JUDGMENT OF THE COURT (Fifth Chamber)

18 January 2001 *

In Case C-150/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Svea Hovrätt, Sweden, for a preliminary ruling in the proceedings pending before that court between

Svenska Staten (Swedish State)

and

Stockholm Lindöpark AB

and between

Stockholm Lindöpark AB

and

Svenska Staten (Swedish State),

on the interpretation of Article 13A(1)(m) and Article 13B(b) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the

* Language of the case: Swedish.

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: D.A.O. Edward, acting as President of the Chamber, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Svenska Staten, by H. Regner and H. Rustand, acting as Agents,

— Stockholm Lindöpark AB, by P.-O. Nordh, Advokat,

— Commission of the European Communities, by E. Traversa and K. Simonsson, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Swedish State, represented by H. Regner, of Stockholm Lindöpark AB, represented by P.-O. Nordh, of the United Kingdom Government, represented by J.E. Collins, acting as Agent, and of the Commission, represented by K. Simonsson, at the hearing on 29 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2000,

gives the following

Judgment

1 By order of 26 March 1999, received at the Court on 23 April 1999, the Svea Hovrätt (Svea Court of Appeal) 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 13A(1)(m) and 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, 'the Sixth Directive').

2 The three questions have been raised in proceedings between the Swedish State and Stockholm Lindöpark AB ('Lindöpark') concerning damages claimed by Lindöpark from the Swedish State on the ground that, at the time of the Kingdom of Sweden's accession to the European Union, it incorrectly transposed the Sixth Directive, in particular Article 13 thereof.

Community legislation

3 Article 2 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;

2. the importation of goods.'

4 Article 6(1) of the Sixth Directive provides as follows:

'1. "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include *inter alia*:

— assignments of intangible property whether or not it is the subject of a document establishing title,

— obligations to refrain from an act or to tolerate an act or situation,

— the performances of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.'

5 Article 13A(1) of the Sixth Directive is worded as follows:

'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:

...

(m) certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education;

...'.

6 Article 13B 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 for 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.

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

7 Article 17 of the Sixth Directive, as worded pursuant to amendment by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1), provides:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country;

(b) value added tax due or paid in respect of imported goods within the territory of the country;

...'

National legislation

8 Under Article 1 of Chapter 1 of the Mervärdesskattelagen (1994:200) (Swedish VAT Law: hereinafter 'the VAT Law'), VAT is to be paid to the State on *inter alia* supplies of taxable goods or services effected during the course of business. Chapter 3, Article 1, of the VAT Law provides that supplies of goods or services and imports are to be taxable, unless provision to the contrary is made in that chapter. For a taxable person, the counterpart of being subject to tax is that he may, under Article 3 of Chapter 8 of the VAT Law, deduct input tax on acquisitions or imports for the purposes of his business.

9 Articles 2 and 3 of Chapter 3 of the VAT Law set out various exemptions in relation to immovable property. According to the order for reference, the first paragraph of Article 2 provides for 'an exemption in the case of transactions relating to immovable property, including the assignment and grant of leases, tenancy rights, housing cooperative rights, leasehold rights, servitudes and other rights in immovable property'. Prior to 1 January 1997, that provision contained a second paragraph which was worded as follows:

'The exemption from value added tax shall also cover the supply of premises or other facilities or part thereof for the purpose of the practice of sport or physical education, as well as the related supply of accessories or other arrangements for the practice of sport or physical education.'

10 That provision was repealed by amending legislation which entered into force on 1 January 1997.

The main proceedings and the questions referred for a preliminary ruling

11 Lindöpark is a development company which runs a golf course for the exclusive use of businesses, which are thus able to offer both their staff and their clients an opportunity to play golf on the course.

12 Under the second paragraph of Article 2 of Chapter 3 of the VAT Law, which was in force until 1 January 1997, the 'company golf' activity run by Lindöpark was exempt from VAT. Lindöpark was therefore not entitled to deduct input VAT incurred on goods and services used for the purposes of that activity. Since the amendment of that provision entered into force on 1 January 1997, Lindöpark's activities have been subject to VAT and it is therefore entitled to deduct input VAT.

13 Lindöpark contends that the legislation in force until 1 January 1997 constituted a breach of its rights, at least from the time of the Kingdom of Sweden's accession to the European Union, that is, from 1 January 1995. It therefore brought proceedings against the Swedish State before the Solna Tingsrätt (Solna District Court), seeking damages of SEK 500 000. This sum purportedly represents the input tax paid between 1 January 1995 and 31 December 1996, which Lindöpark was not entitled to deduct during that period, with interest amounting to SEK 41 632 from the date when the deductions could theoretically have been made. Lindöpark claims that the Swedish State had failed to implement the Sixth Directive correctly so far as Article 13 was concerned.

14 By judgment of 29 September 1997, the Solna Tingsrätt upheld Lindöpark's claims and ordered the Swedish State to pay it damages of SEK 500 000, together with interest to run from the date on which the action was commenced.

15 The Swedish State appealed against that judgment to the Svea Hovrätt. Lindöpark also appealed in so far as its claim had not been fully upheld.

16 Since the Svea Hovrätt was uncertain about the interpretation of the Sixth Directive, and in particular Article 13 thereof, in the circumstances of the case, it decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do the provisions of Article 13A(1)(m) and 13B(b) of the Sixth VAT Directive preclude national legislation providing for a general exemption from VAT for the supply of sports facilities, as laid down in the second paragraph of Article 2 of Chapter 3 of the Mervärdesskattelagen (1994:200), in the version in force before 1 January 1997?

2. Does Article 13, in combination with Articles 2, 6 and 17 of the Sixth VAT Directive, confer on individuals rights on which they can rely as against Member States before a national court?

In the event that the first two questions are answered in the affirmative:

3. Does the implementation and application of the exemption provided for in the second paragraph of Article 2 of Chapter 3 of the Mervärdesskattelagen (1994:200) entail a sufficiently serious (clear) infringement of Community law such as to render a Member State liable in damages?'

The first question

17 By its first question, the national court is asking essentially whether the provisions of Article 13A(1)(m) and 13B(b) of the Sixth Directive preclude national legislation from providing for a general exemption from VAT for the supply of premises and other facilities and the related supply of accessories or other arrangements for the practice of sport or physical education, including services supplied by profit-making organisations.

18 The supply of premises and other facilities and the related supply of accessories or other arrangements for the practice of sport or physical education constitute supplies of services within the meaning of Article 6 of the Sixth Directive. Therefore, those activities are, in principle, subject to VAT under Article 2(1) of the directive.

19 By way of exception to the principle laid down in Article 2, Article 13A(1)(m) of the Sixth Directive provides for an exemption from tax for supplies of services linked to sport or physical education. That exemption is, however, specifically limited to supplies provided by non-profit-making organisations. It follows that, where such services are supplied by profit-making suppliers, they cannot fall within the scope of the exemption. Chapter 3 of the VAT Law, in so far as it provides, in the second paragraph of Article 2, for a general exemption for such supplies without restricting its scope to non-profit-making suppliers, is therefore inconsistent with the wording of the relevant provisions of the Sixth Directive.

20 As justification for the national rules, the Swedish State argues that another provision applies in the case before the national court, namely Article 13B(b) of the Sixth Directive, which exempts the leasing and letting of immovable property. Since the main characteristic of Lindöpark's activities is the letting out to clients

of a golf course, which is immovable property, it was proper to apply the exemption to Lindöpark's activities.

21 As to that argument, the Court is called upon, in the context of the questions referred by the national court, to provide that court with the criteria for determining whether a provision of national law such as that at issue is consistent with the Sixth Directive. It is for the national court, which alone has jurisdiction in that regard, to resolve the main proceedings in the light of their particular facts.

22 As regards the national legislation at issue, it is certainly not impossible that in certain circumstances a supply of premises for the practice of sport or physical education may constitute the letting of immovable property and thus fall within the scope of the exemption in Article 13B(b) of the Sixth Directive. However, the national legislation does not refer to a particular case but provides for a general exemption for all services linked to the practice of sport or physical education without making any distinction, among those services, between those that constitute the letting of immovable property and other services. By so doing, it introduces a new category of exemption for which the Sixth Directive does not provide.

23 Therefore, the answer to be given to the first question must be that the provisions of Article 13A(1)(m) and 13B(b) of the Sixth Directive preclude national legislation from providing for a general exemption from VAT for the supply of premises and other facilities and the related supply of accessories or other arrangements for the practice of sport or physical education, including services supplied by profit-making organisations.

24 As regards the application of Article 13B(b) of the Sixth Directive to the case before the national court, the Court of Justice can do no more than provide

guidance based on well-established case-law to the national court and it is for that court to determine this point in the dispute before it.

25 First, it has consistently been held that 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*, Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 13; Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 52; and Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 64).

26 Second, services linked to the practice of sport or physical education must, so far as is possible, be considered as a whole. According to the case-law of the Court of Justice, 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* v *Finanzamt Flensburg* [1996] ECR I-2395, paragraph 12). As the Commission has rightly pointed out, the activity of running a golf course generally entails not only the passive activity of making the course available but also a large number of commercial activities, such as supervision, management and continuing maintenance by the service-provider, provision of other facilities and so forth. In the absence of quite exceptional circumstances, letting out a golf course cannot therefore constitute the main service supplied.

27 Finally, account should be taken of the fact that permission to use a golf course will normally be restricted as regards the purpose for which it is used and the period of its use. According to the case-law of the Court, the period of enjoyment of immovable property is an essential element of a lease (judgments cited above in *Commission* v *Ireland*, paragraph 56, and *Commission* v *United Kingdom*, paragraph 68).

28 It is for the national court to determine, in the light of those factors, whether the activity in question in the main proceedings may be considered exempt from VAT under Article 13B(b) of the Sixth Directive.

The second question

29 By its second question, the national court asks essentially whether the provisions of Article 17(1) and (2) of the Sixth Directive, read together with those of Articles 2, 6 and 13, are sufficiently clear, precise and unconditional for an individual to rely on them as against a Member State before a national court.

30 In order to answer that question, it is sufficient to refer to the Court's well-established case-law on the circumstances in which a directive may be relied on (see Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraphs 17 to 25).

31 It follows from that case-law that, despite the relatively wide discretion enjoyed by the Member States in implementing certain provisions of the Sixth Directive, individuals may effectively plead before national courts the provisions of the directive which are sufficiently clear, precise and unconditional (see Case C-10/92 *Balocchi* v *Ministero delle Finanze* [1993] ECR I-5105, paragraph 34, and Case C-62/93 *BP Soupergaz* v *Greek State* [1995] ECR I-1883, paragraph 34).

32 The Court has already specifically recognised that Article 17(1) and (2) (*BP Soupergaz*, paragraph 36) and Article 13B(d)(1) (*Becker*, paragraph 49) of the Sixth Directive have those characteristics. Article 2 and Article 6 (only paragraph 1 of which has any bearing on this case) and Article 13B(b) also satisfy the

criteria established by the case-law cited in paragraph 31 above, as the Advocate General observes in paragraphs 45 and 46 of his Opinion.

33 The answer to the second question must therefore be that the provisions of Article 17(1) and (2) of the Sixth Directive, read together with those of Articles 2, 6(1) and 13B(b), are sufficiently clear, precise and unconditional for an individual to rely on them as against a Member State before a national court.

The third question

34 By its third question, the national court asks essentially whether the implementation of a general exemption from VAT for the supply of premises and other facilities and the related supply of accessories or other arrangements for the practice of sport or physical education, where no such general exemption is to be found in the Sixth Directive, constitutes a serious breach of Community law that can render a Member State liable in damages.

35 As a preliminary point, it should be kept in view that in its answer to the second question the Court has found that the provisions of Article 17(1) and (2) of the Sixth Directive, read together with Articles 2, 6(1) and 13B(b), confer on individuals rights on which they may rely as against the Member State concerned before a national court. It follows that Lindöpark may properly pursue the debts which it claims to be owed by the Swedish State and may do so retroactively, basing its claim directly on the provisions of the Sixth Directive which are in its favour. At first sight, therefore, an action for damages founded on the Court's case-law relating to the liability of Member States for breaches of Community law does not seem necessary.

36 Further, in answer to the question, it should be borne in mind that it has also consistently been held that the principle that a Member State may incur liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty (see, in particular, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* v *Germany* [1996] ECR I-4845, paragraph 20; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit International and Others* v *Bundesamt für Finanzen* [1996] ECR I-5063, paragraph 47; and Case C-319/96 *Brinkmann Tabakfabriken* v *Skatteministeriet* [1998] ECR I-5255, paragraph 24).

37 Likewise, the Court, having regard to the circumstances of the case, held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (*Brasserie du Pêcheur and Factortame*, paragraph 51; *Dillenkofer*, paragraphs 21 and 23; *Denkavit and Others* paragraph 48; *Brinkmann*, paragraph 25; see also Case C-140/97 *Rechberger and Others* v *Austria* [1999] ECR I-3499, paragraph 21; and Case C-424/97 *Haim* v *Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, paragraph 36).

38 Although, in principle, it is for the national courts to determine whether the conditions for State liability for breach of Community law are met, the Court of Justice may nevertheless indicate certain circumstances which the national courts may take into account in their evaluation. In the present case, the national court inquires about the conditions for there to be a sufficiently serious breach of Community law.

39 On that point, according to the case-law of the Court, a breach is sufficiently serious where, in the exercise of its legislative powers, a Member State has manifestly and gravely disregarded the limits on the exercise of its powers.

Factors which the competent court may take into consideration include the clarity and precision of the rule breached (*Rechberger*, paragraph 50).

40 As the Court found in answering the first two questions, it is evident from the provisions of the VAT Law at issue in the main proceedings that the general exemption enacted by the Swedish legislature has no basis in the Sixth Directive and therefore became clearly incompatible with the directive as from the date of the Kingdom of Sweden's accession to the European Union. Given the clear wording of the Sixth Directive, the Member State concerned was not in a position to make any legislative choices and had only a considerably reduced, or even no, discretion. In those circumstances, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see Case C-5/94 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)* [1996] ECR 1-2553, paragraph 28; and *Dillenkofer and Others*, paragraph 25). Furthermore, the fact that the national legislation at issue in the main proceedings was repealed with effect from 1 January 1997, two years after Sweden's accession, indicates that the Swedish legislature had become aware that it was incompatible with Community law.

41 The Swedish State contends that, even assuming a breach of Community law, it was in any event excusable since the Court had not yet clarified the relevant provisions of the Sixth Directive and the Commission had not initiated any infringement proceedings, which left it with no reliable guidance as to the effect of the relevant Community law. That contention must be rejected. As the Advocate General makes clear in paragraphs 73 and 74 of his Opinion, there could be no reasonable doubt, capable of extenuating the alleged breach, as to the import of the provisions in question.

42 The answer to the third question must therefore be that the implementation of a general exemption from VAT for the supply of premises and other facilities and for the related supply of accessories or other arrangements for the purposes of the

practice of sport or physical education, where no such exemption is to be found in Article 13 of the Sixth Directive, constitutes a serious breach of Community law that can render a Member State liable in damages.

Costs

43 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 questions referred to it by the Svea Hovrätt by order of 26 March 1999, hereby rules:

1. **The provisions of Article 13A(1)(m) and 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, preclude national legislation from providing for a general exemption from value added tax for the supply of premises and other facilities and the related supply of accessories or other arrangements for the practice of sport or physical education, including services supplied by profit-making organisations.

2. The provisions of Article 17(1) and (2) of Directive 77/388, read together with those of Articles 2, 6(1) and 13B(b), are sufficiently clear, precise and unconditional for an individual to rely on them as against a Member State before a national court.

3. The implementation of a general exemption from value added tax for the supply of premises and other facilities and for the related supply of accessories or other arrangements for the purposes of the practice of sport or physical education, where no such exemption is to be found in Article 13 of Directive 77/388, constitutes a serious breach of Community law that can render a Member State liable in damages.

Edward Jann Sevón

Delivered in open court in Luxembourg on 18 January 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber