Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

16 April 2015*

(Reference for a preliminary ruling — Taxation — Common system of value added tax — Letting of immovable property — Supply of electricity, heating, water and refuge collection — Agreements between the landlord and the suppliers of those goods and services — Supplies provided to the tenant considered to be provided by the landlord — Service charges — Determination of the taxable amount — Possibility of including service charges in the taxable amount of rental services — Transaction composed of a single supply or several independent supplies)

In Case C-42/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Poland), made by decision of 22 October 2013, received at the Court on 27 January 2014, in the proceedings

Minister Finansów

v

Wojskowa Agencja Mieszkaniowa w Warszawie,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas and C.G. Fernlund (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2014,

after considering the observations submitted on behalf of:

— the Minister Finansów, by T. Tratkiewicz and J. Kaute, acting as Agents,

— the Wojskowa Agencja Mieszkaniowa w Warszawie, by K. Przygodzka and A. Fajt, acting as Agents, and by K. Warfołomiejew, radca prawny, and Ł. Adamczyk, doradca podatkowy,

— the Polish Government, by B. Majczyna and A. Kramarczyk-Szaładzińska, acting as Agents,

— the Greek Government, by K. Nasopoulou, acting as Agent,

* Language of the case: Polish.

— the United Kingdom Government, by J. Beeko, acting as Agent, and R. Hill, Barrister,

— the European Commission, by Ł. Habiak and L. Lozano Palacios, 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 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 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14) ('the VAT Directive').

2 The request has been made in proceedings between the Minister Finansów (Minister for Finance) and the Wojskowa Agencja Mieszkaniowa w Warszawie (the Military Housing Agency in Warsaw) ('the Wojskowa Agencja Mieszkaniowa') concerning an individual interpretation of the Minister Finansów of 21 June 2011 rejecting the method for calculating and applying value added tax ('VAT') applied by the latter in respect of goods delivered and services provided in the context of the letting of immovable property.

Legal context

EU law

3 The second subparagraph of Article 1(2) of the VAT Directive provides:

'On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.'

4 Article 14(1) of the VAT Directive states:

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

5 Article 15(1) of that directive provides:

'Electricity, gas, heat or cooling energy and the like shall be treated as tangible property.'

6 Pursuant to Article 24(1) of that directive:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods.'

7 Article 73 of the VAT Directive reads as follows:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

Polish law

8 Article 7(1) of the Law on the tax on goods and services (ustawa o podatku od towarów i usług, Dz. U No 54, heading 535) of 11 March 2004 provides:

'The supply of goods referred to in Article 5(1)(1) shall mean the transfer of the right to dispose of the goods as owner ...'

9 Article 8(1) of that law states:

'The supply of services referred to in Article 5(1)(1) shall mean any supply to a natural person, legal person or organisational unit without legal personality which does not constitute a supply of goods within the meaning of Article 7 ...'

10 Article 29(1) of that law is worded as follows:

'The taxable amount is made up of the turnover, subject to paragraphs 2 to 21, Articles 30 to 32, Article 119 and Article 120(4) and (5). The turnover corresponds to the amount due by virtue of the sale, minus the amount of tax due. The amount due is to cover the whole payment due from the purchaser or a third party. Turnover is to be increased by any received grants, subsidies and other additional payments of a similar character having a direct effect on the price (amount due) of the goods or services supplied by the taxable person, minus the amount of tax due.'

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

11 The Wojskowa Agencja Mieszkaniowa is a public body responsible, inter alia, for letting State immovable property entrusted to it. In the context of this activity it resells supplies including, first, the provision of certain utilities, including electricity, heating and water, and, second, refuse disposal, by passing on to tenants the costs which it incurs in purchasing those goods and services from third-party suppliers. As regards utilities, the Wojskowa Agencja Mieszkaniowa charges tenants in advance in accordance with the rental agreement. It does so by applying the tax rate applicable to each utility, then, at the end of the year, it corrects the accounts to reflect a tenant's actual consumption of electricity, heating and water.

12 As VAT rates increased from 1 January 2011, the Wojskowa Agencja Mieszkaniowa was uncertain as to the rates applicable to items on its invoices issued after that date, either for claiming outstanding balances from tenants or for correcting overpayments by them. The Wojskowa Agencja Mieszkaniowa sought an individual interpretation from the Minister Finansów, indicating which rates it thought were applicable.

13 In his individual interpretation of 21 June 2011, the Minister Finansów explained that the method of calculating the VAT envisaged by the Wojskowa Agencja Mieszkaniowa was incorrect and noted that the provision of utilities and refuse collection were part of a whole constituting a single supply, namely rental services. Therefore, it was appropriate to include those various services in the taxable amount of the service that constituted the main service and to apply a single tax rate, namely the rate applicable to that service. The Minister Finansów stated that that rate was 23% as from 1 January 2011 and 22% prior to that.

14 Since the tax authorities maintained the position set out in the individual interpretation, the Wojskowa Agencja Mieszkaniowa brought an action before the Wojewódzki Sąd Administracyjny w Warszawie (Administrative Court of the voïvodie of Warsaw), which annulled the interpretation of the Minister Finansów by judgment of 17 July 2012.

15 That court held that the charges arising from the provision of utilities and refuse collection had to be included in the taxable amount of the rental service, as part of the rent, except where it is clear from the rental agreement that all or some of those charges are not included in the rent and are paid separately by the tenant.

16 That court found that the Wojskowa Agencja Mieszkaniowa had not provided clear information in this regard and that the Minister Finansów ought to have sought clarification from it before adopting the individual interpretation.

17 The Wojewódzki Sąd Administracyjny w Warszawie pointed out that the fact that the tenant and the suppliers of the utilities and the refuse collection service have not concluded an agreement directly does not necessarily mean that the landlord supplies the tenant with a single rental service of a complex nature.

18 The Minister Finansów brought an appeal on a point of law before the Naczelny Sąd Administracyjny (Supreme Administrative Court).

19 That court notes that the case has important practical consequences since, as regards the supply of water, in particular, depending on whether it is billed separately or included in the rent, the applicable rate of VAT will be 8% or 23% respectively. However, it harbours doubts as to how to interpret the VAT Directive in the light of the Court's case-law, and more specifically as to whether the landlord provides a single supply or several distinct supplies.

20 In those circumstances the Naczelny Sąd Administracyjny decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 14(1), Article 15(1) and Article 24(1) of the VAT Directive be interpreted as meaning that there are supplies by the landlord of electricity, heat, water and refuse disposal services to the tenant of the premises directly using those goods and services, which are supplied to those premises by specialist third persons, in a situation where one of the parties to the agreements for the supply of those goods and services is the landlord, who simply passes on the costs thereof to the tenant who actually uses them?

(2) If the answer to Question 1 is in the affirmative, do the costs of electricity, heat, water and refuse disposal used by the tenant of the premises increase, as regards the landlord, the taxable amount (rent), as referred to in Article 73 of the VAT Directive, resulting from the supply of the rental service, or do the supplies of goods and services in question constitute supplies separate from the rental service?'

Consideration of the questions referred

Question 1

21 By Question 1, the referring court asks, in essence, whether Articles 14(1), 15(1) and 24(1) of the VAT Directive must be interpreted as meaning that, with regard to the letting of immovable property, the supply of electricity, heating and water and refuse collection, provided by third-party suppliers for the tenant directly using those goods and services must be regarded as being supplied by the landlord where he has concluded agreements for such provisions and where he simply passes on the costs to the tenant.

22 The referring court states that it harbours doubts about this, in the light, in particular, of the judgment in *Auto Lease Holland* (C-185/01, EU:C:2003:73), which concerns the interpretation of Article 5(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), now Article 14(1) of the VAT Directive.

23 In that judgment, which concerns a motor vehicle leasing contract allowing the lessee of the leased vehicle to refuel the vehicle in the name and on behalf of the lessor of the vehicle, the Court examined whether it was to be deemed that the lessor supplied fuel to the lessee of that vehicle.

24 The Court answered in the negative, pointing out that, under Article 5(1) of Directive 77/388, '"[s]upply of goods" shall mean the transfer of the right to dispose of tangible property as owner'. The Court stated that the concept of a supply of goods includes any transaction of a supply of tangible property by a party which empowers the other party to dispose of it as if he were the owner of that property. It held that the oil companies transferred to the lessee of the leased vehicle the right actually to dispose of the fuel as owner and that there was not a supply of fuel by those companies to the lessor of the leased vehicle nor, as a result, from that lessor to the lessee of that vehicle (judgment in *Auto Lease Holland*, C-185/01, EU:C:2003:73, paragraphs 31 to 36).

25 It should be pointed out that the facts underlying such an agreement are not the same as those underlying a rental agreement for immovable property together with supplies of the sort at issue in the main proceedings.

26 In the context of an agreement such as that at issue in the case which gave rise to the judgment in *Auto Lease Holland* (C-185/01, EU:C:2003:73), the lessee of the leased vehicle himself purchases the fuel from filling stations and has a free choice as to its quality and quantity, as well as when to purchase. The Court held that the fuel management agreement between the lessor of the leased vehicle and the lessee of that vehicle is not a contract for the supply of fuel, but rather a contract to finance its purchase (judgment in *Auto Lease Holland*, C-185/01, EU:C:2003:73, paragraph 36).

27 By contrast, in an agreement such as that at issue in the main proceedings in which the landlord concludes the agreement for the provision of supplies consisting of the provision of utilities and refuse collection, it is the landlord who purchases the services in question for the immovable property which he lets. It is true that the tenant uses those supplies directly, but does not purchase them from specialist third-party suppliers. Accordingly, the considerations relating to the purchase of fuel in the judgment in *Auto Lease Holland* (C-185/01, EU:C:2003:73), which are valid in relation to Article 14(1) of the VAT Directive, do not apply, under a rental agreement such as that at issue in the main proceedings, either to the supply of electricity, heating and water, which also constitute goods for the purposes of Article 15 of the VAT Directive, or to the supply of services within the meaning of Article 24 of the VAT Directive, such as refuse collection. It follows from the purchase by the landlord of supplies comprising the provision of those goods and services that it is the landlord who must be regarded as providing those supplies to the tenant.

28 Therefore, the answer to Question 1 is that Articles 14(1), 15(1) and 24(1) of the VAT Directive must be interpreted as meaning that, in the context of the letting of immovable property, the provision of electricity, heating and water and refuse collection, provided by third-party suppliers for the tenant directly using those goods and services must be regarded as being supplied by the landlord where he has concluded agreements for the provision of those supplies and simply passes on the costs thereof to the tenant.

Question 2

29 By Question 2, the referring court asks, in essence, whether the VAT Directive must be interpreted as meaning that the letting of immovable property and the associated provision of water, electricity and heating and refuse collection must be regarded as constituting a single supply or several distinct and independent supplies which must be assessed separately from the point of view of VAT.

30 It should be recalled, as a preliminary point, that for VAT purposes every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (judgments in *Field Fisher Waterhouse*, C-392/11, EU:C:2012:597, paragraph 14, and *BGŻ Leasing*, C-224/11, EU:C:2013:15, paragraph 29).

31 Nevertheless, in accordance with settled case-law of the Court, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise in turn to taxation or exemption, must be considered to be a single transaction when they are not independent. 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. Such is also the case where one or several services constitute the principal service, and where the other service or services constitute one or several ancillary services which share the tax treatment of the principal service (judgment in *BGŻ Leasing*, C-224/11, EU:C:2013:15, paragraph 30). 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 in *Field Fisher Waterhouse*, C-392/11, EU:C:2012:597, paragraph 17 and the case-law cited).

32 In order to determine whether the services supplied constitute independent services or a single service it is necessary to examine the characteristic elements of the transaction concerned (judgment in *BGŻ Leasing*, C-224/11, EU:C:2013:15, paragraph 32).

33 As regards rental charges such as those at issue in the main proceedings, the Court has already had two occasions to clarify which elements need to be regarded as characteristic.

34 In the judgment in *RLRE Tellmer Property* (C-572/07, EU:C:2009:365), the Court pointed out that, as regards the cleaning of the common parts of an apartment block, the service could be provided in various ways, such as, for example, a third party invoicing the cost of the service direct to the tenants or by the landlord employing his own staff for the purpose or using a cleaning company. In that case, as the service was invoiced separately from the rent by the landlord and the two services could be separated from each other, the Court held that they could not be regarded as constituting a single transaction (judgment in *RLRE Tellmer Property*, C-572/07, EU:C:2009:365, paragraphs 22 and 24).

35 In the judgment in *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597), the Court ruled that the content of a lease may be a factor of importance. As regards, in that case, a contract for the rent of offices by a law firm, the Court stated that, according to the information available to it, the contract provided that, in addition to the letting of premises, the landlord had to provide the tenant with a number of services resulting in rental charges, non-payment of which could result in termination of the lease. The Court considered that the economic reason for concluding that contract was not only to obtain the right to occupy the premises concerned, but also for the tenant to obtain a number of services. The Court concluded that the lease designated a single supply between the landlord and the tenant. In its analysis, the Court placed itself in the shoes of an average tenant of the commercial premises concerned, that is to say offices for law firms (judgment in *Field Fisher Waterhouse*, C-392/11, EU:C:2012:597, paragraph 23).

36 It should be noted that those two judgments concern supplies which, like those at issue in the main proceedings, are generally useful, even necessary, to the enjoyment of the immovable property let. It follows from that case-law that those supplies may exist independently of the letting of immovable

property. Nevertheless, depending on the specific circumstances, in particular the content of the contract, they may constitute ancillary supplies or be inseparable from the letting and form a single supply with it.

37 It follows in particular from the judgment in *BGŻ Leasing* (C-224/11, EU:C:2013:15, paragraphs 44 and 45) that the elements which reflect the interests of the contracting parties, such as, for example, the way in which invoicing and pricing are carried out, may be taken into account to determine the characteristic elements of the transaction concerned. It needs to be assessed, in particular, whether, under the contract, the tenant and the landlord seek, above all, respectively, to obtain and let immovable property, and whether the fact that one party obtains other services provided by the other party is of only secondary importance to them, even if they are necessary for the enjoyment of the property.

38 Accordingly, account should be taken of the following circumstances which make it possible to distinguish two main types of scenario.

39 First, if the tenant has the right to choose his suppliers and/or the terms of use of the goods or services at issue, the supplies relating to those goods or services may, in principle, be considered to be separate from the letting. In particular, if the tenant can determine his own consumption of water, electricity or heating, which can be verified by the installation of individual meters and billed according to their consumption, supplies relating to those goods or services may, in principle, be considered to be separate from the letting. As regards services, such as the cleaning of the common parts of a building under joint ownership, such services should be regarded as separate from the letting if they can be organised by each tenant individually or by the tenants collectively and if, in all cases, the supply of those goods and services is itemised separately from the rent on invoices addressed to the tenant.

40 In this scenario, the mere fact that the non-payment of rental charges allows the landlord to terminate the rental agreement does not prevent the services to which those charges relate from constituting services separate from the letting (see, to that effect, judgment in *BGŻ Leasing*, C-224/11, EU:C:2013:15, paragraph 47).

41 Furthermore, the fact that the tenant has the right to obtain those services from the provider of his choice is also not in itself decisive, since the possibility that elements of a single supply may, in other circumstances, be supplied separately is inherent in the concept of a single composite transaction (judgment in *Field Fisher Waterhouse*, C-392/11, EU:C:2012:597, paragraph 26).

42 Second, if an immovable property offered for letting appears objectively, from an economic point of view, to form a whole with the supplies that accompany it, they can be considered to constitute a single supply with the letting. The same may apply to the letting of turnkey offices, ready for use with the provision of utilities and certain other supplies, and the immovable property which is let for short periods, in particular for holidays or for professional reasons, and offered with those supplies, which are not separable from it.

43 Moreover, if the landlord himself is not able to choose freely and independently, particularly of other landlords, the suppliers and the terms of use of the goods or services provided with the letting, the supplies at issue are generally inseparable from the letting and may also be regarded as forming a whole, and thereby a single supply, with the latter. This is particularly so where the landlord, who owns part of a multi-dwelling building is required to use suppliers designated by the co-proprietors collectively and to pay his share of the costs related to such supplies, which he then passes on to the tenant.

44 In this second scenario, to separately assess for VAT purposes the provision of supplies for the letting would constitute an artificial split of a single economic transaction.

45 Thus, in a case such as that at issue in the main proceedings, which, according to the information provided at the hearing, concerns the letting of a large number of immovable properties intended to be used for various purposes ranging from a hangar to use as housing by a tenant, it is important to ascertain in the context of each letting whether, with respect to utilities, the tenant is free to determine his own levels of consumption. In that regard, the existence of individual meters and billing according to the amount of the goods used is a factor of importance which suggests that the provision of utilities should be regarded as constituting separate supplies from the letting. So far as concerns refuse collection, if the tenant has the choice of supplier or may conclude a contract directly with the supplier, even if, for reasons of convenience, he does not exercise that choice or option, but obtains the service from the supplier designated by the landlord on the basis of a contract concluded between the landlord and the supplier, that circumstance points to the existence of a supply separate to the letting. If, in addition, the amount due for refuse collection and that due under the letting are itemised separately on the invoice, it must be considered that the landlord does not provide a single supply consisting of the letting and that supply.

46 It is, in all cases, for the national court to make the necessary assessments taking into account all the circumstances of the letting and the accompanying supplies and in particular, the content of the agreement itself.

47 In light of the foregoing, the answer to Question 2 is that:

— The VAT Directive must be interpreted as meaning that the letting of immovable property and the provision of water, electricity and heating as well as refuse collection accompanying that letting must, in principle, be regarded as constituting several distinct and independent supplies which need to be assessed separately for VAT purposes, unless the elements of the transaction, including those indicating the economic reason for concluding the contract, are so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split.

— It is for the national court to make the necessary assessments taking into account all the circumstances of the letting and the accompanying supplies and, in particular, the content of the agreement itself.

Costs

48 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 14(1), 15(1) and 24(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EU of 22 December 2009, must be interpreted as meaning that, in the context of the letting of immovable property, the provision of electricity, heating and water and refuse collection, provided by third-party suppliers for the tenant directly using those goods and services must be regarded as being supplied by the landlord where he has concluded agreements for the provision of those supplies and simply passes on the costs thereof to the tenant.**

2. **That directive must be interpreted as meaning that the letting of immovable property and the provision of water, electricity and heating as well as refuse collection accompanying that letting must, in principle, be regarded as constituting several distinct and independent supplies which need to be assessed separately for VAT purposes, unless the elements of the**

transaction, including those indicating the economic reason for concluding the contract, are so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split.

It is for the national court to make the necessary assessments taking into account all the circumstances of the letting and the accompanying supplies and, in particular, the content of the agreement itself.

[Signatures]