

Arrêt de la Cour
Case C-144/00

**Criminal proceedings
against
Matthias Hoffmann**

(Reference for a preliminary ruling from the Bundesgerichtshof)

«(VAT – Sixth Directive – Exemptions for certain activities in the public interest – Body – Meaning – Services performed by a natural person – Cultural services by a soloist)»

Opinion of Advocate General Geelhoed delivered on 14 November 2002 I - 0000 Judgment of the Court (Sixth Chamber), 3 April 2003 I - 0000

Summary of the Judgment

1.. Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for by the Sixth Directive – Exemption for certain cultural services – Other [recognised] cultural bodies – Meaning – Soloists performing individually – Included (Council Directive 77/388, Art. 13A(1)(n))

2.. Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for by the Sixth Directive – Restrictions under Article 13A – Exclusion (Council Directive 77/388, Art. 13A)

1. Article 13A(1)(n) of the Sixth Directive 77/388 concerning the exemption from value added tax for certain cultural services supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned, is to be interpreted to the effect that the expression other [recognised] cultural bodies does not exclude soloists performing individually. The principle of fiscal neutrality requires that individual performers, as long as their services are recognised as cultural, may be regarded, like cultural groups, as bodies similar to public-law bodies supplying certain cultural services mentioned in that provision. see paras 27, 30, operative part 1

2. The heading of Article 13A of the Sixth Directive 77/388, the wording of which is Exemptions for certain activities in the public interest, does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision. The possible restrictions on the benefit of the exemptions may be imposed only in the context of the application of paragraph 2 of that provision, relating, respectively, to the Member States' discretion to make the benefit of the exemption subject to certain conditions and to their obligation to exclude certain services from such benefit. see paras 37, 39-40, operative part 2

JUDGMENT OF THE COURT (Sixth Chamber)
3 April 2003 (1)

((VAT – Sixth Directive – Exemptions for certain activities in the public interest – Body – Meaning – Services performed by a natural person – Cultural services by a soloist))

In Case C-144/00,

REFERENCE to the Court under Article 234 EC by the Bundesgerichtshof (Germany) for a preliminary ruling in the criminal proceedings before that court against

Matthias Hoffmann,

on the interpretation of Article 13A(1)(n) of the 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 (OJ 1977 L 145, p. 1),

THE COURT (Sixth Chamber),,

composed of: J.-P. Puissechet (Rapporteur), President of the Chamber, R. Schintgen, V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

?Mr Hoffmann, by A.J. Rädler, Steuerberater and M. Lausterer, Rechtsanwalt,

?the German Government, by W.-D. Plessing and T. Jürgensen, acting as Agents,

?the Netherlands Government, by M.A. Fierstra, acting as Agent,

?the United Kingdom Government, by J.E. Collins, acting as Agent, and by A. Robertson, Barrister,

?the Commission of the European Communities, by G. Wilms and K. Gross, acting as Agents, having regard to the Report for the Hearing,

after hearing the oral observations of Mr Hoffmann, represented by A.J. Rädler and M. Lausterer, of the German Government, represented by M. Lumma, acting as Agent, and of the Commission, represented by G. Wilms and K. Gross, at the hearing on 3 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2002,

gives the following

Judgment

1 By order of 5 April 2000, received at the Court on 17 April 2000, the Bundesgerichtshof (Federal Court of Justice, Germany) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 13A(1)(n) of the 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 (OJ 1977 L 145, p. 1, hereinafter the Sixth Directive).

2 The questions were raised in the course of an appeal on a point of law before the Bundesgerichtshof by Mr Hoffman, a concert promoter, following his conviction for, among other things, not having paid value added tax (hereinafter VAT) on the fees paid to three soloist singers for concert engagements in Germany.

Community law

3 Article 13 of the Sixth Directive governs certain exemptions from VAT. It provides among other things:

A. Exemptions for certain activities in the public interest

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(n) certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned;

...

2.(a) Member States may make the granting to bodies other than those governed by public law ... of [the] exemption provided for in [paragraph] (1) ... (n) subject ... to one or more of the following conditions:

?they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,

?they shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned,

?they shall charge prices approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to value added tax,

?exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax.

(b) The supply of services or goods shall not be granted exemption as provided for in [paragraph] (1) ... (n) above if:

?it is not essential to the transactions exempted,

?its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.

...

National law

4 The Umsatzsteuergesetz (Law on value added tax, hereinafter the UStG), contains Paragraph 4, entitled Exemption of supplies of goods and services, which provides *inter alia*

: ... the following are exempt: ... 20.(a) The activities of the following bodies of the Federal State, the *Länder* (Lands), and of local authorities and associations thereof: theatres, orchestras, chamber music ensembles, choirs, museums, botanical gardens, zoos, animal parks, archives, libraries, monuments and classified parks. The same provisions apply to the activities of similar bodies belonging to other taxable persons if the competent authority of the *Land* certifies that they fulfil the same cultural functions as the bodies mentioned in the first sentence. ...

(b) The organisation of theatrical performances and concerts by other taxable persons, if they are performed by the theatres, orchestras, chamber music ensembles or choirs mentioned in subparagraph (a).

5 Paragraph 18 of the UStG, entitled Taxation Procedure, provides, in subparagraph 8(1): To ensure the recovery of the tax, the Federal Ministry of Finance may, with the agreement of the Bundesrat (Upper House of Parliament), by order require that tax on the following transactions is to be retained and paid by the recipient:

1. transactions effected by taxable persons established abroad

.

6 Such a procedure has effectively been put in place in the Federal Republic of Germany.

7 The Umsatzsteuer-Richtlinien (Guidelines for the interpretation and administration of turnover tax) state, with regard to the exempt persons mentioned in Paragraph 4(20) of the UStG:

(1) All groups of musicians and vocal ensembles consisting of two or more participants are treated as orchestras, chamber music ensembles or choirs. The type of music is not to be taken into account. Consequently, light music groups may also come within this provision.

(2) The tax exemption of concerts is not precluded by the participation therein of soloists provided that the whole performance retains its character as a concert. That condition may be regarded as satisfied, for example, in relation to concerts at which oratorios are performed. The same applies to the organisation of concerts [Paragraph 4(20)(b) of the UStG].

The main proceedings and the questions referred

8 Mr Hoffman organised the world tour of three great solo singers established outside Germany who appeared together in a series of concerts. For their two concerts in Germany, he obtained from the competent cultural authorities certificates that his organising activities were equivalent to those mentioned in Paragraph 4(20)(a) of the UStG. The German Government has however stated, in the course of these proceedings, that those certificates were not binding on the tax authorities on the question whether the three soloists each constituted a body within the meaning of that provision.

9 Mr Hoffman did not deduct any VAT from the fees paid to the three soloists and did not pay that tax. He was prosecuted for tax evasion, for those actions among others, before the Landgericht (Regional Court of Justice), Mannheim (Germany). In his defence he maintained that, in view of the certificates which had been issued to him by the cultural authorities, he did not have to pay VAT on the fees of the three soloists.

10 By judgment of 22 December 1998, the Landgericht sentenced Mr Hoffman to a term of imprisonment.

11 That court held that the exemption under Paragraph 4(20)(a) of the UStG did not apply to the services of the three artists appearing as soloists, as the exemption only applied to bodies, which would exclude individual artists. The Landgericht concluded that, at the concerts in question, the personality of each of the soloists, and not the overall performance, was to the forefront and that the musical arrangement was tailored to the services of each of them. The Landgericht noted also that a separate contract was made with each of the artists, with the result that the services were not those of a duet or a trio.

12 According to the Landgericht, its interpretation of Paragraph 4(20)(a) of the UStG is not contrary to Article 13A(1)(n) of the Sixth Directive. Article 13A(2) of that directive leaves it to Member States to make the tax exemption for cultural services by persons other than public-law bodies subject to certain conditions, among which are the absence of a systematic aim to make a profit and management and administration on an essentially voluntary basis. The Community legislature thus considered that it is above all bodies which are economically weak and particularly serving the public interest which deserve to be exempted from VAT. According to the Landgericht, the Member States are thus free to adopt or not the exemptions made possible by the Sixth Directive and, in any event, the exemptions under Article 13A thereof cannot apply to natural persons.

13 Mr Hoffmann appealed on a point of law to the Bundesgerichtshof against the judgment of the Landgericht, arguing, essentially, that the refusal to apply the tax exemption to soloists constituted discrimination contrary to Community law.

14 In that regard, the Bundesgerichtshof observes that, in Case C-216/97 *Gregg* [1999] ECR I-4947, the Court held, in respect of Article 13A(1)(b) and (g) of the Sixth Directive, that the terms establishment and organisation used therein are sufficiently broad to include natural persons as well. It is true that those terms suggest the existence of an individualised entity performing a particular function, but that condition can be satisfied not only by legal persons, but also by one or more natural persons running a business.

15 According to the Bundesgerichtshof, everything suggests that a uniform interpretation must be placed on the term bodies recognised in Article 13A(1)(n) of the Sixth Directive and consequently performances by soloists as natural persons can fall within the scope of the exemption from VAT. In addition, the principle of fiscal neutrality, inherent in the VAT system and cited by the Court in Case C-283/95 *Fischer* [1998] ECR I-3369, also precludes

traders who carry on similar activities from being treated differently as regards taxation. 16 In those circumstances the Bundesgerichtshof decided to refer the following questions to the Court for a preliminary ruling:

(1) Is Article 13A(1)(n) of the 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 (OJ 1977 L 145, p. 1) to be interpreted as meaning that the term other [recognised] cultural bodies used therein also covers a soloist who supplies cultural services?

(2) If the first question is answered in the affirmative, do restrictions arise from the heading ... certain activities in the public interest chosen in Article 13A, for example where performances by soloists serve primarily commercial purposes?

The first question

17 Mr Hoffmann and the Commission argue that in *Gregg*, cited above, the Court abandoned its earlier case-law following from its judgment in Case C-453/93 *Bulthuis-Griffioen* [1995] ECR I-2341, according to which the benefit of the exemptions set out in Article 13A(1) of the Sixth Directive was reserved exclusively to legal persons. They point out in particular that the Court held, at paragraph 18 in *Gregg*, that the meaning of organisation covers an individualised entity performing a particular function, and that it is a condition capable of being satisfied both by legal persons and by one or more natural persons running a business. Similarly, the Court held, at paragraphs 19 and 20 of that judgment, that that interpretation is consistent with the principle of fiscal neutrality inherent in the common system of VAT which precludes economic operators carrying on the same activities in a similar situation from being treated differently as far as the levying of VAT is concerned. Mr Hoffmann and the Commission therefore submit that soloists can be bodies within the meaning of Article 13A(1)(n) of the Sixth Directive.

18 According to the German, Netherlands and United Kingdom Governments, it follows from consistent case-law that the exemptions set out in Article 13 of the Sixth Directive must be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration (Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 20, and *Gregg*, cited above, paragraph 12).

19 The wording and scheme of Article 13A(1)(n) of the Sixth Directive show that only certain cultural services, and supplies of goods which are closely linked to them, may be exempted from VAT. Furthermore, those services must be supplied by specific bodies, the Member States having in that regard a discretion as to the bodies other than public-law bodies which they recognise.

20 According to those governments, although the Court, in *Gregg*, applied the term organisation to natural persons, so that the principle of fiscal neutrality was observed, it did not, however, assimilate natural persons generally to recognised organisations. It stated that natural persons can be organisations within the meaning of the provisions in question only if they call on a set of human and material resources for their activity. A soloist cannot therefore be considered as a body because a set of human and material resources and the organisational structure which that implies is manifestly lacking, contrary to the case of a choir, an orchestra or a chamber music ensemble.

21 Finally, assuming that soloists can be categorised as bodies, the discretion of the Member States in the application of Article 13A(1)(n) of the Sixth Directive must be taken into account. Since the exemption from VAT of bodies other than public-law bodies is expressly subjected to their recognition by the Member State, the national legislature may exclude individual artists from the benefit of that exemption.

22 The principle of fiscal neutrality does not preclude this. There is no distortion of competition unless cultural services of the same type are subjected without justification to a different regime. The services of soloists and of bodies are different. The services of soloists are very markedly personal. They are linked to their reputation and are therefore not comparable to those of choirs, orchestras or chamber music ensembles.

23 Article 13A(2)(a) of the Sixth Directive authorises Member States to apply one or more of the conditions set out therein to bodies wishing to take advantage of the provisions of Article 13A(1)(n) of the Sixth Directive. The first two of those conditions (not having a systematic aim to make a profit and those responsible for the management and administration being volunteers) show clearly that the word bodies covers entities which carry on activities in the public interest, and not individuals carrying on their activities alone. The non-profit-making condition cannot apply to a person pursuing an individual activity. Likewise, it would be impossible for an individual to be managed and administered on an essentially voluntary basis by a person with no direct financial interest in the activities of that individual.

24 In that regard it must be noted that, at paragraph 17 of the judgment in *Gregg*, the Court held, in relation to Article 13A(1)(b) and (g) of the Sixth Directive, in respect of certain social and medical services, that the term organisation is in principle sufficiently broad to include natural persons as well, and that the exemptions referred to in that provision are not confined to the activities carried on by legal persons, but may also extend to activities carried on by individuals. The Court stated, at paragraph 18 of the same judgment that, while the meaning of organisation suggests the existence of an individualised entity performing a particular function, that condition is also satisfied by one or more natural persons running a business.

25 There is no reason to depart from that view in relation to the cultural services mentioned in Article 13A(1)(n) of the Sixth Directive, with regard to performers supplying services individually such as solo singers.

26 In particular, such performers may, in the same way as a cultural group, carry on their activity professionally, semi-professionally or on an amateur basis and do so either on a profit-making basis, or without payment or, as the case may be, on an expenses-only basis. In those various cases, even if the performer supplies his services entirely by his own means, and whatever the legal form he has chosen for his activity, he appears as an individualised entity carrying on a cultural activity, in the same way as a cultural group.

27 Consequently, the principle of fiscal neutrality requires that individual performers, as long as their services are recognised as cultural, may be regarded, like cultural groups, as bodies similar to public-law bodies supplying certain cultural services mentioned in Article 13A(1)(n) of the Sixth Directive.

28 It is in the context of the application of Article 13A(2)(a) of the Sixth Directive that the Member States may, if they so wish, for individual artists as for cultural groups, make the exemptions set out in paragraph 1(n) of the same provision for certain cultural services subject to one or more conditions set out therein, in particular to the absence of a systematic profit-making aim and to the essentially voluntary nature of the organisation of the cultural services in question.

29 Similarly, if they comply with the obligation laid down by Article 13A(2)(b) of the Sixth Directive of excluding from the exemption supplies of services and goods which are not essential to the cultural activity in question or whose basic purpose is to obtain for those concerned additional income by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT, the Member States must treat individual performers and cultural groups in the same way.

30 The reply to the first question must therefore be that Article 13A(1)(n) of the Sixth Directive is to be interpreted to the effect that the expression other [recognised] cultural bodies does not exclude soloists performing individually.

The second question

31 By its second question the referring court is asking, essentially, whether the heading, by itself, of Article 13A of the Sixth Directive, which refers to [e]xemptions for certain activities in the public interest, entails restrictions to the possibilities of exemption provided for by that provision, in particular if the services in question are provided primarily for commercial purposes.

32 Mr Hoffmann submits that the Member States may not apply Article 13A of the Sixth Directive by establishing criteria for the refusal of exemption other than those specifically laid down by that provision. In addition, the establishment of criteria for refusal must comply with the principle of equal treatment, as is clear, in particular, from the judgment in Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 36.

33 According to the German Government, the heading of Article 13A of the Sixth Directive does not in itself entail any restriction on the choice by the Member States of the bodies which may enjoy recognition entitling them to the right to exemption from VAT.

34 The Netherlands Government asserts that it is possible to exclude cultural bodies pursuing commercial purposes from the exemption under Article 13A of the Sixth Directive, which concerns certain activities in the public interest, since, according to paragraph 1(n) of that provision, those entitled to exemption must be recognised by the Member States which may refuse such recognition. In addition, the Netherlands Government points out that the Member States may, on the basis of Article 13A(2) of the Sixth Directive, subject the grant of exemption to bodies other than public-law bodies to the condition that they do not have a systematic profit-making aim.

35 According to the United Kingdom Government, the heading of Article 13A of the Sixth Directive indicates that the exemptions provided for by that provision must be restricted to activities in the public interest. Therefore, Article 13A(1)(n) of the Sixth Directive is to be interpreted restrictively, in such a way that only cultural activities carried on in the public interest are exempted and not those carried on solely for profit.

36 The Commission points out that, in accordance with Article 13A(2)(a) of the Sixth Directive, the Member States may lay down restrictions on the exemption for bodies with a systematic profit-making aim. In addition, paragraph (b) of that provision entails restrictions on the possibilities of exemption set out in Article 13A(1)(n) of the Sixth Directive, particularly where the exemption is capable of distorting competition. In the main proceedings, it is for the court adjudicating on the substance of the case to determine whether the performances in question were intended to obtain additional income for Mr Hoffmann's business, whether he was in competition with commercial enterprises subject to VAT and whether the grant of the exemption would distort competition.

37 In that regard, it must be observed that the heading of Article 13A of the Sixth Directive, the wording of which is Exemptions for certain activities in the public interest, does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision.

38 First, the activities which are to be exempted from VAT, those which may be exempted by the Member States and those which may not, as well as the conditions to which the activities eligible for exemption may be made subject by the Member States, are specifically defined by the content of Article 13A of the Sixth Directive. Second, as is confirmed by paragraph 2(a) of that article, which authorises, but does not oblige, the Member States to restrict exemption to bodies other than public-law bodies which do not have a systematic profit-making aim, the commercial nature of an activity does not preclude it from being, in the context of Article 13A of the Sixth Directive, an activity in the public interest.

39 The possible restrictions on the benefit of the exemptions provided for by Article 13A of the Sixth Directive may be imposed, as is pointed out at paragraphs 28 and 29 of this judgment, only in the context of the application of paragraph 2 of that provision.

40 The reply to the second question must therefore be that the heading of Article 13A of the Sixth Directive does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision.

Costs

41 The costs incurred by the German, Netherlands and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the case pending before the referring court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 5 April 2000, hereby rules:

1. Article 13A(1)(n) of the 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, is to be interpreted to the effect that the expression other [recognised] cultural bodies does not exclude soloists performing individually.

2. The heading of Article 13A of that directive does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision.

Puissochet

Schintgen

Skouris

Macken

Cunha Rodrigues

Delivered in open court in Luxembourg on 3 April 2003.

R. Grass

J.-P. Puissochet

Registrar

President of the Sixth Chamber

1 – Language of the case: German.