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Case C-401/05

VDP Dental Laboratory NV

v

Staatssecretaris van Financiën

(Reference for a preliminary ruling from the

Hoge Raad der Nederlanden)

(Sixth VAT Directive – Exemptions – Article 13A(1)(e) – Scope of the exemption – Manufacture and repair of dental prostheses by an intermediary who does not have the status of dentist or dental technician – Subcontracting to a dental technician)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive

(Council Directive 77/388, Art. 13A(1)(e))

Article 13A(1)(e) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, must be interpreted as meaning that it does not apply to supplies of dental prostheses effected by an intermediary who does not have the status of dentist or dental technician, but has acquired such prostheses from a dental technician.

The terms ‘dentists’ and ‘dental technicians’ in that article of the Sixth Directive are unambiguous and, if the wording of that provision is not to be radically altered and the condition relating to the status of the supplier rendered inoperative, those terms clearly cannot be understood as including intermediaries who are not specifically either dentists or dental technicians. Consequently, since the Community legislature did not intend to extend the exemption referred to in that provision to supplies of dental prostheses which are not made by dentists or dental technicians, neither the objectives of that exemption nor the principle of fiscal neutrality can compel a broad interpretation of Article 13A of the Sixth Directive in that respect. On the contrary, having regard to the specific wording of the conditions for the exemption provided for in that article, any interpretation which extends the wording of that provision must be regarded as incompatible with the purpose thereof as intended by the Community legislature.

(see paras 35-37, 42, operative part)

JUDGMENT OF THE COURT (Third Chamber)

14 December 2006 (*)

(Sixth VAT Directive – Exemptions – Article 13A(1)(e) – Scope of the exemption – Manufacture and repair of dental prostheses by an intermediary who does not have the status of dentist or dental technician – Subcontracting to a dental technician)

In Case C-401/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 11 November 2005, received at the Court on 14 November 2005, in the proceedings

VDP Dental Laboratory NV

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J. Malenovský, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– VDP Dental Laboratory NV, by R. Oorthuizen, belastingadviseur,

– the Netherlands Government, by H.G. Sevenster and M. de Mol, acting as Agents,

– the Greek Government, by S. Spyropoulos, K. Boskovits and O. Patsopoulou, acting as Agents,

– the Commission of the European Communities, by D. Triantafyllou and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 13A(1)(e), 17(3)(a) and 28cA(a) 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 (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) (‘the Sixth Directive’).

2 This reference was made in the course of proceedings between VDP Dental Laboratory NV

('VDP') and the Staatssecretaris van Financiën (State Secretary for Finances) as regards that undertaking's right to deduct, for the years 1996 to 1998, the input value added tax ('VAT') on supplies of dental prostheses made to dentists based in the Netherlands and in other Member States.

Legal context

Community legislation

3 Article 2(1) of the Sixth Directive makes subject to VAT 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.

4 Article 13A(1)(e) of the Sixth Directive provides:

'Exemptions within the territory of the country

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:

…

(e) services supplied by dental technicians in their professional capacity and dental prostheses supplied by dentists and dental technicians'.

5 Article 17(2)(a) of the Sixth Directive, as amended by Article 28f(1) thereof, provides, under the heading 'Origin and scope of the right to deduct':

'2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person'.

National legislation

6 In the version in force before 1 December 1997, Article 11(1)(g) of the Law on turnover tax (Wet op de omzetbelasting) of 28 June 1968 (Stb. 1968, No 329; 'the 1968 Law on VAT') provided that the following were exempted from VAT:

'supplies of goods and services made by dentists and dental technicians …'.

7 Since 1 December 1997, Article 11(1)(g) of the 1968 Law on VAT has provided that the following are exempt from VAT:

'services supplied by psychologists and dental technicians; supplies of dental prostheses …'.

8 Article 15(2) of the 1968 Law on VAT provides:

'In so far as the goods and services are used for the purposes of the supplies referred to [in Article 11] … , the right to deduct arises only in respect of the supplies mentioned in subparagraphs (i), (j) and (k) of Article [11], provided that the consignee of those supplies is resident or established

outside the Community or that those supplies are directly linked with goods to be exported to a country outside the Community.'

The main proceedings and the questions referred for a preliminary ruling

9 VDP is an undertaking established in the Netherlands and is engaged in having dental fittings such as crowns, inlays and bridges manufactured to order for dentists established in the Netherlands, other Member States and non-member countries. After ascertaining whether the dental plaster casts supplied by the dentists are usable for the purposes of making a dental prosthesis, VDP sends those plaster casts to a laboratory (usually established outside the Community) and requests that a dental prosthesis be manufactured on the basis thereof. When that prosthesis is finished, the laboratory supplies it to VDP which pays remuneration for it to the laboratory and, where necessary, has it imported into the Community. VDP then supplies the prosthesis, in return for payment, to the dentist who ordered it. VDP does not employ any dental technicians or dentists.

10 In its VAT declarations for the period 1 January 1996 to 31 December 1998, VDP took the view that the supplies it made to dentists based in the Netherlands were exempt from VAT and consequently, under Article 15(2) of the 1968 Law on VAT, it did not deduct the input VAT in respect of such supplies, with the exception of the input VAT relating to supplies made to dentists based outside the Netherlands.

11 A notice of additional assessment was sent to VDP as regards that period. According to the Tax Inspector, since VDP makes only the supplies referred to in Article 11 of the 1968 Law on VAT, it is not authorised to deduct that tax, even in respect of supplies to dentists based outside the Netherlands, except where exclusion from deduction would lead to double taxation, namely, firstly, where the goods were exported to a non-member country and, secondly, in the case of an intra-Community supply provided that VDP states the VAT identification number of the purchaser and declares it to be an intra-Community supply. However, those conditions were not satisfied in the present case.

12 By judgment of 13 January 2003, the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal) (Netherlands) held, contrary to the view of the Tax Inspector, that VDP's supplies in the period from 1 January 1996 to 30 November 1997 were not exempt under Article 11(1)(g) of the 1968 Law on VAT in the version in force prior to 1 December 1997 with the result that the additional assessment to which VDP had been made subject was not justified for that period.

13 On the other hand, as regards the period from 1 December 1997 to 31 January 1998, the Gerechtshof te Amsterdam held that VDP's activities did meet the conditions laid down by Article 11(1)(g) of the 1968 Law on VAT in the version in force as from 1 December 1997. Although VDP's activities cannot be considered to be a supply of dental prostheses by a dental technician for the purposes of Article 13A(1)(e) of the Sixth Directive, as none of the people employed by VDP have a professional qualification as a dental technician and VDP merely takes orders, assesses the usability of the plaster casts, commissions third parties to manufacture the dental prostheses and supplies them to the customer, the fact remains, according to that court, that Article 11(1)(g) of the 1968 Law on VAT, unlike Article 13A(1)(e) of the Sixth Directive, lays down no condition as regards the status of the supplier who makes the supply. Consequently, the Gerechtshof te Amsterdam refused the deductions made by VDP for that period on the ground that as the application of Article 11(1)(g) of the 1968 Law on VAT is inextricably linked to the exclusion of the right to deduct VAT, VDP could not at one and the same time rely on the exemption provided for in that article and, for the purposes of deducting VAT, the provision of the Sixth Directive under which those services are not exempt.

14 In the appeal on a point of law it brought before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), VDP claims that it was entitled to deduct VAT in respect of the supplies to France and Italy. Since, under the national laws on VAT of those two Member States, no exemption applies to the supplies of dental fittings which VDP made to those countries, the goods and services which it bought for the purposes of supplying dental prostheses to dentists based in those Member States are used in connection with supplies which are subject to tax under the Sixth Directive. Article 17(2) of that directive therefore means that VDP can, to that extent, deduct VAT.

15 In its order for reference, the Hoge Raad der Nederlanden observes that it cannot be inferred either from the wording of Article 11(1)(g) of the 1968 Law on VAT, in the version in force as from 1 December 1997, or from the history of that law, that the application of the exemption is subject to the condition that the supplier has a particular status. However, that court raises the question whether that finding constitutes a proper application of Article 13A(1)(e) of the Sixth Directive. On the one hand, the objective of lowering healthcare costs could be an argument in favour of the exemption of the supplies at issue (see, to that effect, Case C?76/99 *Commission* v *France* [2001] ECR I-249, paragraph 23). On the other hand, a stricter interpretation could lead to the conclusion that the words ‘dental prostheses supplied by dental technicians’ covers only a supply by a dental technician acting as such.

16 The Hoge Raad der Nederlanden raises the question whether, where a supply of dental prostheses is effected from a Member State which, under the Sixth Directive, exempts that supply, to Member States such as the French Republic and the Italian Republic, where the supply would be subject to tax under Article 28(3)(a) of the Sixth Directive in conjunction with point 2 of annex E thereto, Article 17(3)(a) of the directive precludes deduction of VAT or whether the principle of fiscal neutrality requires the Member State of dispatch to permit that deduction. The Hoge Raad der Nederlanden maintains in this connection that, although Article 17(1) of the Sixth Directive does not attach any right to deduct VAT to the exemption provided for in Article 13 thereof, Article 17(3)(b) of the directive does grant a right to deduct as regards the exemption provided for in Article 28c concerning intra-Community supplies.

17 Noting that this issue is pending before the Court in Case C-240/05 *Eurodental*, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 13A[(1)](e) of the Sixth Directive to be interpreted as meaning that dental prostheses supplied by a taxable person who contracts out the manufacture thereof to a dental technician are covered by the notion of “dental prostheses supplied by dental technicians”?

(2) If the answer to that question is in the affirmative: Is Article 17(3)(a) of the Sixth Directive to be interpreted as meaning that a Member State which has exempted the abovementioned supplies from VAT must attach the right to deduct to those supplies in so far as (in particular under the first indent of Article 28bB(1) of the Sixth Directive) they take place in another Member State which has excluded them from exemption pursuant to Article 28(3)(a) of the Sixth Directive, in conjunction with point 2 of Annex E thereto?’

The questions referred for a preliminary ruling

18 By its first question, the national court asks whether the exemption from VAT provided for in Article 13A(1)(e) of the Sixth Directive applies to supplies of dental prostheses made by a supplier who has contracted out the manufacture thereof to dental technicians.

19 It is apparent from the order for reference that that question is asked as regards supplies

effected by a supplier, VDP, which does not itself employ either dentists or dental technicians, but carries out commercial activities as an intermediary in the course of which it buys dental prostheses from dental technicians in order to resell them to dentists or to private individuals.

20 An examination must therefore be made of whether supplies of dental prostheses made by such a commercial intermediary who does not have the status of dentist or dental technician are covered by the provisions of Article 13A(1)(e) of the Sixth Directive.

21 According to the Netherlands Government, all supplies of dental prostheses manufactured by dental technicians are covered by the exemption provided for in that provision, whether those prostheses are supplied directly by dental technicians or indirectly by an intermediary. By contrast, VDP, the Greek Government and the Commission of the European Communities submit that the exemption is not applicable.

22 In that regard, it must be borne in mind that the Sixth Directive confers a very wide scope on VAT comprising all economic activities of producers, traders and persons supplying services (see, inter alia, Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 10).

23 However, Article 13 of the Sixth Directive exempts certain activities from VAT. According to the case-law, the terms used to specify those exemptions are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all supplies of goods or services for consideration by a taxable person (see, to that effect, Joined Cases C-394/04 and C-395/04 *Ygeia* [2005] ECR I-10373, paragraph 15; Case C-415/04 *Stichting Kinderopvang Enschede* [2006] ECR I-1385, paragraph 13; and Case C-106/05 *L.u.P.* [2006] ECR I?0000, paragraph 24).

24 Furthermore, Article 13A of the Sixth Directive does not exempt from VAT every activity performed in the public interest, but only those which are listed therein and described in great detail (see, to that effect, Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 18, and Case C-212/01 *Unterpertinger* [2003] ECR I-13859, paragraph 36).

25 Moreover, although it is true that the exemptions are granted in favour of activities pursuing specific objectives, most of the provisions in Article 13A of the Sixth Directive also define the bodies which are authorised to supply the exempted services and those services are not therefore defined by reference to purely material or functional criteria (Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraph 13; *Stichting Uitvoering Financiële Acties*, paragraph 12; and Case C?216/97 *Gregg* [1999] ECR I-4947, paragraph 13).

26 In that regard, it must be borne in mind that, according to the case-law, the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition. That must also be true of the specific conditions laid down for those exemptions to apply and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption. Although the introductory sentence of Article 13A(1) of the Sixth Directive states that Member States are to lay down the conditions for exemptions in order to ensure the correct and straightforward application of the exemptions and to prevent any possible evasion, avoidance or abuse, those conditions cannot affect the definition of the subject-matter of the exemptions envisaged (see, inter alia, Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraphs 22 to 24 and the case-law cited).

27 As regards the exemption at issue in the main proceedings, Article 13A(1)(e) of the Sixth Directive provides, according to the very wording of the second part of the sentence, for the exemption of ‘dental prostheses supplied by dentists and dental technicians’.

28 Like most of the exemptions provided for in Article 13A of the Sixth Directive and unlike several of those provided for in Article 13B thereof (see, inter alia, Case C-305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I-6729, paragraph 64, and Case C-169/04 *Abbey National* [2006] ECR I-4027, paragraph 66), that exemption is thus not only defined according to the nature of the goods supplied, but also according to the status of the supplier.

29 That restriction on the scope of the exemption is clear from all the language versions of Article 13A(1)(e) of the Sixth Directive (see, in addition to the English version, for example, the following versions, Danish – ‘tandlaegers og tandteknikeres levering af tandproteser’ –, German – ‘die Lieferungen von Zahnersatz durch Zahnärzte und Zahntechniker’ –, French – ‘fournitures de prothèses dentaires effectuées par les dentistes et les mécaniciens-dentistes’ –, Italian – ‘le forniture di protesi dentarie effettuate dai dentisti e dagli odontotecnici’, – and Dutch – ‘het verschaffen van tandprothesen door tandartsen en tandtechnici’).

30 It is also borne out by the fact that the first part of the sentence in Article 13A(1)(e) of the Sixth Directive exempts services supplied by dental technicians in their professional capacity, that exemption thus applying to all the activities that constitute the specific subject-matter of that profession.

31 It is thus clear from the wording of Article 13A(1)(e) of the Sixth Directive that that provision does not exempt from VAT all supplies of dental prostheses, but only those which are made by the members of two particular professions, namely those of ‘dentist’ and ‘dental technician’.

32 Consequently, supplies of dental prostheses made by an intermediary who does not have the status of dentist or dental technician cannot be covered by the exemption provided for in that provision.

33 Therefore, the exemption provided for by the 1968 Law on VAT, which, since 1 December 1997, has applied to all supplies of dental prostheses regardless of the status of the supplier, is inconsistent with the wording of the corresponding provisions of the Sixth Directive. The broad interpretation advocated in that respect by the Netherlands Government is at variance with the case-law of the Court cited in paragraph 23 of this judgment according to which the exemptions provided for in Article 13 of the directive, and in particular the terms ‘dentists’ and ‘dental technicians’, are to be strictly interpreted.

34 However, that government submits that the principle of strict interpretation of exemptions is not the only one of relevance for establishing the scope of the exemptions and that both their objective and the principle of fiscal neutrality must also be taken into account. Firstly, Article 13A(1)(e) of the Sixth Directive, like Article 13A(1)(b) and (c), has the objective of preventing medical care, in this case dental care, from becoming inaccessible on account of the increased costs that would follow if that care were subject to VAT (see, to that effect, Case C?76/99 *Commission* v *France* [2001] ECR I-249, paragraph 23, and Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 29). That would, however, be the case if supplies of dental prostheses made by intermediaries were not exempt, as dentists, who effect exempt transactions themselves, would not be able to deduct input VAT and would, therefore, pass that tax on to their patients. Secondly, intermediaries and dental technicians effect the same supplies since it is of no account to dentists whether the supplier manufactures the dental prostheses himself or whether he subcontracts that transaction to a dental technician.

35 In this respect, it must be stated that the terms ‘dentists’ and ‘dental technicians’ in Article 13A(1)(e) of the Sixth Directive are unambiguous. If the wording of that provision is not to be radically altered and the condition relating to the status of the supplier rendered inoperative, those terms clearly cannot be understood as including intermediaries who are not specifically either dentists or dental technicians.

36 Consequently, since the Community legislature did not intend to extend the exemption referred to in that provision to supplies of dental prostheses which are not made by dentists or dental technicians, neither the objectives of that exemption nor the principle of fiscal neutrality can compel a broad interpretation of Article 13A of the Sixth Directive in that respect.

37 On the contrary, having regard to the specific wording of the conditions for the exemption provided for in Article 13A(1)(e) of the Sixth Directive, any interpretation which extends the wording of that provision must be regarded as incompatible with the purpose thereof as intended by the Community legislature (see, to that effect, *Stichting Uitvoering Financiële Acties*, paragraph 14).

38 Furthermore, a strict interpretation of the exemption provided for in that provision is not such as to render it ineffective, as supplies made by a dental technician to an intermediary like the one in question in the main proceedings are exempt from VAT with the result that the intermediary does not have to pay VAT on such supplies.

39 It follows that supplies of dental prostheses made by an intermediary who does not have the status of dentist or dental technician are not covered by the exemption provided for in Article 13A(1)(e) of the Sixth Directive and that, therefore, they remain subject to the general rule making them subject to VAT laid down in Article 2(1) of the directive. Under Article 17(2)(a) of the Sixth Directive, such supplies therefore give rise to entitlement to deduct input VAT.

40 In that regard, it follows from the case-law that the provisions of Article 17(2) of the Sixth Directive, read together with Articles 2 and 13A(1)(e) of that directive, confer on individuals rights on which they may rely as against the Member State concerned before a national court (see, to that effect, Case C-62/93 *Soupergaz* [1995] ECR I-1883, paragraphs 35 and 36, and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraphs 32, 33 and 35).

41 Therefore, an undertaking like VDP, which objects to national legislation such as that at issue in the main proceedings on the ground that it is inconsistent with the Sixth Directive, can rely directly on the provisions of that directive for the purpose of securing a decision that the supplies of dental prostheses concerned are liable to VAT and, consequently, deduct input VAT relating to

such supplies.

42 Consequently, the answer to the first question referred for a preliminary ruling must be that Article 13A(1)(e) of the Sixth Directive must be interpreted as meaning that it does not apply to supplies of dental prostheses effected by an intermediary like the one in question in the main proceedings who does not have the status of dentist or dental technician, but has acquired such prostheses from a dental technician.

43 In those circumstances, there is no need to answer the second question referred for a preliminary ruling.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 13A(1)(e) 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 95/7/EC of 10 April 1995, must be interpreted as meaning that it does not apply to supplies of dental prostheses effected by an intermediary like the one in question in the main proceedings who does not have the status of dentist or dental technician, but has acquired such prostheses from a dental technician.

[Signatures]

* Language of the case: Dutch.