JUDGMENT OF THE COURT (First Chamber)

18 November 2004 *

In Case C-284/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour d'appel de Bruxelles (Belgium), by decision of 19 June 2003, received at the Court on 2 July 2003, in the proceedings

État belge

v

Temco Europe SA,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas (Rapporteur), R. Silva de Lapuerta, K. Lenaerts and S. von Bahr, Judges,

* Language of the case: French.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 April 2004,

after considering the observations submitted on behalf of:

— the État belge, by E. Dominkovits, acting as Agent, and by B. van de Walle de Ghelcke and C. Louveaux, avocats,

— Temco Europe SA, by J.-P. Magremanne, avocat,

— the Commission of the European Communities, by E. Traversa and C. Giolito, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 May 2004,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of Article 13B(b) 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 proceedings between Temco Europe SA ('Temco Europe') and the État belge (Belgian State) relating to a summons issued against Temco Europe for payment of EUR 137 125.53 (BEF 5 531 639) in respect of value added tax ('VAT') which is alleged to have been wrongly deducted by that company, of EUR 13 708.51 (BEF 553 000) representing the amount of a fine, and of interest at the legal rate relating to those sums.

Legal framework

Community legislation

3 Under Title X, headed 'Exemptions', Article 13 of the Sixth Directive, itself headed 'Exemptions within the territory of the country', includes the following provisions:

'...

B. Other exemptions

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:

...

(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;

...'

National legislation

4 Article 1709 of the code civil belge (Belgian Civil Code) states:

'The letting of things is a contract by which one of the parties undertakes to allow the other the enjoyment of a thing during a certain time, and in exchange for a certain sum which the latter undertakes to pay to the former.'

5 Article 44(3)(2) of the code de la taxe sur la valeur ajoutée (Belgian value added tax code) ('the VAT Code') provides that, inter alia, 'the leasing and letting of immovable property and the assignment of leases of immovable property and the use thereof in accordance with Article 19(1) ...' are exempt from value added tax.

The main proceedings and the questions referred

6 The national court describes the background to the main proceedings as follows:

'Temco Europe SA is liable to VAT in respect of its property cleaning and maintenance business ... .

It is the owner of a property at 107 to 117 Chaussée de Ruisbroeck. Between the end of 1993 and the beginning of 1994 it had refurbishment work carried out to the building at number 111 and deducted the VAT for which it was invoiced on that work. It has no place of business in the building.

Temco Energy Management Company SA, Publi-round SA and Petrus SA are companies belonging to the same group. Together with Temco Europe SA they are subject to a common central management.

On 1 February 1994, Temco Europe SA entered into three contracts ["the contracts"] with those three companies which the parties thereto described as "transfers", under which Temco Europe SA allowed each transferee to carry on its activities in the property, as allocated by the board of directors of the transferor, without the transferee having individual rights over any specific part of the property. Neither evidence of the transferees' activities nor the allocation resolutions of the board of directors of the transferor have been produced.

The contracts have been entered into for the duration of the transferee's activities, and the latter is bound to use the premises exclusively for its activity in compliance with the internal rules laid down by the transferor. The transferor's board of directors, however, is entitled at any time without notice to require the transferee to vacate the premises referred to in the transfer.

The transferee is responsible for all expenses required for its activity. Gas and electricity are calculated according to consumption and communal outgoings in accordance with the area occupied. The transferee is also liable for repairing deterioration of the premises occupied by it on the basis of criteria set by the transferor's board of directors.

Rent is payable annually and set at BEF 3 500 per m^2 in the part fitted out as offices and BEF 1 000 per m^2 in the part fitted out for storage plus 0.4% of the transferee's turnover exclusive of VAT and BEF 5 000 per annum for each person employed.

The parties expressly excluded application of Article 1709 of the code civil.

The internal rules establish the provisions for access to the building, cleaning, the rights to affix advertising signs and to unlimited access for persons authorised by the transferor and the duty on transferees to ensure that there is:

— connection to telephone, water, gas, electricity and heating services, where applicable in agreement with the other occupiers;

— access for all occupiers to drinks machines, to the canteen and to the showers;

— access to the driveways and car parks;

— responsible storage of items and use of drains and sewers.

Temco Europe SA has provided no relevant information on the performance of those contracts.

In a report drawn up on 30 September 1996, the assistant auditor of the VAT authority stated that:

— in respect of two of the occupiers the contracts were entered into after publication of the transfer of their registered offices to the building in issue;

— no provision in the contracts defined the transferees' activities or the use to be made of the premises;

— there was no monitoring of the portion of the rent linked to turnover, which proportion represented for Petrus SA 7%, for Publi-round SA 6% and for Temco Energy SA 0% of the rent.

— the occupiers have a key to access the building and the building has no security guard or concierge, with the effect that the restriction on access referred to in the internal rules is purely formalistic.

It is not disputed that the companies remained in occupation of the buildings whilst proceedings were pending.'

7 Following an inspection by the administration de la TVA, de l'Enregistrement et des Domaines (VAT, Registration and Property Authority) ('the Authority'), the latter concluded that the contracts were in reality lettings of immovable property exempt from VAT under Article 44(3)(2) of the VAT Code, which is the provision transposing Article 13B(b) of the Sixth Directive, and that accordingly the deduction of VAT on the refurbishment work on the building at number 111 Chaussée de Ruisbroeck was not justified.

8 As a result, the Authority demanded payment from Temco Europe of EUR 137 125.53 (BEF 5 531 639) in respect of VAT which it alleged to have been wrongly deducted, of EUR 13 708.51 (BEF 553 000) representing the amount of a fine, together with interest at the legal rate on those sums.

9 As Temco Europe refused to pay those sums, a summons was issued against it by the Authority. Temco Europe lodged a defence against that summons, and, by judgment of 29 November 2000, the Tribunal de première instance de Bruxelles (Brussels Court of First Instance) (Belgium) annulled it. The Belgian State appealed against that judgment before the court of appeal.

10 The Cour d'appel de Bruxelles (Brussels Court of Appeal) considered the concept of 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive in relation to contracts such as those that had been concluded in the main proceedings. The national court states in that regard:

'In the present case the defendant, the transferor, and the transferees entered into contracts on unequal terms by which the transferees were granted a licence to occupy the property. Those contracts were clearly put in place in order not to come within the scope of the rental and letting of immovable property.

One cannot examine those contracts, however, without taking into account the close link between those companies, all sharing the same management, which enables the transferees to enjoy the benefit of continuity of occupation and fair performance of the terms of the contracts.

The performance of the contracts has shown that the transferees have continuous and unrestricted access to the premises and that they enjoy a high degree of security in occupying their offices and storage premises.'

11 In those circumstances, the Cour d'appel de Bruxelles decided to stay the proceedings and to refer the following question to the Court for a preliminary reference:

'May Article 13B(b) of the Sixth Directive be interpreted to mean that transactions, corresponding in Belgian law to a contract of indefinite duration by which one company, through a number of contracts, simultaneously grants associated companies a licence to occupy a single property in return for a payment set partially but essentially on the basis of the area occupied, where the inherent insecurity of a licence is absent owing to the fact that the transferee and the transferor are under common management, constitute a letting of immovable property within the meaning of Community law, or, in other words, does the independent Community law concept of the "letting of immovable property" in Article 13B(b) of the Sixth Directive cover use, for consideration, of an immovable

asset for purposes other than those of the taxpayer's business — which definition is adopted in Article 44(3)(2) *in fine* of the [VAT Code] — that is to say, the grant under a licence of indefinite duration of a non-exclusive right of occupation in return for a monthly payment, albeit fluctuating and partly dependent on the profits of one of the contracting parties, where the inherent insecurity of a licence is absent owing to the fact that the transferee and the transferor are under common management?'

The question referred

12 By its question, the national court is essentially asking whether Article 13B(b) of the Sixth Directive must be interpreted as meaning that transactions by which one company, through a number of contracts, simultaneously grants associated companies a licence to occupy a single property in return for a payment set essentially on the basis of the area occupied are transactions which constitute the 'letting of immovable property' within the meaning of that provision.

Observations submitted to the Court

13 Temco Europe submits that the contracts, which Belgian law treats as not being rental contracts, do not satisfy the definition of letting under Community law by reason of the absence of an exclusive right of occupation of the property, of the inherent insecurity of that right and the fact that payment in respect of that right is not set with regard only to the period of occupation of the property.

14 The Belgian State argues that, in order to determine the nature of a contract, it is necessary to have regard to the manner of its performance, irrespective of its wording. It also refers to the need to take into account the underlying objective of the exemption laid down by Article 13B(b) of the Sixth Directive, the background to the exemption and the objectives and scheme of the directive. The criterion relating to the period of the contract is not to be interpreted as meaning that the period must always be fixed at the time the contract is concluded. As regards the inherent insecurity of the right of occupation, the Belgian State takes the view that this relates to a method of terminating the obligation, which does not affect the substance of the service provided.

15 The Commission points out that the national court itself considered that the contracts were entered into on unequal terms and lacked any basis in reality, inasmuch as they were clearly put in place in order not to come within the scope of the 'letting of immovable property'. The national court should take the real situation into account and look beneath the contractual terms. It also argues that an intention to avoid tax may be inferred, having regard to the absence of an economic justification at the time the contracts were concluded and that the national court, which has to decide the merits of the case, could base its reasoning on the concept of the abuse of rights which has been applied by the Court in other situations.

Findings of the Court

16 It should be observed at the outset that according to settled case-law the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition (see Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 51; Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 25; and Case C-275/01 *Sinclair Collis* [2003] ECR I-5965, paragraph 22).

17 Secondly, 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, *Commission* v *Ireland*, paragraph 52; Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25; and *Sinclair Collis*, paragraph 23). As the Advocate General rightly states at point 37 of his Opinion, the requirement of strict interpretation does not mean, however, that the terms used to specify exemptions should be construed in such a way as to deprive the exemptions of their intended effect.

18 As regards the exemptions laid down under Article 13B(b) of the Sixth Directive, it must be noted that that provision does not define 'letting', nor does it refer to relevant definitions adopted in the legal orders of the Member States (see Case C-326/99 *Goed Wonen* [2001] ECR I-6831, paragraph 44, and *Sinclair Collis*, paragraph 24). That provision must therefore be interpreted in the light of the context in which it is used, and of the objectives and the scheme of the Sixth Directive, having particular regard to the underlying purpose of the exemption which it establishes (see, to that effect, *Goed Wonen*, paragraph 50).

19 In numerous cases, the Court has defined the concept of the letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive as essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to that effect, *Goed Wonen*, paragraph 55; Case C-409/98 *Mirror Group* [2001] ECR I-7175, paragraph 31; Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 21; Case C-269/00 *Seeling* [2003] ECR I-4101, paragraph 49; and *Sinclair Collis*, paragraph 25).

20 While the Court has stressed the importance of the period of the letting in those judgments, it has done so in order to distinguish a transaction comprising the letting of immovable property, which is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value (see, to that effect, *Goed Wonen*, paragraph 52), from other activities which are either industrial and commercial in nature, such as the exemptions referred to in Article 13B(b)(1) to (4) of the Sixth Directive, or have as their subject-matter something which is best understood as the provision of a service rather than simply the making available of property, such as the right to use a golf course (*Stockholm Lindöpark*, paragraphs 24 to 27), the right to use a bridge in consideration of payment of a toll (*Commission* v *Ireland*) or the right to install cigarette machines in commercial premises (*Sinclair Collis*, paragraphs 27 to 30).

21 The actual period of the letting is thus not, of itself, the decisive factor in determining whether a contract is one for the letting of immovable property under Community law, even if the fact that accommodation is provided for a brief period only may constitute an appropriate basis for distinguishing the provision of hotel accommodation from the letting of dwelling accommodation (Case C-346/95 *Blasi* [1998] ECR I-481, paragraphs 23 and 24).

22 In any event, it is not essential that that period be fixed at the time the contract is concluded. It is necessary to take into account the reality of the contractual relations (*Blasi*, paragraph 26). The period of a letting may be shortened or extended by the mutual agreement of the parties during the performance of the contract.

23 Furthermore, while a payment to the landlord which is strictly linked to the period of occupation of the property by the tenant appears best to reflect the passive nature of a letting transaction, it is not to be inferred from that that a payment which takes into account other factors has the effect of precluding a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive, particularly where the other factors taken into account are plainly accessory in light of the part of the payment linked to the passage of time or pay for no service other than the simple making available of the property.

24 Lastly, as regards the tenant's right of exclusive occupation of the property, it must be pointed out that this can be restricted in the contract concluded with the landlord and only relates to the property as it is defined in that contract. Thus, the landlord may reserve the right regularly to visit the property let. Furthermore, a contract of letting may relate to certain parts of a property which must be used in common with other occupiers.

25 The presence in the contract of such restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the contract of letting.

26 As regards the transaction at issue in the main proceedings, it is for the national court to consider all the circumstances surrounding it in order to establish its characteristics and to assess whether it can be treated as a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive.

27 It is also a matter for that court to establish whether the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time, or whether they give rise to the provision of a service capable of being categorised in a different way.

28 The answer to the question referred must therefore be that:

Article 13B(b) of the Sixth Directive must be interpreted as meaning that transactions by which one company, through a number of contracts, simultaneously grants associated companies a licence to occupy a single property in return for a payment set essentially on the basis of the area occupied and by which the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in return for a payment linked to the passage of time, are transactions comprising the 'letting of immovable property' within the meaning of that provision and not the provision of a service capable of being categorised in a different way.

Costs

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

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

Article 13B(b) 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) must be interpreted as meaning that transactions by which one company, through a number of contracts, simultaneously grants associated companies a licence to occupy a single property in return for a payment set essentially on the basis of the area occupied and by which the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in return for a payment linked to the passage of time, are transactions comprising the 'letting of immovable property' within the meaning of that provision and not the provision of a service capable of being categorised in a different way.

Signatures.