JUDGMENT OF THE COURT (Third Chamber)

14 June 2007 *

In Case C-445/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 20 October 2005, received at the Court on 14 December 2005, in the proceedings

Werner Haderer

v

Finanzamt Wilmersdorf,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Klučka, J.N. Cunha Rodrigues, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

* Language of the case: German.

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure and further to the hearing on 14 December 2006,

after considering the observations submitted on behalf of:

— Finanzamt Wilmersdorf, by D. Bak, acting as Agent,

— the Greek Government, by S. Spyropoulos and S. Trekli, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by G. De Bellis, avvocato dello stato,

— the Commission of the European Communities, by D. Triantafyllou and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13A(1)(j) 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 reference was made in the course of proceedings between Mr Haderer, the appellant in the main proceedings, and the Finanzamt Wilmersdorf (Wilmersdorf Tax Office; 'the Finanzamt') concerning the latter's refusal to grant Mr Haderer exemption from the value added tax ('VAT') for which he was liable in relation to educational services which he provided in 1990 in a freelance capacity (as a 'freier Mitarbeiter') for the *Land* of Berlin.

Legal context

Community legislation

3 Article 13 of the Sixth Directive provides:

'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:

...

(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;

(j) tuition given privately by teachers and covering school or university education;

...'

National legislation

4 It is apparent from the order for reference that, according to the case-law of the Bundesfinanzhof (Federal Finance Court):

— the exemption provided for under Paragraph 4(21)(b) of the Law on Turnover Tax (Umsatzsteuergesetz), in the version in force at the material time in the main proceedings ('UStG'), favours only private schools and other general training or vocational training establishments, but does not extend to freelance workers who provide tuition at those schools or at other training establishments, and

— Paragraph 4(22)(a) of the UStG exempts from taxation only the institutions mentioned in that provision, that is to say, legal persons governed by public law, academies of administration or economics, adult education centres or bodies which operate in pursuit of the public interest or of the aims of a professional organisation. Accordingly, services provided to such institutions by natural persons are not exempted.

Main proceedings and question referred for a preliminary ruling

5 According to the order for reference, Mr Haderer worked for a number of years in a freelance capacity for the *Land* of Berlin. In 1990, he provided assistance with schoolwork at an adult education institute ('Volkshochschule') and ran ceramics and pottery courses at another adult education institute and at a parents' centre ('Elternzentrum'). During that year, Mr Haderer's teaching activities, taken together, regularly amounted to over 30 hours per week.

6 The contracts on the basis of which Mr Haderer carried out those activities were concluded each semester with the *Land* of Berlin for a period of six months. The contracts contained clauses which stated that no 'employment relationship' — within the meaning of that term under German employment law — was thereby established.

7 Mr Haderer's fees, paid by the *Land* of Berlin, were calculated on an hourly basis. Social security contributions, insurance and taxes were not included. He was not entitled to the continued payment of those fees if he was prevented from working, and he bore the risk of losing those fees if courses were cancelled, even if this was as a result of a lack of participants.

8 Under those contracts, Mr Haderer was given financial assistance in respect of his pension contributions and health insurance, and also a proportional leave allowance.

9 Since the Finanzamt did not receive VAT returns from Mr Haderer for the period from 1989 to 1991, it fixed a lump sum amount of VAT for which he was liable in respect of 1990, on the ground that he did not satisfy the conditions for exemption under Paragraph 4(21) or (22) of the UStG.

10 The Finanzgericht (Finance Court) dismissed as unfounded the action brought by Mr Haderer to challenge that decision as to his liability, taking the view that Mr Haderer's activities were not exempted under the UStG.

11 In his appeal to the Bundesfinanzhof on a point of law, Mr Haderer submits inter alia that the teaching activities which he carried out in 1990 are exempt from VAT under Article 13A(1)(i) and (j) of the Sixth Directive.

12 The Bundesfinanzhof takes the view that those activities cannot be exempted under Article 13A(1)(i) of the Sixth Directive because a natural person cannot be deemed to fall within 'other organisations defined by the Member State concerned as having similar objects'. On the other hand, as regards Article 13A(1)(j), the Bundesfinanzhof is unsure whether, in order for the exemption provided for under that provision to apply, the tuition services of a self-employed teacher are required to be supplied directly to the students as recipients of those services, meaning that the teacher is paid by those students, or whether it is sufficient for those services to be carried out in a school or university, as in the main proceedings.

13 Therefore, taking the view that the determination of the dispute before it requires an interpretation of the Sixth Directive, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is tuition for school or university given by a private teacher to be exempt from tax under Article 13A(l)(j) of [the Sixth Directive] only where the private teacher provides his tuition services directly to the pupils [or] students as recipients of those services — and therefore is paid by them — or is it sufficient for the private teacher to provide his tuition services to a school or university as recipient of those services?'

Question referred for a preliminary ruling

14 By its question, the referring court asks, in essence, whether the teaching activities carried out by an individual in a freelance capacity in circumstances such as those of the present case can be exempted from VAT under Article 13A(1)(j) of the Sixth Directive. In particular, the court is unsure whether, for the purpose of such exemption, there must be a direct link between the teacher, as the provider of tuition, and the pupils or students, as its recipients, which, according to the referring court, would mean that the teacher is paid directly by those pupils or students.

15 The Finanzamt and the Italian Government claim that activities such as those at issue in the main proceedings should not be exempted from VAT. By contrast, the Greek Government and the Commission of the European Communities take the view that such activities must be exempted.

16 As a preliminary point, it should be noted that Article 13A of the Sixth Directive relates to the exemption from VAT of certain activities in the public interest. However, that exemption does not cover every activity performed in the public interest, but only those which are listed in that provision and described in great detail (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 18; Joined Cases C-394/04 and C-395/04 *Ygeia* [2005] ECR I-10373, paragraph 16; and Case C-401/05 *VDP Dental Laboratory* [2006] ECR I-12121, paragraph 24).

17 According to the case-law of the Court, the exemptions provided for in Article 13 of the Sixth Directive 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 Case C-349/96 *CPP* [1999] ECR I-973, paragraph 15; Case C-240/99 *Skandia* [2001] ECR I-1951, paragraph 23; and *Ygeia*, paragraph 15).

18 The terms used to specify those exemptions 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 Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 43, and Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraph 36). Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT (see Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 42; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 29; and Case C-106/05 *L.u.P.* [2006] ECR I-5123, paragraph 24). Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see, to that effect, Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 17, and also, in relation to university education, *Commission* v *Germany*, paragraph 47).

19 The same must also be true of the specific conditions laid down for those exemptions to apply, and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption (see, to that effect, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraphs 16 to 20).

20 In the main proceedings, it is common ground that, in Germany, Mr Haderer is not regarded as pursuing objects comparable to those of the bodies governed by public law referred to in Article 13A(1)(i) of the Sixth Directive.

21 It is necessary, therefore, to consider whether activities such as those at issue in the main proceedings are capable of falling within the scope of Article 13A(1)(j) of the Sixth Directive, according to which 'tuition given privately by teachers and covering school or university education' is exempt from VAT.

22 In that context, it must be observed that there is no definition in Article 13A(1)(j) of the Sixth Directive of the terms 'school or university education' for the purposes of that provision.

23 Although the referring court did not express any doubt as to whether the activities at issue in the main proceedings may be covered by those terms, the Finanzamt nevertheless submits that, taking into account the strict interpretation required in respect of exemptions from VAT, the ceramics and pottery courses provided by Mr Haderer do not involve the same demands as those of courses normally given in schools or universities. On the contrary, such courses are intended purely for leisure purposes. The Finanzamt emphasises that while Article 13A(1)(i) of the Sixth Directive refers, in addition to school or university education, to 'children's or young people's education' and 'vocational training or retraining', Article 13A(1)(j) merely refers to school or university education, to the exclusion of any other type of education or training.

24 In that regard, although the terms used to specify the exemption envisaged under Article 13A(1)(j) of the Sixth Directive are, admittedly, to be interpreted strictly, a particularly narrow interpretation of 'school or university education' would risk creating divergences in the application of the VAT system from one Member State to another, as the Member States' respective education systems are organised according to different rules. Such divergences would be incompatible with the requirements of the case-law referred to in paragraph 17 of this judgment.

25 Furthermore, in so far as the Finanzamt's arguments on that point are based on a particular interpretation of 'school' or 'university' in terms of the German education system, it should be noted that whether a specific transaction is subject to or exempt from VAT cannot depend on its classification in national law (see *Kingscrest Associates and Montecello*, paragraph 25).

26 While it is unnecessary to produce a precise definition in this judgment of the Community concept of 'school or university education' for the purposes of the VAT system, it is sufficient, in this case, to observe that that concept is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills, provided that those activities are not purely recreational.

27 It is for the referring court, if necessary, to verify afresh in the light of those factors whether the activities at issue in the main proceedings cover 'school or university education' within the meaning of Article 13A(1)(j) of the Sixth Directive.

28 Furthermore, in order for the exemption under Article 13A(1)(j) of the Sixth Directive to apply, it is not sufficient for the tuition to cover school or university education; it must also be 'given privately by teachers'.

29 In the main proceedings, although it is clear from the case-file that Mr Haderer provides tuition in his capacity as a teacher, a point which has not been disputed by the Finanzamt or by the Member States and the Commission in their observations submitted pursuant to Article 23 of the Statute of the Court of Justice, the question nevertheless arises whether such tuition is given 'privately'.

30 The term 'privately' enables the services supplied by the bodies mentioned in Article 13A(1)(i) of the Sixth Directive to be distinguished from those referred to in Article 13A(1)(j), which are provided by teachers on their own account and at their own risk.

31 The services referred to in Article 13A(1)(j) of the Sixth Directive may include private lessons, for example, in which case there is in principle a link between the actual content of the tuition and the teacher's qualifications. In that regard, the wording of Article 13A(1)(j) in no way precludes tuition given to several people at a time from being covered by the exemption introduced by that provision.

32 In addition, as the Commission submits, the requirement that the tuition be given privately does not necessarily mean that there has to be a direct contractual link between the recipients of that tuition and the teacher who provides it. Indeed, such a contractual link often exists with persons other than the recipients, such as the parents of the pupils or students.

33 In the main proceedings, as paragraphs 5 to 8 of this judgment show, certain matters included in the case-file before the Court, taken in isolation, could certainly suggest that Mr Haderer carried out his activities on his own account and at his own risk, and thus that he was carrying them out 'privately'. That applies, in particular, to the

lack of entitlement to the continued payment of fees if he was prevented from working, and to the fact that he bore the risk of the loss of his fee in the event of courses being cancelled.

34 However, it is clear from those same paragraphs of this judgment that Mr Haderer carried out the activities at issue in the main proceedings on the basis of successive contracts with the *Land* of Berlin. It appears that, save in the event of courses being cancelled because of a lack of pupils or students, the fees he received were calculated on an hourly basis, irrespective of the number of course participants. In addition, even though the contracts stated that no 'employment relationship' — within the meaning of that term under German employment law — was thereby established, Mr Haderer was given financial assistance towards his pension contributions and health insurance, and also a proportional leave allowance. Finally, Mr Haderer carried out the activities at issue in the main proceedings at adult education centres administered by the *Land* of Berlin.

35 The matters set out in the preceding paragraph tend therefore to indicate that, far from giving tuition on his own account and at his own risk, Mr Haderer in fact made himself available as a teacher to the *Land* of Berlin, which paid him as a provider of services to the education system administered by that *Land*. It is for the referring court to verify this, taking into account all the circumstances of the case.

36 The Commission submits that to refuse to allow an exemption in situations such as that of the main proceedings is contrary to the common objective of the specific exemptions referred to in Article 13A(1)(i) and (j) of the Sixth Directive, and would create a lacuna in the system established by those two provisions. According to the Commission, tuition given by private teachers may indeed, in certain circumstances, be comparable to the education provided by the 'bodies' mentioned in Article 13A(1)(i).

37 Nevertheless, the mere fact that the two categories of exemption in Article 13A(1)(i) and (j) of the Sixth Directive seek, inter alia, to promote 'school or university education' as an activity which is in the public interest cannot support the proposition that, together, those two provisions create a system capable of exempting from VAT activities which do not satisfy the conditions of one or other of them, the terms of which, as observed in paragraphs 16 to 19 of this judgment, are to be interpreted strictly and cover only the activities which are listed therein and described in detail.

38 Having regard to all of the foregoing observations, the answer to the question referred must be that, in circumstances such as those in the main proceedings, the activities of an individual acting in a freelance capacity, consisting of providing assistance with schoolwork and also running ceramics and pottery courses in adult education centres, can be exempted from VAT under Article 13A(1)(j) of the Sixth Directive only where such activities consist of tuition given by a teacher on his own account and at his own risk, and covering school or university education. It is for the referring court to verify whether that is the case in the main proceedings.

Costs

39 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:

In circumstances such as those in the main proceedings, the activities of an individual acting in a freelance capacity, consisting of providing assistance with schoolwork and also running ceramics and pottery courses in adult education centres, can be exempted from value added tax under Article 13A(1)(j) 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 only where such activities consist of tuition given by a teacher on his own account and at his own risk, and covering school or university education. It is for the referring court to verify whether that is the case in the main proceedings.

[Signatures]