JUDGMENT OF THE COURT (Sixth Chamber)

3 March 1994 *

In Case C-16/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof, Leeuwarden (Netherlands), for a preliminary ruling in the proceedings pending before that court between

R. J. Tolsma

and

Inspecteur der Omzetbelasting Leeuwarden,

on the interpretation of Article 2 (1) 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 (Official Journal 1977 L 145, p. 1),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

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

Advocate General: C. O. Lenz,
Registrar: J.-G. Giraud,

after considering the written observations submitted on behalf of:

— the German Government, by E. Röder, Ministerialrat, Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor in that Ministry, acting as Agents,

— the Netherlands Government, by A. Bos, Legal Adviser, Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by B. J. Drijber, a member of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 January 1994,

gives the following

Judgment

1 By order of 8 January 1993, which was received at the Court on 20 January 1993, the Gerechtshof (Regional Court of Appeal), Leeuwarden, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 2 (1) 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 (Official Journal 1977 L 145, p. 1, hereinafter referred to as 'the Sixth Directive').

2 Those questions were raised in the course of proceedings between Mr Tolsma and the Inspecteur der Omzetbelasting (Inspector of Turnover Taxes, hereinafter referred to as 'the Inspecteur'), Leeuwarden, following the issue of an assessment to turnover tax.

3 It appears from the case-file that Mr Tolsma plays a barrel organ on the public highway in the Netherlands. During his musical performance he offers passers-by a collecting tin for their donations; he also sometimes knocks on the door of houses and shops to ask for donations, but without being able to claim any remuneration by right.

4 In respect of the period from 1 July to 30 September 1991 Mr Tolsma received from the Inspecteur an assessment to tax on the aforesaid activity in the sum of HFL 1 805 by way of value added tax ('VAT') and HFL 180 by way of a surcharge for late payment.

5 Mr Tolsma's administrative complaint against the assessment was dismissed by the Inspecteur, and he brought proceedings before the Gerechtshof, Leeuwarden.

6 Mr Tolsma argued before that court that sums he received for the music he played in public were not subject to VAT because there was no obligation whatever on passers-by to give him donations, whose amount they determined themselves. The service thus was not provided for consideration and consequently did not fall within the scope of the Sixth Directive.

7 The Inspecteur argued, by contrast, that there was a direct link between the service supplied and the payments obtained, with the result that Mr Tolsma's activity constituted a supply of services for consideration within the meaning of the Sixth Directive. It did not matter that he was not entitled to a remuneration whose amount was determined by the parties in advance.

8 In those circumstances the Gerechtshof, Leeuwarden, referred the following questions to the Court:

'1 (a) Must a service which consists of playing music on the public highway, for which no payment is stipulated but payment is nevertheless received, be

regardedas a supply of services effected for consideration within the meaning of Article 2 of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes?

(b) Is it relevant for the purpose of answering this question that although the payment received is not stipulated, it is nevertheless solicited and, in view of customary usage, can be expected, although its amount is neither quantified nor quantifiable?'

9 For the purpose of answering those questions, it should be noted that Article 2 of the Sixth Directive states that:

'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;

...'

10 To interpret the term 'supply of services effected for consideration' in that article, the article must be seen in its context, and account must be taken of the other provisions of the Sixth Directive and also of the Court's case-law, including its deci-

sions on the Second Council Directive 67/228/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (Official Journal, English Special Edition 1967, p. 16, hereinafter referred to as 'the Second Directive'), which had the same objectives as the Sixth Directive and was replaced by that directive.

11 Article 11 (A) (1) of the Sixth Directive provides that:

'The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies ...'.

12 The Court has already held with reference to the concept of the 'provision of services against payment' in Article 2 (a) of the Second Directive, whose wording is similar to that of Article 2 (1) of the Sixth Directive, that taxable transactions, within the framework of the VAT system, presuppose the existence of a transaction between the parties in which a price or consideration is stipulated. The Court concluded that, where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT (judgment in Case 89/81 *Staatssecretaris van Financiën* v *Hong Kong Trade Development Council* [1982] ECR 1277, paragraphs 9 and 10).

13 In its judgments in Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12, and Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11, the Court stated on this point that the basis of assessment for a provision of services is everything which makes up the consideration for the service and that a provision of services is therefore taxable only if there is a direct link between the service provided and the consideration received (see also the judgment in Case 102/86 *Apple and Pear Development Council* v *Commissioners of Customs and Excise* [1988] ECR 1443, paragraphs 11 and 12).

14 It follows that a supply of services is effected 'for consideration' within the meaning of Article 2 (1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

15 In a case such as that which is the subject of the main proceedings, it is clear that those conditions are not fulfilled.

16 If a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them.

17 Firstly, there is no agreement between the parties, since the passers-by voluntarily make a donation, whose amount they determine as they wish. Secondly, there is no necessary link between the musical service and the payments to which it gives rise.

The passers-by do not request music to be played for them; moreover, they pay sums which depend not on the musical service but on subjective motives which may bring feelings of sympathy into play. Indeed some persons place money, sometimes a considerable sum, in the musician's collecting tin without lingering, whereas others listen to the music for some time without making any donation at all.

18 In addition, contrary to the arguments of the German and Netherlands Governments, the fact that the musician plays in public with a view to collecting money and actually receives certain sums in so doing is of no relevance for the purpose of determining whether the activity in question constitutes a supply of services for consideration within the meaning of the Sixth Directive.

19 That interpretation is not affected by the fact that a musician such as Mr Tolsma solicits money and can in fact expect to receive money by playing music on the public highway. The payments are entirely voluntary and uncertain and the amount is practically impossible to determine.

20 For all the above reasons, the answer to the questions of the Gerechtshof, Leeuwarden, should be that Article 2 (1) of the Sixth Directive must be interpreted as meaning that the 'supply of services effected for consideration' within the meaning of that provision does not include an activity consisting in playing music on the

public highway, for which no remuneration is stipulated, even if the musician solicits money and receives sums whose amount is however neither quantified nor quantifiable.

Costs

21 The costs incurred by the German Government, the Netherlands Government and the Commission of the European Communities, 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 (Sixth Chamber),

in answer to the questions referred to it by the Gerechtshof, Leeuwarden, by order of 8 January 1993, hereby rules:

Article 2 (1) 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 meaning that the 'supply of services effected for consideration' within the meaning of that provision does not include an activity

consisting in playing music on the public highway, for which no remuneration is stipulated, even if the musician solicits money and receives sums whose amount is however neither quantified nor quantifiable.

Mancini Kakouris

Schockweiler Kapteyn Murray

Delivered in open court in Luxembourg on 3 March 1994.

R. Grass

Registrar

G. F. Mancini

President of the Sixth Chamber