Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

22 September 2022 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 98 – Option for the Member States to apply a reduced rate of VAT to certain supplies of goods and services – Annex III, point 14 – Concept of the ‘use of sporting facilities’ – Fitness centres – Individual or group coaching)

In Case C?330/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank van eerste aanleg Oost-Vlaanderen Afdeling Gent (East Flanders Court of First Instance, Ghent Division, Belgium), made by decision of 20 May 2021, received at the Court on 27 May 2021, in the proceedings

The Escape Center BVBA

v

Belgische Staat,

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, M. Safjan and M. Gavalec (Rapporteur), Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– The Escape Center BVBA, by H. Vandebergh, advocaat,

– the Belgian Government, by P. Cottin and J.-C. Halleux, and by C. Pochet, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and A. Hanje, acting as Agents,

– the Finnish Government, by M. Pere, acting as Agent,

– the European Commission, by P. Carlin and W. Roels, 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 98(2), read in conjunction with point 14 of Annex III to 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 proceedings between The Escape Center BVBA, the operator of a fitness centre, and the Belgische Staat (Belgian State) concerning the application of the reduced rate of value added tax (VAT) to the activities of that company.

Legal context

European Union law

3 Under Article 96 of the VAT Directive, Member States are to apply a standard rate of VAT, which is to be fixed by each Member State and which is to be the same for the supply of goods and for the supply of services.

4 Article 97 of the VAT Directive provides that the standard rate may not be less than 15%.

5 Article 98(1) and (2) of that directive provides:

‘1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

…’

6 Annex III to the VAT Directive, which contains the list of supplies of goods and services to which the reduced rates of VAT referred to in Article 98 may be applied, includes, in point 14:

‘use of sporting facilities’.

Belgian law

7 Article 37(1) of the Law of 3 July 1969 introducing the Value Added Tax Code provides that the King is to fix the rates and specifies the classification of goods and services corresponding to those rates, taking into account the relevant legislation issued by the European Union.

8 Article 1 of Royal Decree No 20 of 20 July 1970, fixing the rates of value added tax and classifying goods and services according to those rates, provides that the standard rate of VAT applicable to the goods and services specified under that code is to be 21% and that, by way of derogation from that principle, the tax is to be levied at the reduced rate of 6% for goods and services listed in Table A of the annex to that royal decree. However, that article stipulates that that reduced rate is not to be applied where the services referred to in Table A are ancillary to a complex contract the main purpose of which is to provide other services.

9 Under Section XXVIII of Table A in the annex to that royal decree, the following is subject to the 6% rate: ‘Granting the right of admission to establishments for culture, sports or entertainment, as well as granting the right to make use thereof’.

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

10 The Escape Center, a company operating for profit and subject to VAT for the activity ‘fitness centres’, provides access to facilities where people can use equipment to improve their

fitness and develop their muscles. The fitness equipment is used either by individuals or by groups, with or without limited coaching. It also offers personal training and group classes.

11 In the course of its business, that company has always declared VAT at a rate of 21%. However, in the light of the national case-law on VAT, which was established in a case to which the company had not been a party, it considered that the reduced VAT rate of 6% applied to the whole of the company's activities instead of the standard VAT rate of 21%.

12 The Escape Center therefore sought reimbursement of the difference of 15% in VAT, amounting to EUR 48 622.64, for the period from 2015 to the first quarter of 2018. The tax authorities disagreed and sent a correction notice on 25 March 2019 which the company contested before the referring court, the rechtbank van eerste aanleg Oost-Vlaanderen Afdeling Gent (East Flanders Court of First Instance, Ghent Division, Belgium).

13 That court notes that the Belgian tax authorities do not follow a uniform practice as regards the VAT rate applied to the activity carried out by operators of fitness centres. Some inspectors consider that the standard rate of 21% should be applied to all those activities, whereas other inspectors accept that the reduced rate of 6% or a weighted VAT rate should be applied on the basis of a breakdown of the various activities subject to those two rates respectively.

14 Furthermore, according to the referring court, the Dutch tax authorities accept that services such as the provision of classes, instruction or coaching fall within the concept of 'providing the opportunity to practise sports', which is subject to a reduced rate of VAT. Similarly, that court states that it is inclined to rule, on reading the case-law established by the Court of Justice in the judgment of 10 November 2016, *Baštová* (C?432/15, EU:C:2016:855), that the use of sporting facilities falls within the reduced rate of VAT, even where the service is supplemented by individual or group coaching.

15 In those circumstances, since it took the view that resolution of the dispute before it depended on the interpretation of provisions of the VAT Directive, the rechtbank van eerste aanleg Oost-Vlaanderen Afdeling Gent (East Flanders Court of First Instance, Ghent Division) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 98(2) of [the VAT Directive], read in conjunction with point (14) of Annex III to that directive, be interpreted as meaning that the right to use sporting facilities is subject to the reduced rate of VAT only if no individual or group guidance is provided?'

Consideration of the question referred

16 By its question, the referring court asks, in essence, whether Article 98(2) of the VAT Directive, read in conjunction with point 14 of Annex III to that directive, must be interpreted as meaning that a supply of services consisting of permission to use sporting facilities in a fitness centre and the supply of individual or group coaching may be subject to a reduced rate of VAT.

17 Under Article 96 of the VAT Directive, each Member State is to apply the same standard rate of VAT in respect of the supply of goods and in respect of the supply of services.

18 As a derogation from that principle, Article 98(1) of that directive confers on Member States the option of applying one or two reduced rates of VAT. In accordance with the first subparagraph of Article 98(2) of that directive, the reduced rates of VAT can apply only to supplies of goods and services in the categories set out in Annex III to that directive.

19 Point 14 of Annex III to the VAT Directive authorises the Member States to apply a reduced rate of VAT to ‘the use of sporting facilities’.

20 The VAT Directive does not contain a definition of the concept of the ‘use of sporting facilities’ and Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1) does not provide a definition of that concept. Furthermore, neither the VAT Directive nor Implementing Regulation No 282/2011 contains any reference to the law of the Member States on that subject, with the result that that concept must be given an autonomous and uniform interpretation (see, to that effect, judgment of 29 October 2015, *Saudaçor*, C?174/14, EU:C:2015:733, paragraphs 53 et 54).

21 However, the Court has already interpreted the concept of the ‘use of sporting facilities’ in point 14 of Annex III to the VAT Directive as meaning that it must be understood as covering the right to use facilities for the practice of sport or physical education, and their use for those purposes (judgment of 10 November 2016, *Baštová*, C?432/15, EU:C:2016:855, paragraph 65).

22 Therefore, the supplies of services linked to the use of those facilities and necessary for the practice of sports and physical education may fall within the scope of point 14 of Annex III to that directive (see, to that effect, judgment of 10 November 2016, *Baštová*, C?432/15, EU:C:2016:855, paragraph 66).

23 As the Commission submits, that finding is consistent with the EU legislature’s choice to encourage the effective practice of sport and physical education rather than to focus on access to sports facilities. The purpose of Annex III is to make less onerous, and thus more accessible for the final consumer, who ultimately pays the VAT, certain supplies of services regarded as being particularly necessary (see, to that effect, judgment of 22 April 2021, *Dyrektor Izby Administracji Skarbowej w Katowicach*, C?703/19, EU:C:2021:314, paragraph 37 and the case-law cited) and, in that respect, point 14 of Annex III seeks to promote the practice of sports activities and to render them more accessible to individuals (see, to that effect, judgment of 10 November 2016, *Baštová*, C?432/15, EU:C:2016:855, paragraph 64).

24 While there is no doubt that access to a fitness centre with use of sports facilities and coaching of new customers in the responsible use of that fitness centre’s equipment falls within point 14 of Annex III to the VAT Directive, The Escape Center nevertheless offers, in addition to that access and use, personal coaching and group classes. Therefore, it must be ascertained whether all the services offered by that company are capable of falling within the scope of point 14 of Annex III to that directive, in that they form a single supply.

25 In that regard, there is a ‘single supply’ where, two or more components or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (judgments of 27 October 2005, *Levob Verzekeringen and OV Bank*, C?41/04, EU:C:2005:649, paragraph 22, and of 17 December 2020, *Franck*, C?801/19, EU:C:2020:1049, paragraph 25).

26 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 (judgments of 21 February 2008, *Part Service*, C?425/06, EU:C:2008:108, paragraph 52, and of 19 December 2018, *Mailat*, C?17/18, EU:C:2018:1038, paragraph 34).

27 In that regard, it is irrelevant that, in other circumstances, the components of such a

transaction may be supplied separately and are considered, under the second subparagraph of Article 1(2) of the VAT Directive, to be distinct and independent (see, to that effect, order of 19 January 2012, *Purple Parking and Airparks Services*, C?117/11, not published, EU:C:2012:29, paragraph 31).

28 In assessing whether the personal coaching and group classes to which access to the fitness centre also confers entitlement constitute ancillary services to that access or to the use of the sports facilities of such a centre, the referring court must ascertain the essential features of the transaction in question, and regard must be had to all the circumstances in which it takes place (order of 19 January 2012, *Purple Parking and Airparks Services*, C?117/11, not published, EU:C:2012:29, paragraph 30 and the case-law cited).

29 Although it is for the referring court to make that assessment, it is nevertheless for the Court of Justice to provide it with all the guidance as to the interpretation of EU law which may be of assistance to it (see, to that effect, judgments of 21 February 2013, *Žamberk*, C?18/12, EU:C:2013:95, paragraph 31 and the case-law cited, and of 8 December 2016, *Stock'94*, C?208/15, EU:C:2016:936, paragraph 30).

30 In the present case, it should be noted that the Court has already held that services linked to the practice of sport or physical education must, as far as possible, be considered as a whole (see, by analogy, judgment of 22 January 2015, *Régie communale autonome du stade Luc Varenne*, C?55/14, EU:C:2015:29, paragraph 25 and the case-law cited).

31 In that regard, it should be pointed out, as the Netherlands Government has done, that certain physical activities practised in fitness centres require instruction before they can be practised or can only be practised in a group class setting. Therefore, access to a fitness centre which offers the practice of such physical activities, individual instruction and the group classes to which such access confers entitlement, appear to be linked elements which form, in principle, a single supply. On the other hand, as the Finnish Government submits, that will not be the case where the personal coaching or group classes provided in a fitness centre are not aimed at the usual instruction or coaching of certain physical activities, but essentially at the teaching or training of a sports discipline.

32 Furthermore, in so far as the packages offered to customers give access both to the premises of the fitness centre in which sport and physical education may be carried out and to group classes, without any distinction as to the type of facilities actually used and the possible participation in group classes, that fact constitutes a strong indication that there is a single supply. In that context, taking account of the intention of each visitor as to the use of the facilities which are made available or participation in the group classes offered by the operator would be contrary to the objectives pursued by the VAT system of ensuring legal certainty and the correct and straightforward application of the reduced rate of VAT as regards the use of sporting facilities. In that regard, in order to facilitate the application of VAT, account must be taken, save in exceptional cases, of the objective nature of the transaction in question (see, to that effect, judgment of 21 February 2013, *Žamberk*, C?18/12, EU:C:2013:95, paragraphs 32 and 36 and the case-law cited).

33 Accordingly, subject to the assessment ultimately made by the referring court, it appears from the information available to the Court, as set out in the request for a preliminary ruling, that the personal coaching and group classes to which access to the fitness centre operated by The Escape Center confers entitlement are ancillary to the use of the facilities of that centre or to their actual use.

34 Furthermore, it must be added that, where a Member State decides to make use of the possibility given by Article 98(1) and (2) of the VAT Directive, to apply a reduced rate of VAT to a

category of supply set out in Annex III to that directive, it has, subject to the requirement to observe the principle of fiscal neutrality inherent in the common system of VAT, the possibility of limiting the application of that reduced rate of VAT to concrete and specific aspects of that category (see, to that effect, judgments of 6 May 2010, *Commission* v *France*, C?94/09, EU:C:2010:253, paragraph 28, and of 9 September 2021, *Phantasialand*, C?406/20, EU:C:2021:720, paragraph 25 and the case-law cited).

35 The Belgian Government states that, by Article 1 of Royal Decree No 20 of 20 July 1970 and Section XXVIII of Table A of the annex to that royal decree, the Belgian legislature introduced such a restriction in order to provide for the application of the reduced rate of VAT only for the granting of the right of access to sporting facilities and of the right to use them without any coaching, personal or otherwise, or any class instruction. Therefore, as stated in the particular administrative guidelines on fitness centres, adopted on 24 July 1984, in the event of the supply, by the operator of a fitness centre, of instruction to participants in the various activities, a standard rate of VAT is payable on its services.

36 According to that government, such a selective application of the reduced rate of VAT meets the twofold condition identified in the Court's case-law, referred to in paragraph 34 of the present judgment, that national legislation, first, must isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply in question and, secondly, must comply with the principle of fiscal neutrality (judgments of 6 May 2010, *Commission* v *France*, C?94/09, EU:C:2010:253, paragraph 30, and of 27 February 2014, *Pro Med Logistik and Pongratz*, C?454/12 and C?455/12, EU:C:2014:111, paragraph 45).

37 Although it is for the referring court to determine whether, in the present case, the reduced rate of VAT has been applied selectively, it is apparent from the documents submitted to the Court that that does not appear to be the case.

38 First, the provisions of the royal decree referred to by the Belgian Government do not seem to determine more precisely which, among the supplies of services included in point 14 of Annex III to the VAT Directive, are subject to the reduced rate of VAT. Since those provisions essentially reproduce the content of point 14 of Annex III, they do not appear to be capable of limiting the application of the reduced rate of VAT to concrete and specific aspects of the category of supply at issue.

39 Secondly, the particular administrative guidelines on fitness centres, adopted on 24 July 1984, appears to reflect only an administrative practice, since the Belgian Government has not argued that it has implemented a selective application of the reduced rate of VAT. Moreover, in its request for a preliminary ruling, the referring court does not mention those administrative guidelines and sets out a different administrative tax practice as regards the VAT rate applied to the activity carried out by operators of fitness centres.

40 It is ultimately for the referring court to ascertain the nature and scope of that royal decree and those guidelines in national law.

41 In the light of the foregoing, the answer to the question referred is that Article 98(2) of the VAT Directive, read in conjunction with point 14 of Annex III to that directive, must be interpreted as meaning that a supply of services consisting of permission to use sporting facilities in a fitness centre and the supply of individual or group coaching may be subject to a reduced rate of VAT where that coaching is linked to the use of those facilities and is necessary for the practice of sports and physical education or where that coaching is ancillary to the use of those facilities or to their actual use.

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 (Eighth Chamber) hereby rules:

Article 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with point 14 of Annex III thereto,

must be interpreted as meaning that a supply of services consisting of permission to use sporting facilities in a fitness centre and the supply of individual or group coaching may be subject to a reduced rate of value added tax where that coaching is linked to the use of those facilities and is necessary for the practice of sports and physical education or where that coaching is ancillary to the use of those facilities or to their actual use.

[Signatures]

* Language of the case: Dutch.