JUDGMENT OF THE COURT (Third Chamber)

9 February 2006 *

In Case C-415/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 24 September 2004, received at the Court on the same day, in the proceedings

Staatssecretaris van Financiën

v

Stichting Kinderopvang Enschede,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, A. La Pergola, A. Borg Barthet (Rapporteur) and A. Ó Caoimh, Judges,

* Language of the case: Dutch.

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

after considering the observations submitted on behalf of:

— the Stichting Kinderopvang Enschede, by W. Rouwenhorst, tax adviser,

— the Netherlands Government, by H.G. Sevenster and C. ten Dam, acting as Agents,

— the Commission of the European Communities, by D. Triantafyllou and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2005,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13A (1)(g) to (i) 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 The request has been made in proceedings between the Stichting Kinderopvang Enschede ('the Foundation') and the Staatssecretaris van Financiën ('State Secretary for Finances') concerning reimbursement of value added tax ('VAT') which the Foundation paid over the period from 1 January to 31 March 1998.

Legal context

Community law

3 Article 13A(1)(g) to (i) and 13A(2) of the Sixth Directive are worded as follows:

'A. Exemptions for certain activities in the public interest

1. 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:

...

(g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned;

(h) the supply of services and of goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned;

(i) children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, provided by bodies governed by public law having such as their aim or by other organisations defined by the Member State concerned as having similar objects;

...

2. (a) ...

(b) The supply of services or goods shall not be granted exemption as provided for in (1)(b), (g), (h), (i), (l), (m) and (n) above if:

— it is not essential to the transactions exempted,

— its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.'

National law

4 Article 11(1)(f) of the 1968 Law on Turnover Tax (Wet op de omzetbelasting 1968) of 28 June 1968 (*Staatsblad* 1968, No 329), in the version applicable to the tax year at issue in the main proceedings ('the 1968 Law'), provides:

'Article 11

1. Subject to conditions to be laid down by public administrative regulation the following shall be exempt from tax:

...

f. supplies of goods and services of a social and cultural nature to be defined by public administrative regulation, provided that the operator does not seek to make a profit and that there is no serious distortion of conditions of competition in relation to operators who seek to make a profit'.

5 Article 7(1) of the 1968 Regulation implementing the Law on Turnover Tax (Uitvoeringsbesluit omzetbelasting 1968) of 12 August 1968 (*Staatsblad* 1968, No 423), in the version applicable to the tax year at issue in the main proceedings ('the Implementing Regulation'), provides:

'The supply of goods and services set out in Annex B to this Implementing Regulation shall be treated as a supply of goods and services of a social and cultural nature within the meaning of Article 11(1)(f) of the [1968] Law.'

6 Item 6 of Annex B(b) to the Implementing Regulation refers in particular to:

'The supply of goods and services within the meaning of Article 7 of the Implementing Regulation made as such by the organisations listed hereinafter, provided that they do not seek to make a profit:

...

6. Childcare organisations and schools for children with long-term illnesses'.

The dispute in the main proceedings and the question referred for a preliminary ruling

7 The Foundation is a non-profit-making organisation which provides childcare, at a variety of locations, for children under school age and for children of school age

outside school hours. It also maintains a list of host parents who, after screening by the Foundation, look after children in their own homes. Host parents may attend a training course paid for by the Foundation. For parents opting to have their child looked after by a host parent, the Foundation puts them in touch with the host parents on its list who are most appropriate for the parents' needs. The Foundation then acts as intermediary in the conclusion of a written agreement between the parents and the host parents. If, after a period of time, one of the parties wishes to discontinue the agreement or the terms of the agreement are breached, the parents of the child may again make use of the services of the Foundation. The Foundation does not accept any liability for damage arising from any breach of the agreement. Nor does it guarantee that the host parents will indeed be able to mind the child during the hours requested.

8 For the services which it provided as intermediary, the Foundation charged parents, during the period at issue in the main proceedings, the sum of NLG 3.45 per child for each hour during which the services of a host parent were used. Parents also paid the host parents an hourly rate of NLG 5 per child.

9 On the basis of that provision of services, the Foundation paid NLG 6 424 in respect of VAT for the period from 1 January to 31 March 1998 pursuant to a tax demand. The Foundation, however, lodged an objection with the Tax Inspectorate, seeking reimbursement of the tax paid on the basis of Article 11(1)(f) of the 1968 Law, Article 7(1) of the Implementing Regulation and item 6 of Annex B(b) thereto, arguing that the effect of those provisions was to exempt those services from VAT. The Tax Inspectorate dismissed that objection.

10 The Foundation appealed against the Tax Inspectorate's decision to the Gerechtshof te Arnhem (Regional Court of Appeal in Arnhem). By its ruling of 9 April 2001 the

Gerechtshof te Arnhem found in favour of the Foundation and set aside the decision of the Tax Inspectorate. The Staatssecretaris van Financiën then brought an appeal on a point of law against that ruling before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

11 In those circumstances, the Hoge Raad decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 13A(1)(g), (h) and (i) of the Sixth Directive be construed as meaning that the service provided as described [in the decision of the national court], consisting in intermediary activities in connection with the care of children under school age and of schoolchildren outside of school hours in the homes of host parents, falls to be regarded as a service covered by one or more of those provisions?'

The question referred for a preliminary ruling

12 By its question the national court is essentially asking whether services as an intermediary between the parents of a child and the host parents looking after that child, such as those provided by the Foundation, are exempt from VAT as being services closely linked to welfare and social security work, the protection of children or young persons and/or children's or young people's education.

13 As a preliminary point, it should be noted that, according to the case-law of the Court, the exemptions provided for in 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, in particular, Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 29, and Joined Cases C-394/04 and C-395/04 *Ygeia* [2005] ECR I-10373, paragraph 15). Those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (see, in particular, Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 21, and *Ygeia*, cited above, paragraph 15).

14 Moreover, the purpose of Article 13A of the Sixth Directive is to exempt from VAT certain activities which are in the public interest. However, that provision grants exemption from VAT not for every activity performed in the public interest, but only for those which are listed therein and described in great detail (Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraph 60, and *Ygeia*, paragraph 16).

15 In order to be exempt under Article 13A(1)(g) to (i) of the Sixth Directive, the Foundation's intermediary services must be closely linked to one of the activities set out therein.

16 It is therefore first of all necessary to establish whether the childcare provided by the host parents, to which the Foundation's services as intermediary are linked, can come within one of the activities referred to in Article 13A(1)(g) to (i) of the Sixth Directive, that is to say, respectively, welfare and social security work, the protection of children and young persons and children's or young people's education.

17 It is common ground that the childcare provided by host parents can be regarded as the provision of a service falling within the scope of welfare and social security work and the protection of children and young persons within the meaning of Article 13A(1)(g) and (h) of the Sixth Directive.

18 The Netherlands Government, however, is of the view that childcare is not a service falling within the sphere of children's or young people's education and hence, that Article 13A(1)(i) cannot be taken into account for the purpose of resolving a case such as that in the main proceedings.

19 In this regard, it cannot be established with certainty from the information available to the Court whether education is provided as an integral part of the childcare provided by host parents. In the light of the findings made in paragraph 17 of this judgment, it is not necessary to rule on this point.

20 Thus, the childcare provided by host parents is capable of being covered at the very least by the two categories of exemption provided for in Article 13A(1)(g) and (h) of the Sixth Directive.

21 Secondly, the parties to the main proceedings agree that the Foundation is an organisation recognised by the Member State concerned within the meaning of Article 13A(1)(g) and (h) of the Sixth Directive. The Netherlands Government and the Commission of the European Communities consider that host parents must also satisfy this criterion. They take the view that the Foundation's services as intermediary can be covered by an exemption only where the service itself, to

which the intermediary services are closely linked, also fulfils all the conditions required for exemption.

22 The Netherlands Government refers with good reason in this regard to the wording of Article 13A(2)(b) of the Sixth Directive, which provides that 'the supply of services or goods shall not be granted exemption as provided for in (1)(b), (g), (h), (i), (l), (m) and (n) above if ... it is not essential to the transactions exempted'. It is apparent from these provisions that the main transaction, to which the supply of goods or services in question is closely linked, must itself also be an exempted transaction. In the case in the main proceedings, the exemption of the Foundation's services as intermediary between the parents of the child being cared for and the host parents thus presupposes that the childcare service provided by the latter is itself exempt from VAT.

23 Given that host parents are independent persons who cannot be regarded as bodies governed by public law, the childcare services can be covered by the exemption under Article 13A(1)(g) or (h) of the Sixth Directive only to the extent that they are provided by 'organisations recognised as charitable by the Member State concerned'. The national authorities have a discretion in this regard which they must exercise in accordance with Community law (see, to that effect, *Kingscrest Associates and Montecello*, cited above, paragraphs 48 to 53). In this connection the Court has held inter alia that the expression 'other organisations recognised as charitable by the Member State concerned' in Article 13A(1)(g) of the Sixth Directive does not exclude from that exemption natural persons running a business, in that case a private entity seeking to make a profit (*Kingscrest Associates and Montecello*, paragraph 36). It is for the national court to determine whether the childcare services provided by host parents satisfy the conditions for exemption set out in those provisions, in particular the condition that the service provider must fulfil the criterion of 'charitable'.

24 Thirdly, in order to be exempt from VAT under Article 13A(1)(g) to (i) of the Sixth Directive, the Foundation's services as intermediary must be closely linked to the childcare services. The Commission and the Netherlands Government deny that such a link exists, relying in particular on Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, in which exemption under Article 13A(1)(i) of the Sixth Directive for research activities carried out for consideration by public institutions of higher education was disallowed. The Court held, at paragraph 49 of that judgment, that the supply of such services was not closely related to university education, after having stated, at paragraph 48, inter alia that 'although the undertaking of such projects may be regarded as of great assistance to university education, it is not essential to attain its objective'.

25 Whatever the interpretation given to the expression 'closely linked' under Article 13A(1)(g) and (h) of the Sixth Directive, Article 13A(2)(b) thereof in any event makes exemption conditional on the supply of goods or services concerned being essential to the transactions exempted (see, to that effect, *Ygeia*, paragraph 26). It follows that, in the case in the main proceedings, the Foundation's services as intermediary may be exempted only where it is established that they are essential to the childcare service.

26 While the Foundation maintains in this regard that parents can only have access to the childcare service provided by host parents by using the Foundation's intermediary services, the Netherlands Government and the Commission contend that other channels are available for putting parents seeking childcare in touch with host parents, such as advertisements or commercial agencies.

27 As the Advocate General has correctly noted at points 55 to 57 of his Opinion, the mere fact of keeping a list of all people known to offer childcare and making that list available to parents cannot be described as an essential service. Conversely, if the Foundation's screening of host parents' past records, and the fact of providing them with training, result in the selection only of host parents who are competent, trustworthy and such as to provide a higher quality of childcare than parents could otherwise have obtained without using the Foundation's services, these services could then be regarded as essential to the provision of quality childcare.

28 It is for the national court to determine whether, in the light of the facts of the case before it, the childcare service used by parents on the basis of the Foundation's services as intermediary between parents and host parents is of such a nature or quality that it would be impossible to obtain a service of the same value without the assistance of an intermediary service such as that offered by the Foundation.

29 The Netherlands Government also contends, in the alternative, that those services should be excluded from exemption under Article 13A(2)(b) of the Sixth Directive because their basic purpose is to obtain additional income for the Foundation by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT. However, since consideration of such an argument requires in essence an appraisal of questions of fact which fall outside the jurisdiction of the Court in the context of a reference for a preliminary ruling, it is for the national court to assess the substance thereof, taking account of all the specific facts of the case in the main proceedings.

30 The answer to the question referred must therefore be that Article 13A(1)(g) and (h) of the Sixth Directive, read together with Article 13A(2)(b) thereof, must be interpreted as meaning that services as an intermediary between persons seeking, and persons offering, a childcare service, provided by a body governed by public law or an organisation recognised as charitable by the Member State concerned, may benefit from exemption under those provisions only where:

— the childcare service itself meets the conditions for exemption laid down in those provisions;

— that service is of such a nature or quality that parents could not be assured of obtaining a service of the same value without the assistance of an intermediary service such as that which is the subject-matter of the dispute in the main proceedings;

— the basic purpose of the intermediary services is not to obtain additional income for the service provider by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

Costs

31 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 13A(1)(g) and (h) 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, read together with Article 13A(2)(b) thereof, must be interpreted as meaning that services as an intermediary between persons seeking, and persons offering, a childcare service, provided by a body governed by public law or an organisation recognised as charitable by the Member State concerned, may benefit from exemption under those provisions only where:

— **the childcare service itself meets the conditions for exemption laid down in those provisions;**

— **that service is of such a nature or quality that parents could not be assured of obtaining a service of the same value without the assistance of an intermediary service such as that which is the subject-matter of the dispute in the main proceedings;**

— **the basic purpose of the intermediary services is not to obtain additional income for the service provider by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.**

[Signatures]