Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

17 December 2020*

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Exemption for leasing and letting immovable property – National legislation exempting from VAT the supply of heat by an association of residential property owners to property owners belonging to that association)

In Case C-449/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany), made by decision of 12 September 2018, received at the Court on 13 June 2019, in the proceedings

WEG Tevesstraße

v

Finanzamt Villingen-Schwenningen,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, K. Lenaerts, President de la Court, acting as Judge of the Third Chamber, N. Wahl, F. Biltgen (Rapporteur) and L. S. Rossi, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by J. Möller and S. Eisenberg, acting as Agents,

– the European Commission, by J. Jokubauskaitė and L. Mantl, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2020,

gives the following

* Language of the case: German.

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 association of residential property owners and co-owners, WEG Tevesstraße ('WEG Tevesstraße'), comprising a limited liability company, a public authority and a municipality, on the one hand, and the Finanzamt Villingen-Schwenningen (Villingen-Schwenningen tax office, Germany) ('the Finanzamt'), on the other, concerning the setting of the deduction of input value added tax (VAT) paid in relation to the costs of purchasing and operating a cogeneration power unit for 2012.

Legal context

European Union law

3 Article 2(1)(a) of the VAT Directive provides:

'The following transactions shall be subject to VAT:

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

4 Article 9(1) of the VAT Directive states:

'"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". Economic activity includes, in particular, the exploitation of goods or intangible and legal assets in a continuous manner with a view to profit.'

5 Article 14(1) of the VAT Directive is worded as follows:

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

6 Article 15(1) of the VAT Directive provides:

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

7 Article 135(1)(l) of the VAT Directive provides:

'Member States shall exempt the following transactions:

…

(l) the leasing or letting of immovable property.'

8 Article 136 of the VAT Directive provides:

‘Member States shall exempt the following transactions:

(a) the supply of goods used solely for an activity exempted under Articles 132, 135, 371, 375, 376 and 377, Article 378(2), Article 379(2) and Articles 380 to 390b, if those goods have not given rise to deductibility;

(b) the supply of goods on the acquisition or application of which VAT was not deductible, pursuant to Article 176.’

German law

9 Paragraph 1(1)(1) of the Umsatzsteuergesetz (Law on turnover tax) of 21 February 2005 (BGB1. 2005 I, p. 386), in the version applicable to the main proceedings (‘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 or her business. …’

10 Under Paragraph 4(13) of the UStG, the following are exempt from VAT: ‘services supplied by associations of residential property owners … to the residential property owners and co-owners, in so far as the services consist in making the common property available for use, maintenance, repair and other management purposes, as well as the supply of heat and similar goods.’

11 Paragraph 9(1) of the UStG provides that the trader may waive the exemption provided for in Paragraph 4(13) if the transaction is carried out for the purposes of another trader’s business.

12 Paragraph 15(1), (2) and (4) of the UStG provides inter alia:

‘(1) The trader may deduct the following amounts of input tax:

1. tax lawfully due for supplies of goods and services which have been made for its business by another trader.

…

(2) There is no deduction of input tax in respect of the tax on the supplies, the importation or the intra-Community acquisition of goods, or in respect of other supplies of services which the trader uses for the following transactions:

1. exempt transactions;

…

(4) If the trader uses any goods or services supplied, imported or acquired in the Community only in part to carry out transactions in respect of which there is no right to deduct, the part of the input tax which is economically attributable to those transactions shall not be deductible …’

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

13 In 2012, the WEG Tevesstraße built a cogeneration power unit for operation on land belonging to the property owners of that association. The electricity generated by that power unit was supplied to an energy distributor while the heat produced was supplied to the property owners of that association. The WEG Tevesstraße requested a deduction of the VAT and, in that respect, it claimed from the Finanzamt an amount representing the input VAT paid totalling EUR 19 765.17 relating to the costs of purchasing and operating that power unit for 2012.

14 In December 2014, the Finanzamt issued a tax assessment in respect of VAT for 2012 allowing the deduction of input VAT for the amount relating to the production of electricity, which corresponded to 28% of the amount claimed, but refused the deduction of input VAT for the amount relating to the production of heat which corresponded to 72% of the amount claimed. In support of its assessment, the Finanzamt stated that the supply of heat by an association of property owners to the property owners of that association is, under Paragraph 4(13) of the UStG, a transaction that is exempt from VAT.

15 Following the rejection by the Finanzamt of its challenge, the WEG Tevesstraße brought an action before the referring court seeking the deduction of input VAT for the amount corresponding to the production of heat. In support of its action, it argues, in essence, that that provision of the UStG contravenes EU law, since the VAT Directive does not contain any provision exempting the supply of heat by an association of property co-owners to themselves.

16 It follows from the request for a preliminary ruling that, like part of German legal literature, the referring court has doubts whether the exemption under Paragraph 4(13) of the UStG may be based on Article 135(1)(l) of the VAT Directive and, therefore, whether or not the VAT Directive precludes that national legislation.

17 In those circumstances, the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are the provisions of [the VAT Directive] to be interpreted as precluding legislation of a Member State under which the supply of heat by associations of residential property owners to those owners is exempt from [VAT]?’

The question referred for a preliminary ruling

18 By its question, the referring court asks in essence, whether Article 135(1)(l) of the VAT Directive must be interpreted as meaning that it precludes national legislation which exempts from VAT the supply of heat by an association of residential property owners to the property owners belonging to that association.

19 As a preliminary point, it should be noted, as the Advocate General did in point 20 of his Opinion, that, in order to give an answer that is helpful for the referring court, it is important to take into account the legal and factual elements of that request.

20 In that regard, it should be pointed out that the question referred is based on the premiss that the activity at issue in the main proceedings is an operation that is subject to VAT, for the purposes of Article 2(1)(a) of the VAT Directive.

21 First of all, that premiss is actually supported by the actual purpose of the question referred for a preliminary ruling. The exemptions laid down by the VAT Directive are intended to be applied only to the activities falling within the scope of that directive (see, to that effect, judgments of 11 June 1998, *Fischer*, C-283/95, EU:C:1998:276, paragraph 18; of 29 April 2004, *EDM*, C-77/01, EU:C:2004:243, paragraph 59; and of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166, paragraph 26), so that, if the supply of heat at issue in the main proceedings did not fall within the scope of the VAT Directive, the issue whether or not that directive precludes an exemption such as the one in Paragraph 4(13) of the UStG would not arise. In addition, that premiss is confirmed by the fact that the referring court, in its request for a preliminary ruling, expressly refers to Article 2(1)(a) of the VAT Directive.

22 Next, as is apparent from the observations of the German Government, the German legislature considered that the exemption introduced by Paragraph 4(13) of the UStG was necessary given that the supplies carried out by associations of residential property owners for the benefit of their members are, in principle, subject to VAT.

23 Finally, as the referring court stated in its request for a preliminary ruling, it is clear from the case-law of the Bundesfinanzhof (Federal Finance Court, Germany), more particularly the judgment of 20 September 2018 IV R 6/16 (DE:BFH:2018:U.200918.IVR6.16.0, paragraph 56), that the supply of heat for consideration by an association of residential property owners to its members constitutes a supply that is subject to VAT under Paragraph 1(1) of the UStG, but which must be exempt from that tax pursuant to Paragraph 4(13) of the UStG.

24 In that regard, it should be observed that, although the VAT Directive gives a very wide scope to VAT, only activities of an economic nature are covered by that tax (judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraph 20 and the case-law cited).

25 According to Article 2(1)(a) of the VAT Directive, relating to taxable transactions, the supply of goods for consideration within the territory of a Member State by a taxable person acting as such, inter alia, is subject to VAT (judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraph 21 and the case-law cited).

26 With regard to the activity at issue in the main proceedings, that is to say the supply of heat, it should be pointed out that, under Article 15(1) of the VAT Directive, heat is to be treated as tangible property. It follows that that activity constitutes a supply of goods, for the purposes of Article 14(1) of that directive.

27 As regards the issue whether a supply takes place for consideration, it should be recalled that the Court has repeatedly held that the fact that a supply of goods is carried out 'for consideration', for the purposes of Article 2(1)(a) of the VAT Directive, requires the existence of a direct link between the service provided and the consideration received. Such a direct link exists only if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied. Further, that consideration must have a subjective value that is actually received and is capable of being expressed in monetary terms (judgment of 13 June 2018, *Gmina Wrocław*, C-665/16, EU:C:2018:431, paragraph 43 and the case-law cited).

28 In the present case, it is apparent from the file submitted to the Court, which is, however, a matter for the referring court to ascertain, that all the property owners belonging to the WEG Tevesstraße pay to that association consideration for the provision of heat, the amount of which is determined according to their individual consumption of heat as revealed on their individual meters. If that situation is verified, it would be appropriate to conclude that the supply of heat at issue in the main proceedings takes place 'for consideration', for the purposes of Article 2(1)(a) of the VAT Directive.

29 With regard to the notion of 'taxable person for VAT purposes', and even though the status of a taxable person for VAT purposes in an association of residential property owners such as the WEG Tevesstraße does not appear to have been called into question by the referring court, it should be recalled that, under Article 9(1) of the VAT Directive, a 'taxable person' means 'any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity'. According to the case-law of the Court, the terms used in Article 9(1) of the VAT Directive, in particular the term 'any person who', give to the notion of 'taxable person' a broad definition focused on independence in the pursuit of an economic activity to the effect that all persons – natural or legal, both public and private, even entities devoid of legal personality – which, in an objective manner, satisfy the criteria set out in that provision must be regarded as being taxable persons for the purposes of VAT (see, to that effect, judgment of 12 October 2016, *Nigl and Others*, C-340/15, EU:C:2016:764, paragraph 27 and the case-law cited).

30 In order to establish that an economic activity is being carried out in an independent manner, it is necessary to examine whether the persons concerned perform their activities in their own name, on their own behalf and under their own responsibility, and whether they bear the economic risk associated with carrying out those activities (judgment of 12 October 2016, *Nigl and Others*, C-340/15, EU:C:2016:764, paragraph 28 and the case-law cited).

31 While it is ultimately for the national court, which has sole jurisdiction to assess the facts, to determine, in the light of the considerations set out in paragraphs 29 and 30 above, whether an association of residential property owners such as the WEG Tevesstraße must be regarded as 'independently' carrying on an activity, such as the one at issue in the main proceedings consisting in the production and marketing of heat, the Court, which is called on to provide answers of use to the referring court, may provide guidance, based on the case file in the main proceedings and on the written and oral observations that have been submitted to it, in order to enable the national court to give judgment in the particular case pending before it.

32 In that regard, first, as the Advocate General stated in paragraph 49 of his opinion, it is apparent from the order for reference that, under German law, an association of residential property owners such as the WEG Tevesstraße is a legal person distinct from the property owners which make up that entity. Further, convergent economic interests between the association of residential property owners and the property owners concerned are not sufficient to support a finding that that association does not exercise the activity at issue 'independently', for the purposes of Article 9(1) of the VAT Directive.

33 Secondly, it is true that, according to Article 11 of the VAT Directive, each Member State, after consulting the advisory committee on VAT referred to in Article 398 of that directive, may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links. However, in the present case, it is not necessary to examine Article 11 given that it is not apparent from the file submitted to the Court that, in the main proceedings, the German tax authority relied on fiscal unity for the purposes of that provision.

34 The notion of 'economic activity' is defined in the second subparagraph of Article 9(1) of the VAT Directive as covering all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. It is apparent from the Court's case-law that that definition shows that the scope of the term 'economic activities' is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. Thus, an activity is generally classified as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (see, to that effect, judgment of 12 November 2009, *Commission* v *Spain*, C-154/08, not published, EU:C:2009:695, paragraph 89 and the case-law cited).

35 Even if the activities carried on by an association of residential property owners such as WEG Tevesstraße consist in exercising the functions assigned to it by national legislation, that fact is in itself irrelevant for the purposes of classifying the provision of those services as economic activities (see, to that effect, judgment of 29 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733, paragraphs 39 and 40).

36 In the present case, the supply of heat stems from the operation of a cogeneration power unit by WEG Tevesstraße. As is apparent from paragraph 28 above, and subject to verification by the referring court, there does not appear to be any dispute that the consideration for supplying heat was a payment made by the property owners belonging to that association. Nor is it disputed that the payments thus received by that association were permanent in nature. Furthermore, it is apparent from the order for reference that the electricity produced by that power unit is supplied to an energy distribution company and that that supply was made in consideration for payment.

37 It is apparent both from the wording of Article 9(1) of the VAT Directive and from the case-law of the Court that, for a finding that the exploitation of tangible or intangible property is carried out for the purpose of obtaining income therefrom, it is irrelevant whether or not that exploitation is intended to make a profit (judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraph 35 and the case-law cited).

38 As is confirmed, moreover, by the premiss on which the question referred for a preliminary is based, it follows that the VAT Directive is applicable in the present case and that the supply of heat at issue in the main proceedings constitutes a supply of goods which is, in principle, subject to VAT, for the purposes of Article 2(1)(a) of that directive.

39 Having clarified that, it is appropriate to examine, in the first place, the issue raised by the referring court and by the German Government whether an exemption such as the one in Paragraph 4(13) of the UStG may come under Article 135(1)(l) of the VAT Directive, by which Member States exempt 'the leasing or letting of immovable property'. In that regard, it is important to recall that, according to settled case-law, the terms used to describe the exemptions envisaged by Article 135(1) of the VAT Directive, including the notions of 'leasing' and 'letting of immovable property', are to be interpreted strictly since these exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, inter alia, judgment of 19 December 2018, *Mailat*, C-17/18, EU:C:2018:1038, paragraph 37 and the case-law cited).

40 In addition, in the absence of a definition of those notions in the VAT Directive, the Court defined the 'letting of immovable property', for the purposes of Article 135(1)(l) of that directive, as an arrangement whereby the lessor assigns to the lessee, in return for rent and for an agreed period, the right to occupy its property and to exclude any other person from it (see, inter alia, judgment of 19 December 2018, *Mailat*, C-17/18, EU:C:2018:1038, paragraph 36 and the case-law cited).

41 The Court has also specified that the exemption provided for in Article 135(1)(l) of the VAT Directive is due to the fact that the letting of immovable property, whilst being an economic activity, is normally a relatively passive activity, not generating any significant added value. Such an activity is thus to be distinguished from other activities which are either industrial and commercial in nature, or have as their subject matter something which is best understood as the provision of a service rather than simply making property available, such as the right to use a golf course, the right to use a bridge in consideration of payment of a toll or the right to install cigarette machines in commercial premises (judgment of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö* (Computing centre services), C-215/19, EU:C:2020:518, paragraph 41 and the case-law cited).

42 In the main proceedings, as is apparent from the request for a preliminary ruling, the activity at issue consists in the supply of heat generated by the operation, by WEG Tevesstraße, of a cogeneration power unit. By supplying that heat, that association simply sells tangible property which is the result

of the exploitation of another tangible property, albeit the latter is immovable, without however conferring on the purchasers of the heat, that is to say the property owners belonging to that association, the right to occupy an immovable property, in the present case the cogeneration power unit, and to exclude any other person from enjoyment of such a right, within the meaning of the case-law referred to in paragraph 40 above.

43 In the second place, as regards the issue, also raised by the referring court and by the German Government, whether an exemption such as the one in Paragraph 4(13) of the UStG has its basis in report No 7 of the meeting of the Council of the European Union of 17 May 1977 concerning Article 13 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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'), it should be recalled that, according to that report, 'the Council and the [European] Commission declare that Member States may exempt making the common property available for use, maintenance, repair and other management purposes, as well as the supply of heat and similar goods by associations of residential property owners to the property owners themselves'.

44 However, it is settled case-law that declarations made in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of interpreting that directive where no reference is made to the content of the declaration in the wording of the provision in question, and, moreover, such declarations have no legal significance (see, inter alia, judgment of 22 October 2009, *Swiss Re Germany Holding*, C-242/08, EU:C:2009:647, paragraph 62 and the case-law cited).

45 It should be pointed out that that is the situation in the present case, since neither Article 13B(b) of the Sixth Provision, making provision for the exemption of the leasing and letting of immovable property, nor Article 135(1)(l) of the VAT Directive, which replaced that provision, contain the slightest evidence that the declaration of the Council and the Commission set out in that report was reflected in those provisions.

46 Therefore, it must be concluded that Article 135(1)(l) of the VAT Directive must be interpreted as meaning that an exemption such as the one in Paragraph 4(13) of the UStG does not come under that provision.

47 That conclusion cannot be called into question by the argument advanced by the German Government and implicitly based on the principle of fiscal neutrality, according to which the supply of heating by an association of residential property owners to the property owners belonging to that association should be exempt from VAT in order to ensure equal treatment for VAT purposes between, on the one hand, the owners and tenants of single family homes not subject to VAT, who are respectively exempt from VAT, where they supply heat to themselves as property owners or where they simultaneously lease the house and the heating system, and on the other, the co-owners of properties subject to VAT, where the association to which they belong supplies them with heating.

48 It is true that, according to established case-law, the principle of fiscal neutrality, which was intended by the EU legislature to reflect, in matters relating to VAT, the general principle of equal treatment (judgment of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraph 41 and the case-law cited), precludes in particular treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (judgment of 14 December 2017, *Avon Cosmetics*, C-305/16, EU:C:2017:970, paragraph 52 and the case-law cited). Furthermore, it is apparent from the case-law of the Court that that principle must be interpreted as meaning that a difference in treatment for the purposes of VAT of two deliveries of goods or two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle (see, to that effect, judgment of 10 November 2011, *Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 36). However, it must be pointed out that the line of argument advanced by the German Government is based on a

comparison of supplies of goods to two clearly distinct groups of consumers and that the fact that those groups are potentially treated differently is merely the consequence of the choice made by the persons belonging to those groups to own or not to own a dwelling in a building under co-ownership.

49 In view of all the foregoing considerations, the answer to the question referred is that Article 135(1)(l) of the VAT Directive must be interpreted as meaning that it precludes national legislation which exempts from VAT the supply of heat by an association of residential property owners to the property owners belonging to that association.

Costs

50 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:

Article 135(1)(l) 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 it precludes national legislation which exempts from value added tax the supply of heat by an association of residential property owners to the property owners belonging to that association.

[Signatures]