Case 107/84

Commission of the European Communities
v
Federal Republic of Germany

'Value-added tax — Exemption provided for postal authorities'

Summary

Tax provisions — Harmonization of legislation — Turnover taxes — Common system of value-added tax — Exemptions provided for by the Sixth Directive — Exemption for the supply of services by the public postal services — Extension to the supply of services by other bodies on behalf of the public postal services — Not permissible
(Council Directive No 77/388, Art. 13 A (1) (a))

Article 13 A (1) (a) of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes exempts from value-added tax the supply of services by the public postal services themselves, but not the supply of services on behalf of the public postal services by other bodies.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 June 1985 *

Mr President,
Members of the Court,

1. What is the scope of the expression 'the supply of services by the public postal services' used in Article 13 A (1) (a) of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (hereinafter referred to as 'the Sixth Directive')?

(a) Does the expression include only services provided *by* the public postal

* Translated from the French.

services of a Member State or does it also cover services provided *for* those postal services with a view to the performance of their functions?

(b) Are the public postal services to be defined by reference to the *authority* which engages in postal activities or by reference to the *activity* itself?

Those appear to be the questions raised by the action brought by the Commission against the Federal Republic of Germany under Article 169 of the EEC Treaty.

Paragraph 4 of the German *Umsatzsteuergesetz* [Law on turnover taxes] of 26 November 1979 provides as follows:

'The following transactions referred to in Points 1 to 3 of Paragraph 1 (1) of this Law shall be exempt from tax:

...

(7) Services provided by virtue of statutory provisions by transport undertakings for the *Deutsche Bundespost* [German Federal postal service]'.

Pursuant to that provision the Federal Republic of Germany exempts from value-added tax the transportation of letters, parcels and other mail by the *Deutsche Bundesbahn* [German Federal Railways] or by the German airline *Lufthansa* as well as by certain private railway undertakings under contracts concluded with the *Deutsche Bundespost.* Such transportation is effected on behalf of the *Deutsche Bundespost* in return for compensation or remuneration. It should be emphasized that the aforementioned transport undertakings are obliged to carry out such transportation under Paragraph 4 (2) of the *Postgesetz* [law on the postal service] and under Paragraph 21 (4) of the *Luftverkehrsgesetz* [law on air transport]. It is those services, which the Commission refers to as 'inputs', which are exempt from value-added tax.

The Commission considers that Paragraph 4 (7) of the Umsatzsteuergesetz is not in conformity with Article 13 A (1) (a) of the directive. Under the heading 'Exemptions within the territory of the country', which relates to all its provisions, Article 13 provides 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:

(a) the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto'.

2. The Commission maintains that Article 13 of the Sixth Directive lays down an exhaustive list of exemptions by way of derogation from Article 2, which lays down the general principle that the supply of goods and services is to be subject to value-added tax. Since it constitutes an exception to that principle, Article 13 A (1) (a) must be interpreted *strictly.* Whilst the heading of Article 13 A refers to exemptions for *certain* activities in the public interest, only those activities which it lists may be exempted and not activities of the same type. Thus, by virtue of the third subparagraph of Article 4 (5) in conjunction with Point 2 of Annex D, the supply of water, gas, electricity and steam is subject to value-added tax.

The Commission proposes that the expression 'public postal services' be interpreted on an institutional basis by reference to an organic criterion. In its opinion a separate Community definition should be formulated which embraces solely the established State postal authorities, that is to say in this case exclusively the

Bundespost, and does not extend to undertakings engaging in activities on behalf of such authorities. Only services provided *directly* by such authorities may be exempted and not those provided by other persons on their behalf.

The Federal Republic of Germany disagrees with the Commission's argument and relies essentially on a 'functional' interpretation based on a material criterion. Public postal services comprise all services provided *directly* or *indirectly* by the postal authority. Regardless of whether those services are provided by the public postal authority itself or by undertakings acting on its behalf, the transportation of mail must be regarded as an activity pursued in the public interest. As is shown by the heading of Article 13 A, the directive grants such activities preferential treatment with regard to taxation.

The Federal Republic of Germany contends that, although the expression 'öffentliche Posteinrichtungen' used in the German version of Article 13 A (1) (a) appears to support the use of an organic criterion, the term 'services publics' used in the French version has both an institutional and a functional meaning. In fact the German term may also be used in the wider sense.

Since the Federal Republic of Germany considers that a literal interpretation does not provide conclusive support for either view, it proposes a schematic and teleological interpretation and refers, in the absence of any express statement in the preamble to the directive, to the provisions of Articles 4 (5) and 13 A thereof. In its view subparagraphs (b) to (q) of Article 13 A (1) concern a range of *activities*, of a public or private nature depending on the objective pursued. Article 4 (5) makes the exemption for public services dependent not on conditions concerning legal status but on the carrying out of specific activities. In the final analysis the term 'bodies governed by public law' comprises all bodies, whether they are legal persons governed by public law or licensed undertakings, which engage in an activity that involves the exercise of powers conferred by public law or is in the public interest. That wide interpretation of the term 'public service' is in accordance with the Court's interpretation of that term (Judgment of 17 December 1980 in Case 149/79, *Commission* v *Belgium* [1980] ECR 3881).

The Federal Republic of Germany draws two conclusions from the foregoing.

First, only a wide definition of the public service encompassing both direct and 'indirect' administration is able both to safeguard the freedom enjoyed by the Member States under the rules of international and Community law to decide upon their own internal organization and to ensure observance of the principle of the equal sharing by the Member States of public burdens.

Secondly, the activities of the *Bundespost* are the activities of a public authority within the meaning of the final subparagraph of Article 4 (5). Article 13 A (1) (a) would be deprived of any useful effect if its scope were no wider than that of Article 4 (5).

The *Bundesbahn* and *Lufthansa* do not operate solely on behalf of the *Bundespost* but are, by virtue of their statutory obligation to supply services to the *Bundespost*, integrated into the postal service in a limited sense and engage in 'indirect

postal activities'. Those activities must therefore be regarded as exempt under Article 13 A (1) (a).

The Commission objects that the Federal Republic of Germany has not proposed any definition of the term 'postal activity' and adheres to its view that Article 13 A (1) (a) lays down an exhaustive list of exceptions and must therefore be interpreted on the basis of its actual provisions, to which the fourth subparagraph of Article 4 (5) refers. It contends that it is not possible to use Article 4 of the directive to classify railways and air transport undertakings as indirect postal services in order then to include them within the term 'public postal services' within the meaning of Article 13 A (1) (a). A separate Community definition of the term would refer not to the activity but to the organization.

3. In order to provide a solution to the dispute it is necessary to examine first the position occupied by the provisions to be interpreted within the scheme established by the directive.

Article 2 of the directive lays down the following general principle: 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to value added tax.

The first subparagraph of Article 4 (5) lays down the following general exception:

'States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connexion with these activities or transactions'.

It follows that, in principle, the supply of services by bodies governed by public law is not subject to value-added tax.

The next two subparagraphs of Article 4 (5), however, state that tax is to be charged in respect of:

activities of the aforementioned bodies which could lead to significant distortions of competition (second subparagraph); and

activities of such bodies which are listed in Annex D to the directive (third subparagraph), for example the transport of goods, passenger transport and telecommunications.

Finally, the fourth and final subparagraph of Article 4 (5) states that

'the Member States may consider activities of these bodies which are exempt under Article 13 or 28 as activities which they engage in as public authorities'.

The general scheme of the directive is therefore as follows:

The supply of any service by a taxable person which is not a body governed by public law or which does not engage in the activities laid down in Article 13 A and B of the directive is subject to value-added tax. Those activities may to some extent be assimilated to those of a public authority. According to the Commission, this is the result of a 'compromise' arrived at by the Member States in the course of the drafting of the text. It is therefore of an exceptional and exhaustive nature. However, it is still necessary to define its scope.

The Federal Republic of Germany, relying on the difference in the wording of Articles 4 (5) and 13 A (1) (a), which refer respectively to 'bodies governed by public law' and 'public postal services', maintains that the two concepts are not the same.

Whereas the first can have one meaning only, the second, borrowed from French law, may have an institutional or a functional meaning. The parties have proposed different methods of interpretation: in essence, the Commission lays emphasis upon a literal interpretation of Article 13 A (1) (a), whilst the Federal Republic of Germany relies on the scheme of the text.

4. As both parties have admitted — in this respect the Commission accepted the Federal Republic of Germany's view at the hearing — an interpretation of the directive by reference to the German and French language versions thereof does not appear to be the most appropriate way of determining the meaning of the expression 'public postal services'.

It is therefore necessary to refer to the principles which the Court has expounded concerning the approach to be adopted where different language versions use different expressions so that it is not possible to draw with certainty any legal inferences from the terminology used.

Quite recently the Court has stated that:

'in the case of divergence between the language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part' (Judgment of 28 March 1985 in Case 100/84, *Commission* v *United Kingdom of Great Britain and Northern Ireland*, [1985] ECR 1160).

The Court therefore has recourse to a schematic and teleological interpretation.

The preamble to the Sixth Directive is not explicit with regard to the reasons for the exemptions provided for in Article 13.

The stated purpose of the directive is the complete financing of the Communities from their own resources. Those resources consist primarily of the resources accruing from value-added tax and are obtained by applying a common rate of tax

'on a basis of assessment determined in a uniform manner according to Community rules' (second recital).

According to the 11th recital,

'a common list of exemptions should be drawn up so that *the Communities' own resources may be collected in a uniform manner in all the Member States*' (emphasis added).

The directive's objective is therefore to secure the Communities' own resources by establishing, by means of a uniform basis of assessment, an equal system of contribution for each Member State.

It is not possible to take issue with the Federal Republic of Germany when, after referring to that objective, it states that the directive cannot interfere with the power reserved to the Member States to organize their postal system. The directive is not intended to harmonize the laws of the Member States concerning the postal system. Whilst it may constitute an inducement, it does not in any way restrain the Member States' freedom in that area.

It must also be pointed out that the drafting of directives involves consultation and discussion, in the course of which each Member State has the opportunity, before the final drafting of the text, to submit its observations and put forward the reservations necessary for each country to preserve its own prerogatives.

In that respect the Commission observes that when the Council adopted the directive

the German Government must have been aware of the effect the text would necessarily have on its domestic legislation.

As I have already stated, the Federal Republic of Germany also maintains that public service should include indirect administration in order to comply with the principle of the equal sharing by the Member States of public burdens.

It is true that a Community definition of the term 'public postal services' would have the decisive advantage of avoiding the creation of disparities in the field of public burdens. If that expression were interpreted in the same manner throughout the Community, the result would be a uniform basis of assessment for value-added tax and the equal treatment of the Member States. However, it is not clear that the interpretation of Article 13 A (1) (a) is dependent upon a precise definition of the concept of public services.

In this case the issue is not whether the postal activities are carried out in the public interest, which is a necessary condition for a public service. It is not disputed that that condition is satisfied in this case; the Community legislator has provided that the supply of goods and services effected in this area is to be classified amongst the activities exempted from tax by virtue of being in the public interest.

Rather it must be considered whether the expression 'public service', which is capable of two meanings, or is, in the words of Raymond Odent, 'amphibological', has an institutional or functional meaning. It has an institutional meaning where it describes an administrative organization. It has a functional meaning where it describes an activity carried on in the public interest.

In the Commission's view it must be given an institutional meaning: the draftsman of the Sixth Directive did not list the postal authorities to which Article 13 A (1) (a) applies because they were perfectly well known by all the Member States. It is therefore necessary, in order to ensure that the concept has a Community definition, to restrict it by means of an organic criterion solely to postal institutions governed by public law.

That argument, which is based on assertion rather than reasoning, is, of itself, unconvincing. It does not explain why the terms used in Articles 4 (5) and 13 A (1) (a) are different.

The principle that public services must be performed by the State, on which the organic criterion relied upon by the Commission is based, does not appear to be immutable. The Court stated in its judgment of 20 March 1985 (Case 41/83 *Italian Republic* v *Commission* [1985] (ECR 880) that certain postal institutions governed by public law, in that case British Telecommunications, could undoubtedly be privatized.

The organic criterion, linked to the public-law status of the postal authority, does not lend itself to a more precise definition of the concept of public services than the functional criterion used by the Federal Republic of Germany, which admitted that the 'activity' of the postal service cannot be defined precisely and therefore relied upon additional formal factors such as the obligations towards the Bundespost imposed by German law on railway and air transport undertakings. It is

therefore necessary to avoid restricting oneself to a choice between the organic approach put forward by the Commission and the functional approach adopted by the Federal Republic of Germany and — following the Court's case-law — to seek to resolve the question by means of an interpretation which accords with the wording, scheme and objective of the directive.

Article 4 (1) of the directive defines the term 'taxable person'. A taxable person is any person who carries out an activity specified in the directive. The legal form of the person carrying out the activity is irrelevant. The sole determining factor is the carrying out of the activity. A person carrying out an activity specified in Article 2 is subject to tax; however, the carrying out of one of the activities specified in Articles 13 and 28 is exempt from tax. In particular, Article 13 A (1) (a) covers the supply of all postal services other than passenger transport and telecommunications. Any organization carrying out such an activity is exempt from tax. The legal form of that organization is irrelevant; its form is freely determinable by each Member State by virtue of the fourth subparagraph of Article 4 (5). It is merely necessary for the person claiming exemption to show that he *himself* performs the function of public postal service.

A Community solution may therefore be arrived at not by reference to a definition of public service but rather by reference to the term 'taxable person'. It follows not only from a literal interpretation of the expression '*by* the public postal services' used in Article 13 A (1) (a), but also from the general definition of a taxable person contained in Article 4 (1), that that status necessarily arises from carrying out an activity *directly*. The view that carrying out one of the exempt activities 'indirectly' relieves a person of his status as a taxable person is based on an unjustified extension of the scope of the provision and is all the more unjustified inasmuch as Article 13 constitutes a derogation from the principle laid down in Article 2.

The discussion concerning the 'activity' of the postal service is only of importance if the concept of public service is to be defined on the basis of a functional criterion as distinct from an organic criterion. It becomes irrelevant once it is accepted that, by virtue of the fourth subparagraph of Article 4 (5), it is for the Member States to define and regulate the postal system.

Such an interpretation also clarifies the useful effect of Article 13 A (1) (a): the first, second and third subparagraphs of Article 4 (5) relate solely to the activities of bodies governed by public law which they engage in as public authorities. The fourth subparagraph of that provision *equates* with such activities those which may be engaged in *by other bodies*. The postal service, which is a public service, may be run by bodies which are not governed by public law. It *may be* regarded for value-added tax purposes as an activity engaged in by a public authority within the meaning of the first subparagraph of Article 4 (5). The essential point is whether or not the body which is designated by law to run the postal service or a part of that service carries out that activity itself.

5. The Federal Republic of Germany maintains that the *Bundesbahn* and *Lufthansa* have a statutory obligation towards the *Bundespost*; however, the argument based on that obligation is untenable in view of the wording of the directive, Article 6 of which provides that 'the performances of services . . . in pur-

suance of the law' are to be regarded as the supply of services. In addition, Point 1 of Paragraph 1 (1) of the Umsatzsteuergesetz itself provides that:

'There shall be no exemption from tax where:

(a) the transaction is effected in pursuance of a legal or administrative provision'.

Consequently, it appears that the supply of goods and services by *Lufthansa* and the *Bundesbahn* is subject to special arrangements which constitute an exception to the general national rules and are contrary, at first sight, to Article 6 of the directive.

In addition the Federal Republic of Germany contends that *Lufthansa* and the *Bundesbahn* operate on behalf of the *Bundespost* and therefore take over the *Bundespost*'s activities. It is therefore a case of 'indirect State administration'.

The *Bundespost* is completely free to organize its postal activities in the manner in which it sees fit. Nevertheless, it is not disputed that it could itself effect the transportation of letters and parcels. The decision to entrust such transportation to certain undertakings is no doubt based on sound economic grounds, but it is limited by the objectives laid down by the directive: an equal system of contribution for the Member States, harmonization of the basis on which value-added tax is assessed and the need to secure the Communities' own resources. It follows that the only services which may be exempt from tax are those supplied *directly* by bodies which are entrusted by law with the running of the postal service.

Any other solution would have the effect that any decision by those bodies to transfer other activities entrusted to them to various private undertakings would increase exemptions from tax in different economic sectors with the risk of distortion of competition in those sectors and a reduction in the Communities' own resources. There is nothing to prevent a Member State from entrusting the whole of the postal service to a private undertaking, but in such an event the undertaking would have to engage in the postal activities *itself* in order to benefit from tax exemption.

6. Consequently, I propose that the Court should:

Declare that, by providing in Paragraph 4 (7) of the *Umsatzsteuergesetz* that the services provided by transport undertakings for the *Deutsche Bundespost* by virtue of that Law are to be exempt from tax, the Federal Republic of Germany has failed to fulfil its obligations under Articles 5 and 189 of the EEC Treaty and under the Sixth Council Directive (No. 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, and in particular Articles 2, 4 (5) and 13 A (1) (a) thereof;

Order the Federal Republic of Germany to pay the costs.