JUDGMENT OF THE COURT (Sixth Chamber)
6 February 1997 *

In Case C-247/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Finanzamt Augsburg-Stadt

and

Marktgemeinde Welden

on the interpretation of Article 4(1), (2) and (5) and Article 13(B) and (C) 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 (OJ 1977 L 145, p. 1),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray, C. N. Kakouris, P. J. G. Kapteyn and H. Ragnemalm (Rapporteur), Judges,

* Language of the case: German.

Advocate General: A. La Pergola,
Registrar: R. Grass, Registrar,

after considering the written observations submitted on behalf of:

— Finanzamt Augsburg-Stadt, by Alto Schwarz, Leitender Regierungsdirektor, Amtvorsteher, acting as Agent,

— Commission of the European Communities, by Jürgen Grunwald, Legal Adviser, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 October 1996,

gives the following

Judgment

1 By order of 21 March 1995, received at the Court on 17 July 1995, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 4(1), (2) and (5) and Article 13(B) and (C) 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 (OJ 1977 L 145, p. 1; the 'Sixth Directive').

2 The questions were raised in proceedings between Finanzamt Augsburg-Stadt and Marktgemeinde Welden, a German municipality (hereinafter 'the municipality'), concerning its status as a VAT taxable person.

3 Article 4 of the Sixth Directive defines the expression taxable person. As far as bodies governed by public law are concerned, Article 4(5) provides as follows:

'States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

Member States may consider activities of these bodies which are exempt under Article 13 or 28 as activities which they engage in as public authorities.'

4 Article 13 of the Sixth Directive provides that certain activities or transactions are exempt from VAT. Among those activities and transactions, Article 13(B)(b) mentions the leasing and letting of immovable property, with the exception of a number of transactions which are not at issue in this case.

5 Article 13(C) of the Sixth Directive states, however, that Member States may grant taxable persons the right to opt to be taxed on the leasing and letting of immovable property.

6 Under Paragraph 4(12) of the Umsatzsteuergesetz 1980 (German Law on Turnover Tax; hereinafter the 'UStG'), the leasing and letting of immovable property are in principle exempt from turnover tax.

7 Under Paragraph 9 of the UStG, a trader may treat turnover not subject to turnover tax under, *inter alia*, Paragraph 4(12) of the UStG as if he were a taxable person where the turnover was realized from another trader for the requirements of his undertaking.

8 The term 'trader' is defined in Paragraph 2(1) of the UStG as 'anyone who exercises on own account an industrial, commercial or professional activity'. Under Paragraph 2(3), legal persons governed by public law are only involved in such activities in relation to their industrial or commercial establishments and to their agricultural or forestry operations.

9 According to the case-file, the municipality constructed a new building and the premises were let by the municipality itself to a brewery which operated them as a restaurant. The municipality did not supply the restaurant equipment, such as the cookers, machines, extractor hoods, furniture and crockery.

10 Under Paragraph 9 of the UStG, the municipality renounced tax exemption for the rent as provided for in Paragraph 4(12) of the UStG, and declared as input tax the VAT paid on the turnover relating to the costs of erecting the building.

11 The tax authority, Finanzamt Augsburg-Stadt, did not accept the municipality's renunciation on the ground that the letting of the restaurant in the new building was not an activity of an industrial or commercial nature, since the equipment necessary for its operation had not been leased at the same time. Since it had not acted as a trader, the municipality could not be regarded as a VAT taxable person.

12 The municipality brought an action challenging that decision in the Finanzgericht (Finance Court), which upheld it on the basis of the following reasoning. According to the generally accepted view in Germany, the letting of an establishment is treated as an industrial or commercial activity only if the lessor provides the equipment where this is required by the installations and allows the lessee to use it. Otherwise, what is involved is asset management. It appears, however, from the provisions of the Sixth Directive that a body governed by public law will not be refused the status of trader unless it is acting in the exercise of public authority. Since in this case the municipality did not act as a public authority vis-à-vis the lessee, but as a private operator, the Finanzgericht takes the view that it has the status of a trader and may rely directly on the Sixth Directive.

13 Finanzamt Augsburg-Stadt appealed on a point of law to the Bundesfinanzhof, which stayed proceedings and referred the following three questions to the Court for a preliminary ruling:

'1) Does the fourth subparagraph of Article 4(5) of Directive 77/388/EEC allow the Member States to treat tax-exempted activities, in respect of which, however, it is possible to opt to be taxed, of bodies governed by public law as activities which they engage in as public authorities, although they pursue them under the same legal conditions and in the same way as private traders?

2) If the first question is to be answered in the negative: May the scope of the right of option to be taxed be restricted pursuant to the second subparagraph of Article 13(C) of Directive 77/388/EEC in such a way that, where activities coming under the first subparagraph of Article 13(C) of that directive are engaged in by bodies governed by public law, they are treated as business activities only in certain circumstances?

3) If that question is also to be answered in the negative: May a body governed by public law rely directly on Article 4(1) and (2) in conjunction with Article 4(5) of Directive 77/388/EEC in order to oppose the application of a national provision even where the application of those provisions of the directive, albeit having an indirectly favourable effect through the deduction of input tax, also has a burdensome effect?'

The first question

14 The Commission points out that the fourth subparagraph of Article 4(5) of the Sixth Directive allows Member States to treat certain bodies governed by public

law which, under the system of the directive, should in principle be regarded as taxable persons, as non-taxable where their activities are exempt from VAT under Article 13. The two solutions, namely not conferring the status of taxable person on bodies governed by public law or conferring that status on them and exempting them from VAT, have the same result.

15 The Commission considers, however, that the fourth subparagraph of Article 4(5), as a provision derogating from the basic system introduced by the Sixth Directive, should be strictly interpreted and apply to activities exempted under Article 13 only in so far as Article 13 expressly associates them with bodies governed by public law.

16 Consequently, the Commission takes the view that Member States are not authorized under the fourth subparagraph of Article 4(5) of the Sixth Directive to exclude bodies governed by public law from treatment as taxable persons in respect of activities, such as the letting of buildings, which do not satisfy the requirement set out in the preceding paragraph.

17 It should first be noted in this regard that activities pursued as public authorities within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders (Joined Cases 231/87 and 129/88 *Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and Others* [1989] ECR 3233 and Case C-4/89 *Comune di Carpaneto Piacentino and Others* [1990] ECR I-1869, paragraph 8).

18 It does not appear from the case-file that the municipality acted as a public authority within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive. On the contrary, it appears that the letting activity was carried out under the same legal conditions as those to which private traders are subject. Consequently, that provision cannot be used to deny the municipality the status of taxable person.

19 Reference should, however, be made to the fourth subparagraph of Article 4(5) of the directive, which, apart from activities of bodies governed by public law which are not taxable by virtue of the first subparagraph of Article 4(5), gives Member States the option of regarding activities exempt from VAT under Article 13 of the directive as activities of a public authority and hence of excluding bodies governed by public law from treatment as taxable persons in respect of those activities.

20 Since the fourth subparagraph of Article 4(5) of the Sixth Directive does not draw any distinction as between those activities, Member States are authorized to exclude from treatment as taxable persons bodies governed by public law which carry out activities exempted under Article 13 of the directive, even if they are performed in a similar manner to those of a private trader.

21 In so far as a body governed by public law is regarded, by virtue of the fourth subparagraph of Article 4(5), as having carried out an activity as a public authority, it falls to the national court to determine, where necessary, whether the requirements of the second subparagraph of Article 4(5) are satisfied.

22 The answer to the first question must therefore be that the fourth subparagraph of Article 4(5) of the Sixth Directive must be interpreted as permitting Member States to consider that the activities listed in Article 13 of the directive are carried out by bodies governed by public law as public authorities, even if they are performed in a similar manner to those of a private trader.

The second and third questions

23 Since the second and third questions were asked only in case the first question was answered in the negative, there is no need to consider them.

Costs

24 The costs incurred by the Commission of the European Communities, which has 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 (Sixth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 21 March 1995, hereby rules:

The fourth subparagraph of Article 4(5) 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, must be interpreted as permitting Member States to consider that the activities listed in Article 13 of the directive are carried out by bodies governed by public law as public authorities, even if they are performed in a similar manner to those of a private trader.

Mancini Murray Kakouris

Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 6 February 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber