JUDGMENT OF THE COURT (Third Chamber)

3 March 2005 *

In Case C-428/02,

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by order of 15 November 2002, received at the Court on 26 November 2002, in the proceedings

Fonden Marselisborg Lystbådehavn

v

Skatteministeriet,

and

Skatteministeriet

v

Fonden Marselisborg Lystbådehavn,

* Language of the case: Danish.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chambre, A. Borg Barthet, J.-P. Puissochet, J. Malenovský and U. Lõhmus (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written proceedings and further to the hearing on 23 September 2004,

after considering the observations submitted on behalf of:

— Fonden Marselisborg Lystbådehavn, by L. Henriksen and M. Andersen, advokaterne,

— the Skatteministeriet and the Danish Government, by J. Molde, acting as Agent, and P. Biering, advokat,

— the Greek Government, by M. Apessos and K. Georgiadis, acting as Agents,

— the Commission of the European Communities, by E. Traversa and T. Fich, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 October 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13B(b) 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 Directive 92/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47, 'the Sixth Directive').

2 That reference was made in the course of two sets of proceedings between Fonden Marselisborg Lystbådehavn (the Marselisborg Pleasure Boat Port Trust, 'FML') and the Skatteministeriet (Ministry of Fiscal Affairs) and the latter against FML concerning value added tax ('VAT') on the letting of mooring berths for boats in a pleasure boat port complex and of storage sites for housing pleasure boats during the winter.

Legal background

Community law

3 According to the 11th recital in the preamble one of the purposes of the Sixth Directive is to draw up a common list of VAT exemptions so that the Communities' own resources may be collected in a uniform manner in all the Member States.

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

5 Article 4(1) and (2) of the Sixth Directive provides:

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

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

6 Article 13B(b) of the Sixth Directive, which appears in Title X, entitled 'Exemptions', provides:

'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:

...

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites; ...

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption;

...'.

National legislation

7 Article 13(1), point 8, of the Momsloven (Danish Law on VAT) provides:

'The following goods and services are exempt from VAT:

...

(8) the administration, letting and leasing of immovable property, including the supply of gas, water, electricity and heating as part of the letting or leasing. The exemption does not, however, cover the letting of rooms in hotels and similar establishments, the letting of rooms in businesses that let for periods of less than one month, the letting of camp sites, parking areas and advertising spaces, or the hire of safes.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 FML is responsible for the management of the pleasure boat port of Marselisborg. That independent institution lets water-based mooring berths and land sites for the winter storage of boats.

9 Mooring berths may be let on a yearly or monthly basis or for a shorter period of one to several days.

10 Where a mooring berth is let on an annual basis the lessee acquires the right to use a specific and identifiable mooring berth and is entitled to use the common facilities at the port, such as toilets and washing facilities. The mooring berths are adjusted to fit the size of the boats. Each one is individually numbered and is marked with fencing, y-beams or pontoon bridging with y-beams. If the lessee of a berth does not wish to use it for a period exceeding 24 hours, it is made available to visitors without reimbursement.

11 Long-term lessees of mooring berths with a right to a land site must pay an annual site fee and must lodge a deposit which is calculated, inter alia, according to the size of the boat. On the other hand, no deposit is required for letting a mooring berth without a right to a land site. However, the annual rent is higher in this case.

12 Where a mooring berth is let on a monthly basis a monthly hire charge is payable but no deposit is required. The lessee is, in principle, guaranteed a specific numbered mooring berth adapted to the size of his boat.

13 Short-term letting is provided for visitors who receive only mooring berths in the port for one or several days. No deposit is required for this type of letting.

14 As regards the letting of storage sites, the user is able to acquire the right to use a particular site for the winter storage of his boat. That site consists of a cradle, that is, a structure on which the boat is placed, which is numbered, to which the lessee has free access in order to tend and prepare his boat.

15 The dispute in the main proceedings results from the fact that, following an inquiry in 1999 by FML to the Regional Tax Authority, Århus (Denmark), the latter took the view that the income from letting mooring berths was subject to VAT. FML contested that decision before the Landsskatteret (Denmark).

16 In its order of 6 December 2000, the Landsskatteret held that the letting of water-based mooring berths could not benefit from the VAT exemption provided for by Article 13(1), point 8, of the Momsloven, on the ground that that activity could not be regarded as a letting of immovable property. It held that a boat owner does not rent a specific and identifiable area or parts of immovable property but merely acquires a right of use, which consists of having a mooring berth for his boat in the port.

17 On the other hand, as regards winter storage of boats, the Landsskatteret held that that activity is not subject to VAT because it may be treated as a 'letting of immovable property' for the purposes of Article 13(1), point 8, of the Momsloven. It held that a boat owner rents, for a price determined by the surface occupied, a specific and identifiable area to which he has free access during the winter. That letting is not covered by the exemption concerning 'the letting of premises and sites for parking vehicles', because boats are not covered by the term 'vehicles' within the meaning of Article 13B(b)(2) of the Sixth Directive.

18 Both FML and the Skatteministeriet brought proceedings to challenge the Landsskatteret's order before the Vestre Landsret. Since the latter takes the view that the resolution of the dispute before it requires the interpretation of Article 13B (b) of the Sixth Directive, it has decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 13B(b) of the Sixth VAT Directive ... be construed as meaning that the term *'letting of immovable property'* includes the letting of a boat site

consisting of a section of a land-based port area and of a defined and identifiable water-based area?

2. Must Article 13B(b)(2) of the Sixth Directive be construed as meaning that the term "vehicles" includes boats?'

The first question

19 By its first question the national court asks, essentially, whether Article 13B(b) of the Sixth Directive must be interpreted as meaning that the concept of letting of immovable property includes the letting of water-based mooring berths and land storage sites for boats within the port area.

Observations submitted to the Court

20 FML asserts that its activity of letting mooring berths and winter storage sites for boats fulfils the conditions laid down by the case-law of the Court for letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive. Its activities give rise to the payment of rent, the site is let for a fixed contractual period and the letting involves the transfer to the lessee of rights to use the property and to exclude third parties from it.

21 As regards the nature of the object let, FML argues that the port installations constitute fixed structures which cannot easily be dismantled or moved.

22 The Danish Government takes the view that the letting of mooring berths cannot be regarded as the letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive, because the exemptions provided for by that article must be interpreted strictly.

23 It argues that even if the port installations may be treated as 'immovable', the decisive element in defining the concept of 'immovable property' for the purposes of the Sixth Directive, the use of those installations for mooring boats is only an ancillary service which for tax purposes must be treated in the same way as the main service, which is to attribute a mooring berth in the port to boat owners. The latter fails to fulfil the requirements for falling within the definition of immovable property.

24 On the other hand, letting a clearly defined land site to a boat owner for winter storage should be treated as the letting of immovable property within the meaning of the Sixth Directive.

25 The Greek Government supports the Danish Government's view that the definition of 'letting immovable property' does not cover a defined and identifiable water-based mooring berth, but does cover letting land sites for the winter storage of boats.

26 The Commission of the European Communities submits that it is clear from the Court's very broad interpretation of the terms 'letting and leasing of immovable property' that the letting of parts of port land for the winter storage of boats undeniably constitutes a letting of immovable property within the meaning of the Sixth Directive. Furthermore, the letting of a water-based mooring berth cannot be treated differently depending on technical features, such as whether a boat is moored to a buoy or to pontoon bridging, rather than being anchored to the sea bed or moored to a mooring plate.

Findings of the Court

27 According to settled case-law, the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law which must therefore be given a Community definition (see Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 51; Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 25; Case C-275/01 *Sinclair Collis* [2003] ECR I-5965, paragraph 22; and Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 16) .

28 In the absence of a definition of 'letting of immovable property' in Article 13B(b) of the Sixth Directive, that provision must therefore be interpreted in the light of the context in which it is used and the scheme of the Directive, having particular regard to the underlying purpose of the exemption which it establishes (see, to that effect, *Temco Europe*, paragraph 18).

29 In that connection, given that the exemptions referred to in Article 13 of the Sixth Directive are exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person, they should be interpreted strictly (see, in particular, *Commission* v *Ireland*, paragraph 52; Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 64, and *Sinclair Collis*, paragraph 23).

30 In numerous judgments the Court has defined the letting of immovable property, within the meaning of Article 13B(b) of the Sixth Directive, as the landlord assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it (see, to that effect, *Commission* v *Ireland*, paragraphs 52 and 57; Case C-409/98 *Mirror Group* [2001] ECR I-7175, paragraph 31; Case C-326/99 '*Goed Wonen*' [2001] ECR I-6831, paragraph 55, and *Temco Europe*, paragraph 19).

31 In the main proceedings, it is common ground that the relationship between FML and the users of the land sites, who have exclusive use of the sites assigned to them for a fixed period, fall within the definition of letting in that provision. The same is true as regards the relationship between the FML and users of water-based mooring berths, even occasional users, as a mooring berth may be temporarily occupied by another boat when the lessee is not using it for his own. Since such occasional use does not cause harm to the lessee, it cannot be regarded as altering the relationship between him and the port management.

32 Therefore in order to answer the first question it remains to be established whether land- and water-based moorings for boats must be regarded as immovable property.

33 As regards the land sites, it must be observed that the ground used for the storage of boats is immovable property.

34 In the case of water-based mooring berths, the order for reference indicates that FML is the owner of the port land and the port basin. The fact that that land is partly under water does not prevent it from being categorised as immovable property that can be leased or let. As the owner FML may rent out all the port land, including specified parts of it. The letting does not, however, concern a particular quantity of water, but a specific part of the port basin. That water-covered area is clearly delimited and cannot be moved.

35 Consequently, as the Advocate General pointed out in paragraph 32 of her Opinion, even on a narrow interpretation of Article 13B(b) of the Sixth Directive a mooring berth in a port basin fulfils the definition of immovable property within the meaning of that article.

36 The answer to the first question must therefore be that Article 13B(b) of the Sixth Directive must be interpreted as meaning that the concept of letting of immovable property includes the letting of both water-based mooring berths for boats and land sites for storage of boats on port land.

The second question

37 By its second question the national court asks, essentially, whether the definition of 'vehicles' in Article 13B(b)(2) of the Sixth Directive includes boats.

Observations submitted to the Court

38 FML asserts that it is clear from Article 15(2), 28a(2)(a) and 28n(4)(b) and (c) of the Sixth Directive that the Community legislature draws a distinction between the terms 'means of transport' and 'vehicles'. Where a provision covers all means of transport, that is to say aircraft, motor vehicles, boats, etc., the expression 'means of transport' is used. On the other hand, the term 'vehicles' is used only for land-based means of transport on wheels. The definition of 'vehicles' as referred to in Article 13B(b) of the Sixth Directive covers, therefore, only means of land-based transport, and therefore the answer to the second question must be in the negative.

39 The Danish and Greek Governments take the view that 'vehicles' must not be interpreted strictly. The definition should therefore cover anything which may transport a person from one point to another, including boats.

40 The Commission also submits that, notwithstanding the different terminology in the various language versions of Article 13B(b)(2) of the Sixth Directive, the word 'vehicles' is in fact used consistently throughout the Directive and covers means of transport in the broad sense, including boats. A contrary interpretation has illogical consequences which are incompatible with the principle of fiscal neutrality.

Findings of the Court

41 The words used in the various language versions of Article 13B(b)(2) to designate 'vehicles' are not consistent. As the Commission rightly stated, a number of language versions, among which are the French, English, Italian, Spanish, Portuguese, German and Finnish versions, encompass means of transport in general in that definition, including aircraft and boats. On the other hand, other versions, such as the Danish, Swedish, Dutch and Greek versions, have selected a more precise term with a more limited meaning which serves to designate principally 'land-based means of transport'. More particularly, the Danish word 'kjøretøjer' refers to land-based transport on wheels.

42 In that connection it must be recalled that, according to settled case-law, where there is a difference between the language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see, in particular, Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraph 19, and Case C-384/98 *D* [2000] ECR I-6795, paragraph 16).

43 As regards the letting of premises and sites for parking vehicles, Article 13B(b)(2) of the Sixth Directive introduces an exception to the exemption laid down for the leasing and letting of immovable property. It thus makes the transactions to which it refers subject to the general rule laid down in that directive, namely that VAT is to be charged on all taxable transactions, except in the case of derogations expressly

provided for. That provision cannot therefore be interpreted strictly (see Case C-346/95 *Blasi* [1998] ECR I-481, paragraph 19).

44 Therefore, the term 'vehicles' used in that provision must be interpreted as covering all means of transport, including boats.

45 Letting mooring berths for boats is not limited solely to the right to privately occupy the surface of the water, but also involves making available various port equipment for mooring the boat, landing-stages for the crew and the use of various sanitary or other facilities. As the Advocate General points out in paragraph 51 of her Opinion, none of the reasons, including the social ones, that originally justified allowing the exemption from VAT for immovable property may be applied to the letting of mooring berths for pleasure boats in the circumstances in the main proceedings.

46 In those circumstances, having regard to the objectives of Article 13B(b) of the Sixth Directive, point 2 of that provision, which excludes the letting of premises and sites for parking vehicles from the exemption from VAT, must be interpreted as meaning that it is generally applicable to the letting of premises and sites for parking all means of transport, including boats.

47 In the light of the foregoing, the answer to the second question must be that Article 13B(b)(2) of the Sixth Directive is to be interpreted as meaning that the definition of 'vehicles' includes boats.

Costs

48 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) rules as follows:

1. **Article 13B(b) 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 92/111/EEC of 14 December 1992, must be interpreted as meaning that the concept of letting of immovable property includes the letting of both water-based mooring berths for pleasure boats and land sites for storage of boats on port land.**

2. **Article 13B(b)(2) of Sixth Directive 77/388, as amended by Directive 92/111, must be interpreted as meaning that the definition of 'vehicles' includes boats.**

[Signatures]