JUDGMENT OF THE COURT (Fifth Chamber)

8 June 1999 *

In Joined Cases C-338/97, C-344/97 and C-390/97,

REFERENCES to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Erna Pelzl and Others

and

Steiermärkische Landesregierung (C-338/97),

between

Wiener Städtische Allgemeine Versicherungs AG and Others

and

Tiroler Landesregierung (C-344/97),

* Language of the cases: German.

and between

STUAG Bau-Aktiengesellschaft

and

Kärntner Landesregierung (C-390/97),

on the interpretation of Article 33 of the 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 COURT (Fifth Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, P. Jann, C. Gulmann, D.A.O. Edward and L. Sevón, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mrs Pelzl, Johannes Kovac and Harald Hohenberg, Kovac Schrott GmbH NFG KG, Kovac Management GmbH, P. Kovac & Co. GmbH and Kovac Eisen Maschinen Metalle GmbH NFG KG, by Harald Hohenberg, Rechtsanwalt, Graz,

— Wiener Städtische Allgemeine Versicherungs AG, by Kurt Heller and Maria Th. Pflügl, Rechtsanwälte, Vienna,

— Romed Karl Kleissl, by Christian C. Schwaighofer and Michael Sallinger, Rechtsanwälte, Innsbruck,

— Streiter KG, Alfred Eiter and Stefan Riml, by Andreas Fink and Peter Kolb, Rechtsanwälte, Imst,

— Anton Gschwentner GmbH, by Hubertus Schumacher, Rechtsanwalt, Innsbruck,

— Michael Khuen-Belasi, by Beate Köll-Kirchmeyr, Rechtsanwältin, Schwaz,

— DM Drogeriemarkt GmbH, by Wolf-Dieter Arnold, Rechtsanwalt, Vienna,

— STUAG Bau-Aktiengesellschaft, by Alexander Hasch, Rechtsanwalt, Linz,

— Steiermärkische Landesregierung, by Nikolaus Hermann, Hofrat in the Department of Tourism of the Steiermärkische Landesregierung, acting as Agent,

— Tiroler Landesregierung, by Hansjörg Teissl, 'Chairman' of the 'Board of Appeal established under Section 38 of the 1991 Tyrol Tourism Law at the Offices of the Tiroler Landesregierung', acting as Agent,

— the Austrian Government, by Wolf Okresek, Ministerialrat in the Constitutional Service of the Federal Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by Viktor Kreuschitz, Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of: Mrs Pelzl, Messrs Kovac and Hohenberg, Kovac Schrott GmbH NFG KG, Kovac Management GmbH, P. Kovac & Co. GmbH and Kovac Eisen Maschinen Metalle GmbH NFG KG, represented by Harald Hohenberg; the Wiener Städtische Allgemeine Versicherungs AG and STUAG Bau-Aktiengesellschaft, represented by Kurt Heller; the Steiermärkische Landesregierung, represented by Erwin Wanke, Oberregierungsrat in the Department of Tourism at the Offices of the Steiermärkische Landesregierung, acting as Agent; the Tiroler Landesregierung, represented by Ansgar Rudisch, Hofrat at the Offices of the Tiroler Landesregierung, acting as Agent; the Kärntner Landesregierung, represented by Professor Markus Achatz, acting as Agent; the Austrian Government, represented by Harald Dossi, Ministerialrat in the Constitutional Service of the Federal Chancellor's Office, acting as Agent; and the Commission, represented by Viktor Kreuschitz and Enrico Traversa, at the hearing on 4 February 1999,

after hearing the Opinion of the Advocate General at the sitting on 18 March 1999,

gives the following

Judgment

1 By two orders of 12 August 1997 and an order of 27 October 1997, received at the Court Registry on 29 September 1997, 2 October 1997 and 17 November 1997 respectively, the Verwaltungsgerichtshof (Austrian Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 33 of the 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 Those questions were raised in proceedings between (1) Mrs Pelzl and Others and the Steiermärkische Landesregierung (Government of the *Land* of Styria), (2) Wiener Städtische Allgemeine Versicherungs AG and Others and the Tiroler Landesregierung (Government of the *Land* of Tyrol), and (3) STUAG Bau-Aktiengesellschaft and the Kärntner Landesregierung (Government of the *Land* of Carinthia) concerning the liability of the plaintiffs in the main proceedings for charges to promote tourism introduced by the Steiermärkische Tourismusgesetz (Tourism Law of the *Land* of Styria), the Tiroler Tourismusgesetz (Tourism Law of the *Land* of Tyrol), and the Kärntner Fremdenverkehrsabgabegesetz (Law of the *Land* of Carinthia on the charge to promote tourism).

3 Those charges are intended to promote tourism in the federal *Länder* concerned. In Styria, the charge funds local tourism associations. In the Tyrol, it is paid in part to local tourism associations and in part to a tourism development fund, the Tourismusförderungsfonds. In Carinthia, the charge is divided between the *Land* and the communes.

4 Each of those charges is, in principle, payable by all traders having a direct or indirect economic interest in tourism and having their registered office or a place of business in the Tyrol, Carinthia, or in one of the communes of Styria designated by the Steiermärkische Tourismusgesetz, which applies to most, but not all, of the territory of Styria.

5 The charge is levied according to different rates, depending on the benefit which the taxable person derives from tourism, measured by his classification in a professional category, as well as, in Styria and the Tyrol, by the classification of the commune in which he has his registered office.

6 The basis of assessment of the charge is, in principle and subject to certain exemptions, the annual taxable turnover, as defined by the Federal Law on Turnover Tax, achieved in the federal *Land* concerned.

7 Mrs Pelzl and Others, Wiener Städtische Allgemeine Versicherungs AG and Others, and STUAG Bau-Aktiengesellschaft instituted proceedings before the Verwaltungsgerichtshof challenging the dismissal of their objections against the administrative decisions imposing on them the charges to promote tourism. They argued, in particular, that those contributions were contrary to Article 33(1) of the Sixth Directive, which provides that: 'Without prejudice to other Community provisions..., this directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes...'.

8 The Verwaltungsgerichtshof, which is unsure whether those charges to promote tourism are compatible with Article 33 of the Sixth Directive, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

Case C-338/97

'Does Article 33(1) of the Sixth Council Directive 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 (77/388/EEC) preclude, on the ground that it is in the nature of a turnover tax, the maintenance in force of a charge which is payable in a *Bundesland* (federal State) of a Member State of the European Communities

— in respect of each calendar year by all undertakings directly or indirectly involved in tourism which have their registered office or a place of business within certain closely defined areas, where the sum of those areas comprises almost the whole area of the federal State, and

— the amount of which is essentially proportional to the turnover achieved by the undertaking primarily in that federal State within a calendar year, but where the rate of contribution varies according to the intensity of tourism in that area and according to the degree of benefit which the legislature deems the commercial sector in question (occupational group) to derive from tourism, and

— where no provision is made for the deduction of input tax?'

Case C-344/97

'Is Article 33(1) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (77/388/EEC) to be interpreted with regard to the description "characterised as turnover taxes" as precluding the imposition on traders by a Member State of a tourism charge (contribution) which has the following features:

— it is payable by traders with a direct or indirect interest in the tourism industry and therefore by a large number of, but not all, traders;

— it goes to a local tourism association to finance the development of the tourist industry or to a fund to be used for the whole region (*Land*);

— the basis of assessment is the yearly turnover with certain exceptions, in particular turnover related to services to customers whose place of residence (seat) is outside the area covered by the legislation, in so far as the services are not for a business situated within the area covered by the legislation (a *Bundesland* of a Member State composed of federal States) nor services to final consumers, and turnover related to other services in so far as they are not supplied exclusively or primarily within the area covered by the legislation (the *Bundesland* of the Member State);

— the amount of the charge varies according to the benefit deemed by the legislature to be derived from tourism by the sector to which the taxpayer belongs;

— the amount of the charge is higher in tourist areas than in others, and

— no provision is made for deduction of input tax?'

Case C-390/97

'Does Article 33(1) of the Sixth Council Directive 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 (77/388/EEC) preclude, on the ground that it is in the nature of a turnover tax, the maintenance in force of a charge which is payable in a *Bundesland* (federal State) of a Member State of the European Communities in respect of each calendar year by all undertakings directly or indirectly involved in tourism which have their registered office or a place of business within that federal State, and the amount of which is essentially proportional to the turnover achieved by the undertaking in that federal State within a calendar year, but where the rate of contribution varies according to the degree of benefit which the legislature deems the commercial sector in question (occupational group) to derive from tourism, and where no provision is made for the deduction of input tax?'

9 By order of the President of the Court of 18 November 1997, Cases C-338/97 and C-344/97 were joined for the purposes of the written procedure, the oral procedure and the judgment. By order of the President of the Fifth Chamber of the Court of 15 December 1998, Joined Cases C-338/97 and C-344/97 were joined with Case C-390/97 for the purposes of the oral procedure and the judgment.

10 By its three questions, which should be examined together, the Verwaltungsgerichtshof is in substance asking whether the Sixth Directive, and in particular Article 33 thereof, precludes a charge of the kind introduced by the Steiermärkische Tourismusgesetz, the Tiroler Tourismusgesetz and the Kärntner Fremdenverkehrsabgabegesetz, which is payable by traders in a federal *Land* who have an economic interest in tourism, which is calculated, in principle, on the basis of annual turnover and from which input tax is not deductible.

11 The Steiermärkische Landesregierung and the Tiroler Landesregierung, along with the Austrian Government and the Commission, take the view that the Sixth Directive does not preclude such a charge. They argue that it is not a turnover tax, which is prohibited under Article 33 of the Sixth Directive, because it is not comparable to value added tax ('VAT') and does not adversely affect the operation of the common system of VAT.

12 The plaintiffs in the main proceedings, in contrast, take the view that a charge of that kind must be treated as a turnover tax adversely affecting the common system of VAT and prohibited by Article 33 of the Sixth Directive.

13 It is necessary in that regard to recall the objectives pursued by the introduction of a common system of VAT.

14 According to the preamble to the First Council Directive (67/227/EEC) of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14, hereinafter 'the First Directive'), the harmonisation of legislation concerning turnover taxes is intended to bring about the establishment of a common market within which competition

is not distorted, and whose characteristics are similar to those of a domestic market, by eliminating differences in the imposition of tax such as to distort competition and impede trade.

15 The introduction of a common system of VAT was achieved by the Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16, hereinafter 'the Second Directive') and by the Sixth Directive.

16 The Court has consistently held (see, most recently, Case C-318/96 *SPAR* v *Finanzlandesdirektion für Salzburg* [1998] ECR I-785) that the principle of the common system of VAT consists, by virtue of Article 2 of the First Directive, in the application to goods and services up to the retail stage of a general tax on consumption which is exactly proportional to the price of the goods and services, irrespective of the number of transactions which take place in the production and distribution process before the stage at which the tax is charged.

17 However, VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the costs of the various price components. The procedure for deduction is so arranged by Article 17(2) of the Sixth Directive that taxable persons are authorised to deduct from the VAT for which they are liable the VAT which the goods or services have already borne and that the tax is charged, at each stage, only on the added value and is finally borne by the ultimate consumer.

18 In order to attain the objective of ensuring equal conditions of taxation for the same transaction, no matter in which Member State it is carried out, the common system of VAT was intended, according to the preamble to the Second Directive, to replace the turnover taxes in force in the various Member States.

19 Article 33 of the Sixth Directive accordingly permits a Member State to maintain or introduce taxes, duties or charges on the supply of goods, the provision of services or imports only if they cannot be characterised as turnover taxes.

20 In order to decide whether a tax, duty or charge can be characterised as a turnover tax within the meaning of Article 33 of the Sixth Directive, it is necessary, in particular, to determine whether it has the effect of jeopardising the functioning of the common system of VAT by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT. The Court has stated in this regard that taxes, duties and charges must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT (see Case C-200/90 *Dansk Denkavit and Poulsen* v *Skatteministeriet* [1992] ECR I-2217).

21 The Court finds in this connection that the essential features of VAT are as follows: it applies generally to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; the amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer (see, to that effect, Case C-347/90 *Bozzi* [1992] ECR I-2947).

22 A charge of the kind introduced by the Steiermärkische Tourismusgesetz, the Tiroler Tourismusgesetz and the Kärntner Fremdenverkehrsabgabegesetz is not levied on the movement of goods and services or on commercial transactions in a way comparable to VAT.

23 First, there is no provision for deduction of amounts paid as input tax, with the result that the charges apply not only to the value added at a particular stage in the production and distribution process but also to the overall turnover achieved by the taxable undertakings.

24 Second, the charges are not passed on to the final consumer in a manner characteristic of VAT. Even on the assumption that an undertaking selling to final consumers will take account, in fixing its price, of the amount of the charge included in its general expenses, not all undertakings have the possibility of thus passing on, or passing on in full, the burden of the tax.

25 Third, since the charges to promote tourism are calculated, subject to certain exemptions, on the basis of an overall annual turnover, it is not possible to determine the precise amount of the charge passed on to the customer when each sale is effected or each service supplied, and the condition that this amount should be proportional to the price charged by the taxable person is thus not satisfied either.

26 It follows that the charges to promote tourism do not constitute a tax on consumption the burden of which rests on the final consumer of the product, but are charges on the activities of undertakings involved in tourism.

27 Thus, even on the assumption that the charges at issue in the main proceedings are generally or almost generally applicable in the federal *Länder* in question, that would not suffice for them to be classified as turnover taxes within the meaning of Article 33 of the Sixth Directive, inasmuch as they are not levied on commercial transactions in a manner comparable to VAT.

28 In those circumstances, the answer to the questions submitted must be that the Sixth Directive, and in particular Article 33 thereof, does not preclude a charge of the kind introduced by the Steiermärkische Tourismusgesetz, the Tiroler Tourismusgesetz and the Kärntner Fremdenverkehrsabgabegesetz, which is payable by traders in a federal *Land* who have an economic interest in tourism, which is calculated, in principle, on the basis of annual turnover and from which input tax is not deductible.

Costs

29 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by orders of 12 August 1997 and 27 October 1997, hereby rules:

The 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, and in particular Article 33 thereof, does not preclude a charge of the kind introduced by the Steiermärkische Tourismusgesetz, the Tiroler Tourismusgesetz and the Kärntner Fremdenverkehrsabgabegesetz, which is payable by traders in a federal *Land* who have an economic interest in tourism, which is calculated, in principle, on the basis of annual turnover and from which input tax is not deductible.

Puissochet Jann Gulmann

Edward Sevón

Delivered in open court in Luxembourg on 8 June 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber