



Recent VAT/GST Case Law on Multiple Supplies of Goods and Services

IATJ 13th Assembly
September 9, 2023




Introduction of the panel

- Main principles of the ECJ jurisprudence concerning multiple supplies and European VAT (Mikko)
- Remarks from the point of view of Australian GST (Jennifer)
- Two examples of recent concrete national applications (France / Céline & Finland / Mikko)
- Discussion and summary

What's the question about?

- Whether a transaction which comprises several elements is to be regarded, for VAT/GST purposes,
 - a) as a single supply *or*
 - b) as two or more distinct supplies to be assessed separately
- Relevance of the assessment:
 - solving the scope of the exemption provisions,
 - applying the rate of tax and
 - identifying the place where the services are provided

A rustic log cabin with a steep gable roof, built from large logs. The interior is visible, showing a wooden table and benches. The cabin is surrounded by a dense forest of tall evergreen trees. The text is overlaid in white on the cabin's interior.

If you are taken overnight into a forest in hope of seeing bears living in nature, are you enjoying:

Several separate services such as guidance, transportation, accommodation and meals?

Or only one safari service constituting of various elements?

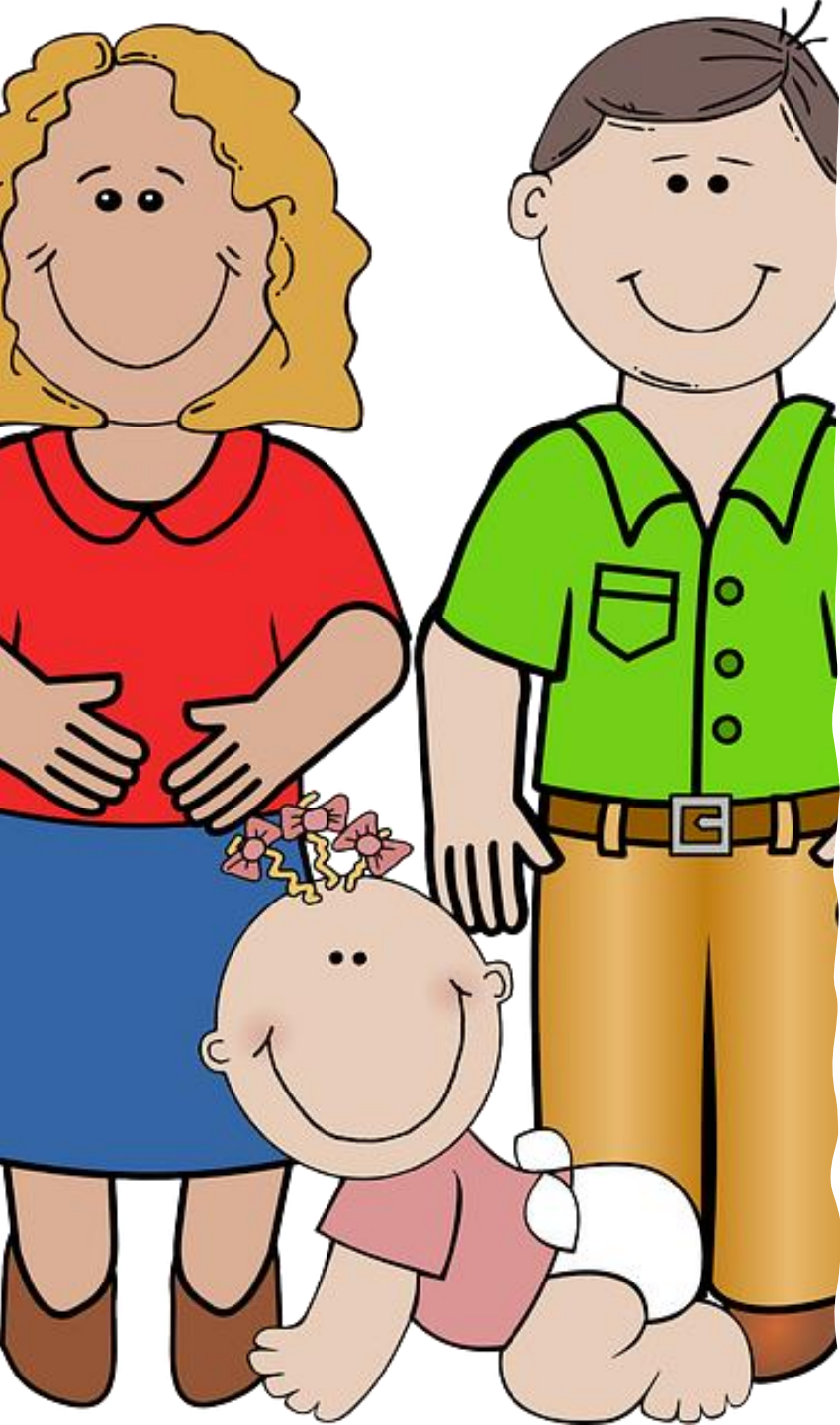
Praxis of the European Court of Justice

- Long-standing jurisprudence, early landmark case being *Card Protection Plan* (C-349/96), judgment 29 February 1999
- Despite of several judgments, guidance of ECJ for national courts remains at rather abstract level
- ECJ in *CPP*: “Having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases”
- Since complexity of commercial transactions has been raising, the court’s statement may be even more topical today



Pick-ups from *CPP* (1)

- Where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place
- Every supply of a service must normally be regarded as distinct and independent
- A supply which comprises a single service from an economic point of view should not be artificially split



Pick-ups from *CPP* (1)

- The essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a **typical consumer**, with several distinct principal services or with a single service

Pick-ups from *CPP* (3)

- There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the treatment of the principal service
- A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but **a means of better enjoying the principal service** supplied



Pick-ups from *CPP* (4)

- The fact that a single price is charged is not decisive
- However, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service
- If, despite of the single price, two (or more) distinct services are deemed to exist, it is necessary to identify the parts of the price which relate to those services
- The simplest possible method of calculation or assessment should be used for this



RECENT AUSTRALIAN GST CASE LAW ON MULTIPLE SUPPLIES OF GOODS AND SERVICES

The Hon Jennifer Davies KC

IATJ 2023

TAXABLE SUPPLY

- GST is payable on “taxable supplies”
 - “A “taxable supply” is a “supply” you make *for consideration to the extent that* it is not “GST-free” or “input taxed”
- GST on a “taxable supply” is 10% of the “value” of the taxable supply
 - one rate of tax
 - The “value” of a taxable supply is the “consideration” for the relevant supply: where the consideration is expressed as an amount of money, the “value” is that amount

MULTIPLE SUPPLIES

- A single transaction may comprise a taxable supply and other types of supplies: eg a supply of rights or services used or consumed partly in Australia (taxable) and partly outside Australia (GST-free)
 - If a supply is partly a taxable supply and partly input taxed or GST exempt, the value of the taxable supply is the proportion of the consideration for the actual supply that the taxable supply represents
 - Must be an apportionment of consideration between taxable supply and other types of supply - “to the extent that”

- A single transaction may comprise more than one taxable supply: eg an executory contract involves both a supply upon entry into the contract and a further supply or supplies in the performance of the contract
 - Apportionment of consideration is unnecessary as GST is payable on the total value of the supply
 - GST is payable only once, although the transaction may involve more than one supply
- A composite supply - ie one involving something integral, ancillary or incidental to the principal supply - is treated as a supply of a single thing and either entirely taxable or entirely non taxable

APPORTIONMENT

- Where a supply is capable of distinct and separate apportionment as between an input taxed supply or a GST exempt supply and an otherwise taxable supply, GST is payable on the value of the actual supply that the taxable supply represents
- Where undifferentiated mixed supply, a fair and reasonable apportionment needed
 - No prescribed method of apportionment: what is a reasonable method of apportioning the consideration for a mixed supply depends on the circumstances of each case and the commercial and legal context in which the transaction occurs
 - Apportionment method used must be supportable
- Little judicial consideration of apportionment to date

IDENTIFICATION AND CHARACTERISATION OF A TAXABLE SUPPLY

- supply” has a very broad meaning under the legislation and includes:
 - Ⓜ a supply of goods and of services
 - Ⓜ provision of advice or information
 - Ⓜ a grant, assignment or surrender of real property
 - Ⓜ a creation, grant, transfer, assignment or surrender of any right
 - Ⓜ a financial supply
 - Ⓜ an entry into, or release from, an obligation to do anything; or to refrain from an act; or to tolerate an act or situation
 - Ⓜ any combination of any 2 or more of those matters

- Liability to GST arises if the supply is made is “for consideration” (ie definition of “taxable supply”)
- Australian courts have rejected a strictly contractual approach to the question as to whether a supply is “for consideration”: what is required is “a connection or relationship” between the supply and the consideration
 - E.g. held that GST payable on a deposit forfeited by a vendor upon termination of a contract for sale of a property upon termination for default by the purchaser; the deposit was in connection with the supply (the entry into the contract) because it operated as security for the performance of the obligation of the purchaser to complete the contract and was liable to forfeiture on that failure: *FCT v Reliance Carpet Co Pty Ltd* (2008) 238 CLR 342
 - E.g. held that airfares paid by prospective passengers who failed to take flights for which reservations and payment had been made where no refund was claimed or available subject to GST - the court rejected the argument that the supply of air travel was the taxable supply and that as air travel did not occur there was no taxable supply for which the fare was received (ie the consideration); court reasoned that that the terms and conditions of purchase did not provide an unconditional promise to carry the passenger on a particular flight - it was sufficient that there was a least a “best endeavours” term to carry the passenger , which was a “taxable supply” for which the consideration (i.e the fare) was received: *FCT v Qantas Airways Ltd* ((2012) 247 286

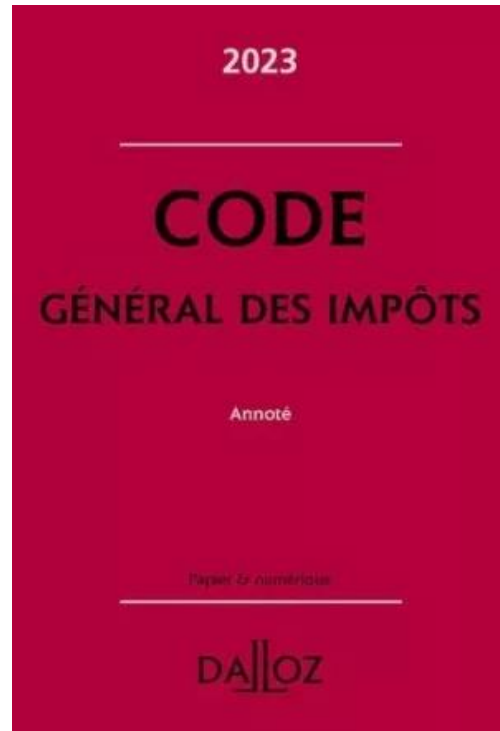
CHARACTERISATION OF MULTIPLE SUPPLIES

- Little judicial consideration to date
- Courts have adopted a “commonsense, practical approach to characterisation”, having regard to relevant contractual terms and commercial reality, reflecting “the practical reality of what in fact is supplied”
 - Held that the sale of spectacles (comprising a frame with the lenses fitted) was a single supply, not 2 separate supplies, being the frame and the lenses: *FCT v Luxottica Retail Australia Pty Ltd* (2011) 191 FCR 561
 - Where a packaged tour of Australia was sold to non-residents which included accommodation in Australia, issue was whether the supply of the accommodation component was incidental to the actual supply of the tour - held no but was an important element of the tour which was to be treated as a [separate supply](#) for GST purposes: *Saga Holidays Limited v Commissioner of Taxation* [\[2005\] FCA 1892](#)

VAT

Recent French
case law on
Multiple Supplies
of Goods and
Services

ECJ case law, long applied by the Conseil d'Etat, is now codified in the French tax code



Art. 257 *ter* (Finance Bill for 2021)

I.-Each transaction subject to value-added tax is regarded as distinct and independent and is subject to its own tax regime determined according to its principal element or its non-ancillary elements.

The scope of a transaction is determined, in accordance with II, on the basis of an **overall assessment made from the point of view of the consumer**, considered as an average consumer, taking into account the qualitative and quantitative importance of the various elements involved, as well as all the circumstances in which the transaction takes place.

II - Elements that are **so closely linked that they objectively form a single, indivisible economic supply**, the split of which would be artificial, belong to a single transaction.

When an element is **ancillary to one or more other elements**, it is part of the same operation as the latter.

Key precedents by the Conseil d'Etat (1/3)

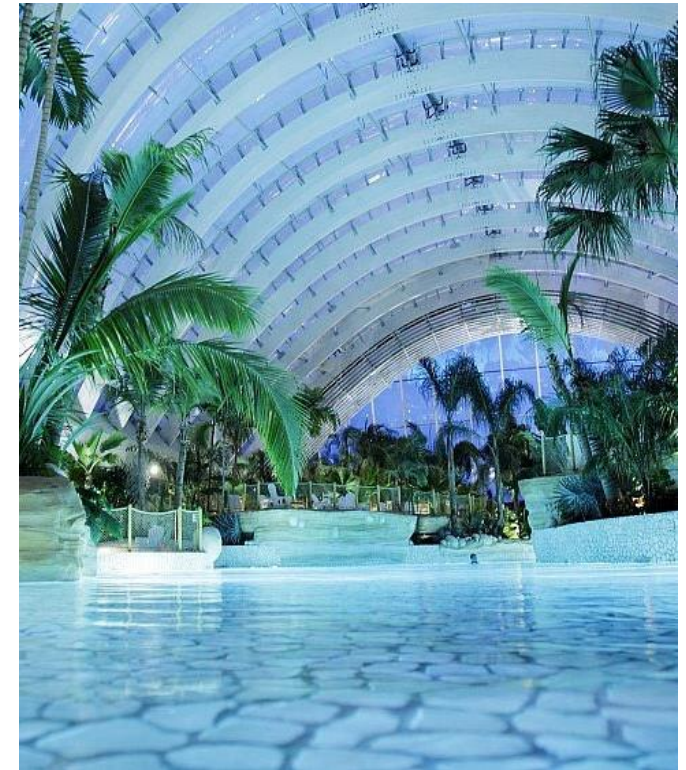
Société Center Parc Resorts France, 2015-06-24, n° 365849

Vacation villages where clients have access to “Aqua Mundo”, a vast aquatic leisure complex set in a tropical greenhouse.

Aqua Mundo and accommodation services are deemed to be a single supply :

- customers do not have the option of refusing to purchase this service and do not benefit from a price reduction should they not use it;
- Aqua Mundo facilities account for only 10% of the cost of accommodation;
- it is only a small part of the sixty or so different activities on offer in each area;
- given its capacity, access to the aquatic complex can never be guaranteed;
- use of Aqua Mundo is not necessarily a determining factor in the decision to stay at a Center Parcs resort, nor is it a systematic practice during a stay.

Consequence: the reduced VAT rate for accommodation services applies to Aqua Mundo services



Key precedents by the Conseil d'Etat (2/3)

Société Xerox et Société Xerox General Services, 2019-04-24, n° 411007 411013

Company in the "desktop publishing" business, providing customers with document management services, to which could be added additional services consisting of enveloping, stamping and delivery of these stamped documents to the French postal company.

Mailing services are deemed NOT ancillary to the document management services:

- mailing service was optional and invoiced separately ;
- it was not the means to benefit under the best conditions from the main document management services ;
- the inclusion of the postage costs in the basis of VAT would have been contrary to the exemption enjoyed, under Directive 2006/112/EC, by services that fall within the scope of the universal public service as well as postage stamps.

Consequence: the standard VAT rate applicable to document management services does not apply to mailing services



Key precedents by the Conseil d'Etat(3/3)

SAS Corsica Ferries France, 2019-04-24, n° 418912

Ferry company operating between Corsica and mainland France

Catering services to passengers on the ships are deemed NOT ancillary to the transportation service:

- catering cost is not included in the price of the transportation service ;
- given the length of the journeys between the mainland and Corsica, passengers, who are not obliged to purchase these services and are authorized to consume the food they take on board, can dispense with catering services, which must be regarded as intended solely to enhance their journey.

Consequence: catering services do not benefit from VAT exoneration applicable to transportation of passengers between mainland France and Corsica



Most recent case law: Société M010, 2022-02-24, n°446128

French company providing a bundle of services to Portuguese and Polish companies sending employees to work in France :

- principal service : accomodation renting,
- additional services : vehicle renting ; providing of work clothes and equipement ; booking of trips from Portugal and Poland to France.

Lower court judged that the additional services could not be equated with accommodation services and should therefore be subject to VAT.

The ruling was annulled on the grounds of a breach of the adversarial principle and the Conseil d'Etat defined guidance for the lower courts, relying on the principles laid out by ECJ in the *Frenetikexito* case (2021-03-24, C-581/19):

*To determine whether a supply must be regarded as ancillary to a principal supply, insofar as it does not constitute for the customer an end in itself but the means of better enjoying the principal services supplied, **account should be taken of the respective value of each of the benefits making up the economic transaction.***



What did the lower court rule?

Rejudging the case, it ruled that **the services cannot be regarded as independent for VAT purposes** (Cour adm. de Lyon, 2023-01-26, 22LY00597) :

“It is clear from the wording of the contracts for the provision of services that, from the point of view of M010's customers, **the sole economic purpose of the operations is to ensure that posted workers settle in France for the duration of their assignment and carry it out under the best possible conditions** (...).

The services provided by the company must be regarded as **a logistical support operation** consisting, for each temporary work assignment taken individually, of a predominant accommodation service, and any ancillary services intended to benefit from the main service under better conditions, and including both vehicle rentals, whatever their duration, and purchases of equipment or transport tickets.

Moreover, a detailed examination of the invoices shows that the cumulative value of ancillary services remains marginal in relation to sales of accommodation services.”

Consequence: all services were subjected to the same reduced tax rate.





- In the *Center Parcs*, *Xerox* and *Corsica Ferries* cases, the **optional nature of the service** was decisive in ruling out classification as an ancillary operation.

With the *M010* case, the lower court regarded the bundle of services as dependent for VAT purposes although the additional services were optional.

=) the criterion of separate / single access and invoice is used by the **ECJ** only for the purpose of the **first exception** to the principle that every supply is independent, i.e. to determine whether several elements form a **single, indivisible economic supply**, which it would be artificial to split

(*Frenetikexito*, C-581/19, § 39).



For the purpose of the **second exception** of the **dependent ancillary supply**, the ECJ deems 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 negligible value of the benefits of the service in relation to the principal supply is only used as an evidence of this first criterion.

(Frenetikexito, C-581/19, §§ 41-42).

The lower court followed these principles but the solution was not self-evident...

Finland



Earlier examples

One single service:

- Office space + cleaning + wifi + printing etc. (KHO 2020:99)
- Paper book + same content in audiobook (KHO 2003/2783)

Separate services:

- Veterinary + medicine (KHO 2009/1042)
- Dressing the deceased + transporting the body (KHO 1996/3057)

KHO 2022:58

- Kid's meal sold by a fast food restaurant constituting of a hamburger, French fries, a drink and a toy
- Price for the entity EUR 4,95
- The meal without a toy EUR 4,00 and a toy sold separately EUR 2,00
- The Supreme Administrative Court (KHO) hold: *not* a single service (by votes 3-2)





KHO 2022:58 – majority sees a toy

- References to various judgments of ECJ
- Because the company offers also a similar meal without a toy, a typical consumer chooses a kid's meal because of the toy
- Splitting the price between meal and toy is not artificial
- Buying the toy is, from the point of view of a typical consumer, an aim in itself, not only a means of better enjoying the principal service



KHO 2022:58 – minority sees a hamburger

- According to the company it is selling a toy separately only in order to fulfill consumer protection legislation, and selling toys is not essential for its restaurant business
- Toy's value is only a minor factor in the entity's price
- For a typical consumer, a kid's meal is one single service and a toy only ancillary part of it
- According to the ECJ, pricing two elements separately is not decisive



Discussion and conclusions

Similar problems may be identified throughout various jurisdictions, even when tax systems are different

But is it, in practice, possible to find and share common solutions, even inside one system (e.g. European VAT)?
