance Directive and on the Amendment of Tax Provisions) (Mutual Assistance Directive Implementation Law) of 26 June 2013 (BGBl. I 2013, p. 1809) ('the UStG'), provides that supplies and other services performed for consideration within the national territory by a trader in the course of that trader's business are subject to turnover tax.

12 Paragraph 3(9a) of the UStG treats the following as other services for consideration:

'1. the use by a trader of goods forming part of the assets of the business for purposes other than those of the business or for the private use of that trader's staff, where the input tax on such goods is wholly or partly deductible, provided that these are not courtesy gifts; …

2. the performance of other services free of charge by a trader for purposes other than those of that trader's business or for the private use of that trader's staff, provided that these are not courtesy gifts.'

13 Paragraph 3a of the UStG governs the determining of the place of performance of other services, stating that:

‘(1) Subject to Paragraph 3a(2) to (8) and Paragraphs 3b, 3e and 3f, another service shall be deemed to have been performed at the place where the trader operates his business. …

(2) Subject to Paragraph 3a(3) to (8) and Paragraphs 3b, 3e and 3f, another service which is performed for the benefit of a trader for the purposes of that trader’s business shall be deemed to have been performed at the place from which that trader operates his business. [If that] service is performed for the benefit of a trader’s permanent establishment however, the place of the permanent establishment shall be decisive in that regard. The first and second sentences shall apply *mutatis mutandis* in the case of another service performed for the benefit of a legal person carrying on exclusively non-entrepreneurial activities to whom an identification number has been assigned for the purposes of turnover tax and in the case of another service performed for the benefit of a legal person carrying on both economic and non-economic activities; this shall not apply to other services which are exclusively intended for the private use of staff or of a shareholder.

(3) By way of derogation from Paragraph 3a(1) and (2)[, with effect from 30 June 2013]:

…

2. The short-term letting of a means of transport shall be deemed to have been performed at the place where that means of transport is actually made available to the recipient. For the purposes of the first sentence, letting shall be deemed to be short-term if it takes place for an uninterrupted period of not more than

(a) 90 days, for vessels,

(b) 30 days, for other means of transport.

The leasing of a means of transport which cannot be regarded as short-term letting within the meaning of the second sentence, performed for the benefit of a customer who is neither a trader for whose business the service is acquired nor a legal person carrying on a non-economic activity to whom an identification number has been assigned for the purposes of turnover tax, shall be deemed to have been performed at the place where the recipient has his or her residence or its registered office. ...’

14 Under Paragraph 3f of the UStG, ‘supplies’, within the meaning of Paragraph 3(1b), and ‘other services’, within the meaning of Paragraph 3(9a), are deemed to have been performed at the place from which the trader operates his business.

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

15 QM, an investment fund management company based in Luxembourg, made two vehicles available to two members of its staff, who operate in Luxembourg and are resident in Germany. Those vehicles are used for professional and private purposes.

16 In 2013 and 2014, one of those vehicles was made available to the member of staff concerned free of charge, while QM deducted an annual sum of EUR 5 688 from the salary of the other member of staff in exchange for the use of the other vehicle.

17 QM is a member of the simplified tax scheme in Luxembourg. In that Member State, the act

of making the two vehicles available was not subject to VAT; nor did it give rise to the right to deduct the input VAT relating to those two vehicles.

18 In November 2014, QM registered as a taxable person in Germany for VAT purposes. In 2015, it declared, for VAT purposes, concerning the act of making those vehicles available, other taxable services amounting to EUR 7 904 for 2013 and EUR 20 767 for 2014.

19 Those tax returns were accepted by the Saarbrücken Tax Office but, on 30 July 2015, QM lodged a complaint in respect of the tax assessments relating to those returns.

20 That complaint was rejected by the Saarbrücken Tax Office on 2 May 2016.

21 On 2 June 2016, QM brought an action against that decision before the Finanzgericht des Saarlandes (Finance Court, Saarland, Germany), in which it argues that the requirements for levying VAT on the act of making vehicles available have not been met. On the one hand, it argues that there was not a supply of services for consideration and that the act of making a vehicle available to one of the two members of staff concerned which involved a financial contribution could, at most, be regarded as a supply of services for partial consideration. On the other hand, it argues that there was also no hiring of means of transport for the purposes of Article 56(2) of Directive 2006/112.

22 In those circumstances, the Finanzgericht des Saarlandes (Finance Court, Saarland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 56(2) of [Directive 2006/112] to be interpreted as meaning that “hiring of a means of transport to a non-taxable person” should also be understood as referring to the provision of a vehicle (company car) forming part of the assets of the business of a taxable person to his staff, if the employee does not provide consideration for it that does not consist in (part of) the work performed by him, and thus does not make any payment, does not use any of his cash remuneration for it, and also does not choose between various benefits offered by the taxable person under an agreement between the parties according to which the entitlement to use the company car is contingent on the forgoing of other benefits?’

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether, on a proper construction of Article 56(2) of Directive 2006/112, the act of making a vehicle forming part of the assets of the business of a taxable person available to one of that taxable person’s employees falls within the scope of that provision if that employee does not provide payment for that vehicle being made available to him or her and does not give up a part of his or her remuneration as consideration for it and if the entitlement to use that vehicle is not contingent on the forgoing of other benefits by that employee.

24 It is important to note that the application of Article 56(2) of Directive 2006/112, which determines the place of taxation for VAT purposes of the hiring of a means of transport presupposes that the transaction under consideration is subject to VAT.

25 In that regard, it should be borne in mind that Article 14(1) of Directive 2006/112 defines the supply of goods as ‘the transfer of the right to dispose of tangible property as owner’.

26 Since such a condition is a priori not satisfied in the case in the main proceedings, the act of making the vehicles in question available must be regarded not as a ‘supply of goods’ within the

meaning of Article 14(1) of Directive 2006/112, but as a ‘supply of services’ within the meaning of Article 24(1) thereof, which states that any transaction which does not constitute a supply of goods within the meaning of Article 14 of that directive is to be regarded as a supply of services (see, to that effect, judgment of 29 July 2010, *Astra Zeneca UK*, C?40/09, EU:C:2010:450, paragraph 26).

27 Under Article 2(1)(c) of Directive 2006/112, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT.

28 In the present case, it is not disputed that QM is a taxable person and that it acts as such when making vehicles available to its employees.

29 However, it follows from settled case-law that a supply of services is effected ‘for consideration’ within the meaning of Article 2(1)(c) of Directive 2006/112, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received (see, to that effect, judgment of 11 March 2020, *San Domenico Vetraria*, C?94/19, EU:C:2020:193, paragraph 21 and the case-law cited).

30 Such a direct link may be given concrete expression, in the employer-employee relationship, by the employee being required to give up a part of his or her cash remuneration as consideration for a service provided by the employer (see, to that effect, judgments of 16 October 1997, *Fillibeck* , C?258/95, EU:C:1997:491, paragraphs 14 and 15, and of 29 July 2010, *Astra Zeneca UK*, C?40/09, EU:C:2010:450, paragraph 29).

31 In the present case, the referring court alludes in its question to the provision of a vehicle for which the member of staff concerned does not make any payment; nor does that member of staff dedicate a part of his cash remuneration thereto. He has also not chosen between various benefits offered by the taxable person under an agreement between the parties according to which the entitlement to use the company car would be contingent on the forgoing of other benefits.

32 Thus, subject to the findings of fact to be made by the referring court, such a supply cannot, accordingly, be classified as a supply of services for consideration within the meaning of Article 2(1)(c) of Directive 2006/112.

33 As regards the question whether that transaction should be treated as a supply of services for consideration under Article 26(1) of that directive, it should be borne in mind that that provision treats a transaction as a supply of services for consideration in two scenarios. The first scenario, referred to in Article 26(1)(a) of that directive, concerns the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the input VAT on such goods was wholly or partly deductible; the second, referred to in Article 26(1)(b) thereof, concerns the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.

34 As the Advocate General stated in point 35 of his Opinion, a supply of services consisting in the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, which cannot be treated as a supply of services for consideration on the basis of Article 26(1)(a) of Directive 2006/112, on the ground that the goods in question have not given rise to the right to deduct the input VAT, contrary to what is required by that provision, cannot, in the alternative, be treated as a supply of services for consideration on the basis of Article 26(1)(b) of that directive without

undermining the effectiveness of the condition relating to the deduction of input tax laid down by the first of those two provisions.

35 In the present case, it is apparent from the file sent to the Court that QM was subject to the simplified tax scheme in Luxembourg, under which it could not claim, for the years at issue in the main proceedings, deduction of the input tax relating to the vehicle made available to a member of staff for no consideration.

36 However, it is not explicitly clear from that file whether such a right of deduction could have arisen in Germany.

37 Even if the referring court were to hold that that condition was satisfied in Germany and that the same was true for the other conditions for applying Article 26(1)(a) of Directive 2006/112, treating the act of making a vehicle available at issue in the main proceedings as a supply of services for consideration as a result could not in any event be covered by the first subparagraph of Article 56(2) of Directive 2006/112.

38 A transaction that is treated as a supply of services for consideration under Article 26(1)(a) of Directive 2006/112 cannot constitute a ‘hiring of a means of transport’ for the purposes of the first subparagraph of Article 56(2) of that directive.

39 Since Directive 2006/112 does not define the concept of the ‘hiring of a means of transport’ for the purposes of the first subparagraph of Article 56(2) thereof and makes no reference to the law of the Member States in that regard, that concept constitutes an autonomous concept of EU law that must be interpreted uniformly throughout the European Union, irrespective of characterisation in the Member States (see, by analogy, judgment of 9 July 2020, *AJPF Cara?-Severin and DGRFP Timi?oara*, C?716/18, EU:C:2020:540, paragraph 30).

40 According to the settled case-law of the Court, the ‘letting of immovable property’ within the meaning of point (b) of Article 13B of the Sixth Directive presupposes that several conditions are satisfied, that is to say, the landlord of property must have conferred on the tenant, in return for rent and for an agreed period, the right to occupy the property and to exclude any other person from enjoyment of such a right (see, to that effect, judgments of 4 October 2001, *‘Goed Wonen’*, C?326/99, EU:C:2001:506, paragraph 55, and of 18 July 2013, *Medicom and Maison Patrice Alard* , C?210/11 and C?211/11, EU:C:2013:479, paragraph 26 and the case-law cited).

41 Those conditions apply, *mutatis mutandis*, for the purpose of determining what constitutes a ‘hiring of a means of transport’ for the purposes of the first subparagraph of Article 56(2) of Directive 2006/112.

42 Accordingly, such a classification presupposes that the owner of the means of transport confers on the person hiring that means of transport, in return for rent and for an agreed period, the right to use it and to exclude other persons from doing so.

43 Regarding the condition that there must be rent, it should be observed that the absence of rent being paid cannot be compensated for by the fact that, for income tax purposes, the private use of goods forming part of the assets of the business in question is viewed as constituting a benefit in kind and therefore, in some way, as part of the remuneration which the beneficiary has given up as consideration for the goods in question being made available to him or her (see, to that effect, judgment of 18 July 2013, *Medicom and Maison Patrice Alard*, C?210/11 and C?211/11, EU:C:2013:479, paragraph 28).

44 Indeed, it follows from case-law that the concept of rent for the purpose of applying the first

subparagraph of Article 56(2) of Directive 2006/112 cannot be interpreted by analogy by equating a benefit in kind to that concept, and that it presupposes the existence of a rent that is to be paid in money (see, to that effect, judgment of 18 July 2013, *Medicom and Maison Patrice Alard*, C?210/11 and C?211/11, EU:C:2013:479, paragraphs 29 and 34).

45 Such a condition cannot be satisfied in the case of the use, free of charge, of goods forming part of the assets of the business, which would be treated as a supply of services for consideration under Article 26(1)(a) of Directive 2006/112.

46 Such a transaction does not, therefore, fall under the first subparagraph of Article 56(2) of Directive 2006/112.

47 It should, however, be added that it is explicitly apparent from the order for reference that the case in the main proceedings also concerns the act of QM making a vehicle available to one of its members of staff, in exchange for which that member of staff paid, during the years at issue in the main proceedings, almost EUR 5 700 per year, deducted from his remuneration.

48 Although no explicit reference has been made to that supply by the referring court in the question referred, the Court of Justice considers it necessary to provide additional clarification in that regard.

49 In such a scenario, there may indeed be a supply of services for consideration for the purposes of Article 2(1)(c) of Directive 2006/112 that may, accordingly, fall under the first subparagraph of Article 56(2) of that directive, which it is for the referring court to ascertain, having regard to the evidence before it.

50 In that regard, it is apparent from the file submitted to the Court that the vehicle in question was made available to a non-taxable person by a taxable person acting as such, and that it is a ‘means of transport’ for the purposes of Article 38 of the Implementing Regulation. Nor does it appear to be in dispute that that vehicle was made available for a period of more than 30 days and that this therefore does not constitute an act of ‘short-term’ hiring within the meaning of Article 56(3) of Directive 2006/112 which would consequently be excluded from the scope of the first subparagraph of Article 56(2) thereof.

51 In addition, as the Advocate General noted in point 48 of his Opinion, the fact that QM is not, under national law, the owner of the vehicle from a legal point of view and that it could have rented out the vehicle in another capacity, in particular because it can dispose of that vehicle under a lease agreement, cannot prevent such an act of making it available from being regarded as constituting a supply of services in the form of the hiring of that vehicle as referred to in Article 56(2) of Directive 2006/112.

52 Similarly, the twofold fact that the vehicle would not have been made available under a separate contract from the employment contract and that the hire period is not precisely limited in time, but would depend on the existence of the employment relationship between QM and its member of staff, would also not be a barrier to such a classification, provided that, however, that period is longer than 30 days.

53 By contrast, it is for the referring court to ascertain whether there is a ‘genuine agreement’ between those persons as to the duration of the right of enjoyment and the right to use the goods and to exclude other persons from such use, as has been held with regard to accommodation (see, by analogy, judgments of 8 May 2003, *Seeling*, C?269/00, EU:C:2003:254, paragraph 51, and of 29 March 2012, *BLM*, C?436/10, EU:C:2012:185, paragraph 29).

54 In addition, although the condition relating to the right of the person hiring the vehicle to be able to use it and to exclude other persons from using it does not require the taxable person to be unable to order that that vehicle be used for professional purposes, it nonetheless presupposes, as the Advocate General indicated in point 63 of his Opinion, that the vehicle remain permanently available to the member of staff concerned, including for his private use.

55 That interpretation is borne out by the underlying logic of the provisions of Directive 2006/112 concerning the place where a service is deemed to be supplied, according to which goods and services should be taxed as far as possible at the place of consumption (see, to that effect, judgment of 13 March 2019, *Srf konsulterna*, C?647/17, EU:C:2019:195, paragraph 29), which corresponds, under the first subparagraph of Article 56(2) of that directive, to the place where the non-taxable person to whom the vehicle is hired is established, has his or her permanent address or usually resides.

56 Having regard to the foregoing, the answer to the question referred is that, on a proper construction of the first subparagraph of Article 56(2) of Directive 2006/112, the act of making a vehicle forming part of the assets of the business of a taxable person available to one of that taxable person's employees does not fall within the scope of that provision if that transaction does not constitute a supply of services for consideration within the meaning of Article 2(1)(c) of that directive. By contrast, the first subparagraph of Article 56(2) of Directive 2006/112 does apply to such a transaction if it involves a supply of services for consideration within the meaning of Article 2(1)(c) of that directive and if that employee has a permanent right to use that vehicle for private purposes and to exclude other persons from using it, in exchange for rent and for an agreed period of more than 30 days.

Costs

57 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:

On a proper construction of the first subparagraph of Article 56(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008, the act of making a vehicle forming part of the assets of the business of a taxable person available to one of that taxable person's employees does not fall within the scope of that provision if that transaction does not constitute a supply of services for consideration within the meaning of Article 2(1)(c) of that directive. By contrast, the first subparagraph of Article 56(2) of Directive 2006/112 does apply to such a transaction if it involves a supply of services for consideration within the meaning of Article 2(1)(c) of that directive and if that employee has a permanent right to use that vehicle for private purposes and to exclude other persons from using it, in exchange for rent and for an agreed period of more than 30 days.

[Signatures]

* Language of the case: German.