JUDGMENT OF THE COURT (First Chamber)

10 March 2005 *

In Case C-491/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Hessischer Verwaltungsgerichtshof (Germany), made by order of 1 October 2003, received at the Court on 20 November 2003, in the proceedings

Ottmar Hermann (in his capacity as liquidator of Volkswirt Weinschänken GmbH)

v

Stadt Frankfurt am Main,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), N. Colneric, K. Schiemann and E. Juhász, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 2 December 2004,

after considering the observations submitted on behalf of:

— Stadt Frankfurt am Main, by J. Walter and D. Kurtz, acting as Agents,

— Commission of the European Communities, by R. Lyal and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 3(2) and (3) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1).

2 That reference was made in the context of proceedings between Mr Hermann, now trustee in bankruptcy of Volkswirt Weinschänken GmbH, and Stadt Frankfurt am Main (City of Frankfurt am Main) regarding the lawfulness of a tax on alcoholic beverages imposed by the City of Frankfurt.

Law

The relevant Community provisions

3 Article 1(1) of Directive 92/12 provides:

'This Directive lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community'.

4 Article 3 reads as follows:

'1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.

Subject to the same proviso, Member States shall also retain the right to levy taxes on the supply of services which cannot be characterised as turnover taxes, including those relating to products subject to excise duty.'

The relevant national provisions

5 Paragraph 1 of the Satzung über die Erhebung einer Getränkesteuer im Gebiet der Stadt Frankfurt am Main (Local law on the levying of a beverage tax within the City

of Frankfurt am Main) of 13 December 1991 (*Amtsblatt der Stadt Frankfurt am Main* No 52 of 24 December 1991), as amended by regulation of 24 May 1996 (*Amtsblatt der Stadt Frankfurt am Main* No 25 of 18 June 1996, 'the GetrStS'), provides that the city is to levy a tax on beverages.

6 Paragraph 2 of the GetrStS provides:

'(1) The tax shall be levied on the supply for consideration, by a trader, of alcoholic beverages for immediate consumption, with the exception of cider.

(2) Own consumption of beverages by the person liable for the tax, including the supply of beverages to the staff of his undertaking, shall be deemed to be a supply for consideration if the value of that own consumption exceeds 5% of the turnover in respect of those beverages.

(3) Any supply for consumption on the premises shall be deemed to be a supply for immediate consumption. ...'

7 Paragraph 4 of the GetrStS sets the tax at 10% of the selling price of the beverages referred to in Paragraph 2. That provision further specifies that 'the selling price shall be the price actually paid by the final consumer, net of beverage tax'.

8 Paragraph 5 of the GetrStS states:

'(1) Anyone who supplies for consideration, in an occupational context, taxable beverages for immediate consumption shall be liable for the tax.

(2) The tax debt shall arise upon supply of the beverage or, in the case referred to in Paragraph 2(2), upon consumption. ...'

9 The GetrStS was repealed with effect from 1 January 2000 (*Amtsblatt der Stadt Frankfurt am Main* No 17 of 25 April 2000).

The main proceedings and the questions referred for a preliminary ruling

10 At the material time in the case in the main proceedings, Volkswirt Weinschänken GmbH operated a restaurant in the City of Frankfurt am Main. For the third quarter of 1995, it was liable to pay the sum of DEM 9 135.35 (approximately EUR 4 670) in beverage tax under the GetrStS.

11 Taking the view that that tax infringed, inter alia, the provisions of Directive 92/12, that company challenged, before the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main), the notice of assessment of 7 November 1995.

12 In its judgment of 14 May 2002, that court annulled the notice.

13 Stadt Frankfurt am Main brought an appeal against that judgment before the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse). During those proceedings, it explained that the GetrStS provides that the tax does not apply to the supply of goods but to transactions for the supply of services. Under the second paragraph of Article 3(3) of Directive 92/12, Member States are to remain free to levy taxes such as the tax on beverages.

14 In those circumstances, the Hessischer Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. A local law imposing a beverage tax defines as the object of that tax "the supply for consideration of alcoholic beverages for immediate consumption" and as such a supply "any supply for consumption on the premises". Is that tax another indirect tax on products subject to excise duty for the purposes of Article 3(1) and (2) of Directive 92/12 ..., or is it a tax on the supply of services relating to products subject to excise duty within the meaning of the second subparagraph of Article 3(3) of Directive 92/12?

2. If the answer to the second alternative in Question 1 is in the affirmative:

In connection with the taxation of a supply of services relating to products subject to excise duty within the meaning of Article 3(1) of Directive 92/12, does the phrase

"subject to the same proviso" in the second subparagraph of Article 3(3) of Directive 92/12/EEC refer only to the proviso contained in the first subparagraph of Article 3 (3) of that directive, namely "provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States", or in such a case must the tax also be for "specific purposes", as laid down in Article 3(2) of the directive?'

The first question

15 By its first question, the national court seeks to ascertain whether a tax such as that imposed by the GetrStS is another indirect tax on products subject to excise duty for the purposes of Article 3(2) of Directive 92/12 or a tax on the supply of services relating to products subject to excise duty within the meaning of the second subparagraph of Article 3(3) of that directive.

16 It is important to note, as a preliminary point, that Article 3(2) of Directive 92/12 lays down strict requirements for indirect taxes imposed by Member States in the case of products subject to excise duty, such as alcoholic beverages. That provision states that indirect taxes, other than excise duty, must have 'specific purposes', namely purposes other than purely budgetary purposes (Case C-434/97 *Commission* v *France* [2000] ECR I-1129, paragraph 19, and Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 31), and that they must also comply with 'the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned'.

17 Under Article 3(3) of Directive 92/12, Member States are to retain the right to introduce or maintain taxes which are levied on products not subject to excise tax (first subparagraph) or taxes 'which cannot be characterised as turnover taxes' levied on 'the supply of services ..., including those relating to products subject to excise duty' (second subparagraph).

18 As to whether the tax imposed by the GetrStS relates to products subject to excise duty for the purposes of Article 3(2) of Directive 92/12 or to the supply of services relating to such products within the meaning of the second subparagraph of Article 3(3), Stadt Frankfurt am Main takes the view that the services supplied are the predominant feature of the transaction taxed by the GetrStS. For a restaurateur, the cost of the beverage itself is of only minor importance compared with the cost of supplying services necessary in order to serve it. The tax thus falls within the scope of the second subparagraph of Article 3(3) of Directive 92/12.

19 The Commission of the European Communities points out that, in order to determine whether such transactions constitute supplies of goods or supplies of services, regard must be had to the essential character of the transaction in question. It refers for that purpose to Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraphs 12 to 14. As regards the sale of alcoholic beverages in cafés, tea rooms and restaurants, the part played by the services supplied by the café owner or restaurateur within the commercial transaction as a whole is minor. The services consist essentially in handing the beverage to the customer in a suitable container and in the appropriate form. Unlike the sale of meals, the price of which is essentially determined by the cost of the supply of services, the purchase price of the product predominates in the case of the sale of beverages. In the view of the Commission, the tax imposed by the GetrStS is therefore a tax on the supply of a product subject to excise duty for the purposes of Article 3(2) of Directive 92/12 (see *EKW and Wein & Co.*, cited above).

20 In that regard, it must first be pointed out that, under Paragraph 2 of the GetrStS, the chargeable event is the supply for consideration of alcoholic beverages for immediate consumption on the premises. Unlike in the *EKW and Wein & Co.* case, in which the national court had referred questions to the Court on the interpretation of Article 3(2) and (3) of Directive 92/12 in connection with a tax levied on the supply for consideration of alcoholic beverages (paragraph 18), the chargeable event in the case in the main proceedings is not the mere supply of such beverages but, on the contrary, refers to a transaction involving a supply of services.

21 In order to determine whether the tax imposed by the GetrStS applies to products subject to excise duty for the purposes of Article 3(2) of Directive 92/12 or, rather, to the services supplied in relation to such products for the purposes of the second subparagraph of Article 3(3), regard must be had to the predominant feature of the transaction on which it is imposed (see, by analogy, *Faaborg-Gelting Linien*, cited above, paragraphs 12 to 14).

22 Where the marketing of a product is always accompanied by a minimal supply of services (such as the displaying of the products on shelves, the issuing of an invoice, etc.), only services other than those which necessarily accompany the marketing of a product may be taken into account in assessing the part played by the supply of services within the whole of a complex transaction also involving the supply of a product.

23 Even though the chargeable event in respect of the tax imposed by the GetrStS is constituted by immediate consumption on the premises and therefore by a feature relating to a supply of services other than the operations which necessarily accompany the marketing of alcoholic beverages, it is not possible to state generally

that, for all the operations falling within the scope of that tax, the feature relating to the supply of services will always predominate.

24 It is therefore necessary to determine, in respect of each transaction taxed, its predominant feature.

25 The order for reference shows that Volkswirt Weinschänken GmbH operates a restaurant in which it serves prepared dishes and beverages.

26 The supply of alcoholic beverages to customers in a catering context is accompanied by a series of services other than the operations which are necessarily connected with the marketing of such products. Those services consist in placing an infrastructure at the customer's disposal, including a dining room with furniture and appurtenances (cloakrooms, toilets, etc.), providing the customer with advice and explanations concerning the beverages served, serving them to him in a suitable container, serving at table and, finally, clearing the tables and cleaning after the food and drink have been consumed (see, to that effect, *Faaborg-Gelting Linien*, paragraph 13).

27 A supply of alcoholic beverages in a catering context is characterised by an array of features and acts, of which the supply of the product itself is only one component and in which services predominate.

28 Consequently, a tax which, in circumstances such as those in the main proceedings, is levied on the supply of alcoholic beverages in a catering context must be regarded as a tax levied on the supply of services 'relating to products subject to excise duty' within the meaning of the second subparagraph of Article 3(3) of Directive 92/12.

29 Finally, it must be held that such a tax cannot be 'characterised as [a] turnover tax ...' within the meaning of that provision where it applies only to a defined category of products, namely alcoholic beverages (see, inter alia, Case 252/86 *Bergandi* [1988] ECR 1343, paragraphs 15 and 16; *EKW and Wein & Co.*, paragraphs 22 and 23, and Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraphs 33 and 35).

30 The answer to the first question must therefore be that a tax which is levied, in a catering context, on the supply for consideration of alcoholic beverages for immediate consumption on the premises must be considered to be a tax on the supply of services relating to products subject to excise duty which cannot be characterised as a turnover tax for the purposes of the second subparagraph of Article 3(3) of Directive 92/12.

The second question

31 By its second question, the national court seeks, in essence, to ascertain whether a tax on the supply of services within the meaning of the second subparagraph of Article 3(3) of Directive 92/12 is subject to the condition that it be for a specific purpose as referred to in Article 3(2).

32 In that regard, it should be recalled that, under the first subparagraph of Article 3(3) of Directive 92/12, Member States are to retain the right to introduce or maintain indirect taxes levied on products not subject to excise duty 'provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States'. The second subparagraph of that same paragraph provides that 'subject to the same proviso', Member States are also to retain the right to levy taxes on the 'supply of services which cannot be characterised as turnover taxes, including those relating to products subject to excise duty'.

33 The right referred to in the second subparagraph of Article 3(3) of Directive 92/12 is subject only to the proviso contained in the first subparagraph, namely that such 'taxes do not give rise to border-crossing formalities in trade between Member States'. The directive therefore does not require taxes falling within the scope of Article 3(3) to comply with the condition laid down in Article 3(2), namely that they be for a specific purpose.

34 The answer to the second question must therefore be that the 'same proviso' to which taxes falling within the scope of the second subparagraph of Article 3(3) of Directive 92/12 are subject refers only to the condition set out in the first subparagraph of that paragraph, namely that such 'taxes do not give rise to border-crossing formalities in trade between Member States'.

Costs

35 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 (First Chamber) rules as follows:

1. **A tax which is levied, in a catering context, on the supply for consideration of alcoholic beverages for immediate consumption on the premises must be considered to be a tax on the supply of services relating to products subject to excise duty which cannot be characterised as a turnover tax for the purposes of the second subparagraph of Article 3(3) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.**

2. **The 'same proviso' to which taxes falling within the scope of the second subparagraph of Article 3(3) of Directive 92/12 are subject refers only to the condition set out in the first subparagraph of that paragraph, namely that such 'taxes do not give rise to border-crossing formalities in trade between Member States'.**

[Signatures]