Reports of Cases

OPINION OF ADVOCATE GENERAL
GIOVANNI PITRUZZELLA
delivered on 8 December 2022 [1]

Case C-516/21

Finanzamt X
v
Y

(Request for a preliminary ruling
from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling – Taxation – VAT – Exemption of transactions involving the leasing or letting of immovable property – Letting of a specially equipped turkey rearing shed – Equipment and machinery made available as a supply ancillary to the leasing of an agricultural building – Single supply – Scope of the exception to the exemption)

1. While the concept of a 'single supply' is the subject of an extensive body of case-law of the Court, the Court is now being asked to clarify whether that case-law must be disregarded and multiple supplies – and therefore value added tax (VAT) rates – maintained where one of those supplies is capable of falling within the scope of the general scheme determined by Council Directive 2006/112/EEC of 28 November 2006 on the common system of value added tax ('the VAT Directive') [2] and of being, accordingly, subject to taxation.

Legal framework

European Union law

The VAT Directive

2. In Chapter 3 of the VAT Directive, entitled 'Exemptions for other activities', Article 135(1)(l) is worded as follows:

'Member States shall exempt the following transactions:

…

[1] Original language: French.

[2] OJ 2006 L 347, p. 1.

(l) the leasing or letting of immovable property.'

3. Article 135(2) of the VAT Directive states that 'the following shall be excluded from the exemption provided for in point (l) of paragraph 1:

(a) the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

(b) the letting of premises and sites for the parking of vehicles;

(c) the letting of permanently installed equipment and machinery;

(d) the hire of safes.

Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1.'

Implementing Regulation (EU) No 282/2011

4. Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax [3] has been amended, inter alia, by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013, [4] which inserted Article 13b into Implementing Regulation No 282/2011.

5. In accordance with Article 13b(d) [5], for the application of the VAT Directive, any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction is to be regarded as 'immovable property'.

German law

6. In accordance with the first sentence of Paragraph 4(12) of the Umsatzsteuergesetz (Law on Turnover Tax) of 21 February 2005 [6] ('the UStG'), the following transactions referred to in Paragraph 1(1), point 1 of that law are exempt:

'(a) the leasing and letting of immovable property ….'

7. The second sentence of Paragraph 4(12) of the UStG states that 'the leasing and letting of machinery and other equipment of any kind which are part of an operating plant (operating equipment) are not exempt, even if they are essential elements of an immovable property.'

[3] OJ 2011 L 77, p. 1.

[4] OJ 2013 L 284, p. 1.

[5] Under the third paragraph of Article 3 of Implementing Regulation No 1042/2013, Article 13b which it inserts into Implementing Regulation No 282/2011 applied only from 1 January 2017.

[6] BGBl. 2005 I, p. 386.

The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

8. From 2010 to 2014, Y leased turkey-rearing sheds with permanently installed equipment and machinery. According to the referring court, that equipment and machinery, comprising in particular an industrial spiral conveyor belt and a heating, ventilation and lighting system maintaining a temperature and brightness appropriate to the stage of growth of the animals concerned, was used to feed the turkeys and to guarantee the rearing conditions necessary for them to reach slaughter maturity and was specially adapted to the contractual use of the building as a building for rearing such poultry.

9. Under the terms of the lease, Y received a single payment which was not split between the provision of the rearing sheds and that of the equipment and machinery. Y considered that the entirety of its leasing supply was exempt from VAT.

10. In contrast, Finanzamt X (Tax Office X, Germany) took the view that the leasing of the equipment and machinery at issue was not exempt and that the agreed single lease payment, 20% of which was attributable to the equipment and machinery, therefore had to be subject to VAT. That tax office issued amended tax notices for the years in dispute. Y brought an action against those notices.

11. The Niedersächsisches Finanzgericht (Finance Court, Lower Saxony, Germany), relying on both the case-law of the Court and that of the Bundesfinanzgerichtshof (Federal Finance Court, Germany), upheld the action brought by Y against those notices, taking the view that the supply was exempt in its entirety. According to that court, the provision of that equipment and machinery constituted a service ancillary to the provision of a rearing shed, as such specially adapted equipment served solely to enable the turkey rearing shed to be operated in accordance with the contract and under optimal conditions. It inferred from this that the lease payment attributable to the provision of those elements was also exempt from VAT as was, therefore, the tenancy payment in its entirety.

12. Tax Office X has brought an appeal on a point of law against that judgment before the referring court, the Bundesfinanzhof (Federal Finance Court, Germany). That court has doubts as to the interpretation to be given to Article 135(2), first subparagraph, point (c) of the VAT Directive.

13. According to the referring court, which relies on the judgment in *Mailat*,[7] the leasing of the industrial spiral conveyor belt, the heating and ventilation equipment and the lighting systems are also exempt from VAT under Article 135(1)(l) of the VAT Directive. Such an interpretation is also confirmed by Article 13(b)(d) of Implementing Regulation (EU) No 282/2011, as amended by Implementing Regulation No 1042/2013, and by German civil law, in accordance with which the objects permanently installed in the animal shed are fundamental elements of immovable property.[8]

[7] Judgment of 19 December 2018 (C-17/18, EU:C:2018:1038).

[8] The referring court refers here to national case-law which concerned a feeding and ventilation system in a piggery.

14. As a preliminary point, the referring court observes that, unlike the other language versions of Article 135 of the VAT Directive, the fact that the German language version of Article 135(2)(c) of that directive refers only to the leasing of equipment and machinery has no bearing on the interpretation of that provision as the two terms – 'letting' and 'leasing' – must be regarded as broadly synonymous.

15. The referring court recalls the case-law of the Court [9] according to which an overview is necessary in the case of an economic transaction comprising a bundle of supplies in order to determine whether one or more supplies can be separated from it, each of which must generally be regarded as a distinct and independent supply. The Court has also held that a transaction cannot be artificially split up and there is a single supply if several individual supplies or actions by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply the division of which would be unrealistic. An economic transaction constitutes a single supply if one or more elements are to be regarded as constituting the principal supply, whereas other elements are to be regarded as ancillary supplies which share the tax treatment of the principal supply. The referring court states that the first criterion to be taken into consideration is the absence of a distinct purpose of the supply from the perspective of the average consumer. The aim of the second criterion is to take into account the respective value of each of the supplies making up the economic transaction, one being minimal or even marginal in relation to the other.

16. The court at first instance held that the provision of equipment and machinery, which was specially adapted and used only to enable the turkey-rearing shed to be operated under optimal conditions, was a supply ancillary to the leasing of the immovable property, which was the principal supply. According to the referring court, that assessment of a single supply is consistent with the case-law of the Court. [10]

17. The referring court notes that two interpretations of Article 135(2), first subparagraph, point (c) of the VAT Directive are possible.

18. Either the principles laid down by the Court regarding the determination of a single transaction could take precedence over Article 135(2), first subparagraph, point (c) of the VAT Directive, which it states is confirmed by the analysis of the Court's case-law on Article 135(2), first subparagraph, point (b) of that directive and, in particular, the judgments in *Henriksen*, [11] *Mailat* [12] and *Stadion Amsterdam*. [13] According to the referring court, it follows from those judgments that the application of Article 135(2), first subparagraph, point (c) of the VAT Directive is limited to cases in which the provision of equipment and machinery takes place independently, and therefore without any connection to an additional provision of buildings or land.

19. Or it could be inferred from Article 135(2), first subparagraph, point (c) of the VAT Directive that the transactions must be split with the result that single transactions should be split into an exempt part (under Article 135(1)(l) of that directive) and a taxable part (under Article 135(2), first subparagraph, point (c) thereof). Such an interpretation is supported by the case-law of the

[9] The referring court mentions here the judgment of 4 March 2021, *Frenetikexito* (C-581/19, EU:C:2021:167).

[10] The referring court mentions here the judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038).

[11] Judgment of 13 July 1989 (173/88, EU:C:1989:329).

[12] Judgment of 19 December 2018 (C-17/18, EU:C:2018:1038).

[13] Judgment of 18 January 2018 (C-463/16, EU:C:2018:22).

Court [14] according to which the exemption granted to the letting of immovable property, which is based on the recognition of the passive nature of the letting alone, is no longer justified where that letting accompanies other activities, which may be commercial, or the provision of other facilities and can therefore no longer constitute the main service supplied. Therefore, according to the referring court, the provision of equipment and machinery referred to in Article 135(2), first subparagraph, point (c) of the VAT Directive does not take place passively but is characterised essentially by the maintenance of that machinery in working order.

20. The referring court also points out that, although in the judgment in *Mailat* [15] the Court accepted that there was a supply ancillary to an exempt letting of immovable property in respect of movable property firmly attached to the immovable property as an integral part thereof, it did so without ruling on the question as to the application of Article 135(2), first subparagraph, point (c) of the VAT Directive.

21. It is in those circumstances that the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the tax liability for the leasing of permanently installed equipment and machinery pursuant to Article 135(2), first subparagraph, point (c) of [the VAT Directive] cover

– only the isolated (independent) leasing of such equipment and machinery or also

– the leasing (letting) of such equipment and machinery which is exempt by virtue of (and as a supply ancillary to) a letting of a building, effected between the same parties, pursuant to Article 135(1)(l) of the VAT Directive?'

22. The German Government and the European Commission lodged written observations before the Court.

Analysis

23. By its single question for a preliminary ruling to the Court, the referring court asks, in essence, which conditions must be satisfied in order for the tax liability arising under Article 135(2), first subparagraph, point (c) of the VAT Directive to apply. More specifically, in the case where a contract is concluded for the leasing of a building intended for the rearing of turkeys, and where that building is equipped with ventilation, heating, lighting and feeding systems appropriate to its function as a rearing shed, the referring court asks whether Article 135(2), first subparagraph, point (c) of that directive requires the leasing of the building, on the one hand, and the letting of those systems as equipment and machinery, on the other, to be considered separately for VAT purposes. [16]

[14] The national court refers here to paragraph 43 of the judgment of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation Centre Services)* (C-215/19, EU:C:2020:518).

[15] Judgment of 19 December 2018 (C-17/18, EU:C:2018:1038).

[16] At the outset, I would point out that it is not apparent either from the directive or from the case-law of the Court that a distinction must be drawn between those two concepts which must therefore be regarded as broadly synonymous (see, for example, judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 36)).

24. In the reasoning which follows, I shall endeavour to demonstrate that, unless a revision is made to settled case-law, the transaction at issue in the main proceedings, described by the referring court itself as a 'single supply', cannot be subject to two separate rates of VAT and that the tax treatment it receives will be determined by that resulting from Article 135(1)(l) of the VAT Directive.

25. In so far as the provision referred to in the question referred for a preliminary ruling constitutes an exception to Article 135(1)(l), it will be necessary to look again at the interpretation of that provision which the Court has provided in its case-law.

26. Before doing so, it is necessary to recall the case-law on the concept of a 'single transaction'.

Review of the Court's case-law on the concept of a single transaction

27. It is clear from the Court's settled case-law [17] that, for VAT purposes, every supply must normally be regarded as distinct and independent, as follows from Article 1(2) of the VAT Directive. [18] Nevertheless, in certain circumstances, several formally distinct supplies, 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. There is a single supply inter alia where two or more elements or acts supplied by the taxable person are *so closely linked* that they form, objectively, *a single, indivisible economic supply*, which it would be artificial to split and would present the risk of distorting the functioning of the VAT system. [19] That is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute 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. [20]

28. In order to determine, where a transaction comprises a bundle of elements and acts, whether the services supplied constitute several independent supplies or a single supply, regard must be had to all the circumstances in which the transaction in question takes place [21] and it is necessary to examine the characteristic elements of the transaction concerned. [22] 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*. [23]

[17] It must be noted that Article 135(1)(l) and Article 135(2), first subparagraph, point (c) of the VAT Directive correspond to Article 13B(b) and (b)(3) 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') and the Court's case-law relating to the latter provisions can be transposed, *mutatis mutandis*, to the corresponding provisions of the VAT Directive.

[18] See, inter alia, judgments of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229, paragraph 30 and the case-law cited); of 28 June 2017, *Leventis and Vafeias* (C-436/16, EU:C:2017:497, paragraph 18); and of 4 March 2021, *Frenetikexito* (C-581/19, EU:C:2021:167, paragraph 37).

[19] See judgment of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraphs 22 and 26).

[20] See, inter alia, judgments of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229, paragraph 31 and the case-law cited); of 18 January 2018, *Stadion Amsterdam*(C-463/16, EU:C:2018:22,, paragraph 23); and of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraphs 32 to 34).

[21] See judgment of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation Centre Services)* (C-215/19, EU:C:2020:518, paragraph 28).

[22] See judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie* (C-42/14, EU:C:2015:229, paragraph 32 and the case-law cited).

[23] See judgment of18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 26 and the case-law cited). The same applies even where it is possible to identify the price corresponding to each distinct element forming part of the single supply (see judgment of 3 September 2015, *Asparuhovo Lake Investment Company* (C-463/14, EU:C:2015:542, paragraph 27)).

The scope of Article 135(1)(l) of the VAT Directive

29. According to equally settled case-law, the fundamental characteristic of the concepts of the 'leasing' and 'letting' of immovable property,[24] within the meaning of Article 135(1)(l) of the VAT Directive, failing any definition of those concepts in that provision, lies in conferring on the other party to the contract, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right.[25] In order to determine whether a particular contract falls within that definition, account should be taken of all the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties.[26]

30. Moreover, since Article 135(1)(l) of the VAT Directive constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person, it must therefore be interpreted strictly.[27] As a general rule, it is for the national courts, which alone are competent to assess the facts, to establish, in the light of the specific circumstances of each case, the essential characteristics of the transaction in question in order to classify it under the VAT Directive.[28] The Court may, however, provide those courts with any guidance as to interpretation that will be helpful to them in disposing of the case.[29]

31. It should also be added that, as regards the rationale for Article 135(1)(l) of the VAT Directive, the Court has held that the exemption provided for therein 'is due to the fact that the leasing of immovable property, whilst being an economic activity, is normally a relatively passive activity, not generating any significant added value. Such an activity is thus to be distinguished from other activities which are either industrial and commercial in nature, such as those giving rise to the exceptions referred to in [Article 135(2) of the VAT Directive], or have as their subject matter something which is best understood as the provision of a supply rather than simply the making available of property, such as the right to use a golf course, the right to use a bridge in consideration of payment of a toll or the right to install cigarette machines in commercial premises'.[30] Thus, according to the Court, the passive nature of the leasing or letting of immovable property, which justifies the exemption provided for in Article 135(1)(l) of the VAT Directive, 'is due to the nature of the transaction itself and not to the way in which the tenant uses the property

[24] With regard to the autonomous nature of the concepts referred to in Article 135, see, by analogy, judgment of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraph 16 and the case-law cited).

[25] See judgment of 22 January 2015, *Régie communale autonome du stade Luc Varenne* (C-55/14, EU:C:2015:29, paragraph 21 and the case-law cited). See also judgments of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 36 and the case-law cited); of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraph 18); and of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation Centre Services)* (C-215/19, EU:C:2020:518, paragraph 40).

[26] See judgment of 22 January 2015, *Régie communale autonome du stade Luc Varenne* (C-55/14, EU:C:2015:29, paragraph 21 and the case-law cited).

[27] See, amongst a wealth of case-law, judgments of 22 January 2015, *Régie communale autonome du stade Luc Varenne* (C-55/14, EU:C:2015:29, paragraph 23); of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 37 and the case-law cited); of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation Centre Services)* (C-215/19, EU:C:2020:518, paragraph 38), and order of 1 December 2021, *Pilsētas zemes dienests* (C-598/20, not published, EU:C:2021:971, paragraph 29). However, the Court has not abandoned the idea of fleshing out the meaning of those terms: see, for example, judgment of 4 October 2001, '*Goed Wonen*' (C-326/99, EU:C:2001:506).

[28] See judgment of 22 January 2015, *Régie communale autonome du stade Luc Varenne* (C-55/14, EU:C:2015:29, paragraph 24).

[29] See judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 35 and the case-law cited).

[30] See, by analogy, judgment of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraph 19). See also judgment of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation Centre Services)* (C-215/19, EU:C:2020:518, paragraph 41).

concerned'.[31] In other words, the mere fact that the tenant uses immovable property for commercial purposes, in accordance with the terms of the letting contract, is not, of itself, such as to preclude the owner of that property being exempt from VAT under Article 135(1)(l) of the VAT Directive.[32]

Application to the dispute in the main proceedings

32. It follows from those reminders that, where there are multiple supplies for the same transaction, for the purposes of determining the rate of VAT applicable to that transaction[33] it is necessary to examine whether that transaction must be regarded as a single transaction, which is the case where (a) two or more of its elements are so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to consider separately or (b) the transaction in question may be divided into a principal supply and one or more other ancillary supplies, the tax treatment of the transaction as a whole being determined by that applicable to the principal supply.

33. *By its nature*, that methodology is applicable in the case of supplies which, considered in isolation, would give rise to the application of a different rate of VAT. Such an approach has also been followed by the Court in the case of an exempt principal supply and an ancillary supply which is subject to VAT.[34] I would add that, as Advocate General Kokott has recently stated, 'a characteristic of a single complex supply is the indivisibility of the elements of the supply. In the case of a single complex supply, the individual elements of the supply merge into a new distinct supply, such that, in the generally accepted view, there is only a single supply'.[35]

34. In other words, contrary to what the German Government appears to suggest, the exemption/exception relationship expressed by Article 135(1) and (2) of the VAT Directive does not preclude, in principle, the classification of a transaction as a single transaction, even if it were to consist of an element which is exempt under Article 135(1) of that directive and an element which is subject to VAT under Article 135(2) of that directive.

35. This is confirmed, moreover, by the judgment in *Henriksen*[36] in which the Court was asked whether Article 13B(b) of the Sixth Directive had to be interpreted as meaning that the 'letting of premises and sites for parking vehicles' also encompassed closed garages connected with immovable property the letting of which was exempt from VAT. After acknowledging that the exceptions to the exemption laid down in that provision should not be interpreted restrictively, even though their purpose was precisely to place the transactions concerned under the general

[31] See, by analogy, judgments of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraph 20), and of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation Centre Services)* (C-215/19, EU:C:2020:518, paragraph 42). The Court recalls that 'an activity is excluded from that exemption where it entails not only the passive activity of making immovable property available but also a certain number of commercial activities, such as supervision, management and continuing maintenance by the owner, as well as the provision of other facilities, so that, in the absence of quite exceptional circumstances, letting out that property cannot therefore constitute the main service supplied' (judgments of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraph 21 and the case-law cited), and of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation Centre Services)* (C-215/19, EU:C:2020:518, paragraph 43)).

[32] See, by analogy, judgment of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraph 22).

[33] For a detailed and systematic analysis, I refer here to the Opinion of Advocate General Kokott in *Frenetikexito* (C-581/19, EU:C:2020:855, point 20 et seq.).

[34] See, as referred to by the Commission in its observations, judgments of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 32); of 21 June 2007; *Ludwig* (C-453/05, EU:C:2007:369, paragraph 20); and of 27 September 2012, *Field Fisher Waterhouse* (C-392/11, EU:C:2012:597, paragraph 28).

[35] Opinion of Advocate General Kokott in *Frenetikexito* (C-581/19, EU:C:2020:855, point 25).

[36] Judgment of 13 July 1989 (173/88, EU:C:1989:329).

rules of that directive – and therefore make them subject to VAT [37] –, the Court pointed out the concept of 'the letting of immovable property', which was the subject of the exemption laid down in Article 13B(b) of the Sixth Directive, 'necessarily also encompasse[d], in addition to the letting of the property which is the principal subject of the transaction, the letting of all property which is accessory to it'. [38] The Court inferred from this that the letting of premises and sites for parking vehicles cannot be excluded from the exemption where that letting is *closely linked* to the letting of immovable property to be used for another purpose, such as residential or commercial property, which is itself exempt, so that the two lettings constitute a *single economic transaction*. [39] Accordingly, the Court held that the 'letting of premises and sites for parking vehicles' covers the letting of all places designed to be used for parking vehicles, including closed garages, and such lettings cannot be excluded from the exemption in favour of the leasing or letting of immovable property if they are closely linked to lettings of immovable property for another purpose which are themselves exempt from VAT. [40]

36. That judgment therefore constitutes a further example of a precedent in the application of the single-supply theory in which the transaction concerned was composed of a principal supply that was exempt (the letting of immovable property for residential use) and an ancillary supply in respect of which it was expressly stipulated that it was not covered by the exemption. The Court therefore did not interpret Article 13B(b)(1) to (4) of the Sixth Directive as meaning that that provision operates as a fragmentation clause which takes precedence over or prevents recourse to the concept of a 'single supply'.

37. Moreover, I would point out that it is not for the Court to classify the facts of the dispute in the main proceedings, as such classification falls within the jurisdiction of the national court alone. The Court's role is confined to providing the national court with an interpretation of EU law which will be useful for the decision which it has to take in the dispute before it. [41] It is therefore for the referring court to determine whether the taxable person provides a single supply in a particular case and to make all definitive findings of fact in that regard. [42] It is apparent precisely from the documents before the Court that the referring court has already carried out that analysis itself. The referring court agrees with the assessment of the court of first instance, which took the view, in accordance with the case-law principles set out above, that at issue was a single transaction [43] composed of a principal supply (the leasing of the rearing shed) and an ancillary supply (the leasing of special equipment in the building in the light of its function as a rearing shed).

38. As I noted above, the finding that there is a single supply is not compatible with the application of a differentiated tax liability, as the Court clearly pointed out when it held 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'. [44] By starting from the premiss, in accordance with the case-law which I have just recalled, that the dispute in the main

37 See judgment of 13 July 1989, *Henriksen* (173/88, EU:C:1989:329, paragraph 12).

38 Judgment of 13 July 1989, *Henriksen* (173/88, EU:C:1989:329, paragraph 14).

39 See judgment of 13 July 1989, *Henriksen* (173/88, EU:C:1989:329, paragraph 15).

40 See judgment of 13 July 1989, *Henriksen* (173/88, EU:C:1989:329, paragraph 17).

41 See judgment of 2 July 2020, *Blackrock Investment Management (UK)* (C-231/19, EU:C:2020:513, paragraph 25 and the case-law cited).

42 See judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 35 and the case-law cited). See also, in a similar vein, judgment of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Colocation Centre Services)* (C-215/19, EU:C:2020:518, paragraphs 30 to 32).

43 I refer here in particular to paragraphs 46, 48 and 50 of the request for a preliminary ruling.

44 Judgment of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 26 and the case-law cited). See also paragraph 36 of that judgment.

proceedings is characterised by the presence of a single supply, the referring court necessarily established, at the same time, that the Tax Office X could not subject such a supply to different rates of VAT.

39. It is clear, in my view, that Article 135(2) of the VAT Directive does not operate as a mandatory splitting clause, as the German Government claims. Although it is true that, in its judgment in *Sequeira Mesquita*,[45] the Court verified, even after finding that there was a single supply which appeared to fall within the scope of Article 135(1)(l) of the VAT Directive, whether the transaction at issue fell within the scope of one of the exclusions from exemption set out in Article 135(2) of that directive, it merely found that that was not the case, while acknowledging that it had not been seised of that question and without taking a position on the possible consequences of such a finding.[46] In those circumstances, it cannot be maintained, as the German Government suggests, that that judgment laid down an obligation to split the supplies, which would follow from Article 135(2) of the VAT Directive and which should systematically take precedence over the application of the single-supply theory.

40. The German Government also points out in its observations that the choice of the EU legislature to exempt the letting of immovable property under Article 135(1)(l) of the VAT Directive was made in consideration of the fact that such an activity is relatively passive, linked simply to the passage of time and not generating any significant added value,[47] unlike other activities[48] which are industrial and commercial in nature or have as their subject matter something which is best understood as the provision of a supply rather than simply the making available of property. However, I find no evidence in the case file which would be such as to call into question that requirement that the activity in the transaction is passive if it were found that, in accordance with the single-supply theory, the entire transaction at issue in the dispute in the main proceedings should be exempt under Article 135(1)(l) of the VAT Directive. In particular, there is no evidence in the file that the lessor has a specific obligation to maintain the various items of equipment which are specially adapted to the contractual use of the building concerned.[49]

41. Furthermore, the situation at issue in the main proceedings could be likened to that brought before the Court in its judgment in *Mailat*.[50] In that case, the question was whether a lease contract for an immovable property which was used for the commercial operation of a restaurant and for all capital equipment and inventory items necessary for that use constituted a 'letting of immovable property' within the meaning of Article 135(1)(l) of the VAT Directive, or a supply of complex services. After examining the evidence in the case file, the Court took the view that the letting of the *movable* property included in the lease contract did not appear to be dissociable from the letting of the immovable property. Some of that property was *incorporated* in that immovable property (such as the equipment and kitchen appliances) and had to be considered as *an integral part of that property*.[51] The movable property that was let (or transferred) at the same time as the immovable property was also used for the operation of the restaurant in the same way

45 Judgment of 28 February 2019 (C-278/18, EU:C:2019:160).

46 See judgment of 28 February 2019, *Sequeira Mesquita* (C-278/18, EU:C:2019:160, paragraphs 32 and 33).

47 This has also been recognised by the Court: see, inter alia, judgment of 18 November 2004, *Temco Europe* (C-284/03, EU:C:2004:730, paragraph 20 and the case-law cited).

48 See point 31 of this Opinion.

49 Again, in holding that there was a single supply, the referring court established, at the same time, that the letting of the equipment in the rearing shed did not constitute, for the tenant, an end in itself but merely a means of better enjoying the principal service.

50 Judgment of 19 December 2018 (C-17/18, EU:C:2018:1038).

51 Once those items have been incorporated and when they must be regarded as an integral part of the building concerned, their *movable* nature could be subject to discussion. It cannot be entirely ruled out that the Court would then also find itself dealing with items which could be classified as 'equipment' or 'machinery' within the meaning of Article 135(2)(c) of the VAT Directive.

as that immovable property, with the result that that letting/transfer could not be regarded as having its own purpose either, but, on the contrary, had to be regarded as a means of better enjoying the principal service supplied, that was the letting of the immovable property.[52] Consequently, the Court held that, in such a case, the letting of the immovable property had to be regarded as the principal supply in relation to the letting of capital equipment – even if it was incorporated in that immovable property – and of inventory items.[53]

42. Therefore, I also take the view that, in the context of the dispute in the main proceedings, such a lease, in which the remuneration of the owner always appears to be passive, by the mere passage of time, does not involve any supply other than that of making available to the lessee the immovable property let, even if it is equipped with a number of systems that are useful for its function.

43. It therefore follows from all the foregoing considerations that the taxation provided for in Article 135(2), first subparagraph, point (c) of the VAT Directive does not apply where the letting or leasing of equipment and machinery constitutes only a supply which is ancillary to the principal supply of the letting or leasing of a building.

44. The German Government considers that a ruling to that effect would amount to greatly reducing the scope of Article 135(2), first subparagraph, point (c) of the VAT Directive and would be contrary to the principle of the non-restrictive interpretation of the provisions of the general scheme established by that directive.

45. I do not share those reservations.

46. First, I do not think it is possible to draw any definitive conclusions on the scope of Article 135(2), first subparagraph, point (c) of the VAT Directive since it will ultimately depend to a large extent on the specific assessment of each transaction. For example, I can well imagine that the letting of equipment or machinery, although also accompanied by the letting or leasing of a building, constitutes, in other situations, the principal supply. Next, the letting or leasing of equipment and machinery corresponding to the classification of immovable property,[54] which may, at least in part, be considered in isolation from the letting or leasing of the building or structure which houses them, may also be subject to VAT under the first subparagraph of Article 135(2) of the VAT Directive.

47. Secondly, the wording of the first subparagraph of Article 135(2) of the VAT Directive may continue to be given a broad definition, which implies a broad understanding of what may constitute 'equipment' or 'machinery' within the meaning of that provision. However, the interpretative principles of application in the case of provisions which exclude the exemption do not appear to me to require, per se, that the application of the case-law on single supplies be excluded, for all the reasons I have given.

48. In those circumstances, I consider that Article 135(1)(l) and Article 135(2), first subparagraph, point (c) of the VAT Directive must be interpreted as meaning that the exemption granted to the leasing of a rearing shed extends to the leasing of equipment and machinery within the meaning of

[52] See judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 39).

[53] See judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 41).

[54] As is already apparent, in my view, from the combined reading of Article 135(1)(l) of the VAT Directive and Article 135(2), first subparagraph, point (c) thereof and as is confirmed by Implementing Regulation No 282/2011 as amended by Implementing Regulation No 1042/2013 (see point 4 of this Opinion).

Article 135(2), first subparagraph, point (c) of that directive which constitute special equipment in the building in the light of its function as a rearing shed, where the supply of such equipment and machinery appears to be ancillary to the leasing of the building.

The interpretation of the second subparagraph of Article 135(2) of the VAT Directive

49. If the Court were to answer the question referred for a preliminary ruling to the effect that Article 135(2), first subparagraph, point (c) of the VAT Directive does not apply in the context of the dispute in the main proceedings because there is a single supply which is characterised primarily by the leasing of the building which would result in the transaction being exempt from VAT under Article 135(1)(l) of that directive, the German Government is of the view that that would not automatically mean that a national provision such as the second sentence of Paragraph 4(12) of the UStG would be incompatible with the VAT Directive. On the contrary, the question then arises as to whether the leasing of the equipment and machinery fitted in the building could be subject to VAT on the basis of the second subparagraph of Article 135(2) of the VAT Directive, a question which the German Government asks the Court to answer.

50. However, analysis of the case file shows that the referring court clearly and explicitly did not refer a question to the Court concerning the interpretation of the latter provision.[55] While acknowledging that that question may arise at a later stage of the analysis of the situation in the main proceedings, it must be noted that the Court cannot answer that question, which has been raised solely by the German Government.

Conclusion

51. Having regard to all the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Bundesfinanzhof (Federal Finance Court, Germany) as follows:

Article 135(1)(l) and Article 135(2), first subparagraph, point (c) of Council Directive 2006/112/EEC of 28 November 2006 on the common system of value added tax

must be interpreted as meaning that the exemption granted to the leasing of a rearing shed extends to the leasing of equipment and machinery within the meaning of Article 135(2), first subparagraph, point (c) of that directive which constitute special equipment in the building in the light of its function as a rearing shed, where the supply of such equipment and machinery appears to be ancillary to the leasing of the building.

[55] See, inter alia, the response of the referring court to the Court's request for information dated 20 October 2021, received by the Court on 1 December 2021.