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Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

21 October 2021 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 132(1)(i) and (j) – Exemptions for certain activities in the public interest – Provision of children’s or young people’s education, school or university education – School or university education – Basic swimming tuition)

In Case C-373/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 27 March 2019, received at the Court on 13 May 2019, in the proceedings

Finanzamt München III

v

Dubrovin & Tröger GbR – Aquatics,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Ninth Chamber, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the German Government, by S. Eisenberg and J. Möller, acting as Agents,
- the European Commission, by N. Gossement and R. Pethke, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 132(1)(i) and (j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request was made in the context of a dispute between the Finanzamt München Abteilung III (Munich Tax Office III, Germany) (‘the Tax Office’) and Dubrovin & Tröger – Aquatics

(‘Dubrovin & Tröger’) concerning the refusal by the Tax Office to exempt from value added tax (VAT) the swimming tuition services provided by Dubrovin & Tröger.

Legal context

EU law

3 Title IX of Directive 2006/112, headed ‘Exemptions’, includes, inter alia, Chapter 2, relating to ‘Exemptions for certain activities in the public interest’, which contains Article 132 of that directive, paragraph 1 of which is worded as follows:

‘Member States shall exempt from tax the following transactions:

...

(i) the provision of children’s or young people’s education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;

(j) tuition given privately by teachers and covering school or university education;

...’

German law

4 Under Paragraph 1(1) of the Umsatzsteuergesetz (Law on Turnover Tax) of 21 February 2005 (BGBl. 2005 I, p. 386), in the version applicable to the dispute in the main proceedings (‘the UStG’):

‘The following transactions shall be subject to value added tax:

‘1. supplies and other services which an undertaking performs for consideration on the domestic market in the course of its business. ...

...’

5 Paragraph 4 of the UStG, entitled ‘Exemptions in respect of supplies of goods and services’, provides:

‘The following transactions covered by Paragraph 1(1)(1) of this law are exempt:

...

21. (a) the services of private schools and other general education or vocational training organisations directly serving the purpose of schooling and education,

(aa) where they are approved at federal level as alternative schools in accordance with Article 7(4) of the Grundgesetz [(Basic Law)] or are permitted under the law of the *Land*, or

(bb) where the competent authority of the *Land* certifies that they provide due preparation for a profession or for an examination to be taken before a legal person governed by public law.

(b) the tuition services of independent teachers directly serving the purpose of schooling and education

(aa) for universities within the meaning of Paragraphs 1 and 70 of the Hochschulrahmengesetz [(Framework Law on higher education)] and public general education or vocational training schools, or

(bb) for private schools and other general education or vocational training organisations, provided they satisfy the requirements set out under letter (a).

22. (a) lectures, courses and other activities of an academic or didactic nature provided by legal persons governed by public law, academies of administration or economics, adult education centres or bodies which serve the public good or the aims of a professional association, provided that the income is primarily used to cover costs,

(b) other cultural and sporting events organised by the commercial operators referred to in letter (a), provided that the remuneration takes the form of participation fees;

...'

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

6 Dubrovin & Tröger runs a swimming school in the form of a civil-law partnership governed by ordinary law. In the context of its activities, it provides, essentially for children, courses of different levels relating the basics and techniques of swimming. On that basis, it takes the view that those services should be exempt from VAT.

7 Following a tax inspection relating to the years 2007 to 2011, proceeding on the basis that those services did not fall within the scope of the VAT exemptions provided for in Paragraph 4(21) and (22) of the UStG, the Tax Office issued, on 22 November 2011, 3 September 2012 and 12 August 2013, annual VAT assessment notices relating to those years.

8 Dubrovin & Tröger challenged those notices first by an objection and then, following the rejection thereof, by an action brought before the Finanzgericht (Finance Court, Germany).

9 While that action was pending, the Tax Office issued, on 21 December 2017, amended annual notices in which it took into account and deducted input VAT while maintaining the classification of the services at issue in the main proceedings as taxable transactions. In accordance with the applicable tax rules, those amended annual notices became the subject of the proceedings before the Finanzgericht (Finance Court).

10 That court upheld the action, pointing out that, if the services at issue in the main proceedings were not exempt under national law, they had to be exempt under Article 132(1)(j) of Directive 2006/112, as interpreted by the Court and the Bundesfinanzhof (Federal Finance Court, Germany).

11 The Finanzgericht (Finance Court) held that the teaching of basic swimming techniques constituted school education and that, furthermore, a civil-law partnership may rely on Article 132(1)(j) of Directive 2006/112 in the same way as individual traders.

12 The Tax Office brought an appeal on a point of law against the decision of the Finanzgericht (Finance Court) before the referring court, the Bundesfinanzhof (Federal Finance Court). It argued, inter alia, that the services at issue in the main proceedings do not fall, any more in EU law than in

national law, within the scope of VAT exemptions, on the ground that Dubrovin & Tröger does not have the status of a teacher giving private tuition, within the meaning of Article 132(1)(j) of Directive 2006/112.

13 In that connection, the referring court takes the view, in the first place, that the services provided by Dubrovin & Tröger constitute tuition, within the meaning of Article 132(1)(i) and (j) of Directive 2006/112, since there is a general interest in learning the basic skill of swimming which every human being should have, in particular for dealing with emergency situations when coming into contact with water.

14 That court adds that the present case differs from that which gave rise to the judgment of 14 March 2019, *A & G Fahrschul-Akademie* (C-449/17, EU:C:2019:202), in which the Court held that the concept of ‘school or university education’ within the meaning of Article 132(1)(i) and (j) of Directive 2006/112 does not cover driving tuition provided by a driving school. Quite aside from the fact that the latter constitutes specialised tuition – as opposed to the various swimming lessons, which are intended to tie in with each other – it is not in the general interest.

15 In the second place, the referring court is uncertain as to the determining criteria for an body to be recognised as having ‘similar objects’ to those of bodies governed by public law the object of which is children’s or young people’s education, school or university education or vocational training or retraining within the meaning of Article 132(1)(i) of Directive 2006/112.

16 That court is inclined to the view that the criteria set out in the judgment of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716), relating to the recognition of the ‘charitable’ nature of an organisation in the light of Article 132(1)(g) of Directive 2006/112, must apply by analogy to the recognition of an organisation as ‘having similar objects’ in the context of Article 132(1)(i) of that directive. Thus, recognition of Dubrovin & Tröger as a body recognised as ‘having similar objects’ could stem from the public interest attached to learning the basic skill of swimming.

17 In the third place, the referring court seeks to ascertain the requirements applicable in so far as concerns the status of ‘private teacher’ which the operator must have in order to qualify for the exemption provided for in Article 132(1)(j) of Directive 2006/112. In that regard, the principle of fiscal neutrality may preclude economic operators engaged in the same activities from being treated differently for VAT purposes, depending on whether they are sole traders or civil-law partnerships governed by ordinary law. Furthermore, the Court has already held that the fact that a teacher provides tuition to several persons at a time does not preclude the recognition of that activity as tuition given privately (judgment of 14 June 2007, *Haderer*, C-445/05, EU:C:2007:344, paragraphs 30 and 31).

18 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the concept of school or university education within the meaning of Article 132(1)(i) and (j) of [Directive 2006/112] also include swimming tuition?’

(2) Can the recognition of an organisation within the meaning of Article 132(1)(i) of [Directive 2006/112] as an organisation having objects similar to those of bodies governed by public law that have as their aim the provision of children’s or young people’s education, school or university education, vocational training or retraining result from the fact that the tuition provided by that organisation enables participants to learn a basic skill (in this case: swimming)?

(3) If the second question is answered in the negative: Does the tax exemption pursuant to Article 132(1)(j) of [Directive 2006/112] require that the taxable person be a sole trader?’

Consideration of the questions referred

The first question

19 By its first question, the referring court is asking, in essence, whether the concept of ‘school or university education’ within the meaning of Article 132(1)(i) and (j) of Directive 2006/112 must be interpreted as covering swimming tuition provided by a swimming school.

20 Article 132 of Directive 2006/112 provides for exemptions which, as indicated by the title of the chapter in which that provision is contained, are intended to encourage certain activities in the public interest. However, those exemptions do not cover every activity performed in the public interest, but only those listed in that provision and described in great detail (judgments of 4 May 2017, *Brockenhurst College*, C?699/15, EU:C:2017:344, paragraph 22 and the case-law cited, and of 14 March 2019, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraph 17).

21 According to the case-law of the Court, those exemptions constitute autonomous concepts of EU law which have the purpose of avoiding divergences in the application of the VAT system from one Member State to another (judgments of 26 October 2017, *The English Bridge Union*, C?90/16, EU:C:2017:814, paragraph 17 and the case-law cited, and of 14 March 2019, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraph 18).

22 The Court has already held that the terms used to specify the exemptions referred to in Article 132 of Directive 2006/112 are to be interpreted strictly, since they constitute exceptions to the general principle, arising from Article 2 of that directive, that VAT is to be levied on all services supplied for consideration by a taxable person. However, that requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive them of their intended effect (judgments of 4 May 2017, *Brockenhurst College*, C?699/15, EU:C:2017:344, paragraph 23 and the case-law cited, and of 14 March 2017, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraph 19).

23 It must be recalled that Article 132(1)(i) and (j) of Directive 2006/112 contains no definition of the concept of ‘school or university education’.

24 The Court has, however, first, taken the view that the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity (judgments of 14 June 2007, *Horizon College*, C?434/05, EU:C:2007:343, paragraph 18, and of 14 March 2019, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraph 21).

25 Second, the Court has stated that the concept of ‘school or university education’, within the meaning of Directive 2006/112, is not limited solely to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils’ or students’ knowledge and skills, provided that those activities are not purely recreational (judgments of 28 January 2010, *Eulitz*, C?473/08, EU:C:2010:47, paragraph 29 and the case-law cited, and of 14 March 2019, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraphs 22 and 23).

26 Thus, the concept of ‘school or university education’ within the meaning of Article 132(1)(i) and (j) of Directive 2006/112 covers activities which are characterised both by their specific nature

and by reason of the framework in which they are carried out (see, to that effect, judgments of 14 June 2007, *Horizon College*, C?434/05, EU:C:2007:343, paragraph 20, and of 14 March 2019, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraph 24).

27 It follows that, by that concept, the EU legislature intended to refer to a certain type of education system which is common to all the Member States, irrespective of the characteristics particular to each national system (judgment of 14 March 2019, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraph 25).

28 Consequently, the concept of ‘school or university education’ for the purposes of the VAT system refers generally to an integrated system for the transfer of knowledge and skills covering a wide and diversified set of subjects, and to the furthering and development of that knowledge and those skills by the pupils and students in the course of their progress and their specialisation in the various constituent stages of that system (judgment of 14 March 2019, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraph 26).

29 It is in the light of those considerations that it is necessary to examine whether the tuition provided by a swimming school, such as that at issue in the main proceedings, can be covered by the concept of ‘school or university education’ within the meaning of Article 132(1)(i) and (j) of Directive 2006/112.

30 In the present case, the referring court points out that there is a clear general interest in swimming tuition and that that fact makes it possible, for the purposes of the exemption provided for in Article 132(1) of Directive 2006/112, to distinguish that tuition from other areas of instruction, such as driving tuition provided by a driving school, at issue in the case which gave rise to the judgment of 14 March 2019, *A & G Fahrschul-Akademie* (C?449/17, EU:C:2019:202).

31 However, it should be pointed out that, while the swimming tuition provided by a swimming school, such as that at issue in the main proceedings, is of undoubted importance and in the general interest, it nevertheless constitutes specialised tuition provided occasionally, which does not amount, in itself, to the transfer of knowledge and skills covering a wide and diversified set of subjects or to their furthering and development which is characteristic of school or university education (see, by analogy, judgment of 14 March 2019, *A & G Fahrschul-Akademie*, C?449/17, EU:C:2019:202, paragraph 29, and order of 7 October 2019, *Finanzamt Hamburg-Barmbek-Uhlenhorst*, C?47/19, not published, EU:C:2019:840, paragraph 33).

32 Moreover, although the importance of the knowledge transferred in the context of driving and sailing tuition cannot be denied, in particular in order to deal with emergency situations and, more generally, to ensure the safety and physical integrity of persons, the Court has nevertheless held, in the judgment of 14 March 2019, *A & G Fahrschul-Akademie* (C?449/17, EU:C:2019:202), and the order of 7 October 2019, *Finanzamt Hamburg-Barmbek-Uhlenhorst* (C?47/19, not published, EU:C:2019:840), that such tuition does not fall within the scope of the concept of ‘school or university education’ within the meaning of Article 132(1)(i) and (j) of Directive 2006/112.

33 In the light of the foregoing, the answer to the first question is that the concept of ‘school or university education’, within the meaning of Article 132(1)(i) and (j) of Directive 2006/112, must be interpreted as not covering swimming tuition provided by a swimming school.

The second and third questions referred

34 In view of the answer to the first question, there is no need to answer the second or 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 (Ninth Chamber) hereby rules:

The concept of ‘school or university education’, within the meaning of Article 132(1)(i) and (j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as not covering swimming tuition provided by a swimming school.

[Signatures]

* Language of the case: German.