Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

4 May 2023 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 135(2), first subparagraph, point (c) – Exceptions to the exemption provided for in Article 135(1)(l) – Letting of permanently installed equipment and machinery in the context of the leasing of an agricultural building)

In Case C?516/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 26 May 2021, received at the Court on 20 August 2021, in the proceedings

Finanzamt X

v

Y,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, L.S. Rossi, J.?C. Bonichot, S. Rodin and O. Spineanu?Matei (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by J. Möller and A. Hoesch, acting as Agents,

– the European Commission, by R. Pethke and V. Uher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 135(2), first subparagraph, point (c) 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 proceedings between Finanzamt X (Tax Office X, Germany) (‘the tax authority’) and Y concerning the imposition of value added tax (VAT) on the provision of

equipment and machinery in the context of the leasing of an agricultural building.

Legal context

European Union law

The VAT Directive

3 Title IX of the VAT Directive includes Chapter 3, entitled ‘Exemptions for other activities’, which contains Article 135 of that directive, which is worded as follows:

‘1. Member States shall exempt the following transactions:

…

(l) the leasing or letting of immovable property.

2. The following shall be excluded from the exemption provided for in point (l) of paragraph 1:

…

(b) the letting of premises and sites for the parking of vehicles;

(c) the letting of permanently installed equipment and machinery;

…

Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1.’

Implementing Regulation (EU) No 282/2011

4 Under Article 13b(d) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1), as amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 (OJ 2013 L 284, p. 1) (‘Implementing Regulation No 282/2011’):

‘For the application of [the VAT Directive], the following shall be regarded as “immovable property”:

…

(d) any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction.’

5 Pursuant to the third paragraph of Article 3 of Regulation No 1042/2013, Article 13b of Implementing Regulation No 282/2011 became applicable on 1 January 2017.

German law

6 The first sentence of Paragraph 4(12) of the Umsatzsteuergesetz (Law on Turnover Tax) of 21 February 2005 (BGBl. 2005 I, p. 386), in the version applicable to the facts in the main proceedings, provides:

‘The following transactions covered by Article 1(1)(l) of this Law shall be exempt from tax:

…

(a) the leasing and letting of immovable property …’.

7 The second sentence of Paragraph 4(12) of the Law on Turnover Tax, in the version applicable to the facts in the main proceedings, states that ‘the leasing and letting of machinery and other equipment of any kind which are part of an operating plant (operating equipment) are not exempt, even if they are essential elements of an immovable property.’

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

8 From 2010 to 2014, Y let, in the context of a lease, a turkey-rearing shed with permanently installed equipment and machinery. According to the referring court, that equipment and machinery included, inter alia, an industrial spiral conveyor belt, which served to feed turkeys, and a heating, ventilation and lighting system maintaining a temperature and brightness appropriate to the stage of growth of the turkeys, guaranteeing the rearing conditions necessary for them to reach slaughter maturity within the specified time. That equipment and machinery were specially adapted for the use of the building as a building for the rearing of such poultry.

9 According to the provisions of the lease, Y received a single payment for the provision of the rearing shed and equipment and machinery. Y took the view that the whole of his leasing service was exempt from VAT.

10 In contrast, the tax authority took the view that the leasing of the equipment and machinery at issue was not exempt from VAT and that the agreed one-off remuneration, 20% of which corresponded to the leasing of machinery and equipment, had to be subject, to that extent, to VAT. Those authorities issued amended tax assessments for the years at issue.

11 The Finanzgericht (Finance Court, Germany), relying both on the case-law of the Court and on that of the Bundesfinanzhof (Federal Finance Court, Germany), upheld the action brought by Y against those notices, taking the view that the leasing service at issue should be fully exempt. According to that court, the provision of the equipment and machinery constituted a supply ancillary to the provision of the rearing shed and had to be exempt on the same basis as that supply.

12 The tax authority brought an appeal on a point of law (*Revision*) against that judgment before the Bundesfinanzhof (Federal Finance Court), the referring court.

13 That court is uncertain as to the interpretation of Article 135(2), first subparagraph, point (c), of the VAT Directive.

14 The referring court states, first, on the basis of the judgment of 19 December 2018, *Mailat* (C?17/18, EU:C:2018:1038), that the leasing of industrial spiral conveyor belts, heating, ventilation and lighting systems are exempt from VAT under Article 135(1)(l) of the VAT Directive. Such an interpretation is confirmed by Article 13b(d) of Implementing Regulation No 282/2011 and by German civil law, according to which items permanently fixed in a rearing shed are essential elements of the building of which they form part.

15 Secondly, the referring court takes the view that, notwithstanding the difference in drafting between Article 135(1)(l) and Article 135(2), first subparagraph, point (c), of the VAT Directive, and irrespective of the differences between the language versions of that directive, leasing and letting must, for the purposes of interpreting Article 135(2), first subparagraph, point (c) of the VAT Directive, be treated in the same way.

16 Thirdly, the referring court observes that it is apparent from the judgment of 4 March 2021, *Frenetikexito* (C?581/19, EU:C:2021:167), that, in the case of an economic transaction comprising a bundle of supplies, an overall assessment is necessary in order to determine whether one or more of those supplies can be separated from it, each of which must, as a general rule, be regarded as a distinct and independent supply for the purposes of the application of VAT, or whether they form an indivisible whole, which cannot be artificially split up.

17 The referring court states that the Finanzgericht (Finance Court) held, on the basis of those case-law principles, that, in the present case, the provision of equipment and machinery, which were specifically adapted and used only to operate the turkey-rearing shed under optimal conditions, constituted a service ancillary to the principal service of providing the building. According to the referring court, which cites the judgment of 19 December 2018, *Mailat* (C?17/18, EU:C:2018:1038), such an assessment, which leads to the conclusion that the supply provided is of a single nature, is consistent with the Court’s case-law.

18 According to the referring court, two interpretations of Article 135(2), first subparagraph, point (c) of the VAT Directive are possible in this context.

19 According to the first interpretation, the principles identified by the Court in order to determine the existence of a single economic supply would allow an exemption from VAT for a supply which should in principle be subject to VAT under Article 135(2), first subparagraph, point (c) of the VAT Directive where it constitutes a supply ancillary to an exempt supply. That interpretation is supported by the case-law of the Court, in particular the judgment of 13 July 1989, *Henriksen* (173/88, EU:C:1989:329, paragraphs 17 and 18), the judgment of 19 December 2018, *Mailat* (C?17/18, EU:C:2018:1038), concerning *inter alia* the transfer of stocks in the context of the letting of a restaurant, and the judgment of 18 January 2018, *Stadion Amsterdam* (C?463/16, EU:C:2018:22), according to which a single supply must be subject to the rate of VAT determined on the basis of the main supply.

20 It follows that the application of Article 135(2), first subparagraph, point (c) of the VAT Directive is limited to cases in which the provision of permanently installed equipment and machinery is independent of the provision of a building or land.

21 According to a second interpretation, Article 135(2), first subparagraph, point (c) of the VAT Directive would entail splitting single economic transactions, by distinguishing supplies exempt from VAT, under Article 135(1)(l) of that directive, from supplies subject to VAT under Article 135(2), first subparagraph, point (c) of that directive.

22 Such an interpretation is also supported by the case-law of the Court, in particular in the judgment of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation centre services)* (C?215/19, EU:C:2020:518, paragraph 43), according to which the exemption granted to the letting of immovable property, which is based on recognition of the passive nature of that letting, is no longer justified where that letting is accompanied by other commercial activities, such as supervision, management and constant maintenance carried out by the owner of the building, as well as the provision of other facilities, so that, in the absence of quite exceptional circumstances, the same letting can no longer constitute a predominant service. It might follow that the provision

of equipment and machinery referred to in point (c) of the first subparagraph of Article 135(2) of the VAT Directive does not take place passively, but is characterised essentially by the retention of that equipment and machinery in working order.

23 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and refer the following question to the Court of Justice:

‘Does the tax liability for the leasing of permanently installed equipment and machinery pursuant to Article 135(2), first subparagraph, point (c) of [the VAT Directive] cover

– only the isolated (independent) leasing of such equipment and machinery or also

– the leasing (letting) of such equipment and machinery which is exempt by virtue of (and as a supply ancillary to) a letting of a building, effected between the same parties, pursuant to Article 135(1)(l) of the VAT Directive?’

Consideration of the question referred

24 By its question, the referring court asks, in essence, whether Article 135(2), first subparagraph, point (c) of the VAT Directive must be interpreted as not applying to the letting of permanently installed equipment and machinery where that letting constitutes a supply ancillary to a principal supply of leasing of a building, carried out under a leasing agreement concluded between the same parties and exempt under Article 135(1)(l) of that directive, and those supplies form a single economic supply.

25 Article 135(2), first subparagraph, point (c) of the VAT Directive provides that lettings of permanently installed equipment and machinery are excluded from the exemption from VAT laid down for the leasing or letting of immovable property by Article 135(1)(l) of that directive.

26 In that regard, it is apparent from the order for reference that the referring court has no doubts as to the applicability of Article 135(2), first subparagraph, point (c) of the VAT Directive to a situation in which the letting of permanently installed equipment and machinery is independent of any leasing or letting of immovable property.

27 However, the referring court is of the view that, in the case in the main proceedings, the provision of such equipment and machinery is a supply ancillary to the principal supply consisting of the provision of the building and that it is inseparable from the latter, with the result that those supplies form a single supply for the application of VAT.

28 According to the case-law of the Court, where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether that transaction gives rise, for the purposes of VAT, to two or more distinct supplies or to one single supply (judgment of 25 March 2021, Q-GmbH (Special risk insurance), C?907/19, EU:C:2021:237, paragraph 19 and the case-law cited).

29 Although, for VAT purposes, every transaction must normally be regarded as distinct and independent, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. There is a single supply where several elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see, to that effect, judgment of 25 March 2021, *Q-GmbH (Special risk insurance)*, C?907/19, EU:C:2021:237, paragraph 20 and the case-law cited).

30 That is the case particularly where one or more elements are to be regarded as constituting

the principal service, while other elements are to be regarded, by contrast, as one or more ancillary services which share the tax treatment of the principal service. 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 25 March 2021, *Q-GmbH (Special risk insurance)*, C?907/19, EU:C:2021:237, paragraph 21 and the case-law cited).

31 In the context of such a single economic supply, the ancillary supply shares the tax treatment of the main supply for VAT purposes (see, to that effect, judgments of 25 February 1999, CPP, C?349/96, EU:C:1999:93, paragraph 32, and of 21 June 2007, Ludwig, C?453/05, EU:C:2007:369, paragraph 20).

32 In that regard, the Court has held that the leasing of immovable property falling within Article 135(1)(l) of the VAT Directive and the supplies of services linked to that leasing may constitute a single supply from the point of view of VAT (see, to that effect, judgment of 27 September 2012, Field Fisher Waterhouse, C?392/11, EU:C:2012:597, paragraph 28). In addition, in the judgment of 19 December 2018, *Mailat* (C?17/18, EU:C:2018:1038, paragraphs 39 to 41), the Court held that Article 135(1)(l) of the VAT Directive had to be interpreted as meaning that a rental contract for an immovable property which was used for the commercial operation of a restaurant and capital goods and inventory items necessary for that use constituted a single supply in which the letting of the immovable property was the principal supply.

33 Furthermore, in interpreting the provisions of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of added value: uniform base (OJ 1977 L 145, p. 1), worded in terms substantially identical to those of Article 135(1)(l), and paragraph 2, first subparagraph, of the VAT Directive, the Court considered that, given that the concept of the letting of immovable property necessarily included the letting of the property constituting the main object of that letting and that of all the property which is ancillary thereto, the letting of parking spaces was not excluded from the VAT exemption provided for the lettings of immovable property when it was closely linked to the letting of such property, so that the two lettings formed a single economic transaction (see, to that effect, judgment of 13 July 1989, *Henriksen*, 173/88, EU:C:1989:329, paragraphs 14 to 17).

34 Therefore, as the Advocate General observed, in essence, in point 39 of his Opinion, Article 135(2) of the VAT Directive is not a provision from which it follows, as the German Government claims, that a single economic transaction must be divided into separate supplies.

35 It is true that, according to settled case-law, the terms used to specify the exemptions envisaged by Article 135(1) of the VAT Directive are to be interpreted strictly, since those 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 19 December 2018, *Mailat*, C?17/18, EU:C:2018:1038, paragraph 37 and the case-law cited). Therefore, exceptions to such a provision which derogate from the application of VAT, the effect of which is that the transactions to which they relate are subject to taxation, which is the rule of principle underlying that directive, must be interpreted broadly (order of 1 December 2021, *Pils?tas zemes dienests*, C?598/20, not published, EU:C:2021:971, paragraph 29 and the case-law cited).

36 However, those principles do not preclude the application of the case-law according to which the various supplies constituting a single economic supply follow the same VAT scheme. The Court has ruled that allowing Member States to subject the various elements making up a single supply to different VAT rates would amount to allowing them to artificially split that supply and would risk distorting the functioning of the VAT system (see, to that effect, judgment of 18 January 2018, *Stadion Amsterdam*, C?463/16, EU:C:2018:22, paragraph 26 and the case-law

cited).

37 In the present case, the case in the main proceedings concerns the leasing of a rearing shed and permanently fixed equipment in that building and specifically adapted for that rearing, the rental contract being concluded between the same parties and giving rise to a single remuneration. It is for the referring court to ascertain whether, as it appears to suggest, those services constitute a single economic supply.

38 If that is the case, it then follows from the case-law cited in paragraphs 31 to 33 above that, where there is a single economic supply consisting of a principal supply which is exempt from VAT under Article 135(1)(1) of the VAT Directive, consisting of the leasing or letting of immovable property, and an ancillary supply, inseparable from the principal supply, which is in principle excluded from that exemption under Article 135(2), first subparagraph, point (c) of that directive, the ancillary service follows the tax treatment of the principal supply. It is also for the referring court to determine whether the supplies making up such a single economic supply are principal or ancillary.

39 In the light of all the foregoing considerations, the answer to the question referred is that Article 135(2), first subparagraph, point (c) of the VAT Directive must be interpreted as not applying to the letting of permanently installed equipment and machinery where that letting constitutes a supply ancillary to a principal supply of leasing a building, carried out under a leasing agreement concluded between the same parties and exempt under Article 135(1)(l) of that directive, and those supplies form a single economic supply.

Costs

40 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 (Fourth Chamber) hereby rules:

Article 135(2), first subparagraph, point (c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as not applying to the letting of permanently installed equipment and machinery where that letting constitutes a supply ancillary to a principal supply of leasing a building, carried out under a leasing agreement concluded between the same parties and exempt under Article 135(1)(l) of that directive, and those supplies form a single economic supply.

[Signatures]

* Language of the case: German.