Case C-407/07

Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing

v

Staatssecretaris van Financiën

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Sixth VAT Directive – Article 13A(1)(f) – Exemptions – Conditions – Services supplied by independent groups – Services supplied to one or several members of the group)

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)(f))

Article 13A(1)(f) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that, provided the other conditions in that provision are met, services supplied to their members by independent groups are covered by the exemption contained in that provision, even if those services are supplied only to one or several of those members.

A restriction on the scope of that provision, by excluding from the exemption from value added tax services supplied by independent groups to their members, in particular in cases where the needs of those members differ, is not supported by the purpose of that provision, which is to create an exemption from value added tax in order to avoid an entity offering certain services from being required to pay that tax when it has found it necessary to cooperate with other entities by means of a common structure set up to undertake activities essential to the provision of those services.

Moreover, the need to interpret that provision strictly cannot lead to each member of an independent group being given the right to deprive the other members of that group of exemption from value added tax by deciding at any particular time not to use a particular service provided by the group of which it has originally decided to become a member. The existence of such a right for each member of an independent group does not follow either from the wording or from the purpose of Article 13A(1)(f) of the Sixth Directive.

(see paras 36-37, 41, operative part)

JUDGMENT OF THE COURT (Third Chamber)

11 December 2008 (*)

(Sixth VAT Directive – Article 13A(1)(f) – Exemptions – Conditions – Services supplied by independent groups – Services supplied to one or several members of the group)

In Case C?407/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 10 August 2007, received at the Court on 5 September 2007, in the proceedings

Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J. Klu?ka (Rapporteur), U. Lõhmus and P. Lindh, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 4 September 2008,

after considering the observations submitted on behalf of:

– Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing, by B. Zadelhoff, advocaat,

– the Netherlands Government, by C. Wissels, C. ten Dam and M. de Grave, acting as Agents,

– the Commission of the European Communities, by M. van Beek and D. Triantafyllou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 October 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13A(1)(f) 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) (‘the Sixth Directive’).

2 The reference was made in the course of proceedings between the Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing (‘the Stichting’) and the Staatssecretaris van Financiën concerning an adjustment of value added tax (VAT) for the period 1 January 1994 to 31 December 1998.

Legal context

3 The ninth and eleventh recitals in the preamble to the Sixth Directive state:

‘Whereas the taxable base must be harmonised so that the application of the Community rate to taxable transactions leads to comparable results in all the Member States;

…

Whereas a common list of exemptions should be drawn up so that the Communities’ own resources may be collected in a uniform manner in all the Member States’.

4 Article 13 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:

…

(f) services supplied by independent groups of persons whose activities are exempt from or are not subject to value added tax, for the purpose of rendering their members the services directly necessary for the exercise of their activity, where these groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to produce distortion of competition;

…’

Main proceedings and question referred

5 The Stichting is a group of hospitals and other establishments in the health sector, including in particular the Orde van Medisch Specialisten (Medical Specialists’ Order), the Koninklijke Nederlandse Maatschappij tot Bevordering van de Geneeskunst (Netherlands Royal Society for the Promotion of the Practice of Healthcare), the Nationale Ziekenhuisraad (National Hospitals Board), the Vereniging van Nederlandse Ziekenfondsen (Union of Netherlands Sickness Insurance Funds), the Kontaktorgaan Landelijke Organisaties van Ziektekostenverzekeraars (Sickness Insurance Organisations’ Consultative Body) and the Nederlandse Vereniging voor Ziekenhuisdirecteuren (Netherlands Association of Hospital Directors).

6 The order for reference explains that the Stichting supplies for consideration to its members, whose activities are exempt from or are not subject to value added tax, services in the field of healthcare, in particular services related to quality standards and to defining and promoting a policy of quality in the healthcare sector.

7 Some of the services supplied to member hospitals by the Stichting are financed under the Law on the scales of charges for healthcare (Wet tarieven gezondheidszorg) of 20 November 1980 (Stb. 1980, No 646). Those services are exempt from VAT under Article 11(1)(u) of the 1968 Law on turnover tax (Wet op de Omzetbelasting 1968), which transposes Article 13A(1)(f) of the

Sixth Directive.

8 The Stichting supplies other services to some of its members (hospitals and other institutions and persons) for which it is paid separately and the recipients of those services are invoiced individually.

9 A VAT adjustment was imposed on the Stichting in respect of those services for the period 1 January 1994 to 31 December 1998, and the inspector to whom a complaint was made decided to uphold that adjustment on the ground that the services concerned were not exempt from VAT.

10 The Stichting appealed against that decision to the Gerechtshof te Amsterdam which, by judgment of 1 June 2004, annulled the decision and reduced the adjustment to NLG 182 460. It held nevertheless that the Stichting had drawn up separate invoices for the services at issue in the main proceedings and that the corresponding payments did not cover joint expenses, within the meaning of Article 11(1)(u) of the 1968 Law on turnover tax. No exemption from VAT could therefore be granted.

11 The Stichting lodged an appeal in cassation to the Hoge Raad der Nederlanden, which states that it is not disputed that the services at issue in the main proceedings are directly necessary for the exercise of the exempt activities of the members of that group and that there is no distortion of competition.

12 The referring court notes that if the services at issue in the main proceedings are indeed services within the meaning of the Sixth Directive, and if the Stichting claims payment for those services that does not exceed the actual costs, the question then arises whether the sums the members of that group are invoiced correspond to those members' share of the joint expenses within the meaning of Article 13A(1)(f) of the Sixth Directive.

13 Taking the view that the outcome of the proceedings before it depended on the interpretation of that provision, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 13A(1)(f) of [the Sixth Directive] be construed as covering also services supplied by groups coming within the scope of that provision to their members which are directly necessary for the exercise of those members' exempt activities or activities for which they are not subject to tax and by way of payment for which no more is invoiced than represents the costs incurred in respect of those services, if those services are supplied only to one or more members?'

The question referred

14 By its question, the referring court is asking in essence whether Article 13A(1)(f) of the Sixth Directive must be interpreted as meaning that, provided the other conditions in that provision are met, services supplied to their members by independent groups are covered by the exemption contained in that provision, even if those services are supplied only to one or several of those members.

Observations submitted to the Court

15 The Stichting and the Commission of the European Communities submit that the question referred should be answered in the affirmative, contending that if it were to be answered in the negative the scope of Article 13A(1)(f) of the Sixth Directive would be substantially curtailed.

16 They argue that if an independent group supplies one or several of its members with services that fall within the definition of the activities of that group that service can be exempt from

VAT, as provided in Article 13A(1)(f) of the Sixth Directive.

17 The Stichting contends that its many members, all of which are engaged in providing healthcare, do not always share the same needs since their activities are not homogeneous, and that it cannot be envisaged that all the members must engage in all the activities carried on within the group in order to qualify for the exemption in question.

18 In that regard the Stichting states that when a service is supplied only to one of its members the service is invoiced to that member at its actual cost, in keeping with accounting rules. That member will be invoiced for its share of the joint expenses and will only reimburse that share. The conditions for Article 13A(1)(f) of the Sixth Directive to apply are thus met.

19 The Commission, for its part, adds that it cannot be inferred from the wording of the provision in question that every service must be supplied to all the members of an independent group.

20 It argues, moreover, on the basis of Case C?8/01 *Taksatorringen* [2003] ECR I?13711, paragraphs 60 to 62, and on point 117 et seq. of Advocate General Mischo's Opinion in that case, that the Netherlands Government's interpretation would make the exemption in question more or less inapplicable in practice.

21 It refers to the two conditions that, according to Advocate General Mischo in the abovementioned Opinion, must be met in order to qualify for an exemption under Article 13A(1)(f) of the Sixth Directive, which are that the service provider must consist only of operators carrying out an activity which is exempt from, or not subject to, value added tax and that the independent group must not exist for purposes of gain, in the sense that it must only invoice its members for expenses incurred by it in order to meet their requirements, and make no profit whatsoever out of doing so.

22 The Netherlands Government, however, is of the view that the question referred should be answered in the negative. It submits that the decisive question in the present case is whether a service is provided in the joint, collective interest of all the members or in the specific, individual interest of a single member.

23 In its written observations, it queries first of all the assumption that the services at issue in the main proceedings, in particular the service involving the provision of personnel, give rise to no distortion of competition. There is a likelihood of distortion of competition if the payments invoiced for the services concerned reflect only the direct costs of supplying those services. The Netherlands Government notes that the costs to which the national court refers are the actual costs, namely the direct and indirect costs combined, and that those actual costs are difficult to determine. It is difficult therefore to break down the actual costs effectively by activity where the Stichting supplies services only to one or several members.

24 As for the interpretation of Article 13A(1)(f) of the Sixth Directive, the Netherlands Government notes that the exemptions to the general principle that VAT is to be levied are to be interpreted strictly (Case C?287/00 *Commission* v *Germany* [2002] ECR I?5811, paragraph 43), that they constitute independent concepts of Community law (Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 11, and *Commission* v *Germany*, paragraph 44), and that that must also be true of the specific conditions laid down for those exemptions to apply (Case C?453/93 *Bulthuis-Griffioen* [1995] ECR I?2341, paragraph 18).

25 Consideration of the wording of Article 13A(1)(f) of the Sixth Directive, and the rationale of the exemption laid down in that provision, show that services supplied only to some of the

members of an independent group are not covered by that exemption. The exemption calls for exact reimbursement of the group members' share of the joint expenses, which would not be possible for services supplied only to one or several members of that group.

26 Basing its argument on points 118 to 122 of the Opinion of Advocate General Mischo in *Taksatorringen*, the Netherlands Government considers that the rationale of the exemption contained in that provision is the intention not to tax the efficiency gains derived from internal cooperation between the members of an independent group. As a consequence, only services supplied by an independent group collectively to all its members fall within the scope of Article 13A(1)(f) of the Sixth Directive. If that group supplies services only to some of its members, that is not provision of an internal service but of an independent service, which creates a client-supplier relationship that is not in keeping with the aim of the exemption in question.

The Court's reply

27 First of all, as regards the conditions for the application of Article 13A(1)(f) of the Sixth Directive concerning the purpose of the supply of services to members of the independent group and the likelihood of distortion of competition, it must be borne in mind that, in the procedure of cooperation established by Article 234 EC, it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see, inter alia, Case C?435/97 *WWF and Others* [1999] ECR I?5613, paragraph 32; Case C?510/99 *Tridon* [2001] ECR I?7777, paragraph 28; and Case C?291/05 *Eind* [2007] ECR I?10719, paragraph 18).

28 Accordingly, the answer to the question referred by the national court must be predicated on the same assumption as that on which that court based itself in the order for reference, namely that it is agreed between the parties that the provision of services at issue in the main proceedings is directly necessary for the exercise of the exempt activities of the members of the Stichting and that there is no distortion of competition.

29 Secondly, it is clear from the ninth and eleventh recitals in the preamble to the Sixth Directive that the directive is designed to harmonise the basis of assessment of VAT and that the exemptions from that tax constitute independent concepts of Community law which, as the Court has held, must be placed in the general context of the common system of VAT introduced by that directive (Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 18, and *Stichting Uitvoering Financiële Acties*, paragraph 10).

30 It is, moreover, settled case-law that the terms used to specify the exemptions set out in Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (*Stichting Uitvoering Financiële Acties*, paragraph 13; *Taksatorringen*, paragraph 36; and Case C?434/05 *Horizon College* [2007] ECR I?4793, paragraph 16). Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (*Horizon College*, paragraph 16). It is not the purpose of the case-law of the Court to impose an interpretation which would make the exemptions more or less inapplicable in practice (*Taksatorringen*, paragraph 62).

31 It is not clear from the wording of Article 13A(1)(f) of the Sixth Directive that the exemption it provides for must apply only to services supplied by independent groups to all their members.

32 According to that wording, the Community legislature stated only that the VAT exemption should apply to services provided by independent groups where those groups merely claim from their members exact reimbursement of their share of the joint expenses.

33 The Netherlands Government contends that if Article 13A(1)(f) of the Sixth Directive provides that an independent group must claim from its members exact reimbursement of their share of the joint expenses, this means that only those services that are rendered to all the members of the group qualify for the exemption from VAT. The term ‘joint expenses’ comprehends ‘collective expenses’, which refers to services supplied to all the members of the group and not just to one member of it.

34 In that regard, it should be observed, as the Advocate General did in point 18 of her Opinion, that the needs of the members of an independent group are likely to vary from one tax period to the next, so that, in a given period, certain services will be provided by the group to all members, others to several members and yet others to a single member only.

35 Similarly, where an independent group is made up of many members whose needs differ, it is perfectly possible that the services supplied to them by that group are not necessarily the same.

36 The Netherlands Government’s interpretation would therefore restrict the scope of Article 13A(1)(f) of the Sixth Directive by excluding from the exemption from VAT services supplied by independent groups to their members, in particular in cases where the needs of those members differ.

37 Such a restriction of the scope of that provision is not supported by the purpose of that provision, which is to create an exemption from VAT in order to avoid an entity offering certain services from being required to pay that tax when it has found it necessary to cooperate with other entities by means of a common structure set up to undertake activities essential to the provision of those services.

38 Even where the services are supplied only to one or more members of an independent group, the cost of supplying those services remains a joint expense incurred by the group, which has been set up for that purpose, since analytical accounting methods are entirely adequate for identifying the exact share of the expenses attributable to each of the services individually.

39 Similarly, those services are supplied within the framework of the objectives for which the independent group has been set up and are therefore provided in accordance with the purpose of that group.

40 It does not therefore seem possible that Article 13A(1)(f) of the Sixth Directive can be interpreted as making exemption from VAT conditional upon the services being offered to all the members of the independent group concerned.

41 Moreover, the need to interpret that provision strictly cannot lead to each member of an independent group being given the right to deprive the other members of that group of exemption from VAT by deciding at any particular time not to use a particular service provided by the group of which it has originally decided to become a member. The existence of such a right for each member of an independent group does not follow either from the wording or from the purpose of Article 13A(1)(f) of the Sixth Directive.

42 The services supplied by an independent group to its members during different tax periods, or even supplied only to one or several of its members during the same tax period, must therefore

qualify for the exemption provided for in that provision.

43 It follows from all the foregoing that the answer to the question referred should be that Article 13A(1)(f) of the Sixth Directive must be interpreted as meaning that, provided the other conditions in that provision are met, services supplied to their members by independent groups are covered by the exemption contained in that provision, even if those services are supplied only to one or several of those members.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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)(f) 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 must be interpreted as meaning that, provided the other conditions in that provision are met, services supplied to their members by independent groups are covered by the exemption contained in that provision, even if those services are supplied only to one or several of those members.

[Signatures]

* Language of the case: Dutch.