JUDGMENT OF THE COURT (Third Chamber)

14 June 2007 *

In Case C-434/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 2 December 2005, received at the Court on the same date, in the proceedings

Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College)

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Klučka, J.N. Cunha Rodrigues, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

* Language of the case: Dutch.

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure and further to the hearing on 14 December 2006,

after considering the observations submitted on behalf of:

— Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College), by G.C. Bulk, advocaat, and A. van Dongen, adviser,

— the Netherlands Government, by H.G. Sevenster and P. van Ginneken, acting as Agents,

— the Greek Government, by E. Mamouna, O. Patsopoulou and S. Trekli, and by K. Georgiadis and S. Spyropoulos, 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 8 March 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13A(1)(i) 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 Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College), established in Alkmaar (Netherlands) ('Horizon College'), and Staatssecretaris van Financiën (State Secretary for Finance) following an additional assessment for value added tax ('VAT') issued to Horizon College by the State Secretary.

Legal context

Community legislation

3 Article 13 of the Sixth Directive provides:

'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:

...

(i) children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, provided by bodies governed by public law having such as their aim or by other organisations defined by the Member State concerned as having similar objects;

...

2. (a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (n) of this Article subject in each individual case 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 (1)(b), (g), (h), (i), (l), (m) and (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 legislation

4 Article 11(1) of the Law of 1968 on turnover tax (Wet op de omzetbelasting 1968) of 28 June 1968 (*Staatsblad* 1968, No 329) provides:

'1. Subject to conditions to be laid down by public administrative regulation the following shall be exempt from tax:

...

o. the provision of:

1° educational services by establishments intended for the purpose, as defined by or pursuant to the laws governing education, subject, by statutory requirement, to national school inspections or to other controls by the Minister responsible for the educational services concerned;

2° educational services to be defined by public administrative regulation, which may specify that the exemption shall apply only in respect of operators not seeking to profit by such education;

...'

Main proceedings and questions referred for a preliminary ruling

5 According to the order for reference, Horizon College is an 'educational establishment'.

6 During the period relevant to the main proceedings, Horizon College made some of its teachers available to other educational establishments ('the host establishments'), each of which assumed responsibility for the teachers working there.

7 A contract was concluded in respect of each placement between Horizon College, the teacher concerned and the host establishment. Under the terms of the contracts, it was for the host establishment to define the duties of the teacher concerned, having regard to the duration of the placement and the role assigned to that teacher at Horizon College. In addition, the host establishment was required to pay statutory liability insurance for the period of the teacher's placement. The teacher's salary continued to be paid by Horizon College. The host establishment was required to reimburse Horizon College in respect of that salary, without any profit uplift. Horizon College did not charge VAT.

8 The competent tax inspector issued Horizon College with an additional VAT assessment relating to the years from 1995 to 1999 for the sum of NLG 463 828, which, following an objection by Horizon College, was reduced to NLG 299 308 by decision of the Inspector.

9 Horizon College brought an appeal against that decision before the Gerechtshof te Amsterdam (Amsterdam Court of Appeal), which, by judgment of 3 November 2003, dismissed the appeal as unfounded on the ground that the services at issue in the main proceedings were not covered by the exemption from VAT provided for under Article 13A(1)(i) of the Sixth Directive.

10 Horizon College appealed on a point of law to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

11 As it took the view that the outcome of the dispute before it required an interpretation of the Sixth Directive and, in particular, of the meaning of 'education' referred to in Article 13A(1)(i), the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 13A(1)(i) of the Sixth Directive to be interpreted as meaning that the provision of education includes the making available, for consideration, of a teacher to an educational institution in order that he may temporarily provide teaching services there within the area of responsibility of that educational institution?

(2) If the answer to that question is in the negative, can the concept of "services closely related to education" be interpreted as including the service described in Question 1 above?

(3) Are the answers to the above questions affected by the fact that the body which makes the teacher available is itself also an educational institution?'

Questions referred for a preliminary ruling

First question

12 By its first question, read together with the third, the referring court asks, in essence, whether Article 13A(1)(i) of the Sixth Directive is to be interpreted as meaning that the words 'children's or young people's education, school or university education, vocational training or retraining' in that provision cover the situation in which an educational establishment — within the meaning of Article 13A(1)(i) — makes available, for consideration, a teacher to a host establishment in which that teacher temporarily carries out teaching duties under the responsibility of the host establishment.

13 Horizon College takes the view that that question should be answered in the affirmative, since the effective transfer of knowledge and skills which occurs directly between a teacher and students or pupils, irrespective of the legal framework in which such a transfer takes place, is the very essence of education. The Greek and Netherlands Governments and the Commission of the European Communities contend that the first question calls for a negative response.

14 As a preliminary point, it should be noted that Article 13A of the Sixth Directive relates to the exemption from VAT of certain activities in the public interest. However, that exemption does not cover every activity performed in the public interest, but only those which are listed in that provision and described in great detail (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 18; Joined Cases C-394/04 and C-395/04 *Ygeia* [2005] ECR I-10373, paragraph 16; and Case C-401/05 *VDP Dental Laboratory* [2006] ECR I-12121, paragraph 24).

15 According to the case-law of the Court, the exemptions provided for in Article 13 of the Sixth Directive constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (see Case C-349/96 *CPP* [1999] ECR I-973, paragraph 15; Case C-240/99 *Skandia* [2001] ECR I-1951, paragraph 23; and *Ygeia*, paragraph 15).

16 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 services supplied for consideration by a taxable person (see Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 43, and Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraph 36). 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 (see Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 42; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 29; and Case C-106/05 *L.u.P.* [2006] ECR I-5123, paragraph 24). 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 (see, to that effect, Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 17, and also, in relation to university education, *Commission* v *Germany*, paragraph 47).

17 There is no definition in Article 13A(1)(i) of the Sixth Directive of the various forms of education covered by that provision.

18 Admittedly, as Horizon College essentially submits, the transfer of knowledge and skills between a teacher and students is a particularly important element of educational activity.

19 However, in view of the requirements of the case-law referred to in paragraphs 14 to 16 of this judgment, the fact that such a transfer is taking place is not, by itself, sufficient for the mere supply of a teacher to an educational establishment, for the purpose of carrying out teaching duties under the responsibility of that establishment, to be described as educational activity.

20 Indeed, as the Commission submitted, in essence, at the hearing, the educational activity referred to in Article 13A(1)(i) of the Sixth Directive consists of a combination of elements which include, along with those relating to the teacher/student relationship, also those which make up the organisational framework of the establishment concerned.

21 However, as stated in paragraph 7 of this judgment, according to the terms of the placement contracts at issue in the main proceedings, it was for the host establishment to define the duties of the teacher concerned, having regard to the duration of the placement and the role assigned to that teacher at Horizon College. In addition, the host establishment was required to insure the teacher for the period of his or her placement.

22 Accordingly, the making available of a teacher to the host establishment in such circumstances cannot be regarded, of itself, as an activity capable of being covered by the term 'education', within the meaning of Article 13A(1)(i) of the Sixth Directive. As the Greek and Netherlands Governments and the Commission essentially contend, the contract concluded between Horizon College, the host establishment and the teacher concerned aims, at most, simply to facilitate the provision of education by the host establishment.

23 That interpretation is not affected by the circumstance — with which the third question put by the referring court is concerned — that the body which makes the

teacher available is itself, in common with the host establishment, an educational establishment for the purposes of Article 13A(1)(i) of the Sixth Directive. Where a particular activity is not in itself covered by the term 'education', the fact that it is provided by a body governed by public law that has an educational aim, or by another organisation defined by the Member State concerned as having similar objects, cannot alter that analysis.

24 The answer to the first question, read together with the third question, must therefore be that Article 13A(1)(i) of the Sixth Directive is to be interpreted as meaning that the expression 'children's or young people's education, school or university education, vocational training or retraining' does not cover the making available, for consideration, of a teacher to an educational establishment, within the meaning of that provision, in which that teacher temporarily carries out teaching duties under the responsibility of that establishment, even if the body which makes the teacher available is itself a body governed by public law that has an educational aim, or another organisation defined by the Member State concerned as having similar objects.

Second question

25 By its second question, read together with the third, the referring court asks, in essence, whether Article 13A(1)(i) of the Sixth Directive is to be interpreted as meaning that the making available by an educational establishment, within the meaning of that provision, for consideration, of a teacher to a host establishment in which that teacher temporarily carries out teaching duties under the responsibility of the host establishment may be exempt from VAT on the basis that it is a supply of services 'closely related' to education, within the meaning of Article 13A(1)(i).

26 It is apparent from the order for reference that that question arises in the context of a situation in which a teacher is made available in exchange for a payment by the host establishment to the establishment making that teacher available, and where the amount of that payment is equivalent to the salary paid to the teacher in question by the establishment making that teacher available.

27 There is no definition in Article 13A(1)(i) of the Sixth Directive of the supply of services 'closely related' to education (see, as regards university education, *Commission* v *Germany*, paragraph 46). Nevertheless, it is clear from the actual wording of the provision that it does not cover the supply of goods or services which are unrelated to 'children's or young people's education, school or university education, vocational training or retraining'.

28 The supply of goods or services can be regarded as 'closely related' to education, and thus subject to the same tax treatment under Article 13A(1)(i) of the Sixth Directive, only where they are actually supplied as services ancillary to the education which constitutes the principal service (see, by analogy, Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraphs 27 to 30; *Dornier*, paragraphs 34 and 35; and also *Ygeia*, paragraphs 17 and 18).

29 It follows from the case-law of the Court that a service may be regarded as ancillary to a principal service if it does not constitute an end in itself, but a means of better enjoying the principal service (see, to that effect, in particular, Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 24; *CPP*, paragraph 30; *Dornier*, paragraph 34; and *Ygeia*, paragraph 19).

30 As Horizon College and the Commission essentially submit, the supply of a teacher by one educational establishment to another in order for the teacher temporarily to carry out teaching duties under the responsibility of the latter establishment is an activity which can, in principle, be described as a supply of services closely related to education. Indeed, where there is a temporary shortage of teachers in some educational establishments, making qualified teachers attached to other establishments available to those experiencing the shortage will enable students better to enjoy the education provided by the host establishments.

31 That conclusion is not altered by the fact, emphasised by the Greek and Netherlands Governments, that the host establishments benefit from the supply of those teachers, without there being a direct relationship between Horizon College and the students of the host establishments. Similarly, the fact, noted by the Netherlands Government, that the supply of teachers is an activity that is separate from the teaching provided by Horizon College on its own account has no bearing on that conclusion.

32 In fact, in order for students of the host establishments better to enjoy the education provided by those establishments, it is not necessary for services closely related to that education to be supplied directly to those students. Furthermore, any lack of a close connection between the principal activity of the establishment making teachers available and its secondary activity — the supply of services closely related to education — is, in principle, irrelevant.

33 However, the benefit of the exemption provided for under Article 13A(1)(i) of the Sixth Directive is subject to certain conditions which stem from that article.

34 First, both the principal activity of education and the supply of goods or services which are closely related to that activity must be provided by one of the bodies referred to in Article 13A(1)(i) of the Sixth Directive.

35 Indeed, as may be seen from the wording of Article 13A(1)(i), in order for the making available of teachers for the benefit of the host establishments to be exempted under that provision, it is necessary for the activity to be provided by a body governed by public law that has an educational aim, or by another organisation defined by the Member State concerned as having similar objects. As is apparent from the order for reference and, in particular, from the third question raised, that condition is likely to be satisfied in the main proceedings.

36 Moreover, it is clear from the first indent of Article 13A(2)(b) of the Sixth Directive that, in order for a supply of services or goods not to be precluded from being granted exemption as provided for, inter alia, in Article 13A(1)(i), the main transaction, to which that supply is closely linked, must itself also be an exempted transaction (see Case C-415/04 *Stichting Kinderopvang Enschede* [2006] ECR I-1385, paragraph 22).

37 In that regard, it should be noted that, according to the order for reference, the host establishments are themselves 'educational organisations within the meaning of Article 13A(1)(i) of the Sixth Directive'.

38 Second, as is also clear from the first indent of Article 13A(2)(b) of the Sixth Directive, the supply of services or goods which are closely related to the main

transactions referred to, inter alia, in Article 13A(1)(i) may be granted exemption only if they are essential to the transactions exempted (see also, to that effect, *Commission* v *Germany*, paragraph 48; *Ygeia*, paragraph 26; and *Stichting Kinderopvang Enschede*, paragraph 25).

39 In order to be described in those terms, the temporary supply of teachers, such as that at issue in the main proceedings, should be of a nature and quality such that, without recourse to such a service, there could be no assurance that the education provided by the host establishments and, consequently, the education from which their students benefit, would have an equivalent value (see, by analogy, *Stichting Kinderopvang Enschede*, paragraphs 27, 28 and 30).

40 In that regard, it should be observed, as the Netherlands Government has done, that there may well be commercial placement agencies whose services are not exempt and whose activities include the supply of teaching staff to schools or universities. In the main proceedings, for the supply of teachers by Horizon College to be regarded as essential to the education provided by the host establishments, it would have to be of a nature such that — owing, for example, to the qualifications of the staff in question or the flexibility of the terms of their supply — the same level and quality of teaching could not be assured simply by turning to such placement agencies.

41 It falls to the referring court, taking into account all of the specific facts of the dispute before it, to determine the essential character of the services supplied by Horizon College.

42 Third, according to the second indent of Article 13A(2)(b) of the Sixth Directive, the supply of services or goods is not to be granted exemption as provided for in Article

13A(1)(i) if 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 VAT.

43 That exclusion is a specific expression of the principle of fiscal neutrality, which precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 20, and *Ygeia*, paragraph 32).

44 In the main proceedings, it therefore falls to the referring court to determine whether, by making some of its teachers available to other educational establishments, Horizon College intended, essentially, to obtain additional income by carrying out a transaction which was in direct competition with commercial enterprises liable for VAT, such as commercial placement agencies. In that regard, the fact that an establishment engaged in such a placement activity receives payment equal to the salary which it pays to the teachers thus supplied is not, in itself, sufficient to establish that the transaction is not intended to obtain additional income.

45 Finally, it should be noted that Article 13A(2)(a) of the Sixth Directive gives Member States the power to make the granting to bodies other than those governed by public law of the exemption provided for in, inter alia, Article 13A(1)(i) subject to one or more of the conditions set out in Article 13A(2)(a). It is for the referring court to verify whether such a power has been implemented in the Netherlands and, if so, whether such conditions are applicable in the main proceedings.

46 Therefore, the answer to the second and third questions, read together, must be that Article 13A(1)(i) of the Sixth Directive, read in conjunction with Article 13A(2) of that directive, is to be interpreted as meaning that the making available, for consideration, of a teacher to an educational establishment in which that teacher temporarily carries out teaching duties under the responsibility of that establishment, may constitute a transaction that is exempt from VAT on the basis that it is a supply of services 'closely related' to education, within the meaning of Article 13A(1)(i), if such a teacher placement is a means of better enjoying the education deemed to be the principal service, provided, however, — which it is for the national court to verify — that:

— both that principal service and the placement which is closely related to it are provided by bodies referred to in Article 13A(1)(i), taking into account, where appropriate, any conditions which may have been introduced by the Member State concerned pursuant to Article 13A(2)(a);

— that placement is of a nature and quality such that, without recourse to such a service, there could be no assurance that the education provided by the host establishment and, consequently, the education from which its students benefit, would have an equivalent value; and

— the basic purpose of such a placement is not to obtain additional income by carrying out a transaction which is in direct competition with commercial enterprises liable for VAT.

Third question

47 As is apparent from paragraphs 12, 23 to 25, 34 and 35 of this judgment, the answer to the third question is integral to the examination of the first two questions and to the answers which have been given to those questions. Therefore, there is no need to answer the third question separately.

Costs

48 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:

1. **Article 13A(1)(i) 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, is to be interpreted as meaning that the expression 'children's or young people's education, school or university education, vocational training or retraining' does not cover the making available, for consideration, of a teacher to an educational establishment, within the meaning of that provision, in which that teacher temporarily carries out teaching duties under the responsibility of that establishment, even if the body which makes the teacher available is itself a body governed by public law that has an educational aim, or another organisation defined by the Member State concerned as having similar objects.**

2. **Article 13A(1)(i) of Sixth Directive 77/388, read in conjunction with Article 13A(2) of that directive, is to be interpreted as meaning that the making available, for consideration, of a teacher to an educational establishment in which that teacher temporarily carries out teaching duties under the responsibility of that establishment, may constitute a transaction that is exempt from value added tax on the basis that it is a supply of services 'closely related' to education, within the meaning of Article 13A(1)(i), if such a teacher placement is a means of better enjoying the education deemed to be the principal service, provided, however, — which it is for the national court to verify — that:**

— **both that principal service and the placement which is closely related to it are provided by bodies referred to in Article 13A(1)(i), taking into account, where appropriate, any conditions which may have been introduced by the Member State concerned pursuant to Article 13A(2)(a);**

— **that placement is of a nature and quality such that, without recourse to such a service, there could be no assurance that the education provided by the host establishment and, consequently, the education from which its students benefit, would have an equivalent value; and**

— **the basic purpose of such a placement is not to obtain additional income by carrying out a transaction which is in direct competition with commercial enterprises liable for value added tax.**

[Signatures]