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Judgment of the Court (Fifth Chamber) of 25 July 1991. - Ayuntamiento de Sevilla v Recaudadores de Tributos de las Zonas primera y segunda. - Reference for a preliminary ruling: Tribunal Superior de Justicia de Andalucía - Spain. - Taxable persons for the purposes of VAT - Bodies governed by public law. - Case C-202/90.

European Court reports 1991 Page I-04247
Swedish special edition Page I-00385
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Keywords

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1. Tax provisions - Harmonization of laws - Turnover taxes - Common system of value added tax - Economic activities carried out independently within the meaning of Article 4 of the Sixth Directive - Activities such as those of tax collectors entrusted with the collection of local taxes in Spain

(Council Directive 77/388/EEC, Art. 4(1) and (4))

2. Tax provisions - Harmonization of laws - Turnover taxes - Common system of value added tax - Taxable persons - Bodies governed by public law - Activities engaged in as public authorities not taxable - Condition - Activity must be engaged in directly

(Council Directive 77/388/EEC, Art 4(5))

Summary

1. Article 4(1) and (4) of the Sixth Directive (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes must be interpreted as meaning that an activity such as that carried out in Spain by zonal tax collectors, appointed by the local authority whose taxes they collect, must be regarded as being carried out independently because, besides the fact that such collectors are not paid a salary and are not bound to the commune by a contract of employment,

the legal relationship on the basis of which they engage in their activity is not such as to constitute one of employer and employee vis-à-vis the local authority which uses their services.

2. Article 4(5) of the Sixth Directive (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes, which provides that bodies governed by public law are not to be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, must be interpreted as meaning that it is not applicable when the activity of a public authority is not engaged in directly but is entrusted to an independent third party.

Parties

In Case C-202/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Superior de Justicia de Andalucía (High Court of Justice, Andalusia) for a preliminary ruling in the proceedings pending before that court between

Ayuntamiento de Sevilla

and

Recaudadores de las Zonas Primera y Segunda

on the interpretation of Article 4(1), (4) and (5) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (Official Journal 1977 L 145, p. 1),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, G.C. Rodríguez Iglesias, Sir Gordon Slynn, F. Grévisse and M. Zuleeg, Judges,

Advocate General: G. Tesauro,

Registrar: D. Louterman, Principal Administrator,

after considering the observations submitted on behalf of:

- the Ayuntamiento de Sevilla, by E. Barrero González, of its Legal Service, acting as Agent;

- the Spanish Government, by Carlos Bastarreche Saguees, Director General de Coordinacíon Jurídica e Institucional Comunitaria, and Antonio Hierro Hernández-Mora, Abogado del Estado, acting as Agents;

- the Commission of the European Communities, by D. Calleja y Crespo, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Ayuntamiento de Sevilla, the Spanish Government, represented by Rosario Silva de Lapuerta, Abogado del Estado, acting as Agent, and the Commission at the hearing on 2 May 1991,

after hearing the Opinion of the Advocate General at the sitting on 4 June 1991,

gives the following

Judgment

Grounds

1 By an order of 11 June 1990, which was received at the Court on 2 July 1990, the Tribunal Superior de Justicia de Andalucía (High Court of Justice, Andalusia) referred to the Court of Justice under Article 177 of the EEC Treaty two questions on the interpretation of Article 4(1), (4) and (5) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (Official Journal L 145, p. 1, hereinafter referred to as "the Sixth Directive").

2 Those questions were raised in proceedings between the Ayuntamiento de Sevilla (Commune of Seville) and the Recaudadores de las Zonas Primera y Segunda (tax collectors of the first and second zones).

3 It appears from the documents before the Court that under Spanish legislation the tax collectors for a zone are appointed by the local authority whose taxes they collect and must provide the security fixed by that local authority. In the performance of their functions they are directed by the local authority. They are entitled to remuneration in the form of a collection premium, which is a percentage of the sums recovered without constraint, and a proportion of the supplements added on in the event of enforced recovery. Finally, they set up their own offices and recruit their auxiliary staff themselves.

4 When calculating the collection premium, the tax collectors of the first and second zones added on value added tax (VAT). The Commune of Seville lodged a complaint with the Tribunal Económico Administrativo Provincial de Sevilla, which rejected the complaint by a decision of 31 October 1988.

5 An appeal against that decision was lodged with the Tribunal Superior de Justicia de Andalucía, which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

"(1) Must Article 4(1) and (4) of Directive 77/388/EEC be interpreted as meaning that the activity carried out by collectors constitutes, having regard to all its characteristics, professional services carried out independently, remunerated on that basis and consequently subject to the tax?

(2) If that activity is to be regarded as carried out on an independent basis, must it be considered non-taxable because it comprises activities or transactions in which those concerned engage as public authorities, in accordance with Article 4(5) of that directive?"

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Question 1

7 Article 4(1) of the Sixth Directive provides as follows:

"' Taxable person' shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or the results of that activity."

8 The national court wishes to know what factors must be taken into account in order to decide whether an activity such as that of tax collectors is to be regarded as carried out independently within the meaning of that provision.

9 In that regard, the first subparagraph of Article 4(4) states that:

"The use of the word 'independently' in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer' s liability."

10 The documents before the Court show that tax collectors do not receive a salary and are not bound to the Commune by a contract of employment. It must therefore be considered whether their legal relationship with the Commune nevertheless creates the relationship of employer and employee referred to in Article 4(4) of the directive.

11 With regard, firstly, to working conditions, there is no relationship of employer and employee since the tax collectors themselves procure and organize independently, within the limits laid down by the law, the staff and the equipment and materials necessary for them to carry out their activities.

12 That being so, the fact that in the performance of their functions tax collectors are tied to the local authority, which can give them instructions, and the fact that they are subject to disciplinary control by that authority are not decisive for the purpose of defining their legal relationship with the Commune for the purposes of Article 4(4) of the directive (see, with regard to disciplinary control, the judgment of the Court in Case 235/85 Commission v Netherlands [1987] ECR 1471, paragraph 14).

13 With regard, secondly, to remuneration, there is no relationship of employer and employee since tax collectors bear the economic risk entailed in their activity in so far as their profit depends not only on the amount of taxes collected but also on the expenses incurred on staff and equipment in connection with their activity.

14 With regard, finally, to employer' s liability, the fact that the Commune can be held liable for the conduct of tax collectors when they act as representatives of the public authority is not sufficient to establish the existence of a relationship of employer and employee.

15 The decisive criterion for this purpose is the liability arising from the contractual relationships entered into by tax collectors in the course of their activity and their liability for any damage caused to third parties when they are not acting as representatives of the public authority.

16 The reply to the first question must therefore be that Article 4(1) and (4) of the Sixth Directive must be interpreted as meaning that an activity such as that of tax collectors must be regarded as being carried out independently.

Question 2

17 The second question concerns the interpretation of Article 4(5) of the Sixth Directive, the first subparagraph of which provides as follows:

"States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions."

18 As the Court has held on numerous occasions, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (judgments in Case 107/84 Commission v Germany [1985] ECR 2655, paragraph 11; Case 235/85 Commission v Netherlands, cited above, paragraph 21; Joined Cases 231/87 and 129/88 Comune de Carpaneto Piacentino and Others [1989] ECR 3233, paragraph 12).

19 With regard to the first of those two conditions, the Court has already held in its judgment in Commission v Netherlands (at paragraph 21) that an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority.

20 It follows that, if a commune entrusts the activity of collecting taxes to an independent third party, the exclusion from VAT provided for by the abovementioned provision is not applicable.

21 The reply to the second question must therefore be that Article 4(5) of the Sixth Directive must be interpreted as meaning that that provision is not applicable if the activity of a public authority is not engaged in directly but is entrusted to an independent third party.

Decision on costs

Costs

22 The costs incurred by the Spanish Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions submitted to it by the Tribunal Superior de Justicia de Andalucía, by order of 11 June 1990, hereby rules:

1. Article 4(1) and (4) of the Sixth Directive must be interpreted as meaning that an activity such as that of a tax collector must be regarded as being carried out independently.

2. Article 4(5) of the Sixth Directive must be interpreted as meaning that it is not applicable if the activity of a public authority is not exercised directly but is entrusted to an independent third party.