

JUDGMENT OF THE COURT (Third Chamber)

11 September 2014 (*)

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Article 98(2) — Annex III, point 6 — Reduced rate of VAT applicable only to books printed on paper — Books published on physical supports other than paper subject to the standard rate of VAT — Fiscal neutrality)

In Case C-219/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decision of 22 April 2013, received at the Court on 25 April 2013, in the proceedings brought by

K Oy,

THE COURT (Third Chamber),

composed of M. Ileši , President of the Chamber, C.G. Fernlund (Rapporteur), A. Ó Caoimh, C. Toader and E. Jaraši nas, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2014,

after considering the observations submitted on behalf of:

- the Finnish Government, by H. Leppo, acting as Agent,
- the German Government, by T. Henze and K. Petersen, acting as Agents,
- the Estonian Government,, by K. Kraavi-Käerdi and N. Grünberg, acting as Agents,
- the Greek Government, by I. Bakopoulos, acting as Agent,
- Ireland, by A. Joyce, acting as Agent, L. Williams, Solicitor, and C. Toland, Barrister-at-Law,
- the European Commission, by C. Soulay and I. Koskinen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 May 2014,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the first subparagraph of Article 98(2) of and point 6 of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/47/EC of 5 May 2009 (OJ 2009 L 116, p. 18) ('the VAT Directive').

- 2 The request has been made in proceedings brought by K Oy ('K') against the decision of the Keskusverolautakunta (Central Tax Board) ruling that the reduced rate of value added tax (VAT) applied to the supply of books published in paper format cannot be applied to the supply of books published on physical supports other than paper.

Legal context

European Union law

- 3 Article 96 of the VAT Directive provides:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.'

- 4 Article 98(1) and (2) of the VAT Directive provides:

'1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

The reduced rates shall not apply to electronically supplied services.'

- 5 Before it was amended by Directive 2009/47, Annex III to the VAT Directive, containing the list of supplies of goods and services to which the reduced rates referred to in Article 98 of the directive may be applied, mentioned among such supplies, in point 6:

'supply, including on loan by libraries, of books (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising'.

- 6 Recital 4 in the preamble to Directive 2009/47 states:

'[The VAT Directive] should furthermore be amended in order to allow for the application of reduced rates or an exemption respectively in a limited number of specific situations for social or health reasons and in order to clarify and update to technical progress the reference to books in its Annex III.'

- 7 As from 1 June 2009, point 6 of Annex III to the VAT Directive reads as follows:

'supply, including on loan by libraries, of books on all physical means of support (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising'.

Finnish law

- 8 Point 1 of the first subparagraph of Paragraph 1 of the Law on value added tax (Arvonlisäverolaki) of 30 December 1993 (1501/1993), in the version in force for 2011 and 2012 ('the Law on VAT'), provides:

'[VAT] is payable to the State in accordance with the provisions of this law:

(1) on the sale of goods and services in Finland in the course of business'.

9 In accordance with Paragraph 84 of the Law on VAT:

‘The tax payable is 23% of the taxable amount, unless provided otherwise in Paragraph 85 or 85a.’

10 In accordance with Paragraph 85a of the Law on VAT:

‘On the sale of the following services and the sale, intra-Community acquisition, transfer from a warehousing arrangement and importation of the following goods, the tax payable is 9% of the taxable amount:

...

(7) book[s];

...

Not regarded as a book within the meaning of point 7 of the first subparagraph are:

(1) a publication produced otherwise than by printing or by comparable means;

(2) a periodical; or

(3) a publication primarily containing advertising.’

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

11 K is a publishing company whose activities include the publication of general literature and textbooks. It also publishes audiobooks and e-books.

12 According to the documents before the Court, the audiobooks and e-books published by K are available in the form of electronic files on physical supports such as CDs, CD-ROMs, USB keys or other equivalents which reproduce books originally published in paper form. An audiobook, intended to be listened to, reproduces the written text of a printed book, read aloud, on a physical support such as a CD or CD-ROM. An e-book essentially reproduces the content of a book originally available in printed form, to which it corresponds in principle in external appearance and structure, on a physical support such as a CD or USB key, and may be loaded onto a computer or an appropriate reading device. The e-book versions may, however, differ in content and structure from the printed books.

13 K applied to the Keskusverolautakunta for a preliminary ruling to establish whether books published on physical supports other than paper, reproducing the written text of a book in paper format, could be regarded as books within the meaning of point 7 of the first subparagraph of Paragraph 85a of the Law on VAT, sales of which are subject to a reduced rate of VAT.

14 By preliminary ruling of 25 May 2011, the Keskusverolautakunta ruled that only publications printed in paper form or produced by comparable means could be regarded as books, so that audiobooks and e-books published on physical supports such as CDs, CD-ROMs or USB keys could not be considered to be books within the meaning of point 7 of the first subparagraph of Paragraph 85a of the Law on VAT.

15 The Keskusverolautakunta further stated that the first subparagraph of Article 98(2) of the VAT Directive, read in conjunction with point 6 of Annex III to that directive, and the principle of fiscal neutrality did not preclude the application of a standard rate of VAT to

sales of books published on a physical support other than paper, rather than the reduced rate applicable to books published in paper form.

- 16 K appealed to the Korkein hallinto-oikeus (Supreme Administrative Court), seeking to have the preliminary ruling of the Keskusverolautakunta set aside and a new preliminary ruling made declaring that books published on physical supports other than paper, such as CDs, CD-ROMs, USB keys or other equivalents, are to be regarded as books within the meaning of point 7 of the first subparagraph of Paragraph 85a of the Law on VAT, sales of which are subject to a reduced rate of VAT.
- 17 K argued that it is contrary to the principle of fiscal neutrality for a Member State to apply a reduced rate of VAT solely to books published in paper form, to the exclusion of books published on other physical supports.
- 18 The Korkein hallinto-oikeus sought the opinion of the Valtiovarainministeriö (Ministry of Finance). The ministry stated that the tax treatment of books published on a physical support other than paper varied in the different Member States of the European Union. In its view, the Member States can apply a reduced rate of VAT selectively to the supplies of goods and services listed in Annex III to the VAT Directive. They have a wide discretion in this respect. In this context, they are entitled to apply a reduced rate of VAT to books published in paper form and a standard rate to those published on other physical supports.
- 19 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - ‘1. Do the first subparagraph of Article 98(2) of and point 6 of Annex III to [the VAT Directive], when the principle of fiscal neutrality is taken into account, preclude national legislation under which a reduced rate of VAT is applied to printed books, but the standard rate is applied to books on other physical supports such as a CD, CD-ROM or USB key?
 2. As regards the answer given to the question above, is it of any significance
 - whether a book is intended to be read or to be listened to (an audiobook),
 - whether there exists a printed book with the same content as a book or audiobook on a CD, CD-ROM, USB key or other equivalent physical support,
 - that with a book on a physical support other than paper technical features provided by that support, such as search functions, can be exploited?’

Consideration of the questions referred

- 20 By its questions, which should be considered together, the referring court seeks essentially to know, first, whether the first subparagraph of Article 98(2) of and point 6 of Annex III to the VAT Directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which books published in paper form are subject to a reduced rate of VAT and books published on other physical supports such as CDs, CD-ROMs or USB keys are subject to the standard rate of VAT and, secondly, whether the answer to that question may vary depending on the kind of physical support used, the content of the book in question, or the technical properties of the physical support concerned.
- 21 Article 96 of the VAT Directive provides that the same rate of VAT, the standard rate, is applicable to supplies of goods and supplies of services.

- 22 As an exception to that principle, Article 98(1) of the VAT Directive gives the Member States the option of applying either one or two reduced rates of VAT. In accordance with the first subparagraph of Article 98(2), the reduced rates of VAT can apply only to supplies of goods and services in the categories set out in Annex III to the VAT Directive.
- 23 As regards the application of reduced rates of VAT to those categories, it is apparent from the Court's case-law that it is for the Member States, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, to determine more precisely which of the supplies of goods and services included in the categories in Annex III to the VAT Directive the reduced rate is to apply to (see, to that effect, judgments in *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien*, C-442/05, EU:C:2008:184, paragraphs 42 and 43, and *Pro Med Logistik*, C-454/12 and C-455/12, EU:C:2014:111, paragraph 44).
- 24 As regards the principle of fiscal neutrality, it should be recalled that it precludes similar goods or services which are in competition with each other being treated differently for VAT purposes (see judgments in *Commission v France*, C-384/01, EU:C:2003:264, paragraph 25, and *The Rank Group*, C-259/10 and C-260/10, EU:C:2011:719, paragraph 32 and the case-law cited).
- 25 To determine whether goods or services are similar, account must be taken primarily of the point of view of a typical consumer. Goods or services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or the other of those goods or services (see, to that effect, judgment in *The Rank Group*, EU:C:2011:719, paragraphs 43 and 44).
- 26 It must be recalled that, before the amendment introduced by Directive 2009/47, point 6 of Annex III to the VAT Directive referred to the 'supply ... of books'. Directive 2009/47 amended the wording of point 6 of Annex III to the VAT Directive so that it now includes the 'supply ... of books on all physical means of support' in the list of goods and services capable of benefiting from a reduced rate of VAT.
- 27 The question therefore arises whether, as a result of that amendment, a Member State which has chosen to subject the supply of books printed on paper to a reduced rate of VAT is thereby compelled to extend the application of the reduced rate also to supplies of books on all physical supports other than paper.
- 28 On this point, it must be noted, as the European Commission also observed at the hearing, that neither the wording of Directive 2009/47 nor the legislative history of that directive indicates that the EU legislature intended, by amending point 6 of Annex III to the VAT Directive, to compel the Member States to apply an identical reduced rate of VAT to all books, whatever the physical support on which they are published.
- 29 In any event, in the light of the Court's case-law cited in paragraph 23 above, since point 6 of Annex III to the VAT Directive confines itself to referring to the supply of books on all physical means of support, it is for the Member States, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, to determine the physical supports to which the reduced rate of VAT is to apply.
- 30 In this connection, it must be noted, as Ireland did and as the Advocate General observed in point 54 of his Opinion, that, in a case such as that in the main proceedings, as the average consumer's assessment is liable to vary according to the different degree of penetration of new technologies in each national market and the degree of access to the technical equipment enabling the consumer to make use of books published on physical supports other than paper, it is the average consumer in each Member State who must be taken as a reference.

- 31 In those circumstances, it is for the referring court to ascertain, as stated in paragraph 25 above, whether books published in paper form and books published on other physical supports are goods which are liable to be regarded by the average consumer as similar. For that purpose, it will have to assess whether those books have similar characteristics and meet the same needs, using the criterion of whether their use is comparable, in order to ascertain whether or not the differences between them have a significant or tangible influence on the average consumer's decision to choose one or other of those books.
- 32 That answer does not vary according to the kind of support used, the content of the book in question or the technical properties of the physical support, since those are among the circumstances which the referring court will have to take into consideration for assessing whether books published in paper form and books published on other physical supports are goods which are liable to be regarded by the average consumer as similar.
- 33 If, as the Advocate General observes in point 62 of his Opinion, those circumstances are determinative from the point of view of the average consumer of the Member State concerned, it is justifiable for national legislation not to grant the supply of books on supports other than paper the reduced rate of VAT applicable to the supply of printed books. On the other hand, if what matters for that consumer is essentially the similar content of all books, regardless of their physical support or characteristics, the selective application of a reduced rate of VAT is not justified.
- 34 It follows from all the above considerations that the answer to the questions is that the first subparagraph of Article 98(2) of and point 6 of Annex III to the VAT Directive must be interpreted as not precluding, provided that the principle of fiscal neutrality inherent in the common system of VAT is complied with, which is for the referring court to ascertain, national legislation, such as that at issue in the main proceedings, under which books published in paper form are subject to a reduced rate of VAT and books published on other physical supports such as CDs, CD-ROMs or USB keys are subject to the standard rate of VAT.

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 (Third Chamber) hereby rules:

The first subparagraph of Article 98(2) of and point 6 of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/47/EC of 5 May 2009, must be interpreted as not precluding, provided that the principle of fiscal neutrality inherent in the common system of value added tax is complied with, which is for the referring court to ascertain, national legislation, such as that at issue in the main proceedings, under which books published in paper form are subject to a reduced rate of value added tax and books published on other physical supports such as CDs, CD-ROMs or USB keys are subject to the standard rate of value added tax.

[Signatures]

• Language of the case: Finnish.