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In case no. 1508-19, **AA** (Appellant) v. **the Swedish Tax Agency** (Respondent), the Supreme Administrative Court delivered the following judgment on 5 June 2020.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court grants the appeal and overturns the decisions of the lower courts and the Swedish Tax Agency.

BACKGROUND

1. As a main rule, value added tax is charged at a rate of 25 per cent. However, as regards grants and assignments of rights to copyright-protected works, a reduced tax rate of 6 per cent is applied.
2. In the event a transaction is composed of several elements which, assessed individually, are subject to the normal tax rate or a reduced tax rate, a determination must first be made whether there is one supply or whether the transaction consists of several supplies. In the event the transaction is deemed to consist of a single supply, the reduced tax rate is charged provided the predominant element of the supply is covered by such tax rate.
3. In May 2014, AA entered into an agreement with Radio Sweden according to which she, in her capacity as a presenter, would write and present scripts during the programme *Morgonpasset* on the *P3* radio station. The engagement consisted, *inter alia*, of her preparing at least three brief instalments and presenting them in the broadcast of each programme, which lasted three and a half hours. The content of these instalments would be arranged in consultation with the producer of the programme, and each instalment would take three to six minutes to present. By virtue of the agreement, Radio Sweden acquired, for a certain consideration, all

copyright to AA's performances within the context of the agreement during the period of validity of the copyright and, thereby, an exclusive right to make the performances available to the public. The agreement stated that the consideration for the assignment of the copyright was exclusive of 6 per cent value added tax.

4. AA invoiced and reported output tax at the reduced tax rate. The Swedish Tax Agency was of the opinion that the normal tax rate of 25 per cent was to be applied and raised the output tax and imposed a tax surcharge. According to the Swedish Tax Agency, presenter services are not subject to the reduced tax rate and, even if certain rights were assigned in conjunction with an engagement as a presenter, said assignment cannot be deemed to constitute the principal supply.
5. The Administrative Court in Malmö rejected AA's appeal regarding the tax rate but reduced the basis for the tax surcharge.
6. AA appealed to the Administrative Court of Appeal in Gothenburg which rejected the appeal. The administrative court of appeal stated that the agreement consisted of two distinctive elements in which the work as a presenter must be regarded as the principal service while the element which pertained to the assignment of copyright was ancillary. Accordingly, it involved a single supply which, according to the administrative court of appeal, was to be taxed at the normal tax rate.

CLAIMS, ETC.

7. AA claims, principally, that taxes are to be charged in accordance with the submitted tax return and, in the alternative, that the part of the engagement which may be deemed to pertain to the assignment of copyright is to be taxed at the reduced tax rate. Furthermore, she claims that the tax surcharge should be eliminated.
8. *The Swedish Tax Agency* contests grant of the appeal.

REASONS FOR THE RULING

The question in the case

9. The question in the case is how an engagement as a presenter is to be treated for tax purposes.

Legislation, etc.

10. In applicable wording, according to Chapter 7, section 1, third paragraph (8) of the Value Added Tax Act (1994:200), tax is charged at a rate of 6 per cent of the tax basis for grants or assignments of rights covered by, *inter alia*, section 1 of the Act on Copyright in Literary and Artistic Works (1960:729).
11. Section 1 of the Copyright Act provides that anyone who has created a literary or artistic work shall have copyright in that work irrespective of how that work is expressed.
12. In RÅ 1999 reported case no. 9, the question was how an agreement, which entailed that a person was to act both as a producer and a presenter in a series of entertainment programmes and assign the copyright to such performances was to be viewed for the purposes of value added taxation. The Supreme Administrative Court was of the opinion that the entertainment programmes constituted copyright-protected works and that the instalments could partially be regarded as of such creative character that the person in question was to be regarded as the copyright holder of the programmes. However, the essence of the performances was deemed to be in the performance of the services, and the assignment of the copyright to the programmes could not be regarded as the central aspect.
13. In summary, the Supreme Administrative Court came to the conclusion that value added tax was to be charged at a rate of 25 per cent of the tax basis for the performances which – without entailing creation within the meaning of

copyright – pertained to the supply of services as a producer and presenter, and at the rate of 6 per cent on that part of the tax basis which pertained to the assignment of copyright.

The Court's assessment

Generally regarding value added tax

14. The European Court of Justice has in several rulings addressed the issue as to the manner in which a transaction, which consists of several elements, of which one or several elements individually could be covered by an exemption from value added tax or a reduced tax rate, is to be treated for value added tax purposes (see, for example, *Žamberk*, C-18/12, EU:C:2013:95, paragraphs 27–30, *Wojskowa Agencja Mieszkaniowa w Warszawie*, C-42/14, EU:C:2015:229, paragraphs 31, 32 and 35–37, *Stock '94*, C-208/15, EU:C:2016:936, paragraphs 27–29 and *Stadion Amsterdam*, C-463/16, EU:C:2018:22, paragraphs 21–23 and 26). The following is apparent from the case law of the European Court of Justice.
15. Where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine if there are two or more distinct supplies or one single supply and, whether, in the latter case, that single supply falls within an exemption or a reduced tax rate.
16. There is a single supply where one or more elements or acts supplied by the taxable person to a customer are to be regarded as constituting the principal supply, while other elements are to be regarded as one or more ancillary supplies which share the tax treatment of the principal supply. Furthermore, there is a single supply where two or more elements are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

17. In the assessment, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified. In the assessment of what is characteristic, the economic objective of the transaction and the value of the supply to the customer are taken into account. The content of an agreement between the parties may be a factor of importance in the determination and 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.
18. The predominant element must be determined from the point of view of the typical customer and having regard, in an overall assessment, to the qualitative importance, and not merely the quantitative importance of the various elements.

Generally regarding copyright

19. In order for a work to enjoy copyright protection, the product must possess a degree of independence and originality. In the assessment, no evaluation of the literary or artistic quality is to be carried out, but what is determinative is that the work constitutes the result of a creative activity. A purely mechanical reproduction of a chain of events is thus not covered. (Government Bill 1960:17, p. 48 f. and Committee Report 1956:25, p. 66 f.)
20. Swedish law has for a long time used the concept of originality to describe the measure of individual distinctiveness necessary to characterise a work in order for it to be protected by copyright. This concept may be deemed to correspond to the requirement stated by the European Court of Justice according to which a subject matter shall be original in the sense that it is its author's own intellectual creation in order for it to be protected by copyright (case NJA 2015, p. 1097, section 18, cf. *Infopaq*, C-5/08, EU:C:2009:465, paragraph 37).

21. In case NJA 2015, p. 1097, the question was if a TV broadcast of an ice-hockey match could, as a consequence of, *inter alia*, the commentators' work during the broadcast, be regarded as possessing originality. The commentators presented the match. Brief interviews with players and coaches took place during intermissions in the match but, during large parts of the intermissions, an image of a clock was shown. The commentator's speech followed the match and contained in relation thereto certain statistical information and personal reflections (paragraph 22). The Supreme Court was of the opinion that the work of the commentators had been principally directed by events in the match and that the broadcast did not appear to be an intellectual creation of one's own. The broadcast was not protected by copyright, *inter alia*, for this reason (paragraph 23).

Engagement as a presenter

22. Engagements as a presenter may be arranged in different ways. Such an engagement may consist primarily of the presentation of various instalments and guests on the programme and comments dictated by the content thereof. This type of engagement leaves little room for individual distinctiveness. If any grant or assignment of copyright in conjunction with such engagements is relevant at all, it does not, in any case, constitute a more prominent element of the agreement between the parties.
23. An engagement as a presenter can also include producing one's own script and, on condition that the script achieves originality, granting or assigning the copyright to the principal. In such context, regard must be had to all circumstances relating to the transaction in order to determine how it is to be treated for the purposes of value added taxation (see paragraphs 15–18). In the assessment, the content of the service agreement may be relevant (paragraph 17).

Assessment in this case

24. According to the agreement with Radio Sweden, AA has undertaken, in the capacity of presenter, to write scripts for brief instalments in a radio programme and to present them live. Radio Sweden acquires all copyright to her instalments and receives an exclusive right to make them available to the public. The consideration received by AA according to the agreement pertains wholly to the assignment of copyright.
25. The engagement entails that AA, together with other presenters, is to take part in live radio programmes which are three and a half hours long. Music which has not been selected by her is played during a large part of the programme. The content of the instalments to be written and presented by her is independent of the music and thus has no connection to it. She chooses the subjects for the instalments, but is to consult with the producer. Part of the programme time is devoted to conversations and discussions with other presenters, sometimes based on the prepared instalments. She is also to participate in a number of planning days.
26. AA asserts that it is not possible to separate the effort of creating the work from the actual copyright. The work performed by her constitutes, in reality, the work covered by copyright and is thus included in the assignment thereof. Her own instalments as well as the spontaneous comments during the programme in general achieve originality and are protected by copyright. What Radio Sweden wishes to achieve by means of the agreement is to obtain the copyright to her performances. The content thereof would have no value whatsoever for Radio Sweden if it was not the copyright itself which was acquired. Accordingly, the supply in its entirety constitutes such an assignment of copyright as is covered by the reduced tax rate.
27. The Swedish Tax Agency is of the opinion that it is a question of a single supply and that the principal element thereof is comprised of the work effort performed

by AA in her capacity as presenter and that tax should thus be charged at the normal rate of tax.

28. The Supreme Administrative Court notes that AA's undertaking consists, *inter alia*, of her writing scripts for, and performing, brief instalments of subjects which she herself chooses in consultation with the producer. The instalments give the impression of intellectual creation of one's own and may thus be deemed to possess originality. In addition, her input in discussions and conversations during the course of the programme can, in any case in part, be assumed to meet the requirement of originality. The undertaking also includes other tasks which are of a non-creative character (*cf.* RÅ 1999 reported case no. 9).
29. The now-relevant presenter engagement constitutes a single, indivisible supply. The taxable amount is therefore not to be split, but the entire supply will be subject to one and the same rate of VAT (*cf.* *Stadion Amsterdam*, sections 26 and 36). In order for the supply to be covered by the reduced tax rate, it must be regarded as principally pertaining to an assignment of copyright. As regards this question, the Supreme Administrative Court considers the following.
30. The fact that the agreement states that the consideration exclusively pertains to the assignment of copyright cannot by itself lead to the conclusion that the supply exclusively or principally is comprised of the assignment. Nor can the time committed to the various elements in the course of the programme be decisive to the assessment. The fact that the instalments to be written and presented by AA may require as little time as nine minutes of broadcast time out of three and a half hours thus does not preclude the element of the supply pertaining to copyright from *per se* being deemed to be the predominant one. It is the qualitative – and not only the quantitative – importance of that element which, viewed on its own, is covered by the reduced tax rate which is relevant to the assessment for value added tax purposes (*cf.* *Žamberk*, paragraph 30).

31. For Radio Sweden as a media company, it may be assumed that it is the right to make AA's contribution to the radio programmes available to the public that is important and that the economic value for Radio Sweden rests in the acquisition of the copyright. What is principally sought by Radio Sweden may thus be deemed to be the copyright to the instalments created by AA, and the work she carries out in addition and which is not of a creative character may be deemed to be ancillary to the assignment of copyright. Since the predominant element of the supply is comprised of an assignment of copyright, the reduced tax rate is to be charged. Accordingly, the appeal is granted.

Justices Helena Jäderblom, Margit Knutsson, Mahmut Baran, Leif Gäverth and Malin Bonthron have participated in the ruling.

Judge Referee: Ann Linders.