Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

15 November 2012*

(Directive 77/388/EEC — VAT — Exemptions — Article 13B(b) — Leasing or letting of immovable property — Houseboat, without a system of propulsion, permanently attached alongside a riverbank — Leasing of the houseboat, including the landing stage, the plot of land and the area of water contiguous therewith — Exclusive use for the permanent operation of a restaurant-discotheque — Single supply)

In Case C-532/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Köln (Germany), made by decision of 22 September 2011, received at the Court on 19 October 2011, in the proceedings

**Susanne Leichenich**

v

**Ansbert Peffekoven,**

**Ingo Horeis,**

intervening parties:

**Dr. Leyh, Dr. Kossow & Dr. Ott KG, Wirtschaftsprüfungsgesellschaft, Steuerberatungsgesellschaft,**

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting for the President of the Third Chamber, K. Lenaerts, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: J. Mazák,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 6 September 2012,

after considering the observations submitted on behalf of:

— Mrs Leichenich, by H. Bister, Rechtsanwalt,

— Messrs Peffekoven and Horeis, by A. Funke and R. Lenzen, Rechtsanwälte,

* Language of the case: German.

— Dr. Leyh, Dr. Kossow & Dr. Ott KG, Wirtschaftsprüfungsgesellschaft, Steuerberatungsgesellschaft, by T. Wahlen and S. Schneider, Rechtsanwälte,

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the European Commission, by C. Soulay and B.-R. Killmann, acting as Agents,

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

gives the following

## Judgment

1 The reference for a preliminary ruling concerns Article 13B(b) of the 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; 'the Sixth Directive').

2 The reference was made in a dispute between Mrs Leichenich, the owner of a houseboat, and Messrs Peffekoven and Horeis, her tax advisers, concerning the chargeability to value added tax ('VAT') of a leasing of that houseboat, which is permanently immobilised alongside a riverbank and used for the operation of a restaurant-discotheque.

### Legal context

*EU law*

3 Article 2 of the Sixth Directive, which forms part of Title II, headed 'Scope', provides:

'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 13 of that directive, headed 'Exemptions within the territory of the country', provides in paragraph B, headed 'Other exemptions':

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. lettings of safes.

Member States may apply further exclusions to the scope of this exemption;

…’

5 The content of the above provision of the Sixth Directive was repeated, virtually unchanged, in Article 135 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which constitutes the recasting of the Sixth Directive and its successive amendments.

6 Article 38 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1), which forms part of Subsection 10 of that regulation entitled ‘Hiring of means of transport’, provides:

‘1. “Means of transport”, as referred to in Article 56 and point (g) of the first paragraph of Article 59 of Directive 2006/112/EC shall include vehicles, whether motorised or not, and other equipment and devices designed to transport persons or objects from one place to another, which might be pulled, drawn or pushed by vehicles and which are normally designed to be used and actually capable of being used for transport.

...

3. Vehicles which are permanently immobilised and containers shall not be considered to be means of transport as referred to in paragraph 1.’

*German law*

7 Paragraph 4 of the Law on Turnover Tax (Umsatzsteuergesetz) provides:

‘Amongst the operations referred to in Paragraph 1.1.1 of this law, the following are exempt:

...

12.

(a) the leasing or letting of immovable property, of securities to which civil law provisions relating to immovable property apply and of real property of the State;

(b) the supply of immovable property and parts of immovable property intended for occupation on the basis of a contract or pre-contract providing for the transfer of the property;

(c) the formation, transfer and supply of rights in rem over immovable property.

No exemption is granted in respect of the letting of rooms which an entrepreneur reserves for the temporary accommodation of foreign nationals, the letting of car parking spaces, the temporary letting of berths in camping sites and the leasing and letting of machines and other installations of any kind which form part of a working area, even if they constitute essential elements of a building.’

8 In German law, an item of immovable property, whatever its use, is a parcel of land demarcated in space which appears on the land register under a particular number, or which is registered in accordance with the law on the holding of the land register and the advertising of holdings. The question whether a building is an element constituting an item of immovable property is to be assessed, in principle, in accordance with national tax law, having regard to the general provisions of civil law, in this case Paragraph 94 of the Civil Code, headed 'Essential elements of immovable property or buildings', which provides in sub-paragraph 1:

'Elements incorporated into the ground, in particular buildings, form part of the essential elements of immovable property ...'

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

9 It is apparent from the documents before the Court that, in 1999, Mrs Leichenich concluded with the German State, represented by the Water and Waterways Administration (Wasser und Schifffahrtsverwaltung; 'the WSV'), an agreement for the occupation of a parcel of land situated on the left bank of the Rhine, near the City of Cologne, and an area of water, namely a portion of the river, adjacent to that land. By that agreement, the WSV placed those parcels at the disposal of the users for the purposes of operating a houseboat with a landing stage as a restaurant. The houseboat in question has been moored in the same place for many years, has never been moved, and is immobilised by means of ropes, chains and anchors. It has no engine or system of propulsion. It is, moreover, connected to the water and electricity networks and has an address, a telephone line and a septic tank.

10 By a contract of 1 February 2000, Mrs Leichenich let the houseboat, the landing stage and the adjoining area to a company, which used the houseboat exclusively as a café-restaurant and, later, as a discotheque. No VAT was charged on the amount of the rent, given that, according to the advice of Mrs Leichenich's tax advisers, this was the letting of immovable property. However, on an inspection by the Finanzamt Köln-Altstadt, the tax authority having territorial jurisdiction, for the years 2000 to 2003, the period during which Mrs Leichenich was the sole proprietor of the let property, that authority took the view that the letting was of movable property and that, consequently, she was subject to VAT.

11 Mrs Leichenich then brought a civil action against her tax advisers before the Landgericht (Regional Court) Köln (Germany), seeking reimbursement of the sums paid by way of VAT. That court, by judgment of 9 December 2010, referring to the judgment of the Court of Justice of 16 January 2003 in Case C-315/00 *Maierhofer* [2003] ECR I-563, took the view that the houseboat did not constitute immovable property or an essential element of such property, since it was not incorporated into the ground. It could be moved in a few hours, even if that implied a certain preparation and the use of specialist personnel. Consequently, this was an item of moveable property not falling within the exception under Article 13B(b) of the Sixth Directive.

12 In the appeal lodged against that judgment, the Oberlandesgericht (Higher Regional Court) Köln observes that, according to the terms of the letting contract, the latter is not limited to the letting of the houseboat and the landing stage but also includes the area of water and the adjoining plot of land. Therefore, the fixed and permanent use of the houseboat and the landing stage was indissociably linked to the occupation of the area of water and adjoining riverbank. The fixed use of the houseboat permanently prevented any other use of the water covered by it, in particular for public transport. In other words, according to that contract, part of the river, and thus of the ground, had been let. The letting of the houseboat and adjoining landing stage, stipulated in the contract, thus necessarily included the occupation and use of the area of water and plot of land which had previously been granted to Mrs Leichenich by the agreement concluded with the WSV.

13 The referring court further states that, according to the contract, the houseboat can be used only at the specified location and cannot be moved. It had, moreover, been at the same location for many years. That court also states that, given that the letting contract places the ground at the disposal of the lessees for a fixed use of the houseboat and that the latter has a telephone line, connections, and even a septic tank, it may be considered, on the basis of a functional approach, that the houseboat constitutes a building within the meaning of the Sixth Directive, it being understood that such a building cannot, naturally, be fixed to an area of water as solidly as to dry land.

14 The referring court further raises the question whether a distinction must be made, for VAT purposes, between the letting of the part of the immovable property used for the houseboat and the letting of that used for the landing stage, which, according to the terms of the contract, was placed at the disposal of the persons concerned to be used as a mooring place for boats. It raises the question whether that latter supply should not be regarded as ancillary in the context of a single contract, by reason of the fact that the provision of the landing stage served, wholly or in part, to give access to the houseboat.

15 Having regard to those considerations, the Oberlandesgericht Köln decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 13B(b) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes, to be interpreted as meaning that the concept of the leasing or letting of immovable property covers the letting of a houseboat, including the mooring place and landing stage belonging to it, which is designed exclusively for stationary long-term use as a discotheque/restaurant establishment at a demarcated and identifiable mooring place on the water? Does the reply depend on the means whereby the houseboat is attached to the land or on the cost of removing the fastenings of the boat?

If the reply to the first question is in the affirmative:

(2) Is Article 13B(b) of the Sixth Council Directive 77/388/EEC of 17 May 1977 to be interpreted as meaning that the term “vehicles” which, according to the judgment in Case C-428/02 *Fonden Marselisborg Lystbådehavn*, includes boats, is not applicable to a leased houseboat which has no means of self-propulsion (engine) and which has been let for exclusive long-term use at the locality in question and not for the purpose of locomotion? Does the letting of the houseboat and the landing stage, including the areas of land and water on which they are situated, constitute a single tax-free service or is it necessary to differentiate for VAT purposes between the letting of the houseboat and that of the landing stage?’

**The first question and the second part of the second question**

16 By its first question and the second part of its second question, which it will be convenient to examine together, the referring court asks, in essence, whether, on a proper interpretation of Article 13B(b) of the Sixth Directive, the concept of the leasing or letting of immovable property includes the leasing of a houseboat, including the space and the landing stage contiguous therewith, which is fixed by attachments which are not easily removable to the bank and bed of a river, stays in a demarcated and identifiable location in the river water and is exclusively used, according to the terms of the leasing contract, for the permanent operation of a restaurant-discotheque at that location. It also asks whether, in such circumstances, the leasing of the houseboat and of the landing stage constitute a single exempt supply.

17 In that respect, it should first be recalled that, according to consistent case-law, the exemptions under Article 13 of the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition, and that interpretation of the concept of a leasing of immovable property contained in Article 13B(b) of the Sixth Directive cannot depend on that given by the civil law of a Member State (*Maierhofer*, cited above, paragraphs 25 and 26, and case-law cited).

18 Furthermore, under the division of jurisdiction between the Courts of the European Union and the national courts, the Court must take account of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (Case C-434/08 *Harms* [2010] ECR I-4431, paragraph 33).

19 According to the factual findings of the referring court in this case, the leasing contract is not limited to the letting of the houseboat and the landing stage but also includes the area of water and the plot of land contiguous therewith, use of the houseboat and the landing stage being indissociable from the occupation of those other elements. The leasing has, moreover, the sole purpose of operating the houseboat with the landing stage as a restaurant-discotheque.

20 Following those findings of the national court, it is necessary to examine the situation of the houseboat not in an isolated manner, but taking account of its integration into its site.

21 Having regard to those factual elements, it must be held that the non-submerged part of the ground corresponding, in the case in the main proceedings, to the plot contiguous with the site of the houseboat on the water constitutes immovable property. Similarly, the submerged and demarcated part of the riverbed, which is covered by the river water on which the houseboat rests, constitutes immovable property (see, to that effect, *Fonden Marselisborg Lystbådehavn*, paragraph 34; Case C-451/06 *Walderdorff* [2007] ECR I-10637, paragraph 19). The national court observes that use of the houseboat permanently prevents any other use of the waters which it covers.

22 The houseboat, the non-submerged part of the ground and the submerged part of the riverbed constitute a whole which forms the main subject-matter of the leasing contract.

23 It is apparent from the order for reference that the houseboat, without any system of propulsion, has been immobilised on that part of the river water for many years. It is attached to the demarcated part of the riverbed by means of anchors and is attached to the bank by chains and ropes. Those immobilisation measures cannot be removed easily, that is to say without effort and considerable cost. In accordance with the case-law of the Court of Justice, it is not necessary for a construction to be indissociably incorporated into the ground in order to be regarded as immovable property for the purposes of applying the rules on VAT (*Maierhofer*, paragraph 33).

24 By the terms of the leasing contract which is concluded for a duration of five years and which shows no wish of the parties to confer an occasional and temporary character to the use made of the houseboat, the latter is used exclusively for the permanent operation of a restaurant-discotheque. Moreover, the houseboat has a postal address and telephone line and is connected to the water and electricity mains.

25 Taking account of the houseboat's link with the elements that constitute its site and of the fact that it is fixed to those elements, which render it, in practice, a part of that space taken as a whole, and taking into account also the contract which allocates the houseboat exclusively and permanently to the operation, on that site, of a restaurant-discotheque, and taking account of the fact that the latter is connected to the various mains, it must be held that the whole constituted by the houseboat and the elements which compose the site where it is moored must be regarded as immovable property for the purposes of applying the exemption referred to in Article 13B(b) of the Sixth Directive.

26 The European Commission correctly observes that, having regard to the objective envisaged by the contracting parties and the function allocated by them to the houseboat, it is, for those parties, immaterial, from an economic point of view, whether it is a building incorporated into the ground in a fixed manner, for example by piles, or a simple houseboat such as that at issue in the main proceedings.

27 This Court cannot accept the argument of the German Government, according to which the main purpose of the contract was the letting of the houseboat irrespective of the place where it is moored, since, in order to ensure the profitability of a restaurant, the location is of considerable importance. The letting contract and the amount of the rent were agreed in the case at issue in the main proceedings by reference to the location of the houseboat, which is situated, in particular, near a large conurbation and allows easy access to the houseboat-restaurant.

28 It must also be emphasised that, according to the order for reference, the placing of the landing stage at the lessee's disposal is essentially designed to allow access to the houseboat. It is thus apparent that, together with the elements constituting its mooring, namely the submerged and non-submerged ground, the area of water and the adjoining landing stage, the houseboat forms a functional and economic unity, and that the leasing contract, which covers all those elements, encompasses a single supply, in the context of which the letting of the landing stage is ancillary to the letting of the houseboat. Consequently, the letting of that landing stage does not have to be regarded as a separate supply from the point of view of VAT.

29 Having regard to the above considerations, the answer to the first question and the second part of the second question is that, on a proper interpretation of Article 13B(b) of the Sixth Directive, the concept of the leasing or letting of immovable property includes the leasing of a houseboat, including the space and the landing stage contiguous therewith, which is fixed by attachments which are not easily removable to the bank and bed of a river, stays in a demarcated and identifiable location in the river water and is exclusively used, according to the terms of the leasing contract, for the permanent operation of a restaurant-discotheque at that location. That leasing constitutes a single exempt supply, without it being necessary to distinguish between the leasing of the houseboat and that of the landing stage.

**The first part of the second question**

30 By the first part of this question, the national court asks, in essence, whether a houseboat, such as that at issue in the main proceedings, constitutes a 'vehicle' for the purposes of applying the exception under Article 13B(b), point 2, of the Sixth Directive.

31 In accordance with the case-law of the Court of Justice, the term 'vehicle' used in that provision must be interpreted as covering all means of transport, including boats (*Fonden Marselisborg Lystbådehavn*, paragraph 44). According to the normal interpretation of those words, that means methods for transporting persons or goods, namely methods actually used for that function.

32 That approach to the concept of a vehicle, based on the actual use and function of the object under consideration, is confirmed by Article 38(1) and (3) of Regulation No 282/2011, which places the emphasis when classifying a vehicle as a 'means of transport' precisely on the fact that it is intended for the transport of persons or goods, and excludes from that classification vehicles which are permanently immobilised. That regulation, whilst not applicable *ratione temporis* to the case in the main proceedings, nevertheless explains and clarifies concepts appearing in the VAT legislation and applicable since its inception.

33 Consequently, it is not the initial use of an object which is significant, but its actual and current function. The initial use of an item of property cannot definitively confer upon it a certain treatment under the VAT rules, irrespective of the change in actual use which is made of that property.

34 It is apparent from the documents before the Court that the houseboat at issue in the main proceedings, probably initially intended to be used as a means of transport, has not been used for such purposes for the past 30 years, and, during that period, has been permanently immobilised at the same location along the left bank of the Rhine. Moreover, according to the terms of the leasing contract, the contracting parties have not expressed any intention to use the houseboat as a means of transport for the duration of the contract, and have allocated an entirely different function to it. Therefore, that houseboat cannot be regarded as a vehicle for the purposes of the VAT rules.

35 This Court cannot accept the argument of the German Government that the function of the houseboat-restaurant at issue in the main proceedings is comparable to that of a boat-restaurant which makes short cruises on a waterway, such as the Rhine or the Moselle, and which certainly constitutes a means of transport. An ensemble such as that at issue in the main proceedings, constituted by a houseboat and the space and the landing stage contiguous therewith, is an item of immovable property designed exclusively to offer restaurant and entertainment services in a particular setting, whereas boat-restaurants making cruises on a waterway are vehicles for the supply of both restaurant services and tourist services. Consequently, the situation of the latter cannot be compared with that at issue in the main proceedings.

36 As the Commission has correctly observed, in accordance with the principle of fiscal neutrality, the function of the houseboat at issue in the main proceedings is comparable with that of a building used as a restaurant installed close to the latter, on dry land. Therefore, the restaurant-discotheque functioning on that houseboat is in economic competition with similar establishments situated in buildings incorporated into the ground.

37 In the light of the above, the answer to the first part of the second question is that a houseboat, such as that at issue in the main proceedings, does not constitute a vehicle within the meaning of Article 13B(b), point 2, of the Sixth Directive.

## Costs

38 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. **On a proper interpretation of Article 13B(b) of the 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, the concept of the leasing or letting of immovable property includes the leasing of a houseboat, including the space and the landing stage contiguous therewith, which is fixed by attachments which are not easily removable to the bank and bed of a river, stays in a demarcated and identifiable location in the river water and is exclusively used, according to the terms of the leasing contract, for the permanent operation of a restaurant-discotheque at that location. That leasing constitutes a single exempt supply, without it being necessary to distinguish between the leasing of the houseboat and that of the landing stage.**

2. **Such a houseboat does not constitute a vehicle within the meaning of Article 13B(b), point 2, of the Sixth Directive 77/388.**

[Signatures]