JUDGMENT OF THE COURT (Third Chamber)

10 March 2011 *

In Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09,

REFERENCES for preliminary rulings under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decisions of 15 and 27 October 2009, received at the Court on 3 December 2009, in the proceedings

Finanzamt Burgdorf (C-497/09)

v

Manfred Bog,

CinemaxX Entertainment GmbH & Co. KG, formerly Hans-Joachim Flebbe Filmtheater GmbH & Co. KG, (C-499/09)

v

Finanzamt Hamburg-Barmbek-Uhlenhorst,

* Language of the case: German.

Lothar Lohmeyer (C-501/09)

v

Finanzamt Minden,

and

Fleischerei Nier GmbH & Co. KG (C-502/09)

v

Finanzamt Detmold,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: E. Sharpston,
Registrar: K. Malaček, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2010,

after considering the observations submitted on behalf of:

— Mr Bog, by H. Apking and T. Mittrach, Rechtsanwälte,

— CinemaxX Entertainment GmbH & Co. KG, formerly Hans-Joachim Flebbe Filmtheater GmbH & Co. KG, by G. Dzieyk and A. Müller, Rechtsanwälte, and A. Lukat, Steuerberater,

— Mr Lohmeyer, by K. Meger, Steuerberater,

— Fleischerei Nier GmbH & Co. KG, by M. Becker, Rechtsanwalt,

— the German Government, by J. Möller and C. Blaschke, acting as Agents,

— the European Commission, by D. Triantafyllou, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for preliminary rulings concern the interpretation of Articles 2, 5(1) and 6(1) 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 92/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47) ('the Sixth Directive'), and the term 'foodstuffs' in category 1 of Annex H to that directive.

2 The references have been made in four sets of proceedings between the Finanzamt Burgdorf (Tax Office, Burgdorf) and Mr Bog (Case C-497/09), CinemaxX Entertainment GmbH & Co. KG, formerly Hans-Joachim Flebbe Filmtheater GmbH & Co. KG, ('CinemaxX') and the Finanzamt Hamburg-Barmbek-Uhlenhorst (Tax Office, Hamburg-Barmbek-Uhlenhorst) (Case C-499/09), Mr Lohmeyer and the Finanzamt Minden (Tax Office, Minden) (Case C-501/09), and Fleischerei Nier GmbH & Co. KG ('Fleischerei Nier') and the Finanzamt Detmold (Tax Office, Detmold) (Case C-502/09) concerning the question whether certain supplies of food or meals prepared for immediate consumption constitute supplies of goods within the meaning of Article 5 of the Sixth Directive or supplies of services within the meaning of Article 6 of the directive, and, if they are supplies of goods, whether they are subject to the reduced rate of value added tax (VAT) provided for by German law as 'foodstuffs' within the meaning of category 1 of Annex H to the directive.

Legal context

European Union law

3 In accordance with Article 2(1) of the Sixth Directive:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.'

4 Article 5(1) of the Sixth Directive states:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

5 Article 6(1) of the Sixth Directive provides:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

...'

6 Article 12(3)(a) of the Sixth Directive provides:

'The standard rate of [VAT] shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. …

…

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount which may not be less than 5 % and shall apply only to supplies of the categories of goods and services specified in Annex H.'

7 Annex H to the Sixth Directive, entitled 'List of supplies of goods and services which may be subject to reduced rates of VAT', mentions in category 1 '[F]oodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; … ingredients normally intended for use in preparation of foodstuffs; products normally intended to be used to supplement or substitute foodstuffs'.

8 Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax (OJ 2009 L 116, p. 18) authorises Member States to introduce a reduced rate for 'restaurant and catering services'. That directive was not yet in force, however, at the material time in the various main proceedings.

National law

9 Paragraph 1(1)(1) of the Law on turnover tax (Umsatzsteuergesetz, 'the UStG') provides:

'The following transactions shall be subject to turnover tax:

1. supplies of goods and services effected for consideration within the country by a trader in the course of his business.'

10 Under Paragraph 3(1) of the UStG, a trader's supplies of goods are 'supplies by which he or a third party authorised by him entitles the recipient or a third party authorised by him to dispose of goods in his own name (transfer of the power of disposal).'

11 Paragraph 3(9) of the UStG provides:

'Supplies of services are supplies which are not supplies of goods. … The supply of food and beverages for consumption on the spot is a supply of services. Food and beverages are supplied for consumption on the spot if, in accordance with the circumstances of the supply, they are intended to be consumed in a place which is spatially connected with the place of supply and special facilities are made available for consumption on the spot.'

12 In accordance with Paragraph 12(2)(1) of the UStG, a reduced rate of VAT applies inter alia to supplies of 'preparations of meat, fish [etc.]', 'preparations made from cereal, meal, starch or milk, and bakery products', 'preparations of vegetables, fruit [etc.]', and 'miscellaneous preparations of foodstuffs' (those items appear in points 28 and 31 to 33 of the annex to which that provision refers).

The disputes in the main proceedings and the questions referred for preliminary rulings

Case C-497/09

13 Mr Bog sold drinks and food prepared for consumption (in particular, sausages and chips) from three identical mobile snack bars at weekly markets. The mobile snack bars were equipped with a sales counter with a glass splashguard, below and around which ran a 'board' made from a material sold under the name 'resopal' which could be used for the consumption of food on the spot. To the sides of the vehicle, above the drawbar, there was a folding 'tongue', which was in the form of a table at the same height and from the same material as the 'board' running round the vehicle. The area where customers could consume the food was protected from the rain by a folding roof.

14 In his turnover tax declaration for 1994 Mr Bog declared the turnover from the sale of drinks as subject to the standard rate of VAT, while the turnover from the sale of food was declared as subject to the reduced rate. In a special turnover tax check, the inspector found that Mr Bog's customers generally consumed the goods on the spot. Since Mr Bog did not provide any information on the extent of the consumption

taking place at the mobile snack bars, the sales of food subject to the standard rate of tax were estimated to be 70 % of the total sales.

15 On 27 December 2006 the tax authorities therefore issued an amended turnover tax assessment for 2004. Mr Bog lodged an objection to that decision.

16 The competent Finanzgericht (Finance Court) upheld Mr Bog's action against the dismissal of his objection, essentially taking the view that, in order to distinguish between supplies of food subject to the standard rate of VAT and those subject to the reduced rate, the decisive factor was whether the elements of supply of services qualitatively predominated. In this case the supplies were supplies of goods, because, apart from the preparation of the food, the applicant had only provided covered areas at his mobile snack bars where food could be served and bins were placed. Other elements of supply of services which characterised the overall impression on visiting a restaurant of the services offered by the operator (such as service, seating, enclosed rooms at an appropriate temperature and appropriate open-air facilities for consumption, the presence of cloakrooms and lavatories), by contrast, were absent.

17 The tax authorities appealed on a point of law to the Bundesfinanzhof (Federal Finance Court) against the decision of the Finanzgericht, arguing that the supplies of food had been combined with services (preparation of the foodstuffs to make the food and provision of covered facilities for consumption) which went beyond mere selling.

18 The Bundesfinanzhof noted that, with reference to the distinction between the supply of goods and the supply of services in the context of the supply of prepared food and beverages, the Court of Justice had distinguished in Case C-231/94 *Faaborg-Gelting*

Linien [1996] ECR I-2395 between restaurant transactions and transactions relating to takeaway food. Thus restaurant transactions (supplies of services) were characterised by 'a series of services ranging from the cooking of the food to its physical service' of which the provision of food was only one component and in which services largely predominated, while a transaction related to takeaway food (supply of goods) if, in addition to the supply of food, it was 'not coupled with services designed to enhance consumption on the spot in an appropriate setting'.

19 The Bundesfinanzhof had, moreover, consistently taken the view that the decisive criterion was not the quantitative predominance in a catering context of the elements of supply of services over the elements comprising the preparation and supply of food, but rather that the supply of services characteristic of catering was qualitatively predominant on an overall assessment. Furthermore, a quantitative assessment would lead to insoluble problems of differentiation because of the multiplicity of factual situations, in view of the diversity and complexity of food and the ways of serving it.

20 The process of preparing food or meals at a time specified by the customer had been taken into account by the Bundesfinanzhof as an essential element of supply of services which, in conjunction with an additional service element such as, in the present case, the provision of tables to stand at or other facilities for immediate consumption, allowed the conclusion that services were qualitatively predominant.

21 In the light of recent developments in European Union law on VAT, however, the Bundesfinanzhof was uncertain whether the preparation of food or meals intended for immediate consumption did not itself characterise the transaction, so that it was immaterial whether other services were added.

22 If, on the other hand, the supply of food or meals were to be regarded as a supply of services only where other services were added, the court pointed out that the defendant in the main proceedings had provided additional facilities enabling consumption on the spot. It noted, however, that in the present case some of the customers purchased the prepared food or meals only to take away, and thus did not use the facilities provided for consumption on the spot.

23 The court observed, finally, that if food or meals prepared for immediate consumption were not 'foodstuffs' within the meaning of category 1 of Annex H to the Sixth Directive, the Member States would not be entitled to subject them to a reduced rate of VAT, even if their supply was a supply of goods.

24 In those circumstances the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the sale of food or meals prepared for immediate consumption a supply of goods within the meaning of Article 5 of [the Sixth Directive]?

2. Does the answer to Question 1 depend on whether additional service elements are supplied (provision of facilities for consumption)?

3. If Question 1 is answered in the affirmative: is the term "foodstuffs" in category 1 of Annex H to [the Sixth Directive] to be interpreted as covering only foodstuffs to "take away" as typically sold in grocers' shops, or does it also cover food or

meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means?'

Case C-499/09

25 CinemaxX operates cinemas in various locations in Germany.

26 In the foyers of those cinemas, cinema-goers can buy, besides sweets and drinks, portions of popcorn and tortilla chips (nachos) in various sizes. There are no counters for consumption at the sales stands themselves, but in some cinema foyers there are varying numbers of tables to stand at, bar stools, and sometimes benches, chairs, tables, and counters along the walls. Not all of the above-mentioned furnishings are, however, present in all the cinemas. In some auditoria there are drink-holders attached to the seats.

27 Popcorn is produced by filling certain proportions of sugar, maize, popcorn salt and fat into a popcorn machine in which the ingredients are heated. Part of the product is then immediately put in heated containers at the sales counters. When an order is placed, the popcorn is taken out of the heated container using a scoop and served in paper bags of different sizes. The remaining product is stored in large bags or tubs and then put into the heated containers when required. The tortilla chips are generally ordered from suppliers in 500g packages. They are also put in a heated container,

in which they are kept lukewarm. Various sauces (dips) are offered with them. These are delivered ready to serve in large containers. They are warmed and divided into portions.

28 In its turnover tax declaration for June 2005, CinemaxX declared the turnover from the sale of popcorn and tortilla chips as turnover subject to the reduced rate of VAT. The tax authorities contested the tax declaration and issued an assessment in which that turnover was subject to the standard rate.

29 The complaint made to the tax authorities against that assessment by CinemaxX was unsuccessful, as was its action before the competent Finanzgericht. That court considered that the transactions in question were not supplies of goods but supplies of services within the meaning of Paragraph 3(9) of the UStG, because CinemaxX did not sell foodstuffs to be taken away but food to be consumed on the spot.

30 CinemaxX appealed on a point of law to the Bundesfinanzhof, submitting that, where food or meals are supplied, there was a restaurant transaction subject to the standard rate of VAT only where the element of supply of services was predominant. Keeping the popcorn and tortilla chips warm was not material because this involved merely the appropriate storage of foodstuffs and/or the maintenance of an optimum temperature for sale. The lack of takeaway packaging was not prejudicial to CinemaxX's case because the mere lack of certain packaging could not replace either an element of supply of services or a suitable setting for consumption. The cleaning of the cinema auditorium could also not to be taken into account against CinemaxX. The tables for standing at, bar stools and other furnishings were not intended for the consumption of the popcorn and tortilla chips, because the cinema-goers overwhelmingly

consumed those foodstuffs in the auditorium, not in the foyer. Moreover, CinemaxX's supplies did not differ from those made by supermarkets or kiosks in connection with the sale of food. In the view of the average cinema-goer, the sale was merely supplementary to the visit to the cinema. CinemaxX did not provide any dispensing services such as service at one's seat.

31 On the same grounds as those set out in paragraphs 18 to 23 above in connection with Case C-497/09, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the sale of food or meals prepared for immediate consumption a supply of goods within the meaning of Article 5 of [the Sixth Directive]?

2. Does the answer to Question 1 depend on whether additional service elements are supplied (provision of tables, chairs and other facilities for consumption, presentation of a cinema experience)?

3. If Question 1 is answered in the affirmative: is the term "foodstuffs" in category 1 of Annex H to [the Sixth Directive] to be interpreted as covering only foodstuffs to "take away" as typically sold in grocers' shops, or does it also cover food or meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means?'

Case C-501/09

32 Mr Lohmeyer operated several snack stalls and a swinging grill from 1996 to 1999. There he sold food ready for consumption (fried sausages, sausages in curry sauce, hot dogs, chips, steaks, pork belly, skewered meat, spare ribs). He declared his entire turnover from the sale of food as turnover subject to the reduced rate of VAT.

33 The tax authorities established, however, that the stalls had counters, and considered that these were special facilities made available for the consumption of food on the spot, with the result that the transactions in question were in principle subject to the standard rate of VAT. Since they did not rule out that some of the customers did not use the available counters to consume the food but instead purchased the food to take away, the authorities estimated the proportion of the transactions subject to the standard rate of VAT at 80 % of the total transactions.

34 On 28 May 2002 they accordingly issued amended tax assessments for 1996 to 1999. Mr Lohmeyer's complaints and action contesting those assessments were unsuccessful.

35 He appealed on a point of law to the Bundesfinanzhof, submitting essentially that a counter at a snack stall did not constitute infrastructure for the purposes of the Court's case-law.

36 The Bundesfinanzhof had held in a judgment of 18 December 2008, citing *Faaborg-Gelting Linien*, that the process of preparing food or meals at a time determined by each customer constituted an essential service element. However, in the light of the criticism of that case-law, the Bundesfinanzhof considered that it was not sufficiently

certain that the preparation of food at a specified time was to be regarded as an essential element which, either by itself or together with a not insubstantial additional service at the time of the supply to the customer, led to the conclusion that overall there was a supply of services.

37 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the term "foodstuffs" in category 1 of Annex H to [the Sixth Directive] to be interpreted as covering only foodstuffs to "take away" as typically sold in grocers' shops, or does it also cover food or meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means?

2. If "foodstuffs" within the meaning of category 1 of Annex H to [the Sixth Directive] also covers food or meals for immediate consumption: is the first sentence of Article 6(1) of [the Sixth Directive] to be interpreted as covering the supply of freshly prepared food or meals which the customer consumes on the spot, making use of facilities for consumption such as counters, tables for standing at or the like, and does not take away?'

Case C-502/09

38 Fleischerei Nier is a limited partnership which operated a butcher's shop and a party catering service. The food which was ordered from the catering service was supplied hot in closed containers, while crockery, cutlery, tables for standing at and staff were also made available, according to the customers' wishes.

39 In its invoices Fleischerei Nier applied the standard rate of VAT to the charges for the provision of cutlery, crockery, tables for standing at and staff and the reduced rate of VAT to the charges for the food.

40 The tax authorities, however, considered that the supplies of food should also be subjected to the standard rate of VAT to the extent that they were combined with the provision of crockery, cutlery, tables or staff, and accordingly issued an amended tax assessment.

41 In the complaint procedure, the parties reached agreement that the charges for the supply of food were to be subject to the standard rate of VAT in cases where Fleischerei Nier also provided serving staff. The complaint and the action against the amended assessment were unsuccessful.

42 In its appeal on a point of law, Fleischerei Nier argued essentially that the provision of cutlery and crockery was a supply ancillary to the supply of food which did not justify the entire transaction being classified as a supply of services. It was typical of a party

catering service that the customer wanted to entertain his guests in his own home, so that transactions of this kind were not comparable to restaurant transactions.

43 The Bundesfinanzhof had held, citing *Faaborg-Gelting Linien*, that the services of a party catering business were to be treated as a single supply where, in addition to the supply of prepared food, cutlery and crockery were provided and subsequently washed, and that the process of preparing food or meals at a time determined by the particular customer was an essential element of supply of services. However, taking into account the arguments of Fleischerei Nier and the criticisms expressed by legal writers, the Bundesfinanzhof considered that it could no longer be said with a sufficient degree of certainty that that case-law was consistent with the principles of European Union law.

44 The Bundesfinanzhof considered that a party catering business performed for its customers a single supply, not several independent principal supplies, irrespective of whether the customer, in addition to the food, made use of one or more of the optional ancillary services offered, such as cutlery, crockery, tables for standing at or staff.

45 According to that court, it was necessary to clarify whether it was consistent with European Union law, when classifying the single supply of a party catering business, to regard the process of preparation of the food from various foodstuffs as an element of supply of services.

46 The court considered that criteria that worked in practice ought to be developed in order to achieve predictable results in the classification of those supplies and to ensure legal certainty for the operators concerned. There was no doubt that the single supply should always be classified as a supply of services where serving staff were provided, while the other services in consideration should not be regarded as characteristic or

dominant where their actual total cost was well below the actual cost of the food prepared ready for consumption.

47 The Bundesfinanzhof was uncertain, however, whether that approach was compatible with the case-law of the Court, and observed that, according to Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraph 28, when determining the predominant elements of a complex supply, their costs may, inter alia, be relevant, but, according to Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 37, for the purposes of classifying a complex transaction, the costs must not, of themselves, be a decisive factor.

48 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the term "foodstuffs" in category 1 of Annex H to [the Sixth Directive] to be interpreted as covering only foodstuffs to "take away" as typically sold in grocers' shops, or does it also cover dishes and meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means?

2. If "foodstuffs" within the meaning of category 1 of Annex H to [the Sixth Directive] also covers food or meals for immediate consumption: is the process of the preparation of the dishes or meals to be taken into account as an element of supply of services where it has to be decided whether the single supply of a party catering business (provision of food or meals ready for consumption together with their transport and possibly the provision of cutlery and crockery and/or tables for standing at as well as the collection of the objects provided for use) is to be classified as a supply of foodstuffs that is subject to a reduced rate of taxation

(category 1 of Annex H to that directive) or as a supply of services not subject to a reduced rate of taxation (Article 6(1) of that directive)?

3. If Question 2 is answered in the negative: is it consistent with Article 2(1) in conjunction with Articles 5(1) and 6(1) of [the Sixth Directive] for the classification of the single supply of a party catering business as either a supply of goods or a sui generis supply of services to be based purely on the number of the elements in the nature of supplies of services (two or more) compared with the proportion of the supply of goods, or must the elements in the nature of a supply of services necessarily be assessed independently of their number, and, if so, according to what criteria?'

49 By order of the President of the Court of 3 February 2010, Cases C-497/09, C-499/09, C-501/09 and C-502/09 were joined for the purposes of the written and oral procedure and the judgment, on account of the connection between them, in accordance with Article 43 of the Court's Rules of Procedure.

Consideration of the questions referred

50 By the first two questions in Cases C-497/09 and C-499/09, the second question in Case C-501/09 and the second and third questions in Case C-502/09, which should be addressed together, the referring court is essentially asking the Court whether the various activities of supplying food or meals prepared for immediate consumption at issue in the four main proceedings constitute supplies of goods within the meaning of

Article 5 of the Sixth Directive or supplies of services within the meaning of Article 6 of the directive, and what effect the additional elements of supply of services may have in this respect.

Preliminary observations

51 As a preliminary point, it must be established whether, for the purposes of VAT, the various activities at issue in the main proceedings are to be regarded as distinct transactions taxable separately or as single complex transactions comprising a number of elements.

52 According to the Court's case-law, 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, first, whether there are two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of goods or a supply of services (see *Levob Verzekeringen and OV Bank*, paragraph 19, and *Aktiebolaget NN*, paragraph 21).

53 The Court has also held, first, that it follows from Article 2 of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, that 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 two or more 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 (*Levob Verzekeringen and OV*, paragraphs 20 and 22, and *Aktiebolaget NN*, paragraphs 22 and 23).

54 There is also a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as 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 (see, inter alia, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 30; *Levob Verzekeringen and OV Bank*, paragraph 21; Case C-572/07 *RLRE Tellmer Property* [2009] ECR I-4983, paragraph 18; and Case C-276/09 *Everything Everywhere* [2010] ECR I-12359, paragraphs 24 and 25).

55 In the context of the cooperation established by Article 267 TFEU, it is for the national courts to determine whether that is the situation in a particular case and to make all definitive findings of fact in that regard (see, to that effect, *CPP*, paragraph 32, and *Levob Verzekeringen and OV Bank*, paragraph 23).

56 In the present cases, in each of the disputes in the main proceedings, there is a combination of a supply of goods or several goods and a supply of various service elements, and the referring court considers that those supplies of goods and services form a single transaction for the purposes of VAT. There is nothing in the orders for reference or the observations submitted to the Court to show that that classification was not carried out in accordance with the above criteria.

57 In the case of supplies in connection with a party catering business such as that at issue in the main proceedings in Case C-502/09, it may be noted inter alia that the existence of a single transaction is independent of whether the caterer issues a single invoice covering all the elements or issues a separate invoice for the supply of the food (see, to that effect, *CPP*, paragraph 31; *Levob Verzekeringen and OV Bank*, paragraph 25; and *Everything Everywhere*, paragraph 29).

Classification as a supply of goods or a supply of services

58 The Sixth Directive establishes a common system of VAT based inter alia on a uniform definition of taxable transactions (see, inter alia, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 48).

59 As regards the concept of 'supply of goods', Article 5(1) of the Sixth Directive states that the transfer of the right to dispose of tangible property as owner is such a supply. In that regard the case-law of the Court explains that the concept covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner (see, inter alia, *Halifax and Others*, paragraph 51).

60 As regards the concept of 'supply of services', Article 6(1) of the Sixth Directive states that it covers any transaction not constituting a supply of goods within the meaning of Article 5 of that directive.

61 To determine whether a single complex supply such as those at issue in the cases in the main proceedings should be classified as a 'supply of goods' or a 'supply of services', all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and to identify its predominant elements (see, to that effect, inter alia, *Faaborg-Gelting Linien*, paragraphs 12 and 14; *Levob Verzekeringen and OV Bank*, paragraph 27; *Aktiebolaget NN*, paragraph 27; and Case C-88/09 *Graphic Procédé* [2010] ECR I-1049, paragraph 24).

62 It should also be pointed out that the predominant element must be determined from the point of view of the typical consumer (see, to that effect, inter alia, *Levob Verzekeringen and OV Bank*, paragraph 22, and *Everything Everywhere*, paragraph 26) and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements of supply of services in relation to the elements of supply of goods.

63 It should be noted in this respect that, as the marketing of goods is always accompanied by a minimal supply of services such as the displaying of the products on shelves or the issuing of an invoice, only services other than those which necessarily accompany the marketing of goods may be taken into account in assessing the part played by the supply of services within the whole of a complex transaction also involving the supply of a product (Case C-491/03 *Hermann* [2005] ECR I-2025, paragraph 22).

64 The Court has held, more specifically, in *Faaborg-Gelting Linien*, paragraph 14, that restaurant transactions are characterised by a bundle of elements and acts, of which the provision of food is only one component and in which services largely predominate. They must therefore be regarded as supplies of services within the meaning of Article 6(1) of the Sixth Directive. The situation is different, however, where the

transaction relates to food to take away and is not coupled with services designed to enhance consumption on the spot in an appropriate setting.

65 Thus in the case of restaurant transactions on board ferries, the Court observed that the supply of prepared food and drink for immediate consumption is the outcome of a series of services ranging from the cooking of the food to its physical service in a receptacle, while at the same time an infrastructure is placed at the customer's disposal, including a dining room with appurtenances (cloakroom etc.), furniture and crockery. People, whose occupation consists in carrying out restaurant transactions, will have to perform such tasks as laying the table, advising the customer and explaining the food and drink on the menu to him, serving at table and clearing the table after the food has been eaten (*Faaborg-Gelting Linien*, paragraph 13).

66 In the present cases, according to the information provided by the referring court, the activities at issue in the main proceedings in Cases C-497/09 and C-501/09 concern sales from mobile snack bars or snack stalls of sausages, chips and other hot food for immediate consumption.

67 The supply of such products presupposes that they are cooked or reheated, which constitutes a service that must be taken into account in the overall assessment of the transaction for the purpose of classifying it as a supply of goods or a supply of services.

68 However, since the preparation of the hot end product is limited essentially to basic standard actions, which for the most part are done not in response to an order from a particular customer but in continuous or regular fashion according to the demand generally foreseeable, it does not constitute the predominant element of the transaction in question, and cannot in itself characterise that transaction as a supply of services.

69 Moreover, with respect to the elements of supply of services that are characteristic of restaurant transactions, as described in the case-law summarised in paragraphs 63 to 65 above, it is clear that, in the activities at issue in the main proceedings in Cases C-497/09 and C-501/09, there are no waiters, no real advice to customers, no service properly speaking consisting in particular in transmitting orders to the kitchen and then presenting and serving dishes to customers at tables, no enclosed spaces at an appropriate temperature dedicated to the consumption of the food served, no cloakrooms or lavatories, and essentially no crockery, furniture or place settings.

70 The elements of supply of services mentioned by the referring court consist solely in the presence of rudimentary facilities such as counters to eat at, with no possibility of sitting down, enabling a limited number of customers to eat on the spot, in the open air. Such rudimentary facilities require only negligible human intervention. In those circumstances, those elements are only minimal ancillary services, and cannot alter the predominant character of the principal supply, namely that of a supply of goods.

71 The above considerations apply likewise to sales of popcorn and tortilla chips in the foyers of cinemas such as those at issue in the main proceedings in Case C-499/09.

72 According to the account of the facts given by the referring court, the preparation of popcorn, which coincides with its production, and the distribution of popcorn and tortilla chips in packagings form an integral part of the sale of those products, and are not therefore transactions that are independent of the sale. Furthermore, both the preparation of the food and its keeping at a certain temperature are performed regularly rather than to the order of an individual customer.

73 It should also be noted that the provision of furniture (tables for standing at, stools, chairs and benches), apart from the fact that it is not present in all the cinemas, is as a rule independent of the sale of popcorn and tortilla chips, and that the areas where this furniture is provided also serve as waiting rooms and meeting points. Moreover, in practice the food is consumed in the auditoria. For that purpose, the seats in some auditoria are equipped with drink-holders, whose purpose is also to ensure the cleanliness of the auditoria. The mere presence of those furnishings intended, not exclusively, possibly to facilitate the consumption of such food cannot be regarded as an element of supply of services such as to bestow on the transaction as a whole the quality of a supply of services.

74 Accordingly, with respect to activities such as those at issue in the main proceedings in Cases C-497/09, C-499/09 and C-501/09, the dominant element of the transactions in question, on an overall assessment of them, consists in the supply of food or meals ready for immediate consumption, with their summary and standardised preparation being intrinsic to them and the provision of rudimentary facilities to enable a limited number of customers to consume the food on the spot being of a merely ancillary and subordinate nature. Whether the customers use those rudimentary facilities or not is immaterial, since, as immediate consumption on the spot is not an essential characteristic of the transaction in question, it cannot determine its character.

75 With respect to party catering activities such as those at issue in the main proceedings in Case C-502/09, it should be noted, first, that, as is apparent from paragraph 38 above, several combinations of transactions are conceivable, depending on customers' wishes, ranging from the mere preparation and delivery of meals to the full service consisting in addition of the provision of crockery, furniture (tables and chairs), presentation of the dishes, decorations, provision of serving staff, and advice on the composition of the menu and if appropriate the choice of drinks.

76 Next, since what is concerned is a single supply, the classification of the transaction as a supply of goods or a supply of services will depend on all the factual circumstances, having regard to the qualitatively predominant elements from the point of view of the consumer.

77 As regards the food delivered by a party catering service, it must be observed that, unlike food supplied from snack stalls and mobile snack bars and in cinemas, it is not as a rule the result of mere standardised preparation but contains a distinctly greater aspect of the supply of services and requires more work and greater skill. Food quality, creativity and presentation are elements here which are most often of decisive importance for the customer. The customer is frequently offered the possibility not only of choosing the menu but even of having individual dishes made to order. This service aspect is moreover reflected linguistically, in so far as in everyday language one generally speaks of a catering 'service' and of food 'ordered' rather than 'bought' from the caterer.

78 The food is then delivered by the caterer in closed warmed receptacles or reheated by him on the spot. It is also essential for the customer that the food is delivered at the exact time he has specified.

79 Moreover, the supplies of a party catering service may include elements to enable consumption, such as the supply of crockery, cutlery or even furniture. Those elements, unlike the mere provision of a rudimentary infrastructure in the case of snack stalls or mobile snack bars and cinemas, require in addition a certain human intervention to deliver, collect, and if appropriate wash the items.

80 In the light of those considerations, it must be considered that, except in cases in which the caterer does no more than deliver standard meals without any additional service elements, or in which other special circumstances show that the supply of the food represents the predominant element of the transaction, the activities of a party catering service are supplies of services.

81 The answer to the first two questions in Cases C-497/09 and C-499/09, the second question in Case C-501/09, and the second and third questions in Case C-502/09 is therefore that Articles 5 and 6 of the Sixth Directive must be interpreted as meaning that:

— the supply of food or meals freshly prepared for immediate consumption from snack stalls or mobile snack bars or in cinema foyers is a supply of goods within the meaning of Article 5 if a qualitative examination of the entire transaction shows that the elements of supply of services preceding and accompanying the supply of the food are not predominant;

— except in cases in which a party catering service does no more than deliver standard meals without any additional elements of supply of services, or in which other special circumstances show that the supply of the food represents the predominant element of a transaction, the activities of a party catering service are supplies of services within the meaning of Article 6.

The term 'foodstuffs' in category 1 of Annex H to the Sixth Directive

82 By the third question in Cases C-497/09 and C-499/09 and the first question in Cases C-501/09 and C-502/09, which should be taken together, the referring court asks the Court whether, if the transactions at issue in the various main proceedings are supplies of goods, the term 'foodstuffs' in category 1 of Annex H to the Sixth Directive also covers food or meals prepared for immediate consumption.

83 In the absence of a definition in the Sixth Directive of that concept of foodstuffs, it must be interpreted in the light of its context within the Sixth Directive (see, by analogy, Cases C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 17, and Case C-3/09 *Erotic Center* [2010] ECR I-2361, paragraph 14).

84 It follows from Article 12(3)(a) of the Sixth Directive that the application of either one or two reduced rates is an option accorded to the Member States as an exception to the principle that the standard rate applies. Moreover, according to that provision, the reduced rates of VAT may be applied only to the supplies of goods and services listed in Annex H to the directive (see *Commission* v *Spain*, paragraph 18, and *Erotic Center*, paragraph 15). It is settled case-law that, in matters of VAT, provisions which are in the nature of exceptions to a principle must be interpreted strictly, while ensuring that the exception is not deprived of its effectiveness (see, inter alia, Case C-581/08 *EMI Group* [2010] ECR I-8607, paragraph 20, and Case C-175/09 *AXA UK* [2010] ECR I-10701, paragraph 25).

85 The provision in question refers to foodstuffs in general and makes no distinction or restriction whatever according to the kind of business, method of selling, packaging, preparation or temperature.

86 Furthermore, the provision also mentions 'ingredients normally intended for use in preparation of foodstuffs' and 'products normally intended to be used to supplement or substitute foodstuffs'.

87 Finally, food and meals prepared for immediate consumption serve as food for consumers.

88 The answer to the third question in Cases C-497/09 and C-499/09 and the first question in Cases C-501/09 and C-502/09 is therefore that, in cases of the supply of goods, the term 'foodstuffs' in category 1 of Annex H to the Sixth Directive must be interpreted as also covering food and meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means.

Costs

89 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 (Third Chamber) hereby rules:

1. **Articles 5 and 6 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, as amended by Council Directive 92/111/EEC of 14 December 1992, must be interpreted as meaning that:**

   — **the supply of food or meals freshly prepared for immediate consumption from snack stalls or mobile snack bars or in cinema foyers is a supply of goods within the meaning of Article 5 if a qualitative examination of the entire transaction shows that the elements of supply of services preceding and accompanying the supply of the food are not predominant;**

   — **except in cases in which a party catering service does no more than deliver standard meals without any additional elements of supply of services, or in which other special circumstances show that the supply of the food represents the predominant element of a transaction, the activities of a party catering service are supplies of services within the meaning of Article 6.**

2. **In cases of the supply of goods, the term 'foodstuffs' in category 1 of Annex H to the Sixth Directive 77/388, as amended by Directive 92/111, must be interpreted as also covering food and meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means.**

[Signatures]