Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

13 July 2017*

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Exemptions of supplies of services closely linked to sport — Article 133 — Exclusion of the exemption in the event of a risk of distortion of competition to the disadvantage of commercial enterprises subject to VAT — Services supplied by non-profit making organisations governed by public law)

In Case C-633/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the First-tier Tribunal (Tax Chamber), made by decision of 30 November 2015, received at the Court on 30 November 2015, in the proceedings

London Borough of Ealing

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 October 2016,

after considering the observations submitted on behalf of:

– London Borough of Ealing, by F. Mitchell, Barrister, instructed by H. Grantham, Solicitor,

– the United Kingdom Government, by S. Brandon, acting as Agent, and by R. Hill and P. Mantle, Barristers,

– the European Commission, by R. Lyal and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 December 2016,

gives the following

* Language of the case: English.

Judgment

1 This request for a preliminary ruling concerns the interpretation of point (d) of the first paragraph and the second paragraph of Article 133 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, and corrigendum OJ 2007 L 335, p. 60).

2 The request has been made in proceedings between the London Borough of Ealing and the Commissioners for Her Majesty's Revenue and Customs (the United Kingdom tax and customs authority; 'the tax authority') concerning the chargeability of value added tax (VAT) on charges for admission to sports facilities.

Legal context

EU law

3 Under Article 28(3)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'), read together with point 4 of Annex E to that directive, Member States could, during the transitional period referred to in paragraph (4) of that article, continue to subject to VAT the transactions referred to in Article 13A(1)(m) of that directive.

4 Directive 2006/112, in accordance with Articles 411 and 413 of that directive, repealed and replaced the EU legislation on VAT, including the Sixth Directive, with effect from 1 January 2007.

5 Article 132(1)(m) of Directive 2006/112, which is in Chapter 2, headed 'Exemptions for certain activities in the public interest', of Title IX of that directive, provides that the Member States are to exempt:

'the supply of certain services closely linked to sport or physical education by non-profit making organisations to persons taking part in sport or physical education'.

6 Article 133 of that directive provides:

'Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

...

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

Member States which, pursuant to Annex E [to the Sixth Directive], on 1 January 1989 applied VAT to the transactions referred to in Article 132(1)(m) … may also apply the conditions provided for in point (d) of the first paragraph when the said supply of goods or services by bodies governed by public law is granted exemption.'

United Kingdom law

7 During the transitional period referred to in Article 28(3) of the Sixth Directive, the United Kingdom of Great Britain and Northern Ireland continued to apply VAT to supplies of services closely linked to sport and physical education, referred to in Article 13A(1)(m) of that directive, with the exception of two supplies relating to participation in sporting competitions, as provided for in Group 10 of Schedule 6 of the Value Added Tax Act 1983.

8 Group 10 of Schedule 9 of the Value Added Tax Act 1994 provides that the following supplies are to be exempt from VAT:

‘1. The grant of a right to enter a competition in sport or physical recreation where the consideration for the grant consists in money which is to be allocated wholly towards the provision of a prize or prizes awarded in that competition.

2. The grant by an eligible body established for the purposes of sport or physical recreation, of a right to enter a competition in such an activity.

3. The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part.’

9 Note (2A) to Group 10 of Schedule 9 defines ‘eligible body’ as meaning a non-profit making body which meets certain conditions.

10 Note 3 to Group 10 of Schedule 9 provides:

‘In Item 3 an ‘eligible body’ does not include:

(a) a local authority;

(b) a Government department ... ; or

(c) [certain other public entities].’

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

11 The London Borough of Ealing is a local authority which operates a number of sports facilities, such as gymnasia and swimming pools. In the period between 1 June 2009 and 31 August 2012 it accounted for VAT levied on the amounts charged for admission to those facilities.

12 In 2013 the London Borough of Ealing made an application to the tax authority for repayment of that VAT, claiming that those charges ought to have been exempt from VAT under Article 132(1)(m) of Directive 2006/112. That application was rejected on the ground that the national legislation excludes the exemption for the provision of sporting services covered by that provision, where those services are supplied by bodies governed by public law, such as a local authority, pursuant to the conditions laid down in point (d) of the first paragraph and the second paragraph of Article 133 of that directive.

13 The London Borough of Ealing brought an action against that decision before the First-tier Tribunal (Tax Chamber). Before that court, it maintained that the United Kingdom could not rely on the second paragraph of Article 133 of Directive 2006/112, on the ground that that Member State had not applied VAT, on 1 January 1989, to all supplies of sporting services, in that, in particular, rights to participate in a sporting competition were exempted from VAT. Further, according to the London

Borough of Ealing, the second paragraph of Article 133, with respect to supplies of services closely linked to sport or physical education, does not permit non-profit making organisations governed by public law to be excluded from the benefit of the VAT exemption, unless non-profit making organisations other than those governed by public law are also excluded from that benefit. Last, the second paragraph of Article 133 of that directive does not permit Member States to deprive, across the aboard, all local authorities of the benefit of that exemption, since it is necessary to determine 'in each individual case' whether that exemption is likely to cause distortions of competition. The tax authority did not accept those arguments.

14 According to the information provided in the order for reference, the London Borough of Ealing has to be considered to be a non-profit making organisation, whose supplies are closely linked to sport or physical education and are made to persons taking part in sport or physical education, within the meaning of Article 132(1)(m) of Directive 2006/112.

15 In those circumstances, the First-Tier Tribunal (Tax Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the United Kingdom entitled, pursuant to the final paragraph of Article 133 of [Directive 2006/112], to impose the condition contained in point (d) of [the first paragraph of] that article on bodies governed by public law, (i) in circumstances where the relevant transactions were treated by the United Kingdom as taxable on 1 January 1989, but other sporting services were subject to exemption on that date and (ii) in circumstances where the relevant transactions had not first been granted exemption under national law before the United Kingdom sought to impose the condition contained in [point (d) of the first paragraph of] Article 133 [of that directive]?

2) If the answer to [Question] (1) above is in the affirmative, is the United Kingdom entitled to impose the condition contained in [point] (d) of [the first paragraph of] Article 133 [of Directive 2006/112] on non-profit making bodies governed by public law without also applying that condition to non-profit making bodies which are not governed by public law?

3) If the answer to [Question] (2) above is in the affirmative, is the United Kingdom permitted to exclude all public non-profit making bodies from the benefit of the exemption contained in Article 132(1)(m) [of Directive 2006/112] without having considered in each individual case whether the granting of exemption would be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT?'

Consideration of the questions referred

16 First, it must be observed that, according to the information provided in the request for a preliminary ruling, the supplies of services at issue in the main proceedings fall within the scope *ratione temporis* of Directive 2006/112, have to be regarded as meeting the conditions for the exemption provided for in Article 132(1)(m) of that directive and were made by a non-profit making organisation, within the meaning of that provision, governed by public law. Since those supplies of services are subject to VAT under the national legislation at issue in the main proceedings, the questions of the referring court concern solely the interpretation of the second paragraph of Article 133 of that directive, read together with point (d) of the first paragraph of that article, whereby it is possible, subject to certain conditions, to exclude those supplies of services from the benefit of that exemption where those supplies are made by bodies governed by public law.

The first question

17 By its first question, the referring court seeks, in essence, to ascertain whether the second paragraph of Article 133 of Directive 2006/112 must be interpreted as precluding the legislation of a Member State from providing that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of the VAT exemption to bodies governed by public law that supply services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, even though, on the one hand, on 1 January 1989 that Member State did not apply VAT to those supplies of services and, on the other, the supplies of services at issue were not exempted from VAT before the requirement of compliance with that condition was imposed.

18 As regards the question whether all supplies of services closely linked to sport or physical education had to be subject to VAT on 1 January 1989 if a Member State is to be entitled to rely on the second paragraph of Article 133 of Directive 2006/112, it must be observed that the wording of that provision contains no such condition. That provision is applicable to Member States who imposed VAT on the transactions referred to in Article 132(1)(m) of that directive, but does not require all those supplies of services to have been taxable.

19 Such a requirement would, moreover, be contrary to the wording of Article 132(1)(m), to which the second paragraph of Article 133 refers, where there is mention of 'certain' supplies of services closely linked to sport or physical education.

20 Accordingly, a Member State, such as the United Kingdom, which applied, on 1 January 1989, VAT not to all, but to a certain number of such supplies of services, can rely on the right granted to the Member States in the second paragraph of Article 133 of that directive, read together with point (d) of the first paragraph of that article.

21 The second part of the first question concerns the interpretation of the final clause of the second paragraph of Article 133 of Directive 2006/112, namely 'when the said supply of goods or services by bodies governed by public law is granted exemption'.

22 In that regard, the referring court raises the question whether, as maintained by the London Borough of Ealing, that wording implies that the United Kingdom was obliged, in the first place, to exempt supplies of services closely linked to sport or physical education made by non-profit making organisations governed by public law, before it could then, in the second place, apply the condition laid down in point (d) of the first paragraph of Article 133 of Directive 2006/112 to such supplies.

23 Such a requirement cannot however be inferred from the second paragraph of Article 133 of that directive. As the Advocate General stated in point 44 of his Opinion, in that provision it is the present tense that is used, namely 'is granted exemption', and not the past tense, 'was granted exemption'. That provision creates therefore no requirement that those supplies of services should have been exempt from VAT before the condition laid down in point (d) of the first paragraph of Article 133 of that directive could be applied.

24 The objective pursued by the second paragraph of Article 133 of Directive 2006/112 is also conducive to that interpretation. The aim of that provision is not to exempt supplies of services closely linked to sport or physical education, but, on the contrary, as is apparent from the wording of the second paragraph of Article 133, read together with point (d) of the first paragraph of that article, to enable Member States to apply VAT to such supplies of services made by bodies governed by public law and subject to VAT on 1 January 1989.

25 It follows that, pursuant to the second paragraph of Article 133 of that directive, the exemption of supplies of services closely linked to sport or physical education, made by bodies governed by public law, may be subject to the condition laid down in point (d) of the first paragraph of that article, even if those supplies of services did not previously benefit from an exemption in the Member State concerned.

26 In the light of the foregoing, the answer to the first question is that the second paragraph of Article 133 of Directive 2006/112 must be interpreted as not precluding the legislation of a Member State from providing that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of a VAT exemption to bodies governed by public law that supply services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, even though, on the one hand, on 1 January 1989 that Member State did not apply VAT to all such supplies of services and, on the other, the supplies of services at issue were not exempted from VAT before the requirement of compliance with that condition was imposed.

The second question

27 By its second question, the referring court seeks, in essence, to ascertain whether the second paragraph of Article 133 of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, where that legislation provides that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the granting of a VAT exemption to non-profit making organisations governed by public law that make supplies of services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, but fails also to apply that condition to non-profit making organisations other than those governed by public law that make such supplies of services.

28 In that regard, it must be recalled that Article 132(1)(m) of Directive 2006/112, which provides that Member States may exempt certain supplies of services closely linked to sport or physical education made by non-profit making organisations, extends, without distinction, to all non-profit making organisations (see, to that effect, judgment of 25 February 2016, *Commission* v *Netherlands*, C-22/15, not published, EU:C:2016:118, paragraph 43).

29 While Article 133 of that directive permits the Member States to subject the grant of that exemption to compliance with additional conditions, it is apparent from the wording of the first paragraph of that article that Member States may apply the conditions specified in that paragraph, namely points (a) to (d), as a general rule, only to bodies other than those governed by public law. As regards bodies governed by public law, the second paragraph of that article confers the right only to impose on them the condition laid down in point (d) of the first paragraph of that article, which is designed to ensure that there is no distortion of competition to the disadvantage of commercial enterprises, that right being conferred solely on Member States which applied, on 1 January 1989, VAT to the supplies of services referred to in Article 132(1)(m) of that directive.

30 Accordingly, the possibility made available to Member States of excluding the grant of a VAT exemption with respect to supplies of services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of Directive 2006/112, on the basis of Article 133 of that directive, is more closely circumscribed for non-profit making organisations governed by public law than for other non-profit making organisations. As the Advocate General stated in point 27 of his Opinion, the latter provision is designed to place bodies governed by public law at an advantage as compared with other bodies in relation to the exemption of supplies of services closely linked to sport or physical education made by them.

31 In the light of that objective, the word 'also' in the second paragraph of Article 133 of Directive 2006/112 has to be interpreted as meaning that Member State may impose on bodies governed by public law the requirement of compliance with the condition laid down in point (d) of the first paragraph of that article only if it also imposes that requirement on bodies other than those governed by public law.

32 That interpretation precludes national legislation, such as that at issue in the main proceedings, from excluding, from the benefit of the VAT exemption for supplies of services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of Directive 2006/112, solely the supplies of services made by non-profit making organisations governed by public law, while failing also to apply VAT, pursuant to point (d) of the first paragraph of Article 133 of that directive, to supplies of services made by other non-profit making organisations.

33 In the light of all the foregoing, the answer to the second question is that the second paragraph of Article 133 of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, where that legislation provides that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of a VAT exemption to non-profit making organisations governed by public law making supplies of services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, but fails also to apply that condition to non-profit making organisations other than those governed by public law that make such supplies of services.

The third question

34 In view of the answer to the second question, there is no need to answer the third question.

Costs

35 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 (Fourth Chamber) hereby rules:

1. **The second paragraph of Article 133 of Council Directive 2006/112 of 28 November 2006 on the common system of value added tax must be interpreted as not precluding the legislation of a Member State from providing that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of a VAT exemption to bodies governed by public law that supply services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, even though, on the one hand, on 1 January 1989 that Member State did not apply VAT to all those supplies of services and, on the other, the supplies of services at issue were not exempted from VAT before the requirement of compliance with that condition was imposed.**

2. **The second paragraph of Article 133 of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, where that legislation provides that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of a VAT exemption to non-profit making organisations governed by public law making supplies of services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, but fails also to apply that condition to non-profit making organisations other than those governed by public law that make such supplies of services.**

von Danwitz Juhász Vajda

Jürimäe Lycourgos

Delivered in open court in Luxembourg on 13 July 2017.

A. Calot Escobar
Registrar

T. von Danwitz
President of the Fourth Chamber