JUDGMENT OF THE COURT (Sixth Chamber)
11 June 1998 *

In Case C-283/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht Baden-Württemberg, Freiburg, Germany, for a preliminary ruling in the proceedings pending before that court between

Karlheinz Fischer

and

Finanzamt Donaueschingen

on the interpretation of the 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 COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G. F. Mancini (Rapporteur), P. J. G. Kapteyn, J. L. Murray and G. Hirsch, Judges,

* Language of the case: German.

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in that Ministry, acting as Agents,

— the United Kingdom Government, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, and Peter Mantle, Barrister,

— the Commission of the European Communities, by Jürgen Grunwald, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, represented by Ernst Röder; the United Kingdom Government, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Kenneth Parker QC; and the Commission, represented by Jürgen Grunwald, at the hearing on 30 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 March 1997,

gives the following

Judgment

1 By order of 21 August 1995, received at the Court on 25 August 1995, the Finanzgericht (Finance Court) Baden-Württemberg, Freiburg, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of the 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 raised in proceedings between Mr Fischer and the Finanzamt Donaueschingen (Tax Office, Donaueschingen; 'the Finanzamt') concerning the payment of turnover tax on unlawful and punishable games of chance.

Relevant provisions

3 Article 2 of the Sixth Directive states:

'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 11(A)(1)(a), the taxable amount in respect of supplies of goods and services is generally 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 including subsidies directly linked to the price of such supplies.

5 Article 13(B) provides:

'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:

...

(f) betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State;

...'

6 Article 33, in the version in force at the material time, stated that, without prejudice to other Community provisions, the provisions of the Sixth Directive were

not to prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which could not be characterised as turnover taxes.

7 In German law, under Paragraph 1(1) of the Umsatzsteuergesetz (Law on Turnover Tax, *Bundesgesetzblatt* I, 1979, p. 1953; 'the UStG') turnover tax is payable on supplies of goods and services effected for consideration in the relevant tax area by a trader in the course of his business.

8 Paragraph 4(9)(b) of the UStG exempts from the tax turnover covered by the Law on Betting and Lotteries and gaming turnover of licensed public casinos.

9 Under Paragraph 284 of the German Criminal Code, any person who organises games of chance open to the public without official authorisation is to be liable to a fine or a term of imprisonment not exceeding two years. Games of chance organised in clubs or private societies where games of chance are routinely organised are also to be treated as open to the public.

10 In accordance with Paragraph 40 of the Abgabenordnung (Tax Code of 1977, *Bundesgesetzblatt* I, p. 613), it is irrelevant for taxation purposes whether an act which wholly or partly meets the criteria for liability to tax under tax legislation is contrary to a statutory requirement or prohibition or to public morality.

Facts of the main proceedings

11 Between 1987 and 1989 Mr Fischer organised games of chance at several locations in Germany. He had the official permit needed to operate a game of skill calling for use of a machine called 'Roulette Opta II'. However, he departed from the terms of that permit to such an extent that in the end the game resembled the game of roulette as played in duly licensed public casinos.

12 The equipment used by Mr Fischer consisted of a disk with spaces numbered from 1 to 24 and coloured red or black together with two spaces marked '0' and 'X'. The object of the game was to predict, by placing chips on the appropriate squares of the gaming table, where the ball thrown by a croupier would come to rest. The players purchased chips with a value of DM 5 each and could stake one or more of them on each game. If the ball came to rest on the number, the line or the colour on which the stake had been placed, the croupier paid out 24 times, 12 times and twice the stake respectively.

13 Winnings were paid in the form of chips immediately after each game and the other chips staked were collected by the croupier. Players who wished to stop playing could cash in their remaining chips.

14 After carrying out an investigation, the Finanzamt took the view that Mr Fischer supplied services subject to turnover tax, consisting of giving players opportunities of winning. According to the Finanzamt, the basis of assessment should have been the amount of the stakes placed by players, less the winnings paid out. However, as Mr Fischer had not recorded those transactions, it assessed the taxable amount on the basis of a probability calculus, multiplying the takings by a factor of six.

The questions referred for a preliminary ruling

15 The Finanzgericht Baden-Württemberg, before which Mr Fischer brought proceedings, was, first, uncertain whether, in the light of Case 269/86 *Mol* v *Inspecteur der Invoerrechten en Accijnzen* [1988] ECR 3627 and Case 289/86 *Happy Family* v *Inspecteur der Omzetbelasting* [1988] ECR 3655, the transactions at issue in the main proceedings actually constituted supplies of services within the meaning of Article 2(1) of the Sixth Directive or whether, as unlawful activities, they fell outside the scope of that directive. Secondly, if the services at issue were taxable under the Sixth Directive, it raised the question whether the method of calculating the taxable amount established by the Court in Case C-38/93 *Glawe* v *Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] ECR I-1679, which involved the taking into account of solely the net takings after payment of the players' winnings, applied in the case before it. Thirdly, if that was not the case, another method of calculating the taxable amount needed to be established.

16 The national court therefore decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 2(1) of the Sixth Directive to be interpreted as meaning that services which the organiser of unlawful and punishable games of chance provides to the players are not taxable?

(2) If Question 1 is to be answered in the negative: Is Article 11(A)(1)(a) of the Sixth Directive to be interpreted as meaning that, in the case of unlawful gaming in the form of roulette, the basis of assessment for the operator's services to the players is the amount retained by the operator during a tax period?

(3) If Question 2 is to be answered in the negative: How is the basis of assessment to be determined in cases described under Questions 1 and 2?'

Question 1

17 For the purpose of providing the national court with a helpful answer, the first question must be understood as seeking to determine whether the unlawful operation of a game of chance, in this case roulette, falls within the scope of the Sixth Directive and whether a Member State may impose value added tax ('VAT') on that activity when the corresponding activity carried on by a licensed public casino is exempted.

18 It should first be noted that the Sixth Directive expressly refers to forms of gambling in Article 13(B)(f), where it provides for their exemption, and in Article 33, where it states that its provisions are not to prevent the Member States from maintaining or introducing taxes on betting and gambling. It is thus clear that such transactions do not, as such, fall outside the Sixth Directive.

19 It is appropriate, next, to consider the doubts expressed by the national court concerning the possibility of imposing VAT on unlawful activities. In Case 294/82 *Einberger* v *Hauptzollamt Freiburg* [1984] ECR 1177, at paragraphs 19 and 20, *Mol*, cited above, at paragraph 15, *Happy Family*, cited above, at paragraph 17, and Case C-343/89 *Witzemann* v *Hauptzollamt München-Mitte* [1990] ECR I-4477, at paragraph 19, the Court held that illegal imports or supplies of narcotic drugs or counterfeit currency, whose release into the economic and commercial channels of the Community was by definition precluded and which could give rise only to penalties under the criminal law, were wholly alien to the provisions of the Sixth Directive and did not give rise to any VAT debt.

20 As the Court pointed out in Case C-111/92 *Lange* v *Finanzamt Fürstenfeldbruck* [1993] ECR I-4677, at paragraph 12, that principle relates only to products which, because of their special characteristics, may not be marketed or incorporated into economic channels.

21 By contrast, outside those cases where all competition between a lawful economic sector and an unlawful sector is ruled out, the principle of fiscal neutrality precludes a generalised distinction from being drawn in the levying of VAT between unlawful and lawful transactions. The Court has accordingly held that a ban on the export of certain products to specific destinations because they might be used for strategic purposes cannot in itself be sufficient to remove such exports from the scope of the Sixth Directive (*Lange*, paragraphs 16 and 17).

22 The foregoing considerations relating to the import or supply of goods apply equally to the supply of services such as the organisation of games of chance. Those games, and roulette in particular, are lawfully played in a number of Member States. Since the unlawful transactions at issue in the main proceedings are in competition with lawful activities, the principle of fiscal neutrality precludes their being treated differently as regards VAT.

23 The unlawful operation of games of chance therefore falls within the scope of the Sixth Directive.

24 It must, finally, be ascertained whether, as the United Kingdom Government asserted in its written observations, Article 13(B)(f) of the Sixth Directive prohibits the Member States from imposing VAT on unlawful games of chance when the corresponding activity lawfully carried on in duly licensed public casinos is exempted.

25 It is clear from the very wording of that provision that gambling is in principle to be exempted from VAT. The Member States retain the power to lay down the conditions and limitations of that exemption.

26 The Commission has maintained, however, that Article 13(B)(f) does not involve an absolute prohibition on the taxation of games of chance. At the hearing, the United Kingdom Government departed from the view which it had taken in its written observations and maintained that when the Member States lay down the conditions and limitations of the exemption they are entitled to require that the transactions in question take place in duly licensed public casinos.

27 In that regard, it must be pointed out that the exemptions provided for by Article 13(B) are to be applied in accordance with the principle of fiscal neutrality inherent in the common system of VAT (see, to that effect, Case C-45/95 *Commission* v *Italy* [1997] ECR I-3605, paragraph 15). That requirement also applies when the Member States exercise their power under Article 13(B)(f) to lay down the conditions and limitations of the exemption. In according that power to the Member States, the Community legislature did not authorise them to undermine the principle of fiscal neutrality which underlies the Sixth Directive.

28 As pointed out in paragraph 21 of this judgment, it is clear from the judgment in *Lange* that the principle of fiscal neutrality precludes a generalised distinction from being drawn in the levying of VAT between unlawful and lawful transactions. It follows that Member States cannot reserve the exemption solely to lawful games of chance.

29 It cannot be contended, as the German Government has done, that the conditions in which lawful games take place are not comparable to those pertaining in the case of unlawful games on the ground that licensed casinos are subject to a levy calculated on the basis of their profits.

30 First, the common system of VAT would be distorted if Member States could adjust its application on the basis that there are other, unharmonised, taxes. Secondly, as the German Government itself acknowledged at the hearing, there is nothing to prevent levies of the same kind as those payable by licensed casinos from also being imposed on organisers of unlawful games of chance.

31 The answer to the first question must therefore be that the unlawful operation of a game of chance, in the event roulette, falls within the scope of the Sixth Directive. Article 13(B)(f) of that directive must be interpreted as meaning that a Member State may not impose VAT on that activity when the corresponding activity carried on by a licensed public casino is exempted.

Questions 2 and 3

32 In view of the answer given to the first question, there is no need to reply to the second and third questions asked by the national court.

Costs

33 The costs incurred by the German and United Kingdom Governments and by the Commission, 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 Finanzgericht Baden-Württemberg, Freiburg, by order of 21 August 1995, hereby rules:

The unlawful operation of a game of chance, in the event roulette, falls within the scope of the 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. Article 13(B)(f) of that directive must be interpreted as meaning that a Member State may not impose value added tax on that activity when the corresponding activity carried on by a licensed public casino is exempted.

Ragnemalm Mancini Kapteyn

Murray Hirsch

Delivered in open court in Luxembourg on 11 June 1998.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber