ECJ Cases on ''Cancellation of reservations''

Société thermale d'Eugénie-les-Bains (C-277/05) & Air France-KLM and Hop!-Brit Air SAS (C-250/14 and C-289/14)

Summary

	Société thermale d'Eugénie-les-Bains (C-277/05)	**Air France-KLM and Hop!-Brit Air SAS (C-250/14 and C-289/14)**
Service rendered	Reservation of a hotel room	Purchase of an airline ticket
Obligation of the supplier	The obligation to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit	The obligation to transport the passenger arises from the payment of the price of the ticket, the sale is final and definitive
Amount of the Consideration	A deposit contractually agreed – part of total price	Full price of the ticket paid incl. VAT
Connection between service rendered and consideration received	Not linked	Linked
Qualification consideration	A deposit does not constitute the consideration for the supply of an independent and identifiable service (no fee for a service)	Amount paid is directly linked with an identifiable service for which it constitutes the remuneration - the consideration consists of the passenger's right to benefit from the performance of obligations arising from the transport contract
Indemnity payment	Yes, fixed compensation to cover the loss suffered	No, it is not a contractual indemnity
Other		It can't be justified that the amount of the compensation (amount received by the supplier is including the VAT as VAT is not paid to the authorities) being higher than the price paid by the passenger (amount received less VAT paid to the authorities)
VAT qualification	Outside scope of VAT	Service liable to VAT

Detailed version

	Société thermale d'Eugénie-les-Bains (C-277/05)	**Air France-KLM and Hop!-Brit Air SAS (C-250/14 and C-289/14)**
Scope ruling	interpretation of Articles 2(1) and 6(1) of Sixth Council Directive 77/388/EEC of 17 May 1977	interpretation of Articles 2(1) and 10(2) of Sixth Council Directive 77/388/EEC of 17 May 1977
Activity	the operation of thermal establishments, including the provision of hotel and restaurant facilities	Air France-KLM, which became the legal successor to Air France in 2004, is a company established in France carrying out an air transport business. In the context of that business, Air France-KLM performs air passenger transport services within the French territory. Since those domestic flights are subject to VAT, tickets for those flights are sold at prices including VAT.
Amounts paid by the client	It collects, by way of deposits, sums paid in advance by clients of those establishments when reserving rooms. Those sums are either deducted from the amount to be paid for the accommodation later or retained by the company in cases where clients cancel their reservations.	Air France ceased paying to the Treasury VAT on the sale of tickets issued to but not used by passengers of its domestic flights. At issue are, first, non-refundable tickets which are no longer valid as a result of customers being 'no-shows' at boarding, and, secondly, invalid exchangeable tickets which were not used during their period of validity.
Perspective VAT authorities	VAT should have been applied to the deposits which the company had collected from the client at the time of making room reservations and retained where the client cancelled the reservation	tax authorities concluded that the amounts relating to those 'tickets issued and not used' should have been subject to VAT at the reduced rate of 5.5% applicable to supplies of domestic passenger air transport services.
Perspective local court	where a deposit is retained by the company in the event of cancellation by the client, it constitutes the remuneration for the supply of a service consisting in client reception formalities, opening a booking file for the client and entering into an undertaking to reserve accommodation for him VAT should have been applied to deposits paid by Société thermale's clients and retained by the company where the reservation was cancelled, that court held that such deposits had to be regarded, in those circumstances, as the direct consideration and the remuneration for the supply of identifiable services consisting in the opening of a client file and the reservation of accommodation for that client.	the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles) upheld that judgment and held that, in accordance with Articles 256 and 269 of the CGI, read in conjunction with Article 1234 of the Civil Code, the amounts retained following the definitive non-performance of the transport service must be subject to VAT

Defense taxpayer	deposits must be regarded as payments made by way of compensation for its loss as a result of client default and, as such, not subject to VAT.	
Obeservations	the definition of the concept of a 'deposit' can vary from one Member State to another and, second, that the exercise of the cancellation option which is linked to the deposit may entail different consequences depending on which national law is applicable the situation to be examined is that in which the party who has paid a deposit is free to go back on his undertaking, thereby forfeiting that deposit, while the other party may exercise the same option, whereupon it must return double the amount of the deposit. There is no need to examine the rights which may be relied upon by either of those parties if the other exercises that option. The conclusion of a contract and the resulting existence of a legal link between the parties do not usually depend on the payment of a deposit. Since a deposit is not a constituent element of a contract for accommodation, it seems to be no more than an optional element within the parties' freedom of contract. Moreover, the payment of a deposit by the client, on the one hand, and the obligation of the hotelier, on the other, not to contract with anyone else in such a way as to prevent it from honouring its undertaking towards that client cannot – contrary to the French Government's submission – be classified as reciprocal performance, because the obligation in those circumstances arises directly from the contract for accommodation, not from the payment of the deposit. Thus when, following a reservation, the hotelier provides the agreed service, he does no more than honour the contract entered into with his client, in accordance with the principle that contracts must be performed. Accordingly, the fulfilment of that	a supply of services, such as air passenger transport, is subject to VAT where, first, the sum paid by a passenger to an airline company, in the context of the legal relationship constituted by the transport contract, is directly linked with an identifiable service for which it constitutes the remuneration and, secondly, that service is performed. the consideration for the price paid when the ticket was purchased consists of the passenger's right to benefit from the performance of obligations arising from the transport contract, regardless of whether the passenger exercises that right, since the airline company fulfils the service by enabling the passenger to benefit from those services. As a consequence, the applicants in the main proceedings cannot claim that the price paid by the 'no-show' passenger and retained by the company constitutes a contractual indemnity which, since it seeks to compensate for a harm suffered by the company, is not subject to VAT. First, such an interpretation would change the nature of the consideration paid by the passenger, which would become a contractual indemnity where that passenger did not use the identifiable service offered by the airline company. Secondly, an amendment of the characterisation of the price paid by the passenger for the ticket according to whether that passenger turns up at the time of boarding would lead to a difference between the amount of the harm alleged by the airline company resulting from the 'no-show' of the passenger and the amount paid at the time the ticket was purchased. Thus, where the passenger does turn up at the time of boarding, the value of the service corresponds to the ticket price excluding VAT, whereas the amount of the compensation

	obligation cannot be classified as consideration for the payment of a deposit. Since the obligation to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit, there is no direct connection between the service rendered and the consideration received The fact that the amount of the deposit is applied towards the price of the reserved room, if the client takes up occupancy, confirms that the deposit cannot constitute the consideration for the supply of an independent and identifiable service. Since the deposit does not constitute the consideration for the supply of an independent and identifiable service, it must be examined, in order to reply to the referring Court, whether the deposit constitutes a cancellation charge paid as compensation for the loss suffered as a result of the client's cancellation. the parties may make contractual provision – applicable in the event of non-performance – for compensation or a penalty for delay, for the lodging of security or a deposit. Although such mechanisms are all intended to strengthen the contractual obligations of the parties and although some of their functions are identical, they each have their own particular characteristics. deposits, it must be noted first that they mark the conclusion of a contract, since their payment implies a presumption that the contract exists. Secondly, a deposit encourages the parties to perform the contract, because otherwise the party who has paid it stands to lose the corresponding sum, while the other party must, if responsible for the non-performance, return double that amount. Thirdly, the deposit constitutes fixed compensation, since its payment releases one of the parties from the need to prove the	claimed by the applicants in the main proceedings would be that price plus the amount of VAT which would have been chargeable. However, there is nothing to justify the amount of the compensation being higher than the price paid by the passenger. Thirdly, the applicants in the main proceedings can also not rely on the case-law of the Court relating to the exemption from VAT of sums paid by way of deposit. In the main proceedings, first, the price paid by the 'no-show' passenger corresponds to the full price to be paid. Secondly, where the passenger has paid the price of the ticket and the company confirms that a seat is reserved for him, the sale is final and definitive. Moreover, it should be noted that airline companies reserve the right to resell the unused service to another passenger, without being required to reimburse the price to the first passenger. It follows therefrom that the grant of compensation, in the absence of harm, would be unjustified. It must therefore be held that the sum retained by the airline companies is not intended to compensate for possible harm suffered by them as a result of a passenger's 'no-show', but constitutes remuneration, even where the passenger did not benefit from the transport.

	amount of the loss suffered if the other party goes back on the agreement. Whereas, in situations where performance of the contract follows its normal course, the deposit is applied towards the price of the services supplied by the hotelier and is therefore subject to VAT, the retention of the deposit at issue in the main proceedings is, by contrast, triggered by the client's exercise of the cancellation option made available to him and serves to compensate the hotelier following the cancellation. Such compensation does not constitute the fee for a service and forms no part of the taxable amount for VAT purposes Furthermore, the rule that, where non-performance of the contract is attributable to the hotelier, the sum returned is to be double the amount of the sum paid as a deposit supports the classification of that deposit as fixed compensation for cancellation and not as remuneration for the supply of a service. In such circumstances, the client is obviously not providing any service to the hotelier. Since, on the one hand, the deposit paid does not constitute the fee collected by a hotelier by way of genuine consideration for the supply of an independent and identifiable service to his client and, on the other hand, the retention of that deposit, following the client's cancellation, is intended to offset the consequences of the non-performance of the contract, it must be held that neither the payment of the deposit, nor the retention of that deposit, nor the return of double its amount is covered by Article 2(1) of the Sixth Directive.	
Prior case law	It follows from the case-law of the Court that a reply in favour of the first approach outlined in the question referred for a preliminary ruling may be given only if there is a direct link between the service rendered and the consideration received, the sums paid constituting genuine consideration for an identifiable service supplied in the context of a legal relationship	According to settled case-law, a supply of services is effected 'for consideration', within the meaning of that provision, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the

	in which performance is reciprocal (see, to that effect, Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11, 12 and 16; Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14; Case C-174/00 *Kennemer Golf* [2002] ECR I-3293, paragraph 39; and Case C-210/04 *FCE Bank* [2006] ECR I-2803, paragraph 34).	recipient (judgment in *Tolsma*, C-16/93, EU:C:1994:80, paragraph 14). That is the case if there is a direct link between the service supplied and the consideration received, the sums paid constituting the actual consideration for an identifiable service supplied in the context of such a legal relationship (judgment in *Société thermale d'Eugénie-les-Bains*, C-277/05, EU:C:2007:440, paragraph 19 and the case-law cited).
ECJ decision	**Articles 2(1) and 6(1) 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 are to be interpreted as meaning that a sum paid as a deposit, in the context of a contract relating to the supply of hotel services which is subject to value added tax, is to be regarded, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, as a fixed cancellation charge paid as compensation for the loss suffered as a result of client default and which has no direct connection with the supply of any service for consideration and, as such, is not subject to that tax.**	**Articles 2(1) and 10(2) 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, as amended by Council Directive 1999/59/EC of 17 June 1999, then by Council Directive 2001/115/EC of 20 December 2001, must be interpreted as meaning that the issue by an airline company of tickets is subject to value added tax where the tickets issued have not been used by passengers and the latter are unable to obtain a refund for those tickets.**