Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

23 November 2023 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 53 – Services in respect of admissions to entertainment events – Place of supply of services – Streaming of interactive video sessions – Making available of a location and of the equipment necessary for the video capture of performances and for the implementation of accompaniment in order to provide quality performances)

In Case C?532/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania), made by decision of 3 June 2022, received at the Court on 9 August 2022, in the proceedings

Direc?ia General? Regional? a Finan?elor Publice Cluj-Napoca,

Administra?ia Jude?ean? a Finan?elor Publice Cluj

v

SC Westside Unicat SRL,

THE COURT (Tenth Chamber),

composed of E. Regan (Rapporteur), President of the Fifth Chamber, acting as President of the Chamber, I. Jarukaitis and D. Gratsias, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– SC Westside Unicat SRL, by L.M. Roman, avocat?,

– the Romanian Government, by E. Gane and O.?C. Ichim, acting as Agents,

– the European Commission, by A. Armenia and T. Isacu de Groot, 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 53 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, on the one hand, SC Westside Unicat SRL (‘Westside Unicat’) and, on the other hand, the Direc?ia General? Regional? a Finan?elor Publice Cluj-Napoca (Regional Directorate-General for Public Finances of Cluj-Napoca, Romania) and the Administra?ia Jude?ean? a Finan?elor Publice Cluj (Provincial Administration of Public Finances of Cluj, Romania) (together, ‘the tax authority’) concerning the decision of that authority to regard the services provided by that company as being subject to value added tax (VAT) in Romania.

Legal context

European Union law

Directive 2006/112

3 Directive 2006/112 includes, in its Title V, headed ‘Place of taxable transactions’, a Chapter 3, entitled ‘Place of supply of services’. That Chapter 3 contains a Section 2, entitled ‘General rules’, which includes Articles 44 and 45.

4 Article 44 of that directive provides:

‘The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such a place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.’

5 Under Article 45 of that directive:

‘The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.’

6 Chapter 3 of Title V of that directive also contains a Section 3, entitled ‘Particular provisions’, which includes Articles 46 to 59a of Directive 2006/112.

7 Article 53 of that directive is worded as follows:

‘The place of supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions, and of ancillary services related to the admission, supplied to a taxable person, shall be the place where those events actually take place.’

8 Article 54 of that directive provides:

‘1. The place of supply of services and ancillary services, relating to cultural, artistic, sporting,

scientific, educational, entertainment or similar activities, such as fairs and exhibitions, including the supply of services of the organisers of such activities, supplied to a non-taxable person shall be the place where those activities actually take place.

2. The place of supply of the following services to a non-taxable person shall be the place where the services are physically carried out:

(a) ancillary transport activities such as loading, unloading, handling and similar activities;

(b) valuations of and work on movable tangible property.'

Directive 2008/8

9 Recital 6 of Directive 2008/8 states:

'In certain circumstances, the general rules as regards the place of supply of services for both taxable and non-taxable persons are not applicable and specified exclusions should apply instead. These exclusions should be largely based on existing criteria and reflect the principle of taxation at the place of consumption, while not imposing disproportionate administrative burdens upon certain traders.'

10 Article 3 of that directive introduced, inter alia, from 1 January 2011, Articles 53 and 54 of Directive 2006/112 in the version referred to in paragraphs 7 and 8 above.

Implementing Regulation (EU) No 282/2011

11 Article 32(1) and (2) 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), provides:

'1. Services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events as referred to in Article 53 of Directive 2006/112/EC shall include the supply of services of which the essential characteristics are the granting of the right of admission to an event in exchange for a ticket or payment, including payment in the form of a subscription, a season ticket or a periodic fee.

2. Paragraph 1 shall apply in particular to:

(a) the right of admission to shows, theatrical performances, circus performances, fairs, amusement parks, concerts, exhibitions, and other similar cultural events;

…'

12 Under Article 33 of the implementing regulation:

'The ancillary services referred to in Article 53 of Directive 2006/112/EC shall include services which are directly related to admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events and which are supplied separately for a consideration to a person attending an event.

Such ancillary services shall include in particular the use of cloakrooms or sanitary facilities but shall not include mere intermediary services relating to the sale of tickets.'

13 Article 33a of that implementing regulation, which was added by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 (OJ 2013 L 284, p. 1), provides:

‘The supply of tickets granting access to a cultural, artistic, sporting, scientific, educational, entertainment or similar event by an intermediary acting in his own name but on behalf of the organiser or by a taxable person, other than the organiser, acting on his own behalf, shall be covered by Article 53 and Article 54(1) of Directive 2006/112/EC.’

Implementing Regulation No 1042/2013

14 Recital 15 of Implementing Regulation No 1042/2013 states:

‘In accordance with Directive 2006/112/EC, admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events must in all circumstances be taxed at the place where the event actually takes place. It should be made clear that this also applies where tickets to such events are not sold directly by the organiser, but are distributed through intermediaries.’

Directive (EU) 2022/542

15 Recital 18 of Council Directive (EU) 2022/542 of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax (OJ 2022 L 107, p. 1) is worded as follows:

‘In order to ensure taxation in the Member State of consumption, it is necessary for all services that can be supplied to a customer by electronic means to be taxable at the place where the customer is established, has his permanent address or usually resides. Therefore, it is necessary to modify the rules governing the place of supply of services relating to such activities.’

16 Article 1 of Directive 2022/542 amended Article 53 of Directive 2006/112 in order to add the following paragraph to it:

‘This Article shall not apply to admission to the events referred to in the first paragraph where the attendance is virtual.’

Romanian law

The Tax Code

17 Article 278 of Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code) of 8 September 2015 (*Monitorul Oficial al României*, Part I, no 688, of 10 September 2015) (‘the Tax Code’), entitled ‘Place of supply of services’, provides, inter alia:

‘(2) The place of supply of services rendered to a taxable person acting as such shall be the place where the customer has established his business. …

…

(6) By way of derogation from the provisions of paragraph 2, the place of supply of the following services shall be deemed to be:

…

(b) at the place where the events actually take place, for the supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events, such

as fairs and exhibitions, and for ancillary services related to the admission, supplied to a taxable person. …'

The methodological rules for the application of the Tax Code

18 Paragraphs 4, 5, 7 and 8 of point 22 of the Hot?rârea Guvernului nr. 1 din 6 ianuarie 2016 pentru aprobarea Normelor metodologice de aplicare a Legii nr. 227/2015 privind Codul fiscal (Government Decision No 1 of 6 January 2016 approving the methodological rules for the application of Law No 227/2015 establishing the Tax Code) (*Monitorul Oficial al României*, Part I, No 22 of 13 January 2016) provides:

'(4) Services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events as referred to in Article 278(6)(b) of the Tax Code, shall include the supply of services of which the essential characteristics are the granting of the right of admission to an event in exchange for a ticket or payment, including payment in the form of a subscription, a season ticket or a periodic fee.

(5) Paragraph 4 includes in particular the grant of:

(a) the right of admission to shows, theatrical performances, circus performances, fairs, amusement parks, concerts, exhibitions, and other similar cultural events; …

…

(7) The ancillary services referred to in Article 278(6)(b) of the Tax Code shall include services which are directly related to admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events and which are supplied separately for a separate consideration to a person attending an event. Such ancillary services shall include in particular the use of cloakrooms or sanitary facilities but shall not include mere intermediary services relating to the sale of tickets.

(8) The supply of tickets granting access to a cultural, artistic, sporting, scientific, educational, entertainment or similar event by an intermediary acting in his, her or its own name but on behalf of the organiser or by a taxable person, other than the organiser, acting on his, her or its own behalf, shall be covered by Article 278(5)(f) and (6)(b) of the Tax Code.'

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

19 Westside Unicat is a company established in Romania which operates a video recording studio. Its main economic activity is marketing digital erotica to StreamRay USA Inc. ('StreamRay') which took the form, inter alia, of online, face-to-face visual communication sessions ('the video chats') with performers.

20 StreamRay is a legal person registered in the United States which live streams the videos of those sessions on its website and provides its customers, natural persons, with the interface necessary for interacting with the performers.

21 Performers who use the services of Westside Unicat conclude a contract with that company, named 'Association Contract' in the order for reference. They also sign a declaration to confirm to StreamRay that they designate the studio, namely Westside Unicat, to 'collect and receive all sums' due to them in respect of the performances given in the video chats and expressly agree that those sums are to be paid to them by the studio.

22 StreamRay, which supplies services in its own name, sets out the relevant terms of

business which allow its customers to see the performances at issue and interact with the performers. That company sets and collects, in particular, the fees paid by its customers for that purpose. A percentage of the fee collected in this way is paid to Westside Unicat, which, in turn, pays part of it to the performers.

23 Following a tax audit concerning the determination of the VAT to be paid for the period from 1 September 2019 to 30 June 2020, the tax authority issued a tax assessment on 13 November 2020 under which Westside Unicat was regarded as owing an additional 640 433 Romanian lei in VAT.

24 That decision was based on that fact that, contrary to what Westside Unicat had believed when issuing invoices to StreamRay, Romania had to be regarded as the place of supply of the services that it had provided to StreamRay in accordance with Article 278(6)(b) of the Tax Code. According to the tax authority, Westside Unicat was the organiser of the interactive performances at issue, as was apparent from the contracts signed with StreamRay, and those performances were entertainment events, within the meaning of Article 53 of Directive 2006/112, with the result that the solution adopted in the judgment of 8 May 2019, *Geelen* (C?568/17, EU:C:2019:388), should be applied, according to which the place of supply of services consisting in the offer of live streamed interactive erotic video sessions must be considered to be the place where the supplier has established his or her business.

25 Following an unsuccessful administrative appeal against that tax assessment, Westside Unicat brought an action before the Tribunalul Maramure? (Regional Court, Maramure?, Romania) which upheld that action in part by judgment of 19 October 2021. That court held that StreamRay was the organiser of the entertainment events at issue since it allowed its customers to access the interactive erotic video sessions.

26 The tax authority brought an appeal against that judgment before the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) which is the referring court. In support of that appeal, it claimed, in essence, that both the organiser of the entertainment event and all of the traders, acting in their own name, that facilitate the public's access to that event must be regarded as granting such access. According to the tax authority, in the case before that court, like the applicant in the main proceedings in the case which gave rise to the judgment of 8 May 2019, *Geelen* (C?568/17, EU:C:2019:388), Westside Unicat, as organiser of the interactive erotic video sessions at issue, had to be regarded as granting access to those sessions.

27 In that context, the referring court harbours doubts as to whether the services provided by Westside Unicat are covered by the concept of supply of services in respect of admission to entertainment events, as provided for in Article 53 of Directive 2006/112, and, as the case may be, as to how that provision is to be applied.

28 In those circumstances, the Curtea de Apel Cluj (Court of Appeal, Cluj) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 53 of [Directive 2006/112] to be interpreted as applying to services of the type at issue in this dispute, which is to say services provided by a video chat studio to a website operator, consisting in interactive sessions of an erotic nature filmed and transmitted in real [time] via the internet (live streaming of digital content)?

(2) In the event that the first question is answered in the affirmative, then, for the purposes of interpreting the phrase "the place where those events actually take place", appearing in Article 53 of [Directive 2006/112], is the place where the performers appear in front of the webcam relevant, or the place where the organiser of the sessions is established, or the place where customers see

the images, or should some other place be taken into account?’

Consideration of the questions referred

The first question

29 As is clear from the request for a preliminary ruling, the supplied services at issue in the case in the main proceedings consist of creating digital content which takes the form of interactive erotic video sessions filmed by a recording studio in order to make them available to the operator of an internet streaming platform for the purpose of that operator streaming them on that platform.

30 Consequently, in order to provide the referring court with a useful answer, the first question referred must be understood as asking whether Article 53 of Directive 2006/112 must be interpreted as meaning that it applies to services provided by a video chat recording studio to the operator of an internet streaming platform and consisting of creating digital content which takes the form of interactive erotic video sessions filmed by such a studio in order to make them available to that operator for the purpose of the latter streaming them on that platform.

31 In that regard, it must be noted, first, that Articles 44 and 45 of Directive 2006/112 contain a general rule for determining the place where services are deemed to be supplied for tax purposes, while Articles 46 to 59a of that directive provide a number of specific instances of such places (judgment of 13 March 2019, *Srf konsulterna*, C?647/17, EU:C:2019:195, paragraph 20).

32 As follows from the Court’s settled case-law, Articles 44 and 45 of Directive 2006/112 do not take precedence over Articles 46 to 59a thereof. In every situation, the question which arises is whether that situation is covered by one of the cases mentioned in Articles 46 to 59a. If not, it falls within the scope of Articles 44 and 45 of that directive (judgment of 13 March 2019, *Srf konsulterna* , C?647/17, EU:C:2019:195, paragraph 21).

33 It follows that Article 53 of Directive 2006/112 must not be regarded as an exception to a general rule which must be narrowly construed (judgment of 13 March 2019, *Srf konsulterna*, C?647/17, EU:C:2019:195, paragraph 22).

34 Secondly, as regards the live streamed interactive erotic video sessions, the Court has indeed held, in the judgment of 8 May 2019, *Geelen*, (C?568/17, EU:C:2019:388, paragraphs 36 to 42), that such sessions are entertainment activities, since their objective is to provide recipients with a source of entertainment and since the concept of entertainment activities is not limited to the supply of services in the physical presence of the recipients of that activity.

35 However, although, in that judgment, the Court subsequently concluded from those findings that the supply of such services came within the scope of the specific attachment rule then provided for in the first indent of Article 9(2)(c) 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 145, p. 1), as amended by Council Directive 2002/38/EC of 7 May 2002 (OJ 2002 L 128, p. 41) and in Article 52(a) of Directive 2006/112, in the version in force at the time of the facts of the case which gave rise to that judgment, the question raised in the present case concerns the interpretation not of that specific attachment rule, but of another specific attachment rule which, having been introduced by Directive 2008/8, was not yet in force and had not been transposed into the law of the Member States at the time of the facts of the case giving rise to that judgment.

36 While the specific attachment rule set out in the first indent of Article 9(2)(c) of Sixth Directive 77/388 and in Article 52(a) of Directive 2006/112, in the versions in force at the time of

the facts of the case that gave rise to the judgment of 8 May 2019, *Geelen*, (C?568/17, EU:C:2019:388), referred, generally, to cultural, artistic, sporting, scientific, educational, entertainment or similar activities and, where appropriate, the supply of ancillary services, the specific attachment rule in Article 53 of Directive 2006/112 concerns, in particular, the supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions, and of ancillary services related to the admission, supplied to a taxable person.

37 Consequently, the conclusion at which the Court arrived in the judgment of 8 May 2019, *Geelen*, (C?568/17, EU:C:2019:388), regarding the scope of the specific attachment rule at that time set out in the first indent of Article 9(2)(c) of Sixth Directive 77/388 and in Article 52(a) of Directive 2006/112 cannot be transposed to the specific attachment rule set out in Article 53 of Directive 2006/112, which was applicable at the time of the facts at issue in the case in the main proceedings.

38 As regards, on the other hand, the scope of that second rule, it should be observed that, according to its usual meaning, the term ‘event’ designates a presentation to the public. Consequently, it can be concluded, in the absence of a specific definition contained in Directive 2006/112, that the concept of ‘service in respect of admission to an event’, as used in Article 53 of that directive, must be understood as designating the supply of services downstream of organising the subject matter of that presentation and concerned with granting the public admission to the latter.

39 That conclusion is supported, first of all, by Article 33 of Implementing Regulation No 282/2011, which states that services ancillary to those referred to in Article 53 of Directive 2006/112 are to include services which are directly related to admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events and which are supplied separately for a separate consideration to a person attending an event. Since the ancillary services are those that are separately supplied to the person who attends an event, the main service must be regarded as the service provided to that same person for the purpose of granting him or her the right of admission to that event.

40 Next, Article 32 of that implementing regulation states that services in respect of admission to entertainment events as referred to in Article 53 of Directive 2006/112 are to include the supply of services of which the essential characteristics are the granting of the right of admission to an event in exchange for a ticket or payment, which means that those services relate solely to marketing the right of admission to the event in question to customers.

41 Lastly, it is apparent from Article 33a of Implementing Regulation No 282/2011, read in the light of recital 15 of Implementing Regulation No 1042/2013, that Article 53 of Directive 2006/112 applies when tickets to events are not sold directly by the organiser, but are distributed through intermediaries acting in their own name, which also implies that the services referred to in Article 53 of Directive 2006/112 are linked to marketing the right of admission to the event in question to customers.

42 It follows that the specific attachment rule, provided for in Article 53 of Directive 2006/112, must be understood as applying, not to services supplied for the purpose of carrying out an activity giving rise to an event, but only to services consisting of marketing the right of admission to such an event to customers.

43 Therefore, services provided by a video chat recording studio to the operator of an internet streaming platform and consisting of creating digital content which takes the form of interactive erotic video sessions filmed by such a studio in order to make them available to that operator for

the purpose of streaming them on that platform are not covered by Article 53 of Directive 2006/112. Such services are neither services concerned with granting customers the right to access that content nor services ancillary to the latter, but services necessary for that operator to stream that content to its own customers.

44 While it is the case that the video chat recording studio possesses the equipment used to capture and record the erotic performance that will then be streamed in this way, such a fact is insufficient to support the view that that studio grants access to the interactive video sessions which follow since neither the possession of that equipment nor even its operation implies, on its own, that those sessions are to be presented to the public.

45 Such a consideration is, moreover, consistent with the approach adopted by the VAT Committee, which is an advisory committee set up in Article 398 of Directive 2006/112. It is apparent from that committee's guidelines resulting from its meeting of 19 April 2021 (Document B – taxud.c.1(2021)6378389 – 1016) that that committee almost unanimously agreed that, where services consisting of interactive sessions filmed and broadcast in real time via the internet (e.g. video-chat) are supplied by a taxable person who owns the digital content to a final customer, namely a spectator, while that content is provided to that taxable person by another taxable person, the supply of the digital content by the latter does not represent an admission to an entertainment event within the meaning of Article 53 of Directive 2006/112.

46 In light of the foregoing considerations, the answer to the first question is that Article 53 of Directive 2006/112 must be interpreted as meaning that it does not apply to services provided by a video chat recording studio to the operator of an internet streaming platform and consisting of creating digital content which takes the form of interactive erotic video sessions filmed by such a studio in order to make them available to that operator for the purpose of the latter streaming them on that platform.

The second question

47 From the outset, it should be observed that the second question was raised only if it were apparent from the answer to the first question that Article 53 of Directive 2006/112 is applicable to services such as those at issue in the main proceedings.

48 In the light of the answer to the first question, there is no need to reply to the second question.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

Article 53 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,

must be interpreted as meaning that it does not apply to services provided by a video chat recording studio to the operator of an internet streaming platform and consisting of creating digital content which takes the form of interactive erotic video sessions filmed by such a studio in order to make them available to that operator for the purpose of the latter streaming them on that platform.

[Signatures]

* Language of the case: Romanian.