JUDGMENT OF THE COURT (Fifth Chamber)

12 June 2003 *

In Case C-275/01,

REFERENCE to the Court under Article 234 EC by the House of Lords for a preliminary ruling in the proceedings pending before that court between

Sinclair Collis Ltd

and

Commissioners of Customs and Excise,

on the interpretation of Article 13B(b) 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),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, President of the Fourth Chamber, acting as President of the Fifth Chamber, D.A.O. Edward, A. La Pergola (Rapporteur), P. Jann and S. von Bahr, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Sinclair Collis Ltd, by D. Milne QC and R. Baldry, Barrister, instructed by Ernst & Young, Tax Advisers,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and K. Parker QC,

— the Commission of the European Communities, by R. Lyal, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Sinclair Collis Ltd, the United Kingdom Government and the Commission at the hearing on 18 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 10 October 2002,

gives the following

Judgment

1 By an order of 7 June 2001, received at the Court on 12 July 2001, the House of Lords referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 13B(b) 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, hereinafter 'the Sixth Directive').

2 That question was raised in proceedings between Sinclair Collis Ltd (hereinafter 'SC') and the Commissioners of Customs and Excise (hereinafter 'the Commissioners'), who have responsibility in the United Kingdom for collecting value added tax ('VAT'), concerning the VAT regime applicable to an agreement relating to the installation of cigarette vending machines in commercial premises.

Legal background

Community legislation

3 Article 2(1) of the Sixth Directive provides as follows:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

...'

4 Article 13B(b) of the Sixth Directive 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 the exemptions and of preventing any possible evasion, avoidance or abuse:

(a) ...

(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.

...'

National law

5 Item 1 in Group 1 of Part II of Schedule 9 to the Value Added Tax Act 1994 exempts from VAT:

'[t]he grant of any interest in or right over land or of any licence to occupy land'.

6 The concept of a 'licence to occupy land' in that provision of national law refers to the concept of 'letting of immovable property' in Article 13B(b) of the Sixth Directive.

The main proceedings and the question referred for a preliminary ruling

7 SC, which is part of the Imperial Tobacco Group, provides, operates and maintains vending machines for the sale of cigarettes in public houses, clubs and hotels.

8 To that end it has concluded with each owner of these commercial premises an agreement for the provision of such machines in return for payment of an agreed percentage of the gross profits on overall sales of tobacco products made in the premises, more particularly on sales made through the machines (hereinafter 'the agreement').

9 Under the agreement, the machines are to be positioned in such location as the site owner considers to be the most likely to generate the maximum sales. However, the site owner may not unreasonably refuse his consent to a different location selected by SC. SC retains ownership of the cigarettes kept in the machines, of the cash, and of cigars and other tobacco products. The site owner confers on SC for a period of two years the exclusive right to install and operate the machines, which remain the property of SC. In addition, the agreement grants

SC an exclusive right to supply cigars and other tobacco products to the establishment in question.

10 The site owner agrees to provide sufficient electricity and to prevent the installation on his premises of any machine dispensing products comparable to those covered by the agreement. Machines other than those which are designed to be wall-mounted can be moved around.

11 SC retains exclusive control over access to the machines, keeps them properly stocked and removes the money inside for sharing as agreed.

12 In January 1996 the Commissioners decided that the supplies under the agreement ought to be exempt from VAT under Article 13B(b) of the Sixth Directive, on the ground that the agreement constituted a licence to occupy land. SC, which had an interest in the supplies being found to be taxable so as to be able to set off input tax, appealed against that decision to the VAT and Duties Tribunal, Manchester (United Kingdom). The Tribunal found that the real subject of the agreement was the installation of cigarette vending machines and not the use or enjoyment of land and accordingly held that the transaction ought not to be exempt from VAT.

13 The Commissioners appealed against the decision of the Tribunal to the High Court of Justice of England and Wales, which found in their favour. SC appealed against the High Court's decision to the Court of Appeal (England and Wales) (Civil Division), which dismissed the appeal. SC then appealed to the House of Lords.

14 Taking the view that interpretation of the Sixth Directive was required in order to decide the case, the House of Lords decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the grant, by the owner of premises ("the Siteholder") to an owner of a cigarette vending machine, of the right to install, operate and maintain the machine in the premises for a period of two years, in a place nominated by the Siteholder, in return for a percentage of the gross profits of the sales of cigarettes and other tobacco goods in the premises, but with no other significant rights of possession or control than those set out in the written agreement between the parties, capable of amounting to the letting of immovable property within the meaning of Article 13B(b) of [the Sixth Directive]; and what are the principles applicable in deciding whether an agreement amounts to the letting of immovable property within such meaning?'

Consideration of the question referred

15 By its question the national court is essentially asking whether, on a proper construction of Article 13B(b) of the Sixth Directive, the grant, by the owner of premises to an owner of a cigarette vending machine, of the right to install the machine, and to operate and maintain it in the premises for a period of two years, in a place nominated by the owner of the premises, in return for a percentage of the gross profits on the sales of cigarettes and other tobacco goods in the premises, but with no rights of possession or control being granted to the owner of the machine other than those expressly set out in the agreement between the parties, constitutes a letting of immovable property within the meaning of that provision.

16 It is common ground that, under the agreement, the owner of the premises who grants the right to install and maintain a cigarette vending machine is supplying a service as a taxable person within the meaning of Articles 6(1) and 4(1) of the Sixth Directive respectively. The services supplied by him under the agreement are therefore in principle subject to VAT in accordance with Article 2(1) of the Sixth Directive. It remains to be determined whether they fall within the scope of the exemption provided for by Article 13B(b) of the Sixth Directive.

Observations submitted to the Court

17 SC and the Commission submit that the agreement does not constitute the leasing or letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive. They argue that the essential characteristics of a letting within the meaning of that provision include the grant to a person of a right to occupy a defined piece or area of property as one's own and to exclude or allow access to others.

18 SC argues in that regard that the subject of the agreement is the installation and operation of income-producing vending machines, not the use and occupation of the premises in which they are installed. The agreement contains no restriction on the number of machines nor does it identify any defined area where they may be placed. Once installed, they are, like other fixtures on the premises, in the custody or possession of the site owner, who undertakes not to interfere with them. SC retains ownership of the machines but has no control regarding access to them except to restock, maintain and repair them. At the hearing SC stated in this connection that it enjoyed access to the machines only during the opening hours of the establishment.

19 The Commission for its part submits that the right to install a vending machine on premises belonging to another person and to leave it there can be considered to amount to a letting for the purposes of Article 13B(b) of the Sixth Directive only if it entails a right of occupation or control of a defined portion of the premises. Further, the payment made for a letting within the meaning of that provision need not necessarily, in the Commission's view, be a function of its duration.

20 The United Kingdom Government, on the other hand, submits that the agreement amounts to a letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive. By fixing a vending machine to a wall or standing it in a particular place for a sustained period, a person is occupying the land where the machine is situated to the exclusion of all others, such that this may be considered to amount to a letting of immovable property for the purposes of that provision.

21 According to the United Kingdom Government, the fact that the machine may be moved does not mean there is not exclusive occupation. It merely means that the occupation has been varied by consent of the parties. SC's right of access to the machines to maintain and repair them is sufficient for the purposes for which occupation is obtained. Unconditional or unlimited rights of access are not a necessary condition for a right of occupation. The essential point is that the rights of access are consistent with the purpose for which occupation is envisaged.

Findings of the Court

22 It is settled case-law, first of all, that the exemptions provided for by Article 13 of the Sixth Directive have their own independent meaning in Community law and

that they must therefore be given a Community definition (see Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 51, and Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 25).

23 Secondly, the terms used to specify the exemptions provided for by 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 (see, *inter alia*, *Commission* v *Ireland*, paragraph 52, and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25).

24 With regard to the exemptions in Article 13B(b) of the Sixth Directive, the provision does not define 'letting', nor does it refer to relevant definitions adopted in the legal orders of the Member States (see Case C-326/99 '*Goed Wonen*' [2001] ECR I-6831, paragraph 44).

25 However, it is also settled that the fundamental characteristic of a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to that effect, '*Goed Wonen*', paragraph 55, and Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 21).

26 Moreover, in order to determine the nature of a taxable transaction, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features (see Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraph 12, and *Stockholm Lindöpark*, paragraph 26).

27 According to the information supplied by the national court, the subject matter of the agreement is not the passive provision of an area or space, together with the grant to the other party of a right to occupy it as though he were the owner and to exclude all other persons from the enjoyment of that right.

28 That finding is supported, first of all, by the fact that the agreement does not prescribe any precisely defined area or space for the installation of the vending machines at the premises. Contrary to the position in relation to the characteristics of a letting, the location of the machine is material only in so far as it enables the maximum possible number of sales to be generated. Subject to that criterion, under the agreement there is nothing to prevent the machines from being moved about, to a degree, as the site owner wishes.

29 Secondly, the agreement does not confer on SC the right to control or restrict access to the area where the machines are placed. Whilst it is true that under the agreement SC retains an exclusive right of access to the machines to maintain them, keep them stocked with cigarettes and remove the cash inside, that right concerns only access to the machine itself, in particular its inner mechanism, and not access to that part of the premises where the machine is situated. In any event, according to the information provided by SC at the hearing, the right is restricted to the opening hours of the commercial establishment and cannot be exercised without the site owner's consent. Furthermore, third parties have access to the machines within such practical parameters as are imposed by the site owner, in particular during the opening hours of the establishment, and not according to limits determined by SC.

30 In those circumstances, the occupation of an area or space at the commercial premises is, under the terms of the agreement, merely the means of effecting the

supply which is the subject matter of the agreement, namely the guarantee of exercise of the exclusive right to sell cigarettes at the premises by installing and operating automatic vending machines, in return for a percentage of the profits.

31 It follows from the foregoing considerations that the reply to the question referred should be that, on a proper construction of Article 13B(b) of the Sixth Directive, the grant, by the owner of premises to an owner of a cigarette vending machine, of the right to install the machine, and to operate and maintain it in the premises for a period of two years, in a place nominated by the owner of the premises, in return for a percentage of the gross profits on the sales of cigarettes and other tobacco goods in the premises, but with no rights of possession or control being granted to the owner of the machine other than those expressly set out in the agreement between the parties, does not amount to a letting of immovable property within the meaning of that provision.

Costs

32 The costs incurred by the United Kingdom 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 action 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 question referred to it by the House of Lords by order of 7 June 2001, hereby rules:

On a proper construction of Article 13B(b) 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, the grant, by the owner of premises to an owner of a cigarette vending machine, of the right to install the machine, and to operate and maintain it in the premises for a period of two years, in a place nominated by the owner of the premises, in return for a percentage of the gross profits on the sales of cigarettes and other tobacco goods in the premises, but with no rights of possession or control being granted to the owner of the machine other than those expressly set out in the agreement between the parties, does not amount to a letting of immovable property within the meaning of that provision.

Timmermans Edward La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 12 June 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber