

Case C-430/04

Finanzamt Eisleben

v

Feuerbestattungsverein Halle eV

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Sixth VAT Directive – Possibility of relying on the second subparagraph of Article 4(5) – Activities engaged in by a private taxable person in competition with a public authority – Body governed by public law – Treatment as a non-taxable person in respect of activities engaged in as a public authority)

Summary of the Judgment

1. *Acts of the institutions – Directives – Direct effect – Scope*

(Art. 249, third para., EC)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Taxable persons*

(Council Directive 77/388, Art. 4(5), second subpara.)

1. Individuals are entitled to rely before national courts, against the Member State concerned, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.

(see para. 29)

2. A private person who is in competition with a body governed by public law and alleges that that body is, in respect of the activities in which it engages as a public authority, treated as a non-taxable person for value added tax purposes or undertaxed is entitled to rely, in proceedings between a private person and the national tax authorities, on the second subparagraph of Article 4(5) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes. Since the bodies and activities to which the rule of treatment as non-taxable persons applies is clearly defined by Article 4(5) of the Sixth Directive, that provision fulfils the criteria for direct effect.

(see paras 30, 32, operative part)

JUDGMENT OF THE COURT (Second Chamber)

8 June 2006 (*)

(Sixth VAT Directive – Possibility of relying on the second subparagraph of Article 4(5) – Activities engaged in by a private taxable person in competition with a public authority – Body governed by public law – Treatment as a non-taxable person in respect of activities engaged in as a public authority)

In Case C-430/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 8 July 2004, received at the Court on 7 October 2004, in the proceedings

Finanzamt Eisleben

v

Feuerbestattungsverein Halle eV,

Joined party:

Lutherstadt Eisleben,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk (Rapporteur), R. Schintgen, G. Arestis and J. Klučka, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Feuerbestattungsverein Halle eV, by C. Ramme, Rechtsanwalt,
- the Commission of the European Communities, by D. Triantafyllou and K. Gross, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the second subparagraph of Article 4(5) 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, hereinafter ‘the Sixth Directive’).

2 The reference was made in the course of proceedings between the Finanzamt Eisleben (hereinafter ‘the Finanzamt’) and Feuerbestattungsverein Halle eV (hereinafter ‘Feuerbestattungsverein’) relating to the refusal to disclose tax information concerning the local authority of Lutherstadt Eisleben, which is joined as a party to the proceedings before the referring court.

Legal context

The Sixth Directive

3 The first and second subparagraphs of Article 4(5) of the Sixth Directive provide:

‘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 connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.’

National legislation

4 Paragraph 1(1)(1) of the Umsatzsteuergesetz (Law on turnover tax) provides:

‘(1) The following transactions are subject to turnover tax:

1. the supply of goods or services effected for consideration within the national territory by a business person in the course of his business. Transactions are not excluded from taxation where they are carried out pursuant to statute or an order of an authority or are deemed to be carried out under statutory provisions ...’

5 Under Paragraph 2(1) and (3) of the Umsatzsteuergesetz:

‘(1) Business person means a person who independently carries on an industrial, commercial or professional activity ...

...

(3) Legal entities governed by public law are industrially, commercially or professionally active only in the course of their industrial or commercial operations ... and of their agricultural or forestry operations.’

6 Paragraph 30 of the Abgabenordnung 1977 (Tax Code 1977, hereinafter ‘the AO’) provides:

‘(1) Office holders must observe confidentiality in tax matters.

(2) An office holder breaches confidentiality in tax matters if, without authority, he discloses or exploits

1. another’s circumstances

(a) which became known to him during administrative, audit or court proceedings relating to tax matters ...

or

2. a third party’s trade or business secrets which became known to him during one of the proceedings listed under point 1 above ...

(4) The disclosure of information obtained under subparagraph 2 above is permitted provided

1. such disclosure furthers the conduct of proceedings within the meaning of subparagraph 2(l)(a) above ...’

7 Paragraph 40 of the Finanzgerichtsordnung (Finance Court Rules) provides:

‘(1) An action can seek to annul an administrative measure (action for annulment) as well as an order to adopt an administrative measure which has been refused or omitted (action for an administrative measure) or to perform another act.

(2) Except where statute provides otherwise, the action is admissible only if the claimant asserts that his rights have been infringed by the administrative measure or by the refusal or omission of an administrative measure or of another act.’

The main proceedings and the question referred for a preliminary ruling

8 Feuerbestattungsverein is a charitable association which operates a crematorium in the town of Halle. It made an application to the Finanzamt, seeking information as to the tax reference number under which the last notice of tax assessment was issued to Lutherstadt Eisleben, a local authority which also operates a crematorium, as well as the date on which that assessment was adopted. In that application, Feuerbestattungsverein asserted that if Lutherstadt Eisleben were treated as a non-taxable person for the purposes of value added tax (hereinafter ‘VAT’) it would enable that local authority to offer cremation services at prices lower than those which Feuerbestattungsverein itself charges.

9 After pointing out that it is bound to observe confidentiality in tax matters, the Finanzamt refused, by decision of 25 June 1998, to communicate the information sought to Feuerbestattungsverein.

10 Since Feuerbestattungsverein’s notice of objection to that refusal was unsuccessful, it then brought an action before the Finanzgericht (Finance Court), which set aside that decision and ordered the Finanzamt to reach a fresh decision on the application for information. The Finanzgericht referred particularly to the provisions of Paragraph 30(4)(1) and (2)(1)(a) of the AO, by which the disclosure of information obtained in the course of administrative proceedings is permitted provided it furthers the conduct of court proceedings relating to tax matters. It also held that a possible action by Feuerbestattungsverein against the tax assessments on Lutherstadt Eisleben would be admissible, since that association could maintain that its rights have been

infringed because that local authority is treated as a non-taxable person for VAT purposes or is undertaxed.

11 The Finanzamt appealed to the Bundesfinanzhof (Federal Finance Court) on a point of law against the Finanzgericht's judgment. The Bundesfinanzhof considers that the question whether Feuerbestattungsverein is entitled, as a private business person, to rely on the illegality of the supposed treatment as a non-taxable person or undertaxation of Lutherstadt Eisleben requires the interpretation of the second subparagraph of Article 4(5) of the Sixth Directive.

12 In this case, in the referring court's view, the conditions in Paragraph 30(4)(1) of the AO, concerning the permissibility of disclosing information covered, as a rule, by confidentiality in tax matters, are met.

13 In addition, it maintains that the action referred to in Paragraph 40(1) of the Finance Court Rules which Feuerbestattungsverein intends to bring in respect of competition, is admissible only if the claimant in such an action adduces evidence that his rights have been infringed by an administrative measure, by the refusal or failure to adopt such a measure or by the refusal or failure to perform another act. The rights of a third party who is not involved in the relevant tax relationship are infringed, in the referring court's view, only if the treatment as a non-taxable person or undertaxation breaches a statutory rule which was not only adopted in the public interest but which is also intended to protect the interests of certain third parties who are not involved in the relevant tax relationship.

14 Thus, in view of the case-law of the Court of Justice, which has already accepted that Article 4(5) of the Sixth Directive can be relied upon by bodies governed by public law in order to preserve their rights, the referring court states that it seems possible that the provision is intended to protect also private competitors since the treatment of bodies governed by public law as non-taxable persons could lead to significant distortions of competition. However, that court also accepts that another reading of that case-law is conceivable, according to which Article 4(5) is intended only to ensure the fiscal neutrality of VAT, without enabling private competitors to base rights of their own upon it.

15 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a private taxable person able to rely on the second subparagraph of Article 4(5) of Council Directive 77/388/EEC where that taxable person is in competition with a body governed by public law and asserts that the non-taxation or undertaxation of that body is unlawful?'

The question referred for a preliminary ruling

Observations submitted to the Court

16 Feuerbestattungsverein submits that the reply to the question referred by the national court should be in the affirmative.

17 The Commission of the European Communities submits that the treatment of a body governed by public law as a non-taxable person requires that two cumulative conditions are fulfilled, namely that the activities must be carried out by a body governed by public law and that those activities must be carried out by that body acting as a public authority (Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 15). It accepts, for the purpose of replying to the question referred, the national court's implicit assumption that, in the main proceedings, Lutherstadt Eisleben, in operating a crematorium, does so as a public authority and that the

second subparagraph of Article 4(5) of the Sixth Directive is applicable.

18 After noting the case-law concerning the principles governing the possibility of relying on Community directives (Case 57/65 *Lütticke* [1966] ECR 205; Case 41/74 *Van Duyn* [1974] ECR 1337; and Case 103/88 *Fratelli Costanzo* [1989] ECR 1839), the Commission submits that where a tax provision gives rise to direct effects, not only tax creditors and taxpayers must be able to rely upon it, but also, outside the binary relationship between the latter and the tax authorities, third parties affected by the application of such a provision.

19 In that regard, the Commission maintains that an action brought in accordance with the principle of effective judicial protection which forms part of Community law must be admissible, even if the domestic rules of procedure do not provide for this in such a case (Case C-97/91 *Oleificio Borelli* [1992] ECR I-6313, paragraph 13).

20 It suggests, consequently, that the reply to the question referred should be that a private taxable person may rely on the second subparagraph of Article 4(5) of the Sixth Directive where that taxable person is in competition with a body governed by public law and asserts that the non-taxation or undertaxation of that body is unlawful.

The Court's reply

21 It is appropriate to point out, as a preliminary point, that it is clear from the order for reference that Feuerbestattungsverein is in competition with a local authority which is a body governed by public law engaging in an economic activity as a public authority.

22 Starting from the premiss that the local authority Lutherstadt Eisleben could, if treated as a non-taxable person for VAT purposes, offer services at prices lower than those charged by Feuerbestattungsverein, the latter applied to the tax authorities, namely the Finanzamt, for information in that regard. The dispute in the main proceedings thus concerns the Finanzamt's refusal to disclose to a private person, in this case Feuerbestattungsverein, information subject to confidentiality in tax matters relating to that local authority.

23 Accordingly, the national court is asking, in essence, whether a private taxable person which is in competition with a body governed by public law may rely on the second subparagraph of Article 4(5) of the Sixth Directive in order to assert that its rights have been infringed by the treatment as a non-taxable person or undertaxation of that body.

24 In that regard, first, it must be recalled that the second subparagraph of Article 4(5) of the Sixth Directive is intended to ensure compliance with the principle of neutrality of the tax, which precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 41) and that that provision envisages the situation in which bodies governed by public law engage, as entities subject to public law, namely under the special regime applicable to them, in activities or transactions which may also be engaged in, in competition with them, by private individuals under a regime governed by private law or on the basis of administrative concessions (see, to that effect, Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 22).

25 That provision contains a derogation from the rule of treatment of bodies governed by public law as non-taxable persons in respect of the activities or transactions engaged in by them as public authorities where such treatment would lead to significant distortions of competition (*Comune di Carpaneto Piacentino and Others*, paragraph 22).

26 Consequently, if the exemption of the economic activity in question from VAT were to give rise to distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive, the operation of a crematorium by Lutherstadt Eisleben would be taxable by virtue of that same provision (see, to that effect, Case C-276/98 *Commission v Portugal* [2001] ECR I-1699, paragraph 28).

27 It is for the national court to determine whether there are economic circumstances which justify, in the particular case, an exception to the rule of the treatment of bodies governed by public law as non-taxable persons.

28 Secondly, it is settled case-law that unconditional and sufficiently precise provisions of a directive may, in the absence of implementing measures adopted within the prescribed period, be relied on by private individuals 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, in particular, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Joined Cases C-246/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 98).

29 Therefore, individuals are entitled to rely before national courts, against the Member State concerned, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it (Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 27).

30 The Court has already held that since the bodies and activities to which the rule of treatment as non-taxable persons applies is clearly defined by Article 4(5) of the Sixth Directive, that provision fulfils the criteria for direct effect (*Comune di Carpaneto Piacentino and Others*, paragraphs 31 and 33).

31 Consequently, since the conditions noted in paragraphs 28 and 29 of this judgment are fulfilled, a private person who is in competition with a body governed by public law and alleges that that body is, in respect of the activities in which it engages as a public authority, treated as a non-taxable person for VAT purposes or undertaxed is entitled to rely, before the national court, on the second subparagraph of Article 4(5) of the Sixth Directive in proceedings, such as the main proceedings, between a private person and the national tax authorities.

32 In view of the foregoing, the reply to the question referred must be that a private person who is in competition with a body governed by public law and alleges that that body is, in respect of the activities in which it engages as a public authority, treated as a non-taxable person for VAT purposes or undertaxed is entitled to rely, before the national court, on the second subparagraph of Article 4(5) of the Sixth Directive in proceedings, such as the main proceedings, between a private person and the national tax authorities.

Costs

33 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) hereby rules:

A private person who is in competition with a body governed by public law and alleges that that body is, in respect of the activities in which it engages as a public authority, treated as a non-taxable person for value added tax purposes or undertaxed is entitled to rely, before the national court, on the second subparagraph of Article 4(5) 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 in proceedings, such as the main proceedings, between a private person and the national tax authorities.

[Signatures]

* Language of the case: German.