JUDGMENT OF THE COURT (Second Chamber)

17 February 2005 *

In Joined Cases C-453/02 and C-462/02,

REFERENCES for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decisions of 6 November 2002, received at the Court on 13 and 23 December 2002, in the proceedings

Finanzamt Gladbeck

v

Edith Linneweber (C-453/02)

and

Finanzamt Herne-West

v

Savvas Akritidis(C-462/02),

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann and R. Schintgen (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 May 2004,

after considering the observations submitted on behalf of:

— Mrs Linneweber, by M. Nettesheim, Rechtsanwalt,

— the German Government, by W.-D. Plessing, acting as Agent, and D. Sellner, Rechtsanwalt,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents, and A. Böhlke, Rechtsanwalt,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2004,

gives the following

Judgment

1 The questions referred for a preliminary ruling concern the interpretation of Article 13B(f) 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 Those questions were referred in the course of litigation between, first, the Finanzamt Gladbeck and Mrs Linnweber, as the universal heir of her husband, who died in 1999, and, second, the Finanzamt Herne-West and Mr Akritidis concerning the payment of value added tax ('VAT') on income from the operation of games of chance.

Legal background

The Community legislation

3 Article 2 of the Sixth Directive, which constitutes Title II thereof, entitled 'Scope', provides:

'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;

...'

4 Under Article 13B(f) of the Sixth Directive, the Member States are to exempt from VAT:

'betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State'.

The national legislation

5 Paragraph 1(1) of the Umsatzsteuergesetz 1993 (1993 law on turnover tax, BGBl. 1993 I, p. 565, the 'UStG') provides that supplies and other services effected for consideration by a trader in Germany in the course of business are to be subject to VAT.

6 Under Paragraph 4(9)(b) of the UStG, turnover within the scope of the Betting and Lotteries Act (Rennwett- und Lotteriegesetz) and the turnover of licensed public casinos, which arises through operation of a casino are exempt from VAT.

The main proceedings and the questions referred for a preliminary ruling

Case C-453/02

7 Mrs Linneweber is the universal heir of her husband, who died in 1999. The latter had an administrative authorisation to provide to the public, for consideration, gaming and entertainment machines in restaurants and amusement arcades owned by him. Mrs Linneweber and her husband declared the income generated by the operation of those machines in the 1997 and 1998 tax years as exempt from VAT on the ground that income from the operation of gaming machines by licensed casinos is exempt from that tax.

8 However, the Finanzamt Gladbeck took the view that the income at issue was not exempt under Paragraph 4(9)(b) of the UStG since it was not subject to betting, racing or lottery tax and was not derived from the operation of a licensed public casino.

9 The matter was brought before the Finanzgericht Münster (Germany) which upheld the action brought by Mrs Linneweber, on the ground that, by analogy with the judgment of the Court of Justice in Case C-283/95 *Fischer* [1998] ECR I-3369, the income from gaming machines must be exempted from VAT under Article 13B(f) of the Sixth Directive. In paragraph 28 of that judgment, the Court of Justice held that the principle of fiscal neutrality precludes a generalised distinction from being drawn between unlawful and lawful transactions in the levying of value added tax.

10 In support of its appeal on a point of law ('Revision') before the Bundesfinanzhof, the Finanzamt Gladbeck pointed out that the stakes and winning opportunities in the case of gaming machines installed in casinos are significantly higher than those in the case of gaming machines which are lawful outside casinos. Accordingly, contrary to the argument upheld by the Finanzgericht Münster, there was no competition between those two types of machine.

11 Taking the view that the dispute before it turned on the interpretation of the Sixth Directive, the Bundesfinanzhof decided to stay proceedings and refer the following questions to the Court of Justice:

'1 Is Article 13B(f) of [the Sixth Directive] to be interpreted as precluding a Member State from making the organisation of gambling subject to value added tax if it is exempt when organised by a licensed public casino?

2 Does Article 13B(f) of [the Sixth Directive] prohibit a Member State from making the operation of a gaming machine subject to value added tax if the operation of a gaming machine by a licensed public casino is exempt, or must the game of chance machines operated outside casinos also be comparable for that purpose in essential respects, for example as regards the maximum stake and the maximum winnings, with the gaming machines in the casinos?

3 Is the installer of the machine permitted to rely on the exemption laid down in Article 13B(f) of [the Sixth Directive]?'

12 According to the case-file forwarded to the Court of Justice by the referring court, between 1987 and 1991 Mr Akritidis operated a casino in Herne-Eickel (Germany). He organised games of roulette and card games there. Under the terms of the licence he held, those games had to be organised according to rules laid down under a clearance certificate ('Unbedenklichkeitsbescheinigung') issued by the competent authorities.

13 Between 1989 and 1991 Mr Akriditis did not comply with the rules laid down by the competent authorities in either the roulette games or the card games. For instance, amongst other things, card racks were not used, higher stakes were accepted and he kept no record of turnover from the games.

14 The Finanzamt Herne-West assessed the turnover for that period taking the unlawful income from the roulette and card games into account. Following an objection by Mr Akriditis and in the light of the judgment in *Fischer*, cited above, the Finanzamt Herne-West decided that the income from the roulette games should not be subject to VAT. However it decided to treat the unlawfully operated card game as taxable and made a flat-rate assessment of the proportion of the turnover relating to the organisation of that game.

15 Mr Akriditis brought an action against that decision before the Finanzgericht Münster. That court held that, in line with the principles outlined by the Court of Justice in its judgment in *Fischer*, the card game at issue should be exempt from VAT pursuant to Article 13B(f) of the Sixth Directive. It also took the view that Mr Akriditis could rely on that provision directly before the national courts. There was no reason to limit the application of the principles established by the Court in that judgment to the roulette game.

16 In support of its appeal on a point of law ('Revision') before the Bundesfinanzhof, the Finanzamt Herne-West argued that the principles to which the Finanzgericht Münster referred were not applicable by analogy to the card game at issue in this case. In fact, unlike the game at issue in the case leading to the judgment in *Fischer*, there was no competition between the card game organised by Mr Akriditis and those organised by casinos, since those games were not really comparable. Mr Akriditis, for his part, submits that the card game as played in his establishments is equivalent to the 'Black Jack' game played in licensed public casinos.

17 Taking the view that the dispute before it turned on the interpretation of the Sixth Directive, the Bundesfinanzhof decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1 Does Article 13B(f) of [the Sixth Directive] prohibit a Member State from making the organisation of a card game subject to value added tax solely if the organisation of a card game by a licensed public casino is exempt, or must card games organised outside casinos also be comparable for that purpose in essential respects, for example as regards the game rules, the maximum stake and the maximum winnings, with card games in the casinos?

2 Is the installer of the machine permitted to rely on the exemption laid down in Article 13B(f) of [the Sixth Directive]?'

18 By order of the President of the Court of 6 February 2003 Cases C-453/02 and C-462/02 were joined for the purposes of the written procedure, the oral procedure and judgment.

The questions referred

The first question in Case C-453/02

19 As a preliminary point, it must be observed, first, that Paragraph 4(9)(b) of the UStG exempts from VAT the turnover made by licensed public casinos from games of chance or gaming machines without defining the form or the details of the organisation and operation of such games and machines.

20 Second, as the Bundesfinanzhof pointed out in its order for reference, it must be observed that licensed public casinos are not subject to any restriction as regards the games of chance and gaming machines they may operate.

21 Thus, games of chance and gaming machines such as those at issue in the main proceedings may, regardless of the detailed arrangements for their organisation, be operated by licensed public casinos, without the turnover they make from the operation of those games being subject to VAT.

22 Against that background, the first question in Case C-453/02 must be understood as seeking essentially to know whether Article 13B(f) of the Sixth Directive must be interpreted as meaning that it precludes national legislation which provides that the operation of all games of chance and gaming machines is exempt from VAT where it is carried out in licensed public casinos, while that activity does not enjoy that exemption when carried out by traders other than those running casinos.

23 In order to reply to the question as reformulated, it must be observed that it is clear from Article 13B(f) of the Sixth Directive that gambling is in principle to be exempted from VAT but that the Member States retain the power to lay down the conditions and limitations of that exemption (*Fischer*, paragraph 25).

24 However, in exercising that power, the Member States must respect the principle of fiscal neutrality. According to the case-law of the Court of Justice, that principle precludes, in particular, treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subjected to a uniform rate (see, inter alia, Case C-267/99 *Adam* [2001] ECR I-7467, paragraph 36, and Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 20).

25 It is clear from that case-law and from the judgments in Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20, and *Fischer*, that the identity of the manufacturer or the provider of the services and the legal form by means of which they exercise their activities are, as a rule, irrelevant in assessing whether products or services supplied are comparable.

26 As the Advocate General pointed out in points 37 and 38 of her Opinion, in order to determine whether the activities at issue in the case leading to the judgment in *Fischer* were comparable, the Court only examined the comparability of the activities at issue and took no account of the argument that the games of chance differed for the purposes of the principle of fiscal neutrality, for the simple reason that they are organised by or in public casinos.

27 Thus, in paragraph 31 of its judgment in *Fischer*, the Court of Justice held that Article 13B(f) of the Sixth Directive must be interpreted as meaning that a Member State may not impose VAT on the unlawful operation of a game of chance organised outside a licensed public casino when the operation of the same game by such a casino is exempted.

28 Since the identity of the operator of a game of chance is not relevant where it falls to be determined whether the unlawful organisation of that game must be considered to be in competition with the lawful organisation of the same game, it must *a fortiori* be so where it falls to be determined whether two games of chance or two gaming machines operated lawfully must be considered to be in competition with one another.

29 It follows that, in exercising their powers under Article 13B(f) of the Sixth Directive, that is to say, the power to determine the conditions and limitations subject to which the operation of games of chance and gaming machines is to be exempted from the VAT provided for by that provision, the Member States cannot validly make that exemption dependent upon the identity of the operator of such games and machines.

30 In the light of those considerations, the answer to the first question referred in Case C-453/02 must be that Article 13B(f) of the Sixth Directive precludes national legislation which provides that the operation of all games of chance and gaming machines is exempt from VAT where it is carried out in licensed public casinos, while the operation of the same activity by traders other than those running casinos does not enjoy that exemption.

The second question in Case C-453/02 and the first question in Case C-462/02

31 In the light of the answer given to the first question in Case C-453/02 there is no need to answer the second question in that case or the first question in Case C-462/02.

The third question in Case C-453/02 and the second question in Case C-462/02

32 By these questions the referring court seeks to know essentially whether Article 13B (f) of the Sixth Directive has direct effect in the sense that it can be relied on by an operator of games of chance or gaming machines before national courts to prevent the application of rules of national law which are inconsistent with that provision.

33 On this point, it should be noted that wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State (see, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 51, and Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 98).

34 As regards more specifically Article 13B of the Sixth Directive, it is apparent from the case-law that, whilst that provision undoubtedly confers upon the Member States a discretion as regards laying down the conditions for the application of certain of the exemptions it provides for, a Member State may not rely, as against a taxpayer who is able to show that his tax position actually falls within one of the categories of exemption laid down in the directive, upon its failure to adopt the very provisions which are intended to facilitate the application of that exemption (*Becker*, cited above, paragraph 33).

35 It must be added that the fact that Article 13B(f) of the Sixth Directive confirms the discretion which the Member States have by specifying that they have the power to lay down the conditions and limitations to which the exemption for games of chance and gambling is subject, is not such as to call that interpretation into question. Since those games are, as a rule, exempt from VAT, any operator of such games can directly rely on that exemption provided that the Member State concerned has waived the power expressly conferred on it by Article 13B(f) of the Sixth Directive or has failed to exercise that power.

36 It is important to note, moreover, that the principle which applies where a Member State has not exercised the powers conferred on it by Article 13B(f) of the Sixth Directive must apply *a fortiori* where, in exercising that power, a Member State has adopted national provisions which are not compatible with the directive.

37 It follows that, as the Advocate General pointed out in point 72 of her Opinion, where, as in the cases in the main proceedings, the conditions or limitations which a Member State imposes on the exemption from VAT for games of chance or gambling are contrary to the principle of fiscal neutrality, that Member State cannot rely on such conditions or limitations to refuse an operator of such games the exemption which he may legitimately claim under the Sixth Directive.

38 Accordingly, the answer to the third question in Case C-453/02 and the second question in Case C-462/02 must be that Article 13B(f) of the Sixth Directive has direct effect in the sense that it can be relied on by an operator of games of chance or gaming machines before national courts to prevent the application of rules of national law which are inconsistent with that provision.

The effect ratione temporis of this judgment

39 In its oral observations, the German Government made the point that it was possible for the Court, if it held national legislation such as that at issue in the cases in the main proceedings to be incompatible with the Sixth Directive, to limit the effects ratione temporis of this judgment.

40 In support of its argument, that government, first, drew the attention of the Court to the adverse financial consequences of a judgment ruling that a provision such as Paragraph 4(9) of the UStG is incompatible with the Sixth Directive. Second, it argued that the conduct adopted by the Commission following the judgment in Case C-38/93 *Glawe* [1994] ECR I-1679 had led the Federal Republic of Germany to believe that Paragraph 4(9) of the UStG was compatible with the Sixth Directive.

41 In that connection, regard must be had to the settled case-law of the Court to the effect that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC, the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied (see,

in particular, Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 42, and Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, paragraph 44).

42 It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision it has interpreted with a view to calling in question legal relations established in good faith (Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 39, and *Barreira Pérez*, cited above, paragraph 45).

43 As regards the cases in the main proceedings, it must be held, first, that the conduct of the Commission following the judgment in *Glawe*, cited above, cannot validly be relied on in support of the contention that Paragraph 4(9) of the UStG can reasonably be considered to be in conformity with the Sixth Directive. The case giving rise to that judgment concerned only the determination of the basis of assessment for the turnover generated by the operation of gaming machines and did not in any way relate to the difference of treatment accorded in general as regards VAT between licensed public casinos and other operators of games of chance.

44 Second, the financial consequences which might ensue for a Member State from a preliminary ruling have never in themselves justified limiting the temporal effect of such a ruling (see, in particular, *Roders and Others*, cited above, paragraph 48, and *Buchner and Others*, paragraph 41).

45 Accordingly, there is no need to limit the effect of this judgment ratione temporis.

Costs

46 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 (Second Chamber) rules as follows:

1. **Article 13B(f) 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 precludes national legislation which provides that the operation of all games of chance and gaming machines is exempt from VAT where it is carried out in licensed public casinos, while the operation of the same activity by traders other than those running casinos does not enjoy that exemption.**

2. **Article 13B(f) of the Sixth Directive has direct effect in the sense that it can be relied on by an operator of games of chance or gaming machines before national courts to prevent the application of rules of national law which are inconsistent with that provision.**

[Signatures]