Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

28 November 2024*

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Scope – Taxable transactions – Contract for services for the carrying out of a building project – Termination of the contract by the customer – Concept of 'remuneration' – Characterisation – Obligation to pay the total amount agreed after deduction of the costs saved by the supplier – Article 73 – Taxable amount)

In Case C-622/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 25 September 2023, received at the Court on 10 October 2023, in the proceedings

rhtb: projekt gmbh

v

Parkring 14-16 Immobilienverwaltung GmbH,

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), President of the First Chamber, acting as President of the Seventh Chamber, M.L. Arastey Sahún, President of the Fifth Chamber, and J. Passer, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– rhtb: projekt gmbh, by K. Klema, Rechtsanwalt,

– Parkring 14-16 Immobilienverwaltung GmbH, by M. Hübner, Rechtsanwalt,

– the Austrian Government, by A. Posch, J. Schmoll and F. Koppensteiner, acting as Agents,

– the Czech Government, by L. Březinová, M. Smolek and J. Vláčil, acting as Agents,

* Language of the case: German.

– the European Commission, by F. Behre and J. Jokubauskaitė, 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 2(1)(c) and Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in the context of a dispute between two companies established in Austria, namely, rhtb: projekt gmbh ('rhtb'), on the one hand, and Parkring 14-16 Immobilienverwaltung GmbH ('Parkring'), on the other, concerning the imposition of value added tax (VAT) on the amount contractually due following the termination, by the customer (Parkring), of a building project the carrying out of which had already begun and which the construction undertaking (rhtb) was prepared to complete.

Legal context

European Union law

3 Under Article 2(1)(c) of the VAT Directive, 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such' is to be subject to VAT.

4 Article 73 of that directive provides:

'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.'

Austrian law

5 The first sentence of Paragraph 1168(1) of the Allgemeines bürgerliches Gesetzbuch (General Civil Code), in the version applicable to the dispute in the main proceedings ('the ABGB'), provides:

'In the event of non-performance of the work, the contractor shall nevertheless be entitled to the agreed remuneration if it was prepared to supply the service and, through circumstances attributable to the customer, was prevented from doing so; the contractor must, however, take into account what it has saved as a result of the non-performance of the works or what it has acquired, or intentionally failed to acquire, through another use.'

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

6 In March 2018, rhtb and Parkring concluded a contract for services under which rhtb was to carry out a building project in an amount of EUR 5 377 399.69, including VAT of EUR 896 233.28. After works had started, Parkring informed rhtb, in June 2018, that it no longer wished it to carry out that project for reasons not attributable to rhtb.

7 On 19 December 2018, rhtb requested from Parkring, in accordance with the first sentence of Paragraph 1168(1) of the ABGB, payment of the agreed amount, within the meaning of that provision, less the costs saved on account of the unjustified termination of the contract for services in question.

8 Parkring not having made that payment, rhtb lodged an application before the court of first instance seeking payment in the amount of EUR 1 540 820.10, including the VAT relating thereto, arguing that Parkring had unjustifiably withdrawn from that contract and that Parkring was therefore liable for the contractually agreed amount. Parkring disputed the merits of that claim, arguing that rhtb was entitled only to payment of the amount corresponding to the works carried out.

9 The court of first instance granted rhtb's application, stating that Parkring had unjustifiably withdrawn from that contract and holding that the amount due for the works which could not be carried out as a result of the termination of the contract was subject to VAT.

10 The appeal court varied the decision of the court of first instance, holding that no VAT was payable on the amount due in respect of the works not carried out since there had been no exchange of services between the parties to the contract.

11 Both rhtb and Parkring brought an appeal on a point of law (*Revision*) against that decision before the Oberster Gerichtshof (Supreme Court, Austria), which is the referring court. That court has held, in essence, that, following the unjustified termination of the contract for services by Parkring, rhtb was entitled to the contractually agreed amount. However, the referring court has doubts as to whether, in the light of the case-law of the Court, the amount thus due must be regarded as constituting remuneration, within the meaning of the VAT Directive, since, rhtb no longer being obliged, as from the termination of the contract for services by Parkring, to supply the remainder of the agreed service, the condition that there must be a direct link between the consideration received and the service supplied would not be satisfied.

12 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 2(1)(c) of the [VAT Directive] read in conjunction with Article 73 of that directive be interpreted as meaning that the amount which a customer owes to a contractor even where the work has not been (fully) carried out, but the contractor was ready to provide the service and, through circumstances attributable to the customer (for example, cancellation of the work), was prevented from doing so, is subject to VAT?'

Consideration of the question referred

13 As a preliminary point, it should be noted that the request for a preliminary ruling does not contain any indication as to the reasons which led the referring court to seek an interpretation of Article 73 of the VAT Directive. Moreover, it is not apparent from that request that the interpretation of that provision is necessary for resolving the dispute in the main proceedings.

14 Consequently, it must be considered that, by its question, that court asks, in essence, whether Article 2(1)(c) of the VAT Directive must be interpreted as meaning that the amount contractually due following the termination, by the recipient of a supply of services, of a contract validly concluded for that supply of services, subject to VAT, which the supplier had begun providing and which it was prepared to complete, must be regarded as constituting the remuneration for a supply of services for consideration, within the meaning of the VAT Directive.

15 In that regard, it must be recalled that, in accordance with Article 2(1)(c) of the VAT Directive, which defines the scope of VAT, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to that tax.

16 According to the case-law of the Court, a supply of services is carried out 'for consideration', within the meaning of that provision, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for an identifiable service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received (judgment of 11 June 2020, *Vodafone Portugal*, C-43/19, EU:C:2020:465, paragraph 31 and the case-law cited).

17 As regards the direct link between the service supplied to the recipient and the consideration actually received, the Court has held that the consideration for the price paid at the time of the signing of a contract for the supply of a service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from that contract, irrespective of whether the customer uses that right. Thus, that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself or herself of that right (judgment of 11 June 2020, *Vodafone Portugal*, C-43/19, EU:C:2020:465, paragraph 32 and the case-law cited).

18 In that regard, it should be added that, as is apparent from the case-law of the Court, a predetermined amount received by an economic operator where a contract for the supply of services for a certain period is terminated early by its customer, or for a reason attributable to the customer, which corresponds to the sum that that operator would have received for the remainder of that period in the absence of such termination, must be regarded as the remuneration for a supply of services for consideration and subject, as such, to VAT, even though that termination entailed, inter alia, the deactivation of the services referred to in that contract before the expiry of the agreed period (see, to that effect, judgment of 11 June 2020, *Vodafone Portugal*, C-43/19, EU:C:2020:465, paragraph 33 and the case-law cited).

19 The same must apply, a fortiori, in a situation such as that at issue in the main proceedings, in which the supplier had begun supplying the service concerned and was prepared to perform it to completion for the amount contractually provided for.

20 First, the consideration for the amount to be paid by the recipient of the supply of services is constituted by the recipient's right to benefit from the fulfilment, by the supplier, of the obligations under the services contract, even if the recipient no longer wishes to avail itself of that right for a reason attributable to it (see, to that effect, judgment of 11 June 2020, *Vodafone Portugal*, C-43/19, EU:C:2020:465, paragraph 35).

21 In a situation such as that at issue in the main proceedings, the supplier of services not only placed the customer in a position to benefit from the supply of services, within the meaning of the case-law cited in paragraph 17 above, but, since it had already begun the agreed works, actually provided part of that supply, it being noted that the supplier was prepared to perform that contract to completion.

22 Secondly, for the application of the common system of VAT, account must also be taken of the economic and commercial realities of the transaction at issue (see, to that effect, judgment of 11 June 2020, *Vodafone Portugal*, C-43/19, EU:C:2020:465, paragraph 40 and the case-law cited). It must be held that, in the context of an economic approach, the amount due under Paragraph 1168(1) of the ABGB reflects not only the contractually agreed remuneration for the services in question, after deduction of the amounts saved, such that there is a direct link between the amount at issue in the main proceedings and the service supplied, but also provides the supplier of services with a minimum contractual remuneration.

23 The interpretation set out in paragraph 18 above is not invalidated by the argument that, as the Court held in the judgment of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C-277/05, EU:C:2007:440), concerning deposits intended to compensate for the loss suffered by a supplier as a result of the cancellation of a reservation by a customer, there is, in the present case, reason to conclude that the amount contractually provided for constitutes fixed compensation for the loss suffered by the supplier of services as a result of the termination of the contract by the recipient of the supply of services.

24 The situation faced by the Court in the judgment of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C-277/05, EU:C:2007:440), did not concern a situation similar or comparable to that at issue in the main proceedings. In that judgment, the Court in particular found that there was no direct link between the service supplied and the consideration received, since the reservation of the room did not constitute an independent and identifiable supply of services. It also held that the deposits constituted, in a situation such as that at issue in the case which gave rise to that judgment, fixed compensation serving to compensate the supplier of services following the cancellation by a customer and that they did not therefore constitute the fee for such a service.

25 By contrast, in the present case, there is indeed an identifiable supply of services and the supplier had, moreover, begun the agreed works and was prepared to carry them out in their entirety in order to bring the contract to a successful conclusion. If this was not the case, it is because the recipient no longer wished to use the services of that supplier for reasons not attributable to the supplier. Furthermore, the amount due to that supplier of services corresponds to that contractually provided for the performance in full of the supply of services, after deduction of the amounts saved on account of the non-completion of the work. That amount cannot therefore be regarded as constituting fixed compensation intended to compensate for loss suffered.

26 In the light of the foregoing considerations, the answer to the question referred is that Article 2(1)(c) of the VAT Directive must be interpreted as meaning that the amount contractually due following the termination, by the recipient of a supply of services, of a contract

validly concluded for that supply of services, subject to VAT, which the supplier had begun providing and which it was prepared to complete, must be regarded as constituting the remuneration for a supply of services for consideration, within the meaning of the VAT Directive.

Costs

27 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 (Seventh Chamber) hereby rules:

Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as meaning that the amount contractually due following the termination, by the recipient of a supply of services, of a contract validly concluded for that supply of services, subject to value added tax, which the supplier had begun providing and which it was prepared to complete, must be regarded as constituting the remuneration for a supply of services for consideration, within the meaning of Directive 2006/112.

[Signatures]