CASE LAW NOTE

The CJEU Confirms that Composite Services Cannot be Artificially Split in order to Benefit from a Reduced VAT Rate

Thibaut Boulangé & Lionel Van der Noot*

*On 18 January 2018, the Court of Justice of the European Union (hereafter 'CJEU') ruled in the Stadion Amsterdam CV case (*Stadion Amsterdam CV v. Staatssecretaris van Financiën, *Case C-463/16, ECLI:EU:C:2018:22 (18 January 2018)) that a single supply comprised of two distinct elements, one principal, the other ancillary, which, if they were supplied separately, would be subject to different VAT rates, must be taxed solely at the VAT rate applicable to that single supply. The rate must be determined according to the principal element, even if the price of each element forming the full price paid by a consumer can be identified.*

In previous cases, the CJEU had already provided guidance on the VAT treatment applicable to a single supply comprised of several distinct elements. However, the question referred to the CJEU in the Stadion Amsterdam CV case seems to demonstrate that the concept of composite services and the related VAT treatment(s) remained partially unclear(s).

The purpose of this article is to re-examine the main guidelines regarding the concept of composite services as well as the VAT treatment applicable to such supplies in light of the clarification recently provided by the CJEU.

1 Summary of the facts

The question referred for a preliminary ruling request resulted from the proceedings between Stadion Amsterdam CV (hereafter 'Stadion Amsterdam' or the 'Applicant') and the Dutch tax authorities concerning the latter's refusal to allow Stadion Amsterdam to apply a reduced VAT rate to the guided tour it offers to tourists.

Stadion Amsterdam operates a multi-purpose building complex known as the 'Arena', consisting of a stadium and associated facilities. The Arena also houses the museum of the AFC Ajax football club.

Stadion Amsterdam hires the Arena out to third parties as a venue for sports competitions and for artists' performances. When there are no sports or music events taking place, the Applicant offers tours with an admission charge called 'World of Ajax' and consisting of a guided tour of the stadium and the access to the museum without a guide.

During the period under examination, it was not possible to visit the museum without participating in the guided tour of the stadium. The entrance fee was charged at EUR 10.00 per person (EUR 6.50 for the tour and EUR 3.50 for the museum).

Because the Applicant considered that the tour should be treated as a supply of cultural service or as entertainment service, it applied the reduced VAT rate to the corresponding revenue.

However, following a tax inspection, the tax authorities considered that these services did not qualify for the reduced VAT rate and should be subject to the standard VAT rate.

Stadium Amsterdam brought an action against the related tax assessment. In this framework, and further to various appeals, the Regional Court of Appeal of Hertogenbosch considered that the tour constituted *'a single supply of services which could not be divided for the purposes of applying VAT at a special rate to one of the components of that supply'*.[1] This Regional Court therefore held that the turnover linked to the tours should, in its entirety, be subject to the standard VAT rate.

Hearing the case, the Supreme Court of the Netherlands stated that there was a single supply of services composed of two elements, i.e. the guided tour of stadium being the principal component and the visit to the museum being the ancillary component.[2] Noting that CJEU cases may be subject to different interpretations,

Notes

* Thibaut Boulangé is Principal in the VAT department of Atoz Tax Advisers Luxembourg. Email: thibaut.boulange@atoz.lu. Lionel Van der Noot is Director in the VAT department of Atoz Tax Advisers Luxembourg. Email: lionel.vandernoot@atoz.lu.

1 *Stadion Amsterdam CV v. Staatssecretaris van Financiën*, Case C-463/16, ECLI:EU:C:2018:22 (18 Jan. 2018), para. 14.

2 *Stadion Amsterdam CV v. Staatssecretaris van Financiën*, Case C-463/16, ECLI:EU:C:2018:22 (18 Jan. 2018), para. 15.

the Supreme Court decided to refer the following question to the CJEU for a preliminary ruling:

> *Must Article 12(3)(a) of the Sixth Directive be interpreted as meaning that where the supply of a service, which for VAT purposes constitutes one single supply, comprises two or more concrete and specific constituent elements to which, if they had been provided as separate services, different VAT rates would apply, the levying of VAT in respect of that composite service should take place according to the separate rates applicable to those elements if the fee for the service can be split in correct proportion to those constituent elements?*[3]

By its question, the Supreme Court of the Netherlands sought clarification from the CJUE as to whether a composite service comprised of two distinct elements, one principal (guided tour), the other ancillary (museum visit), may be split resulting in both the application of the standard and reduced VAT rate.

2 The position of the CJEU

The CJEU begins its analysis by recalling fundamental principles of its established case-law in relation to single supply comprised of various distinct elements:

> *– where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether the operation gives rise, for VAT purposes, to two or more distinct supplies or to one single supply.*[4] Factual circumstances are crucial in order to assess the bundle of elements and to qualify the operation as a single supply;
>
> *– a transaction which comprises a single supply from an economic point of view should not be artificially split, (…). 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.*[5] The economic reality should prevail and artificial splits have to be disregarded;
>
> *- there is also a single supply 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 service 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.*[6] In order to characterize a service as ancillary, the view of the consumer has to be considered.

In the case at hand, the CJEU noted that the Supreme Court of the Netherlands has already characterized the tour organized by Stadion Amsterdam as a single supply and correctly concluded that the visit to the museum was ancillary to the guided tour of the stadium. This qualification relied on the fact that a single price must be paid for both elements (guided tour and museum) and also considering that there was no possibility to visit only the museum.

The CJEU concludes that '*it follows from the characterisation of an operation comprising several elements as a single supply that that operation will be subject to one and the same rate of VAT*'.[7] Allowing the application of different VAT rates to the various elements of a single supply would run counter to the principles set in its previous case law since such an approach would lead to artificially splitting the supply.

The Court also mentions that even where it is possible to identify the price corresponding to each distinct element forming part of the single supply, the mere fact that such identification is possible (or that the parties agree on those prices) is not sufficient to justify an exception to the above-mentioned principles.[8] Otherwise, fiscal neutrality would be jeopardized since a single supply may be subject to different VAT treatments according to whether or not it is possible to identify the price corresponding to those various elements.

In the light of its jurisprudence, the Court also highlighted, in essence, that none of its cases allows the possibility of applying a separate rate of VAT to separate elements of a single supply.

3 Conclusion

Despite the guidance given by the CJEU in relation to the VAT treatment to be applied to a single supply comprised of several distinct elements in previous cases, the question referred to the CJEU in the Stadion Amsterdam CV case tends to show that the concept of composite services and the related VAT treatment remained partially unclear.

Notes

[3] *Stadion Amsterdam CV v. Staatssecretaris van Financiën*, Case C-463/16, ECLI:EU:C:2018:22 (18 Jan. 2018), para. 19.

[4] *Bog and Others*, Cases C-497/09, C-499/09, C-501/09, C-502/09, EU:C:2011:135 (10 Mar. 2011), para. 52 and *Město Žamberk v. Finanční ředitelství v. Hradci Králové*, Case C-18/12, EU:C:2013:95, (21 Feb. 2013), para. 27.

[5] *Bog and Others,* Cases C-497/09, C-499/09, C-501/09, C-502/09, EU:C:2011:135, (10 Mar. 2011), para. 53.

[6] Cases C-497/09, C-499/09, C-501/09, C-502/09, 10 Mar. 2011, *Bog and Others*, EU:C:2011:135, para. 54.

[7] *Stadion Amsterdam CV v. Staatssecretaris van Financiën*, Case C-463/16, ECLI:EU:C:2018:22 (18 Jan. 2018), para. 26.

[8] *Stadion Amsterdam CV v. Staatssecretaris van Financiën*, Case C-463/16, ECLI:EU:C:2018:22 (18 Jan. 2018), para. 27.

With this new decision, the CJEU reiterates its previous guidance and makes it clear that a single supply comprised of two distinct elements, one principal, the other ancillary, which if they were supplied separately would be subject to different rates of VAT, must be taxed solely at the rate of VAT applicable to that single supply.

This case could have far-reaching consequences on some national VAT legislations and practices. The obligation to make a split based on the VAT rate applicable could in case of single supply contravene to the position of the CJEU in the Stadion Amsterdam case.