ORDER OF THE COURT (Seventh Chamber)

19 January 2012 (*)

(First subparagraph of Article 104(3) of the Rules of Procedure – Taxation – VAT – Sixth Directive – Article 28(2)(a) – Article 28(3)(b) – Exemption of certain transport services – Transaction combining car parking services and the transport of travellers between the car park and an airport – Existence of two separate supplies of services or of a single supply – Principle of fiscal neutrality)

In Case C-117/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), made by decision of 1 March 2011, received at the Court on 4 March 2011, in the proceedings

Purple Parking Ltd,

Airparks Services Ltd

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Seventh Chamber),

composed of J. Malenovský, President of the Chamber, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

the Court, proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation 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), as amended by Council Directive 92/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47) ('the Sixth Directive'), and of the principle of fiscal neutrality.

2 The reference has been made in the context of proceedings brought by Purple Parking Ltd and Airparks Services Ltd against the Commissioners for Her Majesty's Revenue and Customs ('the

Commissioners') concerning the refusal by the latter to reimburse the value added tax ('VAT') paid by the appellants in respect of passenger transport services supplied during the years 2003 to 2006.

Legal context

European Union legislation

3 Article 2(1) of the Sixth Directive provides that 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to VAT.

4 According to Article 12(3)(a) of the Sixth Directive, the standard rate of VAT is to be fixed by each Member State as a percentage of the taxable amount and is to be the same for the supply of goods and for the supply of services. Except where one or two reduced rates apply, that percentage may not be less than 15%. The reduced rates are to be fixed as a percentage of the taxable amount, which may not be less than 5%, and are to apply only to supplies of the categories of goods and services specified in Annex H to that directive.

5 Article 28(2) of the Sixth Directive provides:

'Notwithstanding Article 12(3), the following provisions shall apply during the transitional period referred to in Article 28 l.

(a) Exemptions with refund of the tax paid at the preceding stage and reduced rates lower than the minimum rate laid down in Article 12(3) in respect of the reduced rates, which were in force on 1 January 1991 and which are in accordance with Community law, and satisfy the conditions stated in the last indent of Article 17 of the second Council Directive of 11 April 1967, may be maintained.

…'

6 Article 28(3)(b) of the Sixth Directive provides that, during the transitional period referred to in Article 28(4), Member States may 'continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned'.

7 Annex F to the Sixth Directive, which lists the transactions that may be exempted under Article 28(3)(b) of that directive, refers, at point 17, to 'Passenger transport'.

National legislation

8 Section 30(1) and (2) of the Value Added Tax Act 1994 provides:

'(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section:

(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.'

9 Group 8 of Schedule 8 to that act, entitled 'Transport', refers, at item 4(a), to the transport of passengers 'in any vehicle, ship or aircraft designed or adapted to carry not less than 10 passengers'.

10 Under Note 4A(b) to Group 8, item 4 does not include the transport of passengers in any motor vehicle between a car park (or land adjacent thereto) and an airport passenger terminal (or land adjacent thereto) by the person, or a person connected with him, who supplies facilities for the parking of vehicles in that car park.

11 That note was introduced with effect from 1 April 1995.

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

12 The appellants in the main proceedings are two companies established in the United Kingdom which provide 'off-airport' parking and 'off-airport park-and-ride' services.

13 The car parks operated by the appellants are located some distance away from various national airports. They pay particular attention to the safety of those car parks. The car parks are securely fenced and are floodlit at night. They are all covered by CCTV surveillance, and they are also patrolled at regular intervals, 24 hours per day and 7 days per week.

14 Customers drive their vehicles to the car park, leave them in an arrivals area and then board a bus or mini-bus provided by the car park operator in order to be transported, with their luggage, to the airport terminal. Their vehicles are parked by the employees of that operator. On their return, the customers again use the means of transport provided by the car park operator between the airport terminal and the car park, where their vehicle is made available in a departure area. The transport service is designed to be available at all times and in a sufficiently frequent and reliable manner, the buses leaving either at regular intervals or on demand.

15 The brochures provided by the appellants to customers emphasise the safety of the car park and the efficiency and simplicity of the parking operation. Reference is made in those brochures to 'simply leaving your car, and moving yourself, your family and your luggage into one of our courtesy buses, with the driver of the vehicle helping with the luggage'.

16 The price charged by the appellants to their customers is entirely by reference to the time, calculated per day, that the vehicles are parked in the car park. The number of passengers is irrelevant and the transport is not charged separately. The daily rate is calculated with a view to under-cutting the long term 'on-airport' parking areas by about GBP 1 to GBP 2 per day. The costs incurred by the two appellants of providing the transport to customers between the car park and the airport are included in the calculation of the daily rate. They respectively amount to approximately 33% and 80% of the total cost of their activity.

17 Until 2006, the appellants paid VAT to the Commissioners on the basis of the standard rate for all the services supplied to their customers, in the light of Note 4A(b) to Group 8 of Annex 8 to the

Value Added Tax Act 1994, which excludes transport services such as those provided by the appellants from the zero-rating prescribed, in principle, for transport in any vehicle designed or adapted to carry not less than 10 passengers.

18 However, in 2006, the appellants claimed that that exclusion infringed the principle of fiscal neutrality and that, therefore, their supplies of transport services should have been regarded as zero-rated supplies. The appellants thus sought reimbursement from the Commissioners of the part of the VAT paid in respect of the transport services for the period from 1 April 2003 to 31 March 2006.

19 The Commissioners refused those claims on the ground that the appellants provided a single supply, of parking services taxable at the standard rate, in relation to which the transport service was only an ancillary, incidental or closely linked supply. The Commissioners argued that, in any event, the exception to zero-rating, prescribed in Note 4A(b) to Group 8 of Annex 8 to the Value Added Tax Act 1994, does not infringe the principle of fiscal neutrality.

20 The First-tier Tribunal (Tax Chamber) dismissed an appeal brought against that refusal by decision of 8 July 2009, holding that the parking and transport services supplied by the appellants constituted a single supply of standard-rated taxable services, given, in particular, that the customers wanted parking and that the transport was imposed on them due to the distance between the car park and the airport.

21 The appellants appealed against that decision to the Upper Tribunal (Tax and Chancery Chamber), claiming that they provided two separate and distinct supplies of services, one of parking and the other of transport.

22 Taking the view that the result of the main proceedings depends on the interpretation of European Union law, the Upper Tribunal (Tax and Chancery Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. What particular factors does the referring court have to take into account when deciding whether, in circumstances such as those of the present case, a taxable person is providing a single taxable supply of parking services or two separate supplies, one of parking and one of transport of passengers?

In particular:

(a) Is this case covered by the reasoning adopted by the Court of Justice in [Case C-349/96 *CPP* [1999] ECR I-973 and Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433]? In particular, can the transport services in question be regarded as ancillary to the parking services or so closely linked to them that they form, objectively, a single indivisible economic supply, which it would be artificial to split?

(b) In considering Question I(a), what account should the referring court take of the costs of providing the transport services, as opposed to the parking services, in accordance with paragraphs 24 to 26 of the [Court of Justice’s judgment in Joined Cases C-308/96 and C-94/97

Madgett and Baldwin [1998] ECR I-6229], in assessing whether or not the transport services are ancillary to the parking services?

(c) In the light of the [Court of Justice's judgment in Case C-572/07 *RLRE Tellmer Property* [2009] ECR I-4983], in particular paragraphs 21 to 24, should the referring court when answering Question 1(a) take account of the fact that the transport element of the supplies could be (but is not in fact) provided in a variety of ways (for example, the taxable person could provide those transport services using a third party provider who invoices the taxable person or could use a third party provider who contracts directly with the customer and separately charges for the transport services) and to what extent (if at all) is it relevant whether or not the contract gives the customer the right to choose between the different manners in which the transport element could be provided?

2. When the referring court is considering whether or not there is a single indivisible economic supply in answering Question I(a), what account should it take of the principle of fiscal neutrality?

In particular:

(a) Does the answer depend on whether or not the taxable person also provides parking services or transport services separately to other groups of customer?

(b) Does the answer depend on how other transport services to and from airports, not provided by operators of parking services, are treated under national law?

(c) Does the answer depend on whether or not other instances of the provision by taxable persons of parking and transport services (not involving transport to and from airports) are treated under national law as constituting two distinct supplies, one taxable and one zero-rated?

(d) Does the answer depend on whether or not the taxable person can show that the services it provides are in competition with other similar services involving both a parking and a transport element, whether provided by the same supplier or provided by two separate suppliers? In particular, does the answer depend on whether the taxable person can show that consumers who wish to use their cars to perform part of the journey to the airport can obtain parking and transport to the airport from individual and separate suppliers, for example by parking at a location near a train station and transport by train from that location to the airport or by parking at a location near an airport and another form of public transport to the airport?

(e) How is the referring court to take account of the conclusions reached by the [Court of Justice in Case C-94/09 *Commission* v *France* [2010] ECR I-4261] in relation to the principle of fiscal neutrality and transport services in that case?

3. Does Community law, and, in particular, the principle of fiscal neutrality, preclude a provision of domestic law which excludes zero-rating for transport services between an airport and a car park where the person providing the transport element and the person supplying the car parking element are the same person or connected persons?'

Consideration of the questions referred

Question 1 and Question 2

23 By its first and second questions, which should be considered together, the Upper Tribunal (Tax and Chancery Chamber) asks, in essence, whether the Sixth Directive must be interpreted as meaning that, for the purpose of determining the rate of VAT applicable, services for the parking of a vehicle in an 'off-airport' car park and for the transport of the passengers of that vehicle between that car park and the airport terminal concerned must, in circumstances such as those at issue in the main proceedings, be regarded as a single complex supply of services or as two distinct and independent taxable supplies which must be appraised separately.

24 Pursuant to the first subparagraph of Article 104(3) of the Rules of Procedure of the Court of Justice, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order.

25 Such is the situation in the present case.

26 According to settled case-law, it follows from Article 2 of the Sixth Directive that every supply must normally be regarded as distinct and independent. However, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system (see, inter alia, *CPP*, paragraph 29; *Levob Verzekeringen and OV Bank*, paragraph 20; Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 22; judgment of 2 December 2010 in Case C-276/09 *Everything Everywhere*, not yet published in the ECR, paragraphs 21 and 22; and judgment of 10 March 2011 in Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 *Bog and Others*, not yet published in the ECR, paragraph 53).

27 Furthermore, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, separately, to taxation or exemption, must be considered to be a single transaction when they are not independent (see Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 51; *RLRE Tellmer Property*, paragraph 18; Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 36; and *Everything Everywhere*, paragraph 23).

28 Such is the case particularly where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (see, inter alia, *CPP*, paragraph 30; Case C-34/99 *Primback* [2001] ECR I-3833, paragraph 45; *RLRE Tellmer Property*, paragraph 18; *Everything Everywhere,* paragraphs 24 and 25; and *Bog and Others*, paragraph 54).

29 Further, there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see *Levob Verzekeringen and OV Bank*, paragraphs 22 and 30; *Aktiebolaget NN*, paragraph 23; *Part Service*, paragraph 53; *RLRE Tellmer Property*, paragraph 19; *Don Bosco Onroerend Goed*, paragraph 37; and *Bog and Others*, paragraph 53).

30 In order to determine whether the taxable person is making to the customer, envisaged as being a typical consumer, several distinct principal supplies or a single supply, the essential features of the transaction must be ascertained and regard must be had to all the circumstances in which that transaction takes place (see, to that effect, *CPP*, paragraphs 28 and 29; *Levob Verzekeringen and OV Bank*, paragraphs 19 and 20; *Aktiebolaget NN*, paragraphs 21 and 22; *Commission* v *France*, paragraphs 32 and 33; *Everything Everywhere,* paragraph 26; and *Bog and Others*, paragraph 52).

31 In that regard, the fact that, in other circumstances, the elements in issue can be or are supplied separately is of no importance, given that that possibility is inherent in the concept of a single composite transaction, as is apparent from paragraph 27 of the present order.

32 In the context of the cooperation established by Article 267 TFEU, it is for the national courts to determine whether the taxable person makes a single supply in a particular case and to make all definitive findings of fact in that regard (see, to that effect, *CPP*, paragraph 32; *Levob Verzekeringen and OV Bank*, paragraph 23; *Part Service*, paragraph 54; and *Bog and Others*, paragraph 55).

33 In respect of the dispute in the main proceedings, it is apparent that the parking and transport services supplied, in the circumstances described by the Upper Tribunal (Tax and Chancery Chamber), by the appellants to their customers form, for the purposes of VAT, a complex single supply in which the parking element is predominant.

34 In that respect, it is appropriate, in particular, to take into consideration the pricing of the services in issue (see, by analogy, Case C-453/05 *Ludwig* [2007] ECR I-5083, paragraph 19). The appellants charge their customers a single price, which may be an indication, without being decisive, that there is a single supply (see to that effect, in particular, *CPP*, paragraph 31, and *Everything Everywhere*, paragraph 29). Furthermore, and above all, the amount of the price to be paid is exclusively calculated on the basis of the period for which the vehicle is parked, whereas the number of passengers and, therefore, the extent of use of the transport are irrelevant.

35 That pricing concept reflects the interests of the parties concerned. The customer seeks, first and foremost, parking at an advantageous price. By contrast, the transport service is only the inevitable consequence of the fact that the car park is located at a certain distance from the airport, a location accepted by the customer given that that distance allows him to pay less for the parking service. Secondly, the car park operator offers the transport service in order to be capable, in spite of that distance, of competing with the parking within the airport.

36 Further, the importance of the parking element follows from the measures adopted in order to guarantee the safety of the car park, set out in paragraph 13 of the present order, which are also emphasised in the appellants' brochures. Those measures are particularly important for the customers in the light of the fact that, on average, they park their vehicles for several days.

37 By contrast, the cost of the transport service incurred by the appellants is not capable of invalidating the finding in paragraph 33 of the present order. As follows from paragraph 16 of this order, the proportion of that cost as against the cost of the parking service varies considerably from one service provider to another without that difference affecting the provision of the service from the point of view of the customer.

38 As regards the principle of fiscal neutrality inherent in the common system of VAT, which in particular precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subject to a uniform rate (see, in particular, Case C-481/98 *Commission* v *France* [2001] ECR I-3369, paragraph 22; Case C-267/99 *Adam* [2001] ECR I-7467, paragraph 36; judgment of 3 March 2011 in Case C-41/09 *Commission* v *Netherlands*, not yet published in the ECR, paragraph 66; and judgment of 10 November 2011 in Joined Cases C-259/10 and C-260/10 *The Rank Group*, not yet published in the ECR, paragraph 32 and the case-law cited), it must be recalled that the determination as to whether two supplies which are taxed differently are similar is for the national court to make in the light of the circumstances of the case, and in particular from the point of view of the average consumer (see *The Rank Group*, paragraphs 43, 44 and 56 and the case-law cited).

39 In that context, it should be taken into consideration that it follows from the case-law cited in paragraphs 26 to 30 of the present order that the treatment of several services as a single supply for the purposes of VAT necessarily leads to tax treatment different from that that those services would have received if they had been supplied separately (see to that effect, in particular, *CPP*, paragraph 27; *Levob Verzekeringen and OV Bank*, paragraph 18; *Part Service*, paragraph 49; and *Everything Everywhere*, paragraph 19). Accordingly, a complex supply of services consisting of several elements is not automatically similar to the supply of those elements separately.

40 Furthermore, as regards the importance of the judgment in Case C-94/09 *Commission* v *France*, referred to in the second question, it follows from paragraphs 25 to 29 and 31 to 34 of that judgment that it concerns the possibility for a Member State to apply, in a selective manner, on the basis of general and objective criteria, a reduced rate of VAT to certain aspects of a category of supplies that is listed in the Sixth Directive and, accordingly, concerns a different question from that raised by the first and second questions referred for a preliminary ruling. Indeed, the sole purpose of the latter is whether two services constitute, in the light of the specific circumstances of their supply at issue in the main proceedings, a single supply.

41 In view of the foregoing considerations, the answer to the first and second questions is that the Sixth Directive must be interpreted as meaning that, for the purpose of determining the rate of VAT applicable, services for the parking of a vehicle in an ‘off-airport’ car park and for the transport of the passengers of that vehicle between that car park and the airport terminal concerned must, in circumstances such as those at issue in the main proceedings, be regarded as a single complex supply of services in which the parking service is predominant.

Question 3

42 In the light of the reply given to the first and second questions, it is unnecessary to reply to the third question. In so far as the supply of services at issue in the main proceedings constitutes a single supply the subject of which is the parking service, that supply is subject, under national law, to the standard rate of VAT irrespective of the existence of the provisions providing for the zero-rating of services for the transport of passengers in certain vehicles with the exception of transport services such as those supplied by the appellants in the main proceedings.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the proceedings 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 (Seventh Chamber) hereby rules:

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, as amended by Council Directive 92/111/EEC of 14 December 1992, must be interpreted as meaning that, for the purpose of determining the rate of value added tax applicable, services for the parking of a vehicle in an 'off-airport' car park and for the transport of the passengers of that vehicle between that car park and the airport terminal concerned must, in circumstances such as those at issue in the main proceedings, be regarded as a single complex supply of services in which the parking service is predominant.

[Signatures]

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* Language of the case: English.