Provisional text

JUDGMENT OF THE COURT (Second Chamber)

20 January 2022 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Scope – Taxable transactions – Activities carried out by a company incorporated under private law – Operation of car parks on private land – Control fees levied by that company in the event of failure by the motorists to comply with the general terms and conditions for use of those car parks – Characterisation – Economic and commercial realities of the transactions)

In Case C?90/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Højesteret (Supreme Court, Denmark), made by decision of 7 February 2020, received at the Court on 24 February 2020, in the proceedings

Apcoa Parking Danmark A/S

v

Skatteministeriet,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele, T. von Danwitz, P.G. Xuereb (Rapporteur) and A. Kumin, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Apcoa Parking Danmark A/S, by J. Steen Hansen, advokat,

– the Danish Government, initially by J. Nymann-Lindegren as well as by M.S. Wolff and V.P. Jørgensen, and subsequently by M.S. Wolff and V.P. Jørgensen, acting as Agents, and by B. Søes Petersen, advokat,

– Ireland, by J. Quaney and A. Joyce, acting as Agents,

– the European Commission, by J. Jokubauskait? and U. Nielsen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between Apcoa Parking Danmark A/S ('Apcoa') and Skatteministeriet (Ministry of Taxation, Denmark) concerning the imposition of value added tax (VAT) on the control fees levied by Apcoa in the event of failure by the motorists to comply with the general terms and conditions for use of the car parks situated on private land managed by Apcoa.

Legal context

European Union law

3 Article 2(1)(c) of the VAT Directive provides that 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such' is to be subject to VAT.

4 Article 9(1) of that 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". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

Danish law

The Law on VAT

5 Paragraph 4(1) of the lov nr. 375 om merværdiafgift (Momsloven) (Law on VAT) of 18 May 1994 (*Lovtidende* 1994 A, p. 1727), in the version applicable to the dispute in the main proceedings ('the Law on VAT'), provides:

'Goods and services supplied for consideration within the national territory shall be subject to [VAT]. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner. Any other supply shall be a supply of services.'

6 According to Paragraph 13(1)(8) of that law:

'The following goods and services shall be exempt from [VAT]:

…

(8) The administration, letting and leasing of immovable property, including the supply of gas, water, electricity and heating as part of the letting or leasing. The exemption does not, however, cover … the letting of camp sites, parking areas and advertising spaces, or the hire of safes.'

7 Paragraph 27(1) of that law provides:

'In respect of the supply of goods and services, the taxable amount shall be paid, including subsidies directly linked to the price of the goods or services, but shall not include tax payable

hereunder. If payment takes place in full or in part before the supply or before the invoice is issued, the taxable amount shall be 80% of the sum paid.'

The Law on Road Traffic

8 The referring court notes that the færdselsloven (Law on Road Traffic), in the version applicable to the dispute in the main proceedings, does not list the situations in which control fees for parking in breach of the regulations may be levied on private land. It points out, however, that, following a legislative amendment in 2014, Paragraph 122c of that law states:

'In the case of parking on the private property open to the public, the inspection charge (control fee) may be imposed only if this is clearly indicated on site (subject to a general and clearly marked prohibition on parking in the area).'

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

9 Apcoa, a private company incorporated under Danish law, undertakes as its main activity the operation of car parks on private land under contracts with the site owners.

10 As part of its activity, Apcoa determines the general terms and conditions for use of the car parks that it manages, such as those relating to pricing and maximum parking time.

11 A sign at the entrance to each of those car parks states, first, that 'the [parking] area is operated in accordance with the rules of private law' and, second, that 'control fees of 510 [Danish krone (DKK)]' (approximately EUR 70) or 'DKK 510 per day may be levied for infringement of the regulations'. Those amounts reflected the control fees applied by Apcoa in the tax years concerned, that is to say, 2008 and 2009.

12 It is common ground that Apcoa carries out an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive and is subject to VAT in respect of the payment of parking fees made in accordance with the rules for that payment. However, Apcoa denies that it is liable for VAT in respect of the control fees.

13 On 25 October 2011, Apcoa applied to SKAT (the Danish tax authority) for a refund of the VAT paid in respect of those control fees during the period from 1 September 2008 to 31 December 2009. The amount was assessed at DKK 25 089 292 (approximately EUR 3 370 000).

14 By decision of 12 January 2012, the tax authority refused that application on the ground that, under the applicable national provisions, as set out in paragraphs 5 to 8 of the present judgment, those control fees were regarded, under Danish law, as subject to VAT.

15 That refusal, upheld by the Landsskatteretten (National Tax Tribunal, Denmark), was the subject of an appeal brought by Apcoa before the Retten i Kolding (Kolding District Court, Denmark). By judgment of 23 January 2017, that court dismissed that appeal, holding, in essence, that the control fees applied by Apcoa, which it classified as 'increased parking charges', levied in the event of failure by a motorist to comply with the general terms and conditions for use of the car parks managed by Apcoa, constituted consideration for the supply of the parking service provided to that motorist.

16 Apcoa appealed against that judgment before the Vestre Landsret (High Court of Western Denmark, Denmark). By judgment of 10 September 2018, that court dismissed that appeal on the ground that, in the present case, there was a direct correlation between the parking service and the payment of the control fees for parking in breach of the regulations on private land. Thus, that amount had to be regarded as consideration for a supply of services within the meaning of

Paragraph 4(1) of the Law on VAT.

17 The judgment of the Vestre Landsret (High Court of Western Denmark) was the subject of an appeal before the Højesteret (Supreme Court, Denmark), the referring court, in the context of which Apcoa submitted, in essence, that the amount that it invoices in respect of those control fees, in the event of infringement by a motorist of the general terms and conditions for use of the car parks it manages, does not constitute consideration for retaining the right to park on which that motorist could rely in return for payment of parking charges. That amount, in so far as (i) it is predetermined, without any economic link to the value of those control fees, and (ii) it constitutes, under Danish law, a penalty for infringement of those general terms and conditions for use, cannot be regarded as falling within the scope of Article 2(1)(c) of the VAT Directive, read in conjunction with Paragraph 4(1) of the Law on VAT.

18 The Ministry of Taxation contends that, since, as consideration for the control fees for parking in breach of the regulations, the motorist concerned is effectively provided with a parking space, there is a direct link between the parking service and those control fees. Furthermore, that ministry notes that those control fees constitute a significant part of Apcoa's turnover, since the amounts levied in respect of those control fees represented, for instance, 34% of its turnover in the tax year 2009.

19 The referring court points out, first of all, that the present reference for a preliminary ruling concerns only the question of whether the control fees levied by Apcoa in the event of failure by the motorists to comply with the general terms and conditions for use of the car parks managed by that company are subject to VAT. Furthermore, that court states, first, that it is common ground that the parking itself is subject to VAT and, second, that the dispute in the main proceedings does not concern the charging of VAT on the sums distributed between Apcoa and the owner of the parking area concerned.

20 That said, that court sets out the 13 types of situations in which Apcoa levies control fees for parking in breach of the regulations, namely:

'1. Where the fee paid is insufficient.

2. Where no currently valid parking ticket is visible in the windscreen.

3. Where the ticket cannot be checked, for example where the parking ticket is not displayed correctly.

Situations 1 to 3 apply to paid parking.

4. Where there is no valid parking ticket, for example in the case of a residents' parking zone where permission is required to use specific parking spaces.

5. Parking in spaces reserved for persons with reduced mobility. This ground for charging of control fees for parking in breach of the regulations applies only where there is a sign indicating parking for persons with reduced mobility, irrespective of whether parking is free or paid. To be able to park in those spaces, the motorist must have displayed proof of reduced mobility in the windscreen of his or her vehicle.

6. Parking outside designated parking spaces. This ground for charges of the control fees for parking in breach of the regulations applies to all types of parking spaces where there is a sign indicating that vehicles should be parked inside the spaces concerned.

7. Where parking is prohibited. This ground for charging of control fees for parking in breach of

the regulations applies, for example, where a vehicle is parked on a fire emergency access route.

8. Reserved parking areas. This ground for charging of the control fees for parking in breach of the regulations applies to all types of parking spaces where vehicles must be parked in specific spaces.

9. Where no parking disc is visible.

10. Where a parking disc is incorrectly set or where the parking time indicated has been exceeded.

11. Where the parking disc is illegible. This ground for charging of control fees for parking in breach of the regulations applies, for example, where the needles on the parking disc have become detached or where there is an error in an electronic disc.

12. Where there is more than one parking disc. This ground for charging of control fees for parking in breach of the regulations applies where the motorist concerned has displayed several parking discs in the windscreen in order to extend the parking period.

Situations 9 to 12 apply where parking is free for a limited period but a parking disc is required as proof of the time the vehicle was parked.

13. Other. This ground for charging of control fees for parking in breach of the regulations applies to infringement of general parking regulations which does not correspond to any of the above 12 situations. It applies, for example, where parking clearly obstructs traffic. If this ground is used to justify charging of control fees, it shall be supplemented by a written description of the infringement.'

21 The referring court then recalls the main findings from the case-law of the Court of Justice on the supply of services subject to VAT as regards, on the one hand, the terms and conditions relating to the existence of 'reciprocal performance' establishing a 'legal relationship' reflecting, as the case may be, a 'direct link' between the service supplied and the consideration received and, on the other hand, the condition that the sums paid constitute 'actual consideration for an identifiable service'. It refers, in particular, to the judgments of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C?277/05, EU:C:2007:440), and of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia* (C?295/17, EU:C:2018:942), stating that, in the context of the main proceedings, Apcoa relies on the first of those judgments while the Ministry of Taxation refers, in particular, to the latter judgment.

22 Lastly, the referring court notes that, traditionally, in Denmark, sums levied by private-law management companies, such as Apcoa, in respect of control fees for parking in breach of the regulations have always been regarded as subject to VAT. In that regard, that court refers, in particular, to its case-law resulting from a judgment of 12 April 1996, in which it ruled on the nature, for VAT purposes, of such control fees, which it had classified as 'increased parking fees'. It is apparent from that judgment that such 'increased fees', levied on the basis of a quasi-contractual relationship, had to be regarded as consideration for a supply of services and, therefore, subject to VAT, notwithstanding the fact that those 'increased fees' were fixed at a predetermined and substantial rate compared to that corresponding to the ordinary parking fee which itself was aimed at preventing parking in breach of the regulations.

23 It is therefore possible to take the view that the obligation on the motorists who have infringed the general terms and conditions for use of the car parks concerned to pay control fees for parking in breach of the regulations is based on a quasi-contractual relationship and that there

is therefore a ‘legal relationship’ within the meaning of the case-law arising from the judgment of 3 March 1994, *Tolsma* (C?16/93, EU:C:1994:80, paragraphs 13 and 14) between Apcoa and those motorists. However, doubts remain as to whether those control fees may legitimately be regarded as constituting payment for a supply of services subject to VAT, supported by the fact that, according to the information available to that court, the tax authorities of other Member States of the European Union, such as the Federal Republic of Germany and the Kingdom of Sweden, do not subject such control fees to VAT.

24 In those circumstances, the Højesteret (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 2(1)(c) of [the VAT Directive] be interpreted as meaning that control fees for infringement of regulations on parking on private property constitute consideration for a service supplied and that there is therefore a transaction subject to VAT?’

Consideration of the question referred

25 By its question, the national court asks, in essence, whether Article 2(1)(c) of the VAT Directive must be interpreted as meaning that the control fees levied by a company incorporated under private law, tasked with the operation of private car parks, in the event of failure by the motorists to comply with the general terms and conditions for use of those car parks must be regarded as consideration for a supply of services within the meaning of that provision and, as such, subject to VAT.

26 In that regard, it must be borne in mind that, in accordance with Article 2(1)(c) of the VAT Directive, which defines the scope of VAT, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

27 A supply of services is carried out ‘for consideration’, within the meaning of that provision, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for an identifiable service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received (judgment of 16 September 2021, *Balgarska natsionalna televizia*, C?21/20, EU:C:2021:743, paragraph 31 and the case-law cited).

28 In the present case, it must be noted that parking in a particular space in one of the car parks managed by Apcoa gives rise to a legal relationship between that company, as a service provider and manager of the car park concerned, and the motorist who used that space.

29 In that regard, it is apparent from the documents available before the Court that, in the context of that legal relationship, the parties enjoy rights and assume obligations, in accordance with the general terms and conditions for use of the car parks concerned, which include, in particular, the provision of a parking space by Apcoa and the obligation on the motorist concerned to pay, in addition to the parking fees, where appropriate, in the event of failure to comply with those general terms and conditions, the amount corresponding to the control fees for parking in breach of the regulations, as indicated on the signs mentioned in paragraph 11 of the present judgment.

30 Accordingly, in that context, with regard to, on the one hand, the condition relating to the existence of reciprocal performance, within the meaning of the case-law cited in paragraph 27 of the present judgment, it appears that that condition is fulfilled. The payment of parking fees and, where appropriate, of the amount corresponding to the control fees for parking in breach of the

regulations constitutes consideration for the provision of a parking space.

31 As regards, on the other hand, the condition that the remuneration received by the provider of the service must constitute the actual consideration for the service supplied to the recipient, within the meaning of the case-law cited in paragraph 27 of the present judgment, it must be noted, as the Advocate General did in point 51 of his Opinion, that the motorist who pays those control fees has had the benefit of a parking space or area and that the amount of those control fees is determined by the fact that the terms and conditions which the motorist concerned accepted are satisfied.

32 Accordingly, the total amount of the sums which the motorists have undertaken to pay as consideration for the parking service provided by Apcoa, including, where appropriate, the control fees for parking in breach of the regulations, represents the terms and conditions under which they actually benefited from a parking space, even if they chose to make excessive use of it by exceeding the permitted parking time, by failing to provide proper evidence of their right to park or by parking in a space which they were not entitled to use or in an obstructive manner, contrary to the general terms and conditions for use of the car parks concerned.

33 It therefore appears that those control fees may have a direct link with the parking service and, as a result, that they may be regarded as forming an integral part of the total amount that those motorists have undertaken to pay to Apcoa by deciding to park their vehicle in one of the car parks managed by that company.

34 Furthermore, the amount of those control fees corresponds to the remuneration for part of the costs associated with the supply of the services provided to them by Apcoa. As observed by the Advocate General in point 61 of his Opinion, that amount necessarily takes into account the higher cost of operating car parks which is caused by parking that does not satisfy the normal terms and conditions for use of the service offered. That consideration also seeks to ensure that Apcoa receives contractual remuneration for the service carried out in circumstances attributable to the user, which are not such as to change the economic and commercial realities of their relationship.

35 That finding is supported by the information provided by Apcoa in response to the written questions sent to it by the Court in the present proceedings, according to which, in essence, Apcoa confirmed that it obtains income from those control fees on a continuing basis. In that regard, it is apparent from the documents available before the Court that, for the tax years 2008 and 2009, the income received by Apcoa from those control fees amounted to approximately 35% of its turnover, that is to say, EUR 10.4 million in 2008 and EUR 11 million in 2009.

36 In addition, in response to the written questions asked by the Court, Apcoa points out, in essence, that if, at the end of the parking period for which parking fees have been paid by the motorist concerned, the motorist in question does not take back his or her vehicle, that vehicle is still parked and subject to charging of the control fees for parking in breach of the regulations, which may be repeated, until that motorist comes to collect it.

37 Such factors are capable of establishing the existence of a direct link between the service supplied and the control fees levied by Apcoa within the meaning of the case-law cited in paragraph 27 of the present judgment.

38 That conclusion is supported by the economic and commercial realities of the transaction concerned, subject to verification by the referring court. As regards the importance of contractual terms in a taxable transaction, the consideration of those realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, judgment of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia*

, C?295/17, EU:C:2018:942, paragraph 43 and the case-law cited).

39 Apcoa and the European Commission submitted, however, that the amount paid by a motorist in respect of such control fees cannot be regarded as constituting the actual consideration for an identifiable service supplied to the recipient nor could it be understood as consideration for a supply of independent services, within the meaning of the case-law arising from the judgment of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C?277/05, EU:C:2007:440, paragraphs 21 to 35), since the provision of a parking space by Apcoa does not depend on the payment of those control fees by the motorist concerned.

40 In that regard, it should be noted that, for VAT purposes every supply must normally be regarded as being distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (judgments of 17 January 2013, *BG? Leasing*, C?224/11, EU:C:2013:15, paragraph 29 and the case-law cited, and of 10 November 2016, *Baštová*, C?432/15, EU:C:2016:855, paragraph 68 and the case-law cited).

41 The Court has, however, accepted that there is a direct link where two services are dependent on each other, that is to say, that one is made only on condition that the other is also made, and vice versa (judgment of 11 March 2020, *San Domenico Vetraria*, C?94/19, EU:C:2020:193, paragraph 26 and the case-law cited).

42 That is the case here, in so far as, as observed by the Advocate General in point 66 of his Opinion, there is a link between the fact that Apcoa receives control fees for parking in breach of the regulations and the parking undertaken by the motorist concerned in specific circumstances determined by Apcoa which give rise to that increased fee. The need for monitoring of parking in breach of the regulations and, consequently, the imposition of such control fees would not exist if the service of providing a parking space was not supplied in advance.

43 Furthermore, it should be noted that, in the case which gave rise to the judgment of 18 July 2007, *Société thermale d'Eugénie-les-Bains* (C?277/05, EU:C:2007:440), the services in question had not been supplied. In the case in the main proceedings, the service of providing a parking space was carried out.

44 Nor do the arguments relied on by Apcoa that, first, the amount that it charges in respect of the control fees for parking in breach of the regulations is predetermined and without a real economic link with the value of the parking service supplied and that, second, that amount constitutes a penalty under Danish law, preclude the finding reached in paragraph 37 of the present judgment.

45 As regards, in the first place, Apcoa's argument that that amount is predetermined and has no real economic link with the value of the parking service supplied, it must be recalled that, according to settled case-law, with regard to the characterisation of a transaction as a transaction carried out for consideration within the meaning of Article 2(1)(c) of the VAT Directive, the amount of the consideration, in particular the fact that it is equal to, greater or less than the costs which the taxable person incurred in providing the service, is irrelevant. That fact is not such as to affect the direct link between the services supplied and the consideration received (judgment of 11 March 2020, *San Domenico Vetraria*, C?94/19, EU:C:2020:193, paragraph 29 and the case-law cited).

46 With regard to, in the second place, the argument relied on by Apcoa that the amount which it charges in respect of the control fees for parking in breach of the regulations is classified, under national law, as a penalty, it is sufficient to recall, as the Advocate General did, in essence, in point 42 of his Opinion, that, for the purposes of interpreting the provisions of the VAT Directive, the assessment of whether payment of a fee is made as consideration for a supply of services is a

question of EU law which needs to be determined independently of the assessment made under national law (judgment of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia*, C?295/17, EU:C:2018:942, paragraphs 69 and 70).

47 In the light of all the foregoing considerations, the answer to the question referred is that Article 2(1)(c) of the VAT Directive must be interpreted as meaning that the control fees levied by a company incorporated under private law, tasked with the operation of private car parks, in the event of failure by the motorists to comply with the general terms and conditions for use of those car parks must be regarded as consideration for a supply of services within the meaning of that provision and, as such, subject to VAT.

Costs

48 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 (Second Chamber) hereby rules:

Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the control fees levied by a company incorporated under private law, tasked with the operation of private car parks, in the event of failure by the motorists to comply with the general terms and conditions for use of those car parks must be regarded as consideration for a supply of services within the meaning of that provision and, as such, subject to value added tax (VAT).

[Signatures]

* Language of the case: Danish.