JUDGMENT OF THE COURT (Fourth Chamber)
19 March 1991 *

In Case C-109/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bestendige Deputatie van de Provincieraad van Brabant (executive branch of the Provincial Council of Brabant), Belgium, for a preliminary ruling in the proceedings pending before that body between

NV Giant

and

Gemeente Overijse

on the interpretation of Article 33 of Directive 77/388/EEC, the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes — common system of value added tax: uniform basis of assessment (Official Journal L 145, p. 1),

THE COURT (Fourth Chamber),

composed of: M. Díez de Velasco, President of the Chamber, C. N. Kakouris and P. J. G. Kapteyn, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Louterman, Principal Administrator,

after considering the written observations submitted on behalf of the Commission of the European Communities, by J. F. Buhl and B. J. Drijber, members of its Legal Department, acting as Agents,

having regard to the Report for the Hearing,

* Language of the case: Dutch.

after hearing oral argument from the Commission at the hearing on 15 January1991,

after hearing the Opinion of the Advocate General at the sitting on 7 February 1991,

gives the following

Judgment

1 By order dated 23 January 1990, which was received at the Court on 19 April 1990, the Bestendige Deputatie van de Provincieraad van Brabant referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 33 of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — common system of value added tax: uniform basis of assessment (Official Journal L 145, p. 1, hereinafter referred to as 'the Sixth Directive').

2 That question arose in the context of a dispute between NV Giant and the Commune of Overijse over the levying of a tax on performances and entertainments charged by the commune.

3 It appears from the documents in the case that on 2 March 1983, the Commune of Overijse adopted a tax regulation under Article 2 of which any person who habitually or occasionally organizes public performances or entertainments within the commune and requires those attending or participating to pay an entrance fee must pay a special tax on the gross amount of all receipts. Under Article 3 of the regulation, that tax is payable on the total amount of entrance fees, rental and cloakroom charges, the sale of programmes or dance cards, the proceeds from any refreshments, and so forth. In accordance with paragraph 1 B (c) of Article 4 of the tax regulation, the tax is levied at the rate of 25% on dance halls and restaurants attached to them. It is collected on a yearly basis. The tax regulation was adopted for a period of six years, until the end of 1988.

4 On 28 June 1989, NV Giant lodged an appeal before the Bestendige Deputatie van de Provincieraad van Brabant against the tax levied for 1988. It claimed that the tax can be characterized as a turnover tax and is contrary to Article 33 of the Sixth Directive, which prohibits the introduction of turnover taxes other than value added tax.

5 The Bestendige Deputatie, considering that the settlement of the dispute depended on the interpretation of the Sixth Directive, decided to seek a preliminary ruling on the following question:

'Is the tax regulation of the Commune of Overijse dated 2 March 1983, by which any person who habitually or occasionally organizes public performances or entertainments within the commune and requires those attending or participating to pay an entrance fee must pay a special tax on the gross amount of all receipts and by which in particular an annual tax of 25% is imposed on dance halls and restaurants attached to them on the total amount of entrance fees, rental and cloakroom charges, the sale of programmes or dance cards, the proceeds from all refreshments and any contributions or consideration which may replace or supplement such fees or prices, as well as any other charges, contrary to the prohibition on the imposition of any taxes on turnover other than value added tax laid down in Article 33 of Directive 77/388/EEC, or not?'

6 Reference is made to the Report for the Hearing for a fuller account of the legal background, the facts of the case and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 The purpose of the question referred to the Court is essentially to ascertain whether Article 33 of the Sixth Directive precludes the collection of a special tax on performances and entertainments of the kind levied by the Commune of Overijse under its regulation of 2 March 1983.

8 It must be borne in mind that Article 33 of the Sixth Directive provides that 'without prejudice to other Community provisions, the provisions of 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 characterized as turnover taxes'.

9 As the Court pointed out in its judgment in Case 73/85 (*Kerrutt* v *Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219), it is apparent from that provision that Community law permits systems of taxation which are concurrent with value added tax. Member States may therefore introduce taxes which cannot be characterized as turnover taxes.

10 The answer to the question referred to the Court thus depends on whether the special tax on performances and entertainments in issue, as described in the order for reference, is to be regarded as a turnover tax within the meaning of Article 33 of the Sixth Directive.

11 In order to decide whether a tax can be characterized as a turnover tax it is necessary, in particular, to determine, as the Court stated in its judgment in Case 295/84 (*Rousseau Wilmot* v *Organic* [1985] ECR 3759) and in Case 252/86 (*Bergandi* v *Directeur-général des impôts* [1988] ECR 1343), whether it has the effect of compromising the functioning of the common system of value added tax by levying a charge on the movement of goods and services and on commercial transactions in a way comparable to value added tax.

12 As the Court has consistently held (see, in particular, the judgments in *Rousseau Wilmot* and *Bergandi*, cited above, and in Joined Cases 93/88 and 94/88, *Wisselink and Others* v *Staatssecretaris van Financiën* [1989] ECR 2671), the principle of the common system of value added tax 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. However, value added tax is chargeable on each transaction only after deduction of the amount of value added tax 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 authorized to deduct from the value added tax for which they are liable the value added tax which the goods have already borne.

13 A tax of the kind to which the national court refers in the present case does not possess the characteristics of a turnover tax within the meaning of Article 33 of the Sixth Directive.

14 In the first place, it is not a general tax, since it applies only to a limited category of goods and services. Secondly, it is not charged at each stage of the production and distribution process, since it is imposed annually on the aggregate receipts of taxable undertakings. Thirdly, it is not levied on the value added at each transaction but on the gross amount of all receipts, and it is therefore impossible to establish precisely what fraction of the tax charged on each sale or service may be regarded as having been passed on to the consumer.

15 The answer to the question raised by the Bestendige Deputatie van de Provincieraad van Brabant must therefore be that Article 33 of the Sixth Directive must be interpreted as not precluding the charging of a special tax on performances and entertainments of the kind charged by the Commune of Overijse under its regulation of 2 March 1983.

Costs

16 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 (Fourth Chamber),

in answer to the question referred to it by the Bestendige Deputatie van de Provincieraad van Brabant by order of 23 January 1990, hereby rules:

Article 33 of the Sixth Council Directive (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes — common system of value added tax: uniform basis of assessment (Official Journal L 145, p. 1) must be interpreted as not precluding the charging of a special tax on performances and entertainments of the kind charged by the Commune of Overijse under its regulation of 2 March 1983.

Díez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 19 March 1991.

J.-G. Giraud
Registrar

M. Díez de Velasco
President of the Fourth Chamber