JUDGMENT OF THE COURT (First Chamber)

3 March 2005 *

In Case C-472/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 7 November 2003, received at the Court on 12 November 2003, in the proceedings

Staatssecretaris van Financiën

v

Arthur Andersen & Co. Accountants c.s.,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), N. Colneric, K. Schiemann and E. Juhász, Judges,

* Language of the case: Dutch.

Advocate General: M. Poiares Maduro,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 November 2004,

after considering the observations submitted on behalf of:

— Arthur Andersen & Co. Accountants c.s., by R. Vos and P.J.B.G. Schrijver, advocaten,

— the Netherlands Government, by H.G. Sevenster and N.A.J. Bel, acting as Agents,

— the Commission of the European Communities, by R. Lyal, A. Weimar and L. Ström-van Lier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2005,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of Article 13B(a) 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 That reference was made in the course of proceedings concerning the refusal of the Staatssecretaris van Financiën (Netherlands State Secretary for Finance) to exempt from value added tax ('VAT') 'back office' activities performed by Arthur Andersen & Co. Accountants c.s. ('the defendant') in the life assurance sector.

Legal background

Community legislation

3 According to Article 4(1) of the Sixth Directive, a taxable person means any person who independently carries out in any place any economic activity specified in paragraph 2 of that article, whatever the purpose or the results of that activity.

4 Article 4(4) provides that the term 'independently' in paragraph 1 excludes employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

5 Article 13 B of the Sixth Directive states:

'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) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents ...'

6 Article 2 of Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities (OJ 1977 L 26, p. 14), in force at the material time, provided:

'1. This Directive shall apply to the following activities falling within ex ISIC Group 630 in Annex III to the General Programme for the abolition of restrictions on freedom of establishment:

(a) professional activities of persons who, acting with complete freedom as to their choice of undertaking, bring together, with a view to the insurance or

reinsurance of risks, persons seeking insurance or reinsurance and insurance or reinsurance undertakings, carry out work preparatory to the conclusion of contracts of insurance or reinsurance and, where appropriate, assist in the administration and performance of such contracts, in particular in the event of a claim;

(b) professional activities of persons instructed under one or more contracts or empowered to act in the name and on behalf of, or solely on behalf of, one or more insurance undertakings in introducing, proposing and carrying out work preparatory to the conclusion of, or in concluding, contracts of insurance, or in assisting in the administration and performance of such contracts, in particular in the event of a claim;

...

2. This Directive shall apply in particular to activities customarily described in the Member States as follows:

...

(b) activities referred to in paragraph 1(b):

...

— in the Netherlands:

— Gevolmachtigd agent,

— Verzekeringsagent;

...'

National legislation

7 Article 11 of the Wet op de omzetbelasting 1968 (Law of 1968 on turnover tax) provides:

'The following are exempt from taxation on the conditions laid down by general administrative measures:

...

(k) insurance and the performance of services carried out by insurance agents.'

The background to the dispute and the question referred for a preliminary ruling

8 At the material time in the main proceedings, the defendant, which was established in Rotterdam (Netherlands), included a private company established under Netherlands law called Andersen Consulting Management Consultants ('ACMC').

9 On 26 May 1997, Royal Nederland Verzekeringsgroep NV, Universal Leven NV ('UL'), a company active on the life assurance market through insurance agents, and

ACMC concluded a collaboration agreement, which provided that ACMC would undertake on behalf of UL various activities designated in that agreement as 'back office' activities. ACMC delegated these activities to one of its divisions, Accenture Insurance Services ('AIS'), which shares premises with UL.

10 The 'back office' activities in question are described as follows in the order for reference: the acceptance of applications for insurance, the handling of amendments to contracts and premiums, the issuing, management and rescission of policies, the management of claims, the setting and paying of commission to insurance agents, the organisation and management of information technology, the supply of information to UL and to insurance agents and the drafting of reports for insured parties and third parties, such as the Fiscale Inlichtingen- en Opsporingsdienst (Tax inquiry and inspection service). When the information supplied by an applicant for insurance shows that a medical examination is necessary, the decision on acceptance of the risk is made by UL, otherwise that decision is made by ACMC and binds UL. AIS is in charge of almost all contact with the insurance agents.

11 UL has staff corresponding to the equivalent of 2.9 full-time staff ('FTS'), whilst AIS has 17 FTS working on the 'back office' activities. The AIS staff are trained in life assurance.

12 The collaboration agreement provides for the formation of two committees, the 'Review Committee' and the 'Operating Committee', composed of representatives of UL and of ACMC, with the tasks of assessing the cooperation between UL and ACMC, ensuring compliance with the terms of the agreement, planning the 'back office' activities, discussing developments in insurance and their impact on those activities and resolving any disputes relating to that agreement. It provides for the

appointment of a 'Service manager' and an 'Operational manager', who are to oversee the day-to-day cooperation between UL and AIS in order to ensure the efficiency of the 'back office' activities. It contains an exclusivity clause prohibiting ACMC from performing for third parties 'back office' activities comparable to those performed for UL. It provides for remuneration, calculated on the basis of the insurance portfolio and premiums received, for those 'back office' activities and a minimum remuneration.

13 In its declaration for the month of September 1998, the defendant stated that it had paid the amount of NLG 10 000 in respect of turnover tax. That sum corresponded to the difference between, on the one hand, the turnover tax calculated on the payment invoiced to UL for the 'back office' activities carried out during that period and, on the other, the turnover tax deducted in that respect.

14 Considering that the 'back office' activities carried out for UL were exempt from turnover tax, the defendant sought from the relevant inspector reimbursement of the sum of NLG 10 000, which was refused. It appealed against that refusal to the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) (Netherlands), which upheld its claim by judgment of 23 October 2001. That court considered that, by their collaboration, UL and ACMC intended jointly to make use of their skills in a common purpose, namely the joint operation of an insurance company. Thus, according to that court, the activities carried out by ACMC for UL cannot be regarded as the provision of financial services subject to turnover tax.

15 The Netherlands State Secretary for Finance appealed on a point of law against the judgment of the Gerechtshof te 's-Gravenhage to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The defendant cross-appealed.

16 The Hoge Raad der Nederlanden considers that the activities in question cannot be exempt from VAT as insurance transactions. To that effect, it observes, firstly, that according to the documents in the file and the findings of the Gerechtshof te 's-Gravenhage UL alone bears the risks inherent in the performance of insurance activities and, secondly, that the insurance contracts are underwritten in the name of UL and not of ACMC.

17 However, it is unsure as to the concept of 'services performed by an insurance agent' within the meaning of Article 13B(a) of the Sixth Directive. It observes that certain elements characteristic of that concept, such as the requirement for a direct link between the taxable person and the insured party, do indeed appear to be lacking in the present case. However, it adds that the activities in question constitute services relating to insurance transactions in which ACMC intervenes to a great extent as an agent. According to it, ACMC acts as such firstly between the insurance agents and UL by handling the insurance applications sent by them and very often by finalising them in the name of UL, and secondly between the latter and the insured parties by acting on behalf of UL with regard to those insured parties during the lifetime of the contract and when it is rescinded.

18 In those circumstances the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Where a taxable person has concluded an agreement with a (life) assurance company, such as the agreement at issue between ACMC and UL, under which that

taxable person undertakes, for a certain remuneration and with the aid of qualified personnel who are expert in the insurance field, most of the actual activities related to insurance — including, as a rule, the taking of decisions that bind the insurance company to enter into insurance contracts and maintaining contact with the agents and, as the occasion arises, with the insured — while the insurance contracts are concluded in the name of the insurance company and the insurance risk is borne by the latter, are the activities undertaken by that taxable person in execution of the agreement "related services performed by insurance brokers and insurance agents" within the meaning of Article 13B(a) of the Sixth Directive?'

19 By a letter of 5 January 2004, the national court asked the parties whether they considered that the judgment of 20 November 2003 in Case C-8/01 *Taksatorringen* [2003] ECR I-13711 meant that the question referred for a preliminary ruling should be withdrawn. By letter of 11 February 2004, after having heard the views of the parties, it informed the Court that it wished to maintain its reference for a preliminary ruling.

The question referred for a preliminary ruling

20 First of all, it is necessary to reject the argument in the defendant's written observations that ACMC was bound to UL by a relationship of subordination such as to exempt the activities in question from VAT under Article 4(4) of the Sixth Directive.

21 The reference in that provision to the concepts of 'employer' and 'employee' shows that the exemption from taxation provided for therein presupposes the existence of an employment relationship, which is clearly lacking between ACMC and UL.

22 Furthermore, as stated in the order for reference and not contested by the defendant, ACMC has no contractual relationship with the insured parties, since the insurance contracts are underwritten by UL. The national court was therefore correct to consider that ACMC's activities do not constitute insurance transactions within the meaning of Article 13B(a) of the Sixth Directive (see, to that effect, Case C-240/99 *Skandia* [2001] ECR I-1951, paragraphs 41 and 43).

23 Consequently, in the present case the Court is requested to interpret exclusively the concept of 'services related to insurance transactions performed by insurance brokers and insurance agents' within the meaning of Article 13B(a) of the Sixth Directive and to state whether that concept, which is not defined in that directive, covers activities such as those at issue in the main proceedings.

24 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 (*Skandia*, paragraph 32, and *Taksatorringen*, paragraph 36).

25 It is also settled law that those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another and must be placed in the general context of the common system of VAT (*Skandia*, paragraph 23).

26 In this case, the defendant emphasises the fact that the staff of AIS, to whom the activities in question were delegated by ACMC, are skilled in the field of life assurance and that those activities are related to insurance transactions.

27 However, as the defendant itself admitted at the hearing, those two factors are not sufficient to make ACMC an insurance agent. It is in fact necessary to assess also whether the activities in question correspond to those of such an agent.

28 The defendant contends that this is the case. It adds that ACMC has a relationship both with the insurer, UL, and with the insured parties and beneficiaries.

29 In that regard, it should be noted that, according to the information in the order for reference, ACMC is bound, in the pursuit of its activities, by an exclusivity clause in favour of UL (see paragraph 12 of the present judgment). Therefore it does not have complete freedom as to choice of insurer, a characteristic of the professional activity described in Article 2(1)(a) of Directive 77/92 corresponding to that of an insurance broker.

30 The defendant submits that ACMC's activities are identical to those of the 'gevolmachtigd agent' (agent) referred to in Article 2(2)(b) of Directive 77/92 that are described in Article 2(1)(b). At the hearing, it emphasised that ACMC has the power, both upon signature of the contract and execution thereof, to render UL liable with regard to the insured parties and beneficiaries.

31 In that connection, it should be noted that it was indeed held, in relation to the Sixth Directive, that the professional activity described in Article 2(1)(b) of Directive 77/92 'involves the power to render the insurer liable in respect of an insured person who has incurred a loss' (*Taksatorringen*, paragraph 45).

32 However, as the Advocate General points out in point 31 of his Opinion, it cannot be inferred from that case-law that the existence of a power to render the insurer liable is the determining criterion for recognition of an insurance agent within the meaning of Article 13B(a) of the Sixth Directive. Recognition of a person as an insurance agent presupposes an examination of what the activities in question comprise.

33 In that regard, irrespective of whether, as part of its activities, ACMC has a relationship with both the insurer and the insured parties, as required by the case-law for recognition as an insurance agent (*Taksatorringen*, paragraph 44), it is apparent from the information contained in the order for reference, as supplemented by the information provided by the defendant in its written observations, that ACMC's activities consist in handling insurance applications, assessing the risks to be insured, determining whether a medical examination is required, deciding whether to accept the risk where such an examination is deemed unnecessary, issuing, managing and rescinding insurance policies and making amendments to contracts and modifying premiums, receiving premiums, managing claims, setting and paying commission for insurance agents and maintaining contact with them, handling aspects relating to reinsurance and supplying information to insured parties and insurance agents and to other interested parties, such as the tax authorities.

34 In the light of that information, it must be held that, although they contribute to the essence of the activities of an insurance company, the services rendered by ACMC to UL, which are not insurance transactions within the meaning of Article 13B(a) of the Sixth Directive (see paragraph 22 of the present judgment), do not constitute services that typify an insurance agent either.

35 The services in question have specific aspects, such as the setting and payment of commission for insurance agents, the maintenance of contact with them, the handling of aspects relating to reinsurance and the supply of information to insurance agents and to the tax authorities, which, quite clearly, are not part of the activities of an insurance agent.

36 Furthermore, as the Commission of the European Communities stated in its written observations and as the Advocate General pointed out in point 32 of his Opinion, essential aspects of the work of an insurance agent, such as the finding of prospects and their introduction to the insurer, are clearly lacking in the present case. It is apparent from the order for reference — and the defendant has not disputed — that the activity of ACMC starts only when it handles the applications for insurance sent to it by the insurance agents through whom UL seeks prospects in the Netherlands life assurance market.

37 As the Commission submitted in its written observations and at the hearing, the agreement between ACMC and UL must be regarded as a contract for subcontracted services under which ACMC provides UL with the human and administrative resources which it lacks, and supplies it with a series of services to

assist it in the tasks inherent in its insurance activities. In that regard, it is important to note, on reading the information supplied by the national court, that the staff of UL corresponds to only 2.9 FTS, whereas AIS has 17 FTS working on the 'back office' activities, and that the staff of AIS and UL share the same premises.

38 Consequently, the services rendered by ACMC to UL must be regarded as a form of cooperation consisting in assisting UL, for payment, in the performance of activities which would normally be carried out by it, but without having a contractual relationship with the insured parties. Such activities constitute a division of UL's activities and not the performance of services carried out by an insurance agent (see, by analogy, Case C-235/00 *CSC Financial Services* [2001] ECR I-10237, paragraph 40).

39 In the light of the foregoing, the answer to the question referred to the Court must be that Article 13B(a) of the Sixth Directive must be interpreted as meaning that 'back office' activities, consisting in rendering services, for payment, to an insurance company do not constitute the performance of services relating to insurance transactions carried out by an insurance broker or an insurance agent within the meaning of that provision.

Costs

40 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. The costs incurred in submitting observations to the Court, other than those of the parties to the main proceedings, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 13B(a) 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 must be interpreted as meaning that 'back office' activities, consisting in rendering services, for payment, to an insurance company do not constitute the performance of services relating to insurance transactions carried out by an insurance broker or an insurance agent within the meaning of that provision.

[Signatures]