Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 May 2016*

(Reference for a preliminary ruling — Value added tax — Directive 2006/112/EC — Articles 2(1)(c) and 9(1) — Taxable persons — Economic activities — Definition — Transport of schoolchildren)

In Case C-520/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court, Netherlands), made by decision of 7 November 2014, received at the Court on 18 November 2014, in the proceedings

Gemeente Borsele

v

Staatssecretaris van Financiën

and

Staatssecretaris van Financiën

v

Gemeente Borsele,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen, A. Borg Barthet (Rapporteur), E. Levits and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 November 2015,

after considering the observations submitted on behalf of:

— the Gemeente Borsele, by D. Bos and A.T.M. Joore-van Zanten, belastingadviseurs,

— the Netherlands Government, by M. Bulterman, M. Gijzen and M. Noort, acting as Agents,

* Language of the case: Dutch.

— the United Kingdom Government, by V. Kaye and S. Simmons, acting as Agents, and R. Hill, Barrister,

— the European Commission, by L. Lozano Palacios and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 December 2015,

gives the following

Judgment

1 This request for a preliminary ruling relates to the interpretation of Articles 2(1)(c) and 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

2 The request has been made in proceedings between the Geemente Borsele (municipality of Borsele) and the Staatssecretaris van Financiën (Secretary of State for Finance) concerning the right to deduct the value added tax ('VAT') claimed by that municipality.

Legal context

EU law

3 Article 2(1)(c) of the VAT Directive provides that the following are to be subject to VAT:

'the supply of services for consideration within the territory of a Member State by a taxable person acting as such'.

4 Article 9(1) of the VAT Directive is worded as follows:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

5 Article 13(1) of the VAT Directive provides:

'States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.'

6 Under the heading ‘List of the activities referred to in the third subparagraph of Article 13(1)’, Annex I to the VAT Directive refers, at point 5 thereof, to ‘passenger transport’.

7 Article 73 of the VAT 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.’

Netherlands law

8 Under the heading ‘School transport costs’, Article 4 of the Wet op het primair onderwijs (Law on primary education) provides:

‘1. For the purposes of schooling, the mayor and aldermen shall, on request, cover the transport costs which they deem necessary of the parents of pupils residing in the territory of their municipality. The municipal council shall adopt a decree laying down the detailed rules for covering the transport costs, taking into account the provisions of the following paragraphs.

...

4. The decree shall take into account the contribution that may reasonably be required of parents and provide that appropriate transport may be provided for the pupil. The decree shall lay down the detailed rules governing how the mayor and aldermen may consult experts in this area.

5. The decree shall provide that transport costs are to be covered in respect of the distance between the pupil’s home and

(a) the nearest primary school accessible to him, or if the pupil needs to attend a special needs primary school, the nearest special needs primary school accessible to him;

(b) a different ordinary or special needs primary school if the transport to that school costs the municipality less than the transport to the ordinary or special needs primary school referred to in point (a), where the parents agree to transport to the other school;

(c) the nearest special needs primary school accessible to the pupil in the pupil’s primary school district, where the parents agree to transport to that special needs primary school; or

(d) a different special needs primary school in the school district referred to in point (c), if the transport to that school costs the municipality less than the transport to the special needs primary school referred to in point (c), where the parents agree to transport to the other school.

...

7. The decree may provide that, for parents whose combined income exceeds EUR 17 700, transport costs are to be covered only to the extent that the transport costs exceed the cost of public transport over the distance set by the municipal council on the basis of paragraph 8; that distance may not exceed 6 kilometres. The calculation of income shall be based on the income received during the second calendar year preceding the calendar year during which the school year in respect of an application has been made for transport costs begins. The public transport costs referred to in the first sentence correspond to the public transport costs that would be reasonably incurred for the distance covered, taking into account the zoning system introduced by the decree based on

Article 27(1) of the Law on transport of passengers, regardless of whether the area concerned is served by public transport or the extent to which it is actually used. Where paragraph 10 is applied, the decree shall provide for a financial contribution from the parent, to be calculated in accordance with the third sentence above. From 1 January 1999, the amount referred to in the first sentence above shall be adjusted annually on the basis of changes in the index of standard wages of adult workers in relation to the previous year, rounded to a multiple of EUR 450. That adjusted amount shall replace the amount referred to in the first sentence.

8. The decree may provide that there is no right for transport costs to be covered on the basis of the distance between the school which is accessible to the pupil and his home, measured using the shortest route which is sufficiently practical and safe for the pupil.

...

10. The decree may allow the municipality itself to provide transport or arrange for its provision instead of covering the costs of transport.

11. The decree may provide that, in respect of pupils for whom the distance referred to in paragraph 5 exceeds 20 kilometres, the amount of transport costs to be covered is to depend on the parents' ability to contribute or that the transport which the municipality provides either directly or through others is to be arranged in return for payment of a contribution which depends of the parents' ability to contribute and which cannot exceed the cost of transporting the pupil concerned. In that case, the decree shall also contain provisions concerning the calculation of the parents' ability to contribute. The first sentence shall not apply to pupils attending special needs primary schools who live at a distance of more than 20 kilometres from the closest public or private special needs primary school.

...'

9 Under Article 4(1) of the wet op de expertisecentra (Law on centres of expertise), the 'decree shall take account of contributions that may reasonably be required of parents and shall provide that transport may be provided in a manner which is appropriate for the pupil; however, pupils in special needs secondary education are entitled to have their transport costs covered only where they are obliged to use, on account of their disability, a means of transport other than public transport or cannot, on account of their disability, travel independently on public transport'.

10 The Verordening leerlingenvervoer gemeente Borsele 2008 (Decree concerning the transport of pupils in the municipality of Borsele, 2008) provides, inter alia, that:

— for journeys of distances up to 6 kilometres, the cost of transporting schoolchildren is not covered;

— for journeys of distances between 6 and 20 kilometres, transport for schoolchildren is provided in return for payment by the parents of the child transported of a fixed contribution equal to the price of public transport covering a distance of 6 kilometres;

— for journeys of distances of more than 20 kilometres, transport for schoolchildren is provided in return for payment of a contribution that cannot exceed the cost price of the transport, calculated, per family, by taking account of the parents' ability to contribute, in the light of the parents' combined adjusted income, within the meaning of the 2001 Law on Income Tax.

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

11 The municipality of Borsele uses, for the transport of eligible pupils to and from school, the services of transport undertakings. In that respect, for 2008, it paid the sum of EUR 458 231, inclusive of VAT.

12 In accordance with the provisions of the Decree of the municipality of Borsele concerning the transport of pupils, 2008, approximately one third of parents of pupils for whom school transport was provided paid contributions, equivalent to 3% of the amount paid by that municipality to fund school transport services, totalling to EUR 13 958. The difference was financed by the municipality from public funds.

13 The municipality of Borsele claimed, before the tax authorities, that it was a taxable person for the purposes of VAT in respect of the provision of school transport services in return for payment of contributions and was thus entitled to deduct from that payment the VAT that had been charged by transport undertakings. That claim was rejected on the ground that the municipality did not provide services for consideration and thus did not carry out any economic activity.

14 By decision of 1 July 2009, the tax authorities fixed the amount owed by the VAT Compensation Fund to the municipality of Borsele in respect of 2008; that amount did not include the VAT charged to that municipality by the transport undertakings.

15 The municipality of Borsele brought an action against that decision before the Rechtbank te 's-Gravenhage (District Court, the Hague, Netherlands). That action was rejected as unfounded by decision of 29 December 2010. The municipality of Borsele appealed against that decision before the Gerechtshof te 's-Gravenhage (Appeal Court, the Hague, Netherlands), which, by judgment of 20 April 2012, set aside the decision at first instance and annulled the decisions of the tax authorities. The municipality of Borsele and the Secretary of State for Finance each brought a separate appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court, the Netherlands) against the decision of the Gerechtshof te 's-Gravenhage (Appeal Court, the Hague).

16 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court, the Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 2(1)(c) and Article 9(1) of the VAT Directive be interpreted as meaning that, with regard to the transport of school pupils, on the basis of an arrangement as described in the present judgment, a municipality should to this extent be regarded as a taxable person within the meaning of that directive?

(2) For the purpose of answering that question, should the arrangement as a whole be considered, or should this assessment be made for each transport operation separately?

(3) If the latter is the case, should a distinction be made according to whether pupils are transported over a distance of between 6 and 20 kilometres or over a distance exceeding 20 kilometres?'

The questions referred

17 By its questions, the referring court asks, in essence, whether Article 9(1) of the VAT Directive must be interpreted as meaning that a regional or local authority which provides a service for the transport of schoolchildren under conditions such as those described in the main proceedings acts as a taxable person and is, accordingly, subject to VAT.

18 The first subparagraph of Article 9(1) of the VAT Directive provides that the term 'taxable person' means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

19 Accordingly, in order to establish whether, in the context of the case before the referring court, a regional or local authority acts as a taxable person, it is necessary to determine whether it carries out an economic activity within the meaning of the VAT Directive.

20 In that regard, it must be recalled that the second subparagraph of Article 9(1) of the VAT Directive provides that any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, is to be regarded as an 'economic activity'.

21 As the Advocate General stated at point 32 of her Opinion, an activity can be regarded as an economic activity within the meaning of Article 9(1) of the VAT Directive only where the activity corresponds to one of the chargeable events defined in Article 2 of that directive.

22 In the present case, in order to determine whether the transport for schoolchildren provided by a municipality under conditions such as those described in the main proceedings constitutes an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive, it is therefore necessary to establish, in the first place, whether, in organising that school transport, such a municipality supplied a service for the purposes of Article 2(1)(c) of the VAT Directive.

23 In so far as the information provided by the referring court in its request for a preliminary ruling permits the inference that the transport services at issue in the main proceedings do indeed constitute a supply of services, it is necessary to verify whether those services may be regarded as being provided by the municipality in question for consideration, as required by Article 2(1)(c) of the VAT Directive.

24 In that regard, it should be noted that, according to settled case-law, a supply of services is effected 'for consideration', within the meaning of Article 2(1)(c) of the VAT Directive, and is therefore taxable, 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 value actually given in return for the service supplied to the recipient (see, inter alia, judgments of 3 March 1994 in *Tolsma* C-16/93, EU:C:1994:80, paragraph 14; 5 June 1997 in *SDC*, C-2/95, EU:C:1997:278, paragraph 45; and 26 June 2003 in *MKG-Kraftfahrzeuge-Factoring*, C-305/01, EU:C:2003:377, paragraph 47).

25 In the present case, it must be noted that the parental contribution to the transport costs is not calculated on the basis of the actual costs of the services provided. The amount of the parental contribution is not linked to the number of kilometres travelled per day, the cost price per journey for each pupil transported, or the frequency of the journeys.

26 However, the fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a 'transaction effected for consideration'. The latter concept requires only that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person (see, to that effect, judgments of 8 March 1988 in *Apple and Pear Development Council*, 102/86, EU:C:1988:120, paragraph 12, and 20 January 2005 in *Hotel Scandic Gåsabäck*, C-412/03, EU:C:2005:47, paragraph 22).

27 Accordingly, the fact that approximately one third of the parents in question pay a contribution towards school transport permits the inference that the municipality of Borsele supplied services for consideration for the purposes of Article 2(1)(c) of the VAT Directive.

28 In the second place, as the Advocate General observed in points 49 and 50 of her Opinion, it should be noted that the existence of a supply of services for consideration within the meaning of the abovementioned provision is not sufficient to establish the existence of an economic activity within the meaning of Article 9(1) of the VAT Directive.

29 In that regard, according to the Court's case-law, in order to determine whether a service is supplied 'in return for remuneration', so that the activity in question is to be classified as an economic activity (see, to that effect, the judgment of 26 March 1987 in *Commission* v *Netherlands*, 235/85, EU:C:1987:161, paragraph 15), all the circumstances in which it is supplied have to be examined (see, to that effect, judgment of 26 September 1996 in *Enkler*, C-230/94, EU:C:1996:352, paragraph 27).

30 Comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided may therefore be one way of ascertaining whether the activity concerned is an economic activity (see, by analogy, judgment of 26 September 1996 in *Enkler*, C-230/94, EU:C:1996:352, paragraph 28).

31 Other factors, such as, inter alia, the number of customers and the amount of earnings, may be taken into account along with others when that question is under consideration (see, by analogy, judgment of 26 September 1996 in *Enkler*, C-230/94, EU:C:1996:352, paragraph 29).

32 While it is, of course, ultimately for the national court to assess all the facts of the case in the main proceedings, the Court, which is called on to provide answers of use to the national court, may provide guidance, based on the file in those proceedings and on the written and oral observations which have been submitted to it, which may enable the national court to give judgment in the specific case before it.

33 In that regard, it should be noted, first, that the municipality of Borsele recovers, through the contributions that it receives, only a small part of the costs incurred. The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration (see, by analogy, judgment of 29 October 2009 in *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 50).

34 It therefore follows from that lack of symmetry that there is no genuine link between the amount paid and the services supplied. Hence, it does not appear that the link between the transport service provided by the municipality in question and the payment to be made by parents is sufficiently direct for that payment to be regarded as consideration for that service and, accordingly, for that service to be regarded as an economic activity within the meaning of Article 9(1) of the VAT Directive (see, by analogy, judgment of 29 October 2009 in *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 51).

35 It should be noted, second, that the conditions under which the services at issue in the main proceedings are supplied are different from those under which passenger transport services are usually provided, since the municipality of Borsele, as the Advocate General observed in point 64 of her Opinion, does not offer services on the general passenger transport market, but rather appears to be a beneficiary and final consumer of transport services which it acquires from transport undertakings with which it deals and which it makes available to parents of pupils as part of its public service activities.

36 It follows from all the forgoing considerations that, in answer to the questions submitted by the referring court, Article 9(1) of the VAT Directive must be interpreted as meaning that a regional or local authority which provides a service for the transport of schoolchildren under conditions such as those described in the main proceedings does not carry out an economic activity and is not therefore a taxable person.

Costs

37 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 (Fifth Chamber) hereby rules:

Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a regional or local authority which provides a service for the transport of schoolchildren under conditions such as those described in the main proceedings does not carry out an economic activity and is not therefore a taxable person.

[Signatures]