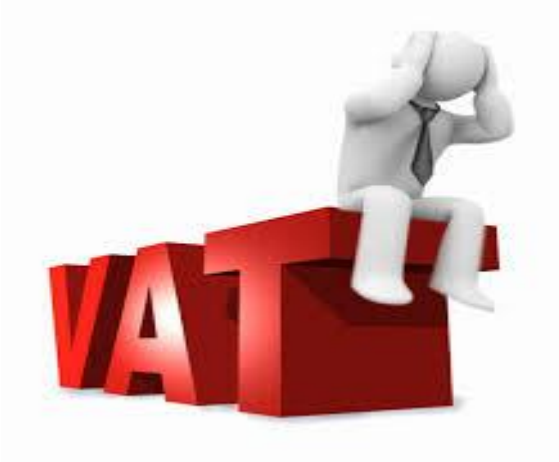
Polish case 42/14 Wojskowa Agencja Mieszkaniowa /The Military Housing Agency/ in Warsaw

dr Dagmara Dominik-Ogińska
judge of Voivodship
Administrative Court in Wrocław,
Poland



State immovable property

tenants

the rental agreements

The Military Housing Agency /MHA/ - landlord

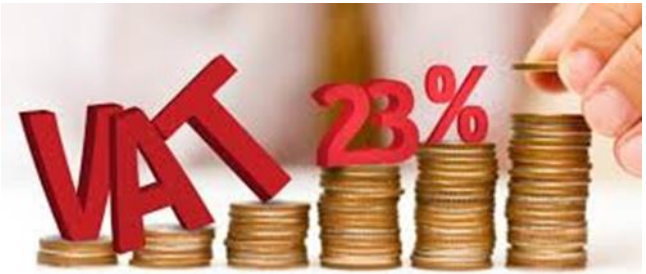
The method of calculating the VAT

- MHA /the taxpayer/ issued invoices separately on
- a rental fee – rental service / basic rate of VAT / and
- the supply of electricity, heating and water and refuse collection /reduced rate of VAT/

/provided by third-party suppliers for the tenant directly using those goods and services/

The position of the tax authority

- the Minister of Finance explained that the method of calculating the VAT envisaged by the The Military Housing Agency was incorrect and noted that the provision of utilities and refuse collection were part of a whole constituting a single supply, namely rental services.
- it was appropriate to include those various services in the taxable amount of the service that constituted the main service and to apply a single tax rate, namely the rate applicable to that service.
- it was about the basic rate of VAT



- The taxpayer did not share this point of view and brought a complaint before the first-instance court.
- The court dismissed her action as unfounded.

- The taxpayer appealed against the judgment of the Supreme Administrative Court.
- In those circumstances, the Supreme Administrative Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- 1) Must Article 14(1), Article 15(1) and Article 24(1) of the VAT Directive be interpreted as meaning that there are supplies by the landlord of electricity, heat, water and refuse disposal services to the tenant of the premises directly using those goods and services, which are supplied to those premises by specialist third persons, in a situation where one of the parties to the agreements for the supply of those goods and services is the landlord, who simply passes on the costs thereof to the tenant who actually uses them?

- (2) If the answer to Question 1 is in the affirmative, do the costs of electricity, heat, water and refuse disposal used by the tenant of the premises increase, as regards the landlord, the taxable amount (rent), as referred to in Article 73 of the VAT Directive, resulting from the supply of the rental service, or do the supplies of goods and services in question constitute supplies separate from the rental service?'

EU law

- The second subparagraph of Article 1(2) of the VAT Directive provides:

‘On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.’

- Article 14(1) of the VAT Directive states:

‘“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.’

- Article 15(1) of that directive provides:

‘Electricity, gas, heat or cooling energy and the like shall be treated as tangible property.’

- Pursuant to Article 24(1) of that directive:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

EU law

- Article 73 of the VAT Directive reads as follows:

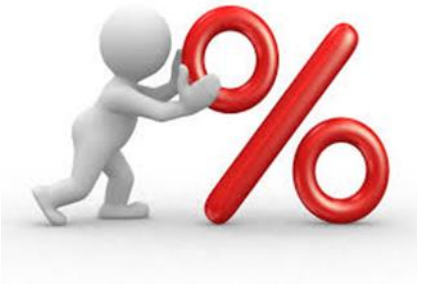
‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

Court of Justice - Question 1

By Question 1, the referring court asked, in essence, whether Articles 14(1), 15(1) and 24(1) of the VAT Directive must be interpreted as meaning that, with regard to the letting of immovable property, the supply of electricity, heating and water and refuse collection, provided by third-party suppliers for the tenant directly using those goods and services must be regarded as being supplied by the landlord where he has concluded agreements for such provisions and where he simply passes on the costs to the tenant.

- In its judgment of 16 April 2015, the CJ pointed out that in an agreement such as that at issue in the main proceedings in which the landlord concludes the agreement for the provision of supplies consisting of the provision of utilities and refuse collection, it is the landlord who purchases the services in question for the immovable property which he lets.
- It is true that the tenant uses those supplies directly, but does not purchase them from specialist third-party suppliers.

- The CJ stated that it follows from the purchase by the landlord of supplies comprising the provision of those goods and services that it is the landlord who must be regarded as providing those supplies to the tenant.
- It refused the considerations relating to the purchase of fuel in the judgment in Auto Lease Holland (C-185/01, EU:C:2003:73)



- Therefore, the answer to Question 1 was that Articles 14(1), 15(1) and 24(1) of the VAT Directive must be interpreted as meaning that, in the context of the letting of immovable property, the provision of electricity, heating and water and refuse collection, provided by third-party suppliers for the tenant directly using those goods and services must be regarded as being supplied by the landlord where he has concluded agreements for the provision of those supplies and simply passes on the costs thereof to the tenant.

Court of Justice - Question 2

By Question 2, the referring court asked, in essence, whether the VAT Directive must be interpreted as meaning that the letting of immovable property and the associated provision of water, electricity and heating and refuse collection must be regarded as constituting a single supply or several distinct and independent supplies which must be assessed separately from the point of view of VAT.

- The answer given by the CJ is a consequence of the settled case law (see judgment in Field Fisher Waterhouse, C-392/11, EU:C:2012:597, and BGŻ Leasing, C-224/11, EU:C:2013:15) from which it follows that for VAT purposes every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive.

- The CJ observed also that in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise in turn to taxation or exemption, must be considered to be a single transaction when they are not independent.
- 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.

- Such is also the case where one or several services constitute the principal service, and where the other service or services constitute one or several ancillary services which share the tax treatment of the principal service.
- 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.

- In order to determine whether the services supplied constitute independent services or a single service it is necessary to examine the characteristic elements of the transaction concerned.

- As regards rental charges such as those at issue in the main proceedings, the Court has already had three occasions to clarify which elements need to be regarded as characteristic.

- In the judgment in RLRE Tellmer Property (C-572/07, EU:C:2009:365), the Court pointed out that, as regards the cleaning of the common parts of an apartment block, the service could be provided in various ways, such as, for example, a third party invoicing the cost of the service direct to the tenants or by the landlord employing his own staff for the purpose or using a cleaning company.
- In that case, as the service was invoiced separately from the rent by the landlord and the two services could be separated from each other, the Court held that they could not be regarded as constituting a single transaction.

- In the judgment in Field Fisher Waterhouse (C-392/11, EU:C:2012:597), the Court ruled that the content of a lease may be a factor of importance.
- As regards, in that case, a contract for the rent of offices by a law firm, the Court stated that, according to the information available to it, the contract provided that, in addition to the letting of premises, the landlord had to provide the tenant with a number of services resulting in rental charges, non-payment of which could result in termination of the lease.
- The Court considered that the economic reason for concluding that contract was not only to obtain the right to occupy the premises concerned, but also for the tenant to obtain a number of services.
- The Court concluded that the lease designated a single supply between the landlord and the tenant. In its analysis, the Court placed itself in the shoes of an average tenant of the commercial premises concerned, that is to say offices for law firms.

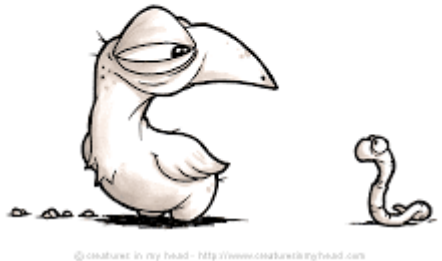
- It follows from the judgment in BGŻ Leasing (C-224/11, EU:C:2013:15, paragraphs 44 and 45) that the elements which reflect the interests of the contracting parties, such as, for example, the way in which invoicing and pricing are carried out, may be taken into account to determine the characteristic elements of the transaction concerned. It needs to be assessed, in particular, whether, under the contract, the tenant and the landlord seek, above all, respectively, to obtain and let immovable property, and whether the fact that one party obtains other services provided by the other party is of only secondary importance to them, even if they are necessary for the enjoyment of the property.

- Finally, the CJ pointed out that directive must be interpreted as meaning that the letting of immovable property and the provision of water, electricity and heating as well as refuse collection accompanying that letting must, in principle, be regarded as constituting several distinct and independent supplies which need to be assessed separately for VAT purposes, unless the elements of the transaction, including those indicating the economic reason for concluding the contract, are so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split.

- The CJ noted that it is for the national court to make the necessary assessments taking into account all the circumstances of the letting and the accompanying supplies and, in particular, the content of the agreement itself.

- The CJ has given some suggestions.

the services supplied constitute independent services



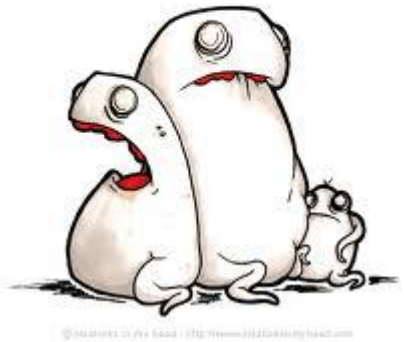
- If the tenant has the right to choose his suppliers and/or the terms of use of the goods or services at issue, the supplies relating to those goods or services may, in principle, be considered to be separate from the letting.

- In particular, if the tenant can determine his own consumption of water, electricity or heating, which can be verified by the installation of individual meters and billed according to their consumption, supplies relating to those goods or services may, in principle, be considered to be separate from the letting.

- As regards services, such as the cleaning of the common parts of a building under joint ownership, such services should be regarded as separate from the letting if they can be organised by each tenant individually or by the tenants collectively and if, in all cases, the supply of those goods and services is itemised separately from the rent on invoices addressed to the tenant.
- The mere fact that the non-payment of rental charges allows the landlord to terminate the rental agreement does not prevent the services to which those charges relate from constituting services separate from the letting .

- The fact that the tenant has the right to obtain those services from the provider of his choice is also not in itself decisive, since the possibility that elements of a single supply may, in other circumstances, be supplied separately is inherent in the concept of a single composite transaction

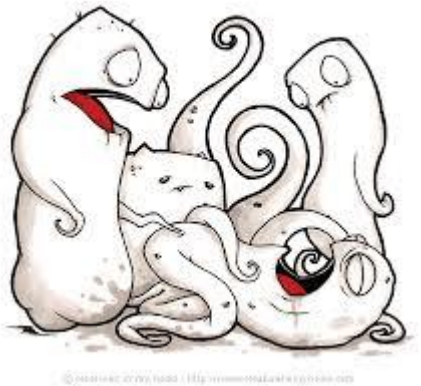
the services supplied constitute a single service



- If an immovable property offered for letting appears objectively, from an economic point of view, to form a whole with the supplies that accompany it, they can be considered to constitute a single supply with the letting.
- The same may apply to the letting of turnkey offices, ready for use with the provision of utilities and certain other supplies, and the immovable property which is let for short periods, in particular for holidays or for professional reasons, and offered with those supplies, which are not separable from it.

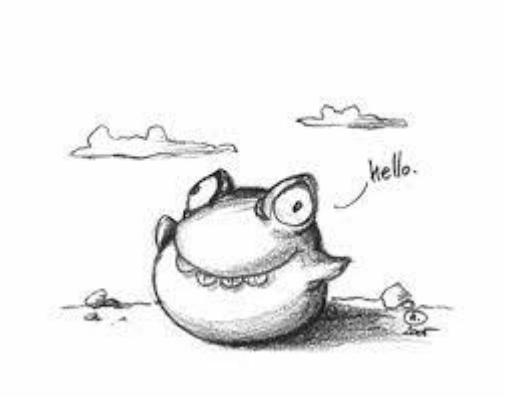
- If the landlord himself is not able to choose freely and independently, particularly of other landlords, the suppliers and the terms of use of the goods or services provided with the letting, the supplies at issue are generally inseparable from the letting and may also be regarded as forming a whole, and thereby a single supply, with the latter.
- This is particularly so where the landlord, who owns part of a multi-dwelling building is required to use suppliers designated by the co-proprietors collectively and to pay his share of the costs related to such supplies, which he then passes on to the tenant.

- In this second scenario, to separately assess for VAT purposes the provision of supplies for the letting would constitute an artificial split of a single economic transaction.



The national court

- It is, in all cases, for the national court to make the necessary assessments taking into account all the circumstances of the letting and the accompanying supplies and in particular, the content of the agreement itself.



Thank you very much!