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Judgment of the Court of 17 October 1989. - Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and others v Comune di Carpaneto Piacentino and others. - References for a preliminary ruling: Commissione tributaria di secondo grado di Piacenza et Commissione tributaria di primo grado di Piacenza - Italy. - Value-added tax - Concept of taxable person - Public bodies. - Joined cases 231/87 and 129/88.

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Keywords

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1.Tax provisions - Harmonization of laws - Turnover taxes - Common system of value-added tax - Taxable persons - Bodies governed by public law - Treatment as non-taxable persons in respect of activities in which they engage as public authorities - Concept - Treatment as taxable persons in the case of distortions of competition and of economic activities whose importance derives from their subject-matter and which are not carried out on a negligible scale - Scope - Transposition of the corresponding criteria into national law - Obligations of the Member States

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

2.Tax provisions - Harmonization of laws - Turnover taxes - Common system of value-added tax - Taxable persons - Bodies governed by public law - Treatment as non-taxable persons in respect of activities in which they engage as public authorities - National legislation providing for treatment as a taxable person in a case not provided for in the directive - Possibility for bodies governed by public law to rely on the relevant provision of the directive

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

Summary

1.The first subparagraph of Article 4(5) of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes must be interpreted as meaning that activities pursued "as public authorities" within the meaning of that provision are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders . Activities engaged in by bodies governed by public law not as bodies governed by public law but as persons subject to private law are therefore excluded from the rule of treatment as non-taxable persons . It is for each Member State to choose the appropriate legislative technique for transposing into national law the rule of treatment as a non-taxable person laid down in that provision .

The second subparagraph must be interpreted as meaning that the Member States are required to ensure that bodies governed by public law are treated as taxable persons in respect of activities in which they engage as public authorities where those activities 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, in cases in which their treatment as non-taxable persons could lead to significant distortions of competition, but they are not obliged to transpose that criterion literally into their national law or to lay down precise quantitative limits for such treatment .

The third subparagraph, which seeks to ensure that certain categories of economic activity the importance of which derives from their subject-matter and which are listed in Annex D are not subject to VAT on the ground that they are carried out by bodies governed by public law as public authorities, must be interpreted as meaning that the Member States are free to exclude the said activities from the scope of the rule of mandatory treatment as a taxable person in so far as they are carried out on a negligible scale, but are not required to do so . It does not therefore require the Member States to transpose into their tax legislation the criterion of the non-negligible scale of activities as a condition for treating them as taxable .

2.A body governed by public law may rely on Article 4(5) of the Sixth Directive for the purpose of opposing the application of a national provision making it subject to VAT in respect of an activity in which it engages as a public authority, which is not listed in Annex D to the directive and whose treatment as non-taxable is not liable to give rise to significant distortions of competition .

Parties

In Joined Cases 231/87 and 129/88

REFERENCES to the Court under Article 177 of the EEC Treaty by the Commissione tributaria di secondo grado and the Commissione tributaria di primo grado, Piacenza, for a preliminary ruling in the proceedings pending before those bodies between

in Case 231/87

Ufficio distrettuale delle imposte dirette di Fiorenzuola d' Arda (Piacenza)

and

Comune di Carpaneto Piacentino (Piacenza),

and

in Case 129/88

Comune di Rivergaro and 23 other local authorities

and

Ufficio provinciale imposta sul valore aggiunto di Piacenza (Piacenza)

on the interpretation of Article 4(5) of Council Directive 77/388 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 (Official Journal L 145, p . 1),

THE COURT

composed of : O . Due, President, Sir Gordon Slynn and F . A . Schockweiler (Presidents of Chambers), G . F . Mancini, R . Joliet, T . F . O' Higgins, J . C . Moitinho de Almeida, G . C . Rodríguez Iglesias and F . Grévisse, Judges,

Advocate General : J . Mischo

Registrar : H . A . Ruehl, Principal Administrator

after considering the observations submitted on behalf of

the Italian Republic, in both cases, by L . Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by F . Favara, avvocato dello Stato,

the Commission of the European Communities, in both cases, by E . Traversa, a member of its Legal Department,

Comune di Carpaneto Piacentino, in Case 231/87, by V . Pototschnig, F . Tesauro and M . Avantaggiati,

the Netherlands Government, in Case 129/88, by H . J . Heinemann, Secretary General of the Ministry of Foreign Affairs,

Comune di Piacenza, in Case 129/88, by F . Capelli and F . Tesauro,

Comune di Rivergaro and 23 other local authorities, in Case 129/88, by F . Tesauro, M . Avantaggiati and F . Mancini,

having regard to the Report for the Hearing and further to the hearing on 1 February 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 March 1989,

gives the following

Judgment

Grounds

1 By orders of 8 May 1987 and 28 April 1988, which were received at the Court on 30 July 1987 and 4 May 1988, the Commissione tributaria di secondo grado di Piacenza (Tax Appeals Board, Piacenza) and the Commissione tributaria di primo grado di Piacenza (First Instance Tax Board, Piacenza) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty

several questions on the interpretation of Article 4(5) of Council Directive 77/388 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 (Official Journal L 145, p . 1), hereinafter referred to as "the Sixth Directive ".

2 Those questions arose in two actions, one between the Ufficio distrettuale delle imposte dirette di Fiorenzuola d' Arda (District Office for Direct Taxes of Fiorenzuola d' Arda), Piacenza, and the Comune di Carpaneto Piacentino, and the other between the Comune di Rivergaro, supported by 23 other local authorities, and the Ufficio provinciale imposta sul valore aggiunto (Provincial Value-Added Tax Office), Piacenza, concerning, in particular, the classification for the purposes of liability to value-added tax (hereinafter referred to as "VAT ") of the following transactions engaged in by the local authorities : concessions in respect of graves, cemetery vaults and chapels, and selling concessions of surface rights in and the sale, with full ownership rights, of land in connection with the subsidized building of homes, the taking out of public ownership and sale of a piece of roadway, water supply, the concession for the operation of the public weighbridge, the sale of wood resulting from the lopping of trees and the sale of fittings for cemetery vaults .

3 The national courts decided to refer questions to the Court of Justice for a preliminary ruling in order to resolve those disputes .

4 In Case 232/87, the national court' s questions seek to ascertain :

"(1) whether the principle set out in the first subparagraph of Article 4(5) of the Sixth Directive, which excludes from the category of activities subject to VAT so-called 'institutional' activities, is directly applicable in the absence of a specific national provision;

(2) whether the Community legislature intended to identify by means of the phrase 'activities or transactions in which they engage as public authorities' in the first subparagraph of Article 4(5) those activities which the public authorities carry out directly and exclusively pursuant to powers vested in them as public authorities, albeit delegated to them;

(3) whether, on the assumption that the institutional activities are carried out exclusively by a public body, the Community legislature, by the use of the expression 'such activities' in the second subparagraph of Article 4(5), intended to refer to residual activities relating to public services, governed by Royal Decree No 2578 of 15 October 1925;

(4) whether the second subparagraph of Article 4(5) must be interpreted as requiring the Member States to incorporate in their VAT legislation the criterion of 'significant distortions of competition' in regard to the taxation of the transactions referred to in the said subparagraph;

(5) whether the third paragraph of Article 4(5) of the Sixth Directive, which provides that public bodies are to be considered taxable persons in relation to the activities listed in Annex D, provided that they are not carried out on such a small scale as to be negligible, requires the Member States to incorporate in their tax legislation the criterion of 'negligibility' ".

5 In Case 129/88, the national court' s questions are as follows :

"(1) Are the Community provisions contained in Article 4(5) of the Sixth EEC Directive on value-added tax immediately and directly applicable?

(2) In order to make the Italian system of value-added tax consistent with the Community provisions was the Italian legislature under an obligation under Article 1 of the Sixth Directive :

(a) to lay down the general principle set out in the first subparagraph of Article 4(5) of the Sixth Directive by stipulating specific criteria for defining the activities engaged in by local authorities 'as

public bodies' ;

(b) to exclude from tax public activities which, although they may be described as commercial activities, are, under the national legislation, in the nature of activities of a public authority;

(c) in any event, not to subject to tax, in compliance with the second subparagraph of Article 4(5), public activities where they do not lead to significant distortions of competition, and to specify the necessary quantitative limits;

(d) to fix, pursuant to the third subparagraph of Article 4(5) of the Sixth Directive, a threshold below which the public activities listed in Annex D to the Sixth Directive are not subject to tax ?".

6 Reference is made to the Report for the Hearing for a fuller account of the facts of and legal background to the main proceedings, the course of the proceedings and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

7 All the questions referred to the Court are concerned with the interpretation of Article 4(5) of the Sixth Directive, which reads as follows :

"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 .

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible .

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 ."

8 The questions raised by the national courts may conveniently be rearranged under four headings concerning the interpretation of the first, second and third subparagraphs of Article 4(5) and the direct effect of that provision, respectively .

The interpretation of the first subparagraph of Article 4(5) of the Sixth Directive

9 The first question seeks to determine, on the one hand, what are the essential characteristics of the activities exercised "as a public authority" referred to in the first subparagraph of Article 4(5) of the Sixth Directive and, on the other, to clarify the obligations imposed on the Member States by that provision .

10 It should be pointed out that it follows from Article 2 of the Sixth Directive, which defines the scope of VAT, that within the territory of the Member States only activities of an economic nature are subject thereto . The concept of economic activities is defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services .

11 According to Article 4(1), "taxable person" is to mean any person who independently carries out any of those economic activities . It is thus by way of exception to that rule that the first subparagraph of Article 4(5), of which the first question seeks an interpretation, excludes from the category of taxable persons States, regional and local government authorities and other bodies governed by public law in respect of some of the activities or transactions in which they engage,

"even where they collect dues, fees, contributions or payments in connection with these activities or transactions ".

12 As the Court held in its judgments of 11 July 1985 in Case 107/84 Commission v Federal Republic of Germany ((1985)) ECR 2663 and of 26 March 1987 in Case 235/85 Commission v Kingdom of the Netherlands ((1987)) ECR 1485, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the rule of treatment as a non-taxable person to apply : the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority .

13 A definition of the latter condition cannot be based, as has been argued, on the subject-matter or purpose of the activity engaged in by the public body since those factors have been taken into account by other provisions of the directive for other purposes .

14 The subject-matter or purpose of certain economic activities falling within the scope of VAT is a decisive factor, on the one hand, for the purpose of limiting the scope of the treatment of bodies subject to public law as non-taxable persons (third subparagraph of Article 4(5) of and Annex D to the Sixth Directive) and, on the other, for that of determining the exemptions referred to in Title X of the directive . Article 13(A)(1) of that title of the directive provides, inter alia, for exemptions in favour of certain activities carried out by bodies governed by public law or by other bodies regarded as social in nature by the Member State concerned by reason of their activities being in the public interest .

15 An analysis of the first subparagraph of Article 4(5) in the light of the scheme of the directive shows that it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons . In so far as that provision makes such treatment of bodies governed by public law conditional upon their acting "as public authorities", it excludes therefrom activities engaged in by them not as bodies governed by public law but as persons subject to private law . Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law .

16 It follows that the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities "as public authorities" within the meaning of that provision when they do so under the special legal regime applicable to them . On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting "as public authorities ". It is for the national court to classify the activity at issue in the light of that criterion .

17 With regard to the transposition of the rule laid down in the first subparagraph of Article 4(5) into national law, it should be pointed out that since the directive imposes an obligation to achieve a result, it is for each Member State in accordance with the third paragraph of Article 189 of the Treaty to choose the appropriate form and methods to attain that result .

18 It follows that although the Member States are required to ensure that the activities or transactions engaged in by bodies governed by public law as public authorities are not subject to VAT in so far as they do not come within one of the exceptions specified in the second and third subparagraphs, they may choose for that purpose the legislative technique which they regard as the most appropriate . Thus they may, for example, merely incorporate into national law the form of words used in the Sixth Directive or an equivalent expression or they may draw up a list of activities in respect of which bodies governed by public law are not to be regarded as taxable persons .

19 The answer to the first question should therefore be that the first subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that activities pursued "as public authorities"

within the meaning of that provision are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders . It is for each Member State to choose the appropriate legislative technique for transposing into national law the rule of treatment as a non-taxable person laid down in that provision .

The interpretation of the second subparagraph of Article 4(5) of the Sixth Directive

20 The second question seeks to determine, on the one hand, the scope of the expression "such activities" in the second subparagraph of Article 4(5) of the Sixth Directive and, on the other, whether the Member States are required to incorporate into their tax legislation the criterion of "significant distortions of competition", laid down in that provision, or to fix quantitative limits for the transposition of that criterion into national law .

21 It should first be pointed out that it follows from both the wording and structure of Article 4(5) of the Sixth Directive that the expression "these activities or transactions" in the second subparagraph corresponds to the activities or transactions referred to in the first subparagraph, that is to say, activities or transactions engaged in by bodies governed by public law as public authorities, to the exclusion, as indicated above, of activities engaged in by them as persons subject to private law .

22 It should next be noted that the second subparagraph of that provision contains a derogation from the rule of treatment of bodies governed by public law as non-taxable persons in respect of activities or transactions engaged in by them as public authorities where that treatment would lead to significant distortions of competition . Thus, with a view to ensuring the neutrality of the tax, which is the major objective of the Sixth Directive, that provision envisages the situation in which bodies governed by public law engage, under the special legal regime applicable to them, in activities 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 .

23 In that situation, the Member States are required by the third paragraph of Article 189 of the Treaty to ensure that bodies governed by public law are treated as taxable persons where the contrary would lead to significant distortions of competition . On the other hand, they are not obliged to transpose that criterion literally into their national law or to lay down precise quantitative limits for treatment as non-taxable persons .

24 The answer to the second question should therefore be that the second subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that the Member States are required to ensure that bodies governed by public law are treated as taxable persons in respect of activities in which they engage as public authorities where those activities may also be engaged in, in competition with them, by private individuals, in cases in which the treatment of those bodies as non-taxable persons could lead to significant distortions of competition, but they are not obliged to transpose that criterion literally into their national law or to lay down precise quantitative limits for such treatment .

The interpretation of the third subparagraph of Article 4(5) of the Sixth Directive

25 The third question seeks to determine whether the third subparagraph of Article 4(5) of the Sixth Directive requires the Member States to transpose into their tax legislation the criterion of the non-negligible scale of activities as a condition for treating bodies governed by public law as taxable persons in respect of the activities listed in Annex D to the directive and whether they must lay down for that purpose a threshold below which such bodies are treated as non-taxable persons .

26 It should be noted that by providing that bodies governed by public law are in any case to be regarded as taxable persons in respect of the activities listed in Annex D provided they are not on such a small scale as to be negligible, the provision in question makes the rule that such bodies are not to be regarded as taxable persons subject to a limitation which must be added to those resulting from the condition laid down in the first subparagraph, namely that the activities must be engaged in as public authorities, and from the derogation laid down in the second subparagraph in cases where treatment as non-taxable persons would lead to significant distortions of competition . The third subparagraph of Article 4(5) thus seeks to ensure that certain categories of economic activity the importance of which derives from their subject-matter are not subject to VAT on the ground that they are carried out by bodies governed by public law as public authorities .

27 However, the obligation to treat bodies governed by public law as taxable persons in respect of the activities listed in Annex D to the directive is imposed on the Member States only in so far as the activities in question are not negligible in scale . Having regard to the structure of the provision in question, it must be interpreted as meaning that the Member States are free to exclude from the scope of such compulsory treatment the activities listed in Annex D in so far as they are carried out on a negligible scale, but are not required to do so . Consequently, they are also not required to fix a ceiling for treatment as non-taxable persons in respect of the activities at issue .

28 The answer to the question referred to the Court should therefore be that the third subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that it does not require the Member States to transpose into their tax legislation the criterion of the non-negligible scale of activities as a condition for treating the activities listed in Annex D as taxable .

The direct effect of Article 4(5) of the Sixth Directive

29 The fourth question seeks to ascertain whether a body governed by public law may rely on Article 4(5) of the Sixth Directive for the purpose of opposing the application of a national provision making it subject to VAT in respect of an activity in which it was engaged as a public authority and which is not listed in Annex D, where treatment of the activity as non-taxable is not liable to give rise to significant distortions of competition .

30 As the Court has consistently held (see, in particular, the judgment of 19 January 1982 in Case 8/81 Becker v Finanzamt Muenster-Innenstadt ((1982)) ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State .

31 Article 4(5) of the Sixth Directive fulfils those criteria, since the bodies and activities in regard to which the rule of treatment as non-taxable persons applies are clearly defined in that provision . Bodies governed by public law, which, in this context must be assimilated to individuals, are therefore entitled to rely on that rule in respect of activities engaged in as public authorities but not listed in Annex D to the directive .

32 That conclusion is not invalidated by the fact that the second subparagraph of Article 4(5) of the Sixth Directive requires activities to be treated as taxable if their treatment as non-taxable would lead to significant distortions of competition . That limitation placed on the rule of treatment as non-taxable persons is thus only a conditional limitation, and whilst it is true that its application involves an assessment of economic circumstances, that assessment is not exempt from judicial review .

33 The answer to the fourth question should therefore be that a body governed by public law may rely on Article 4(5) of the Sixth Directive for the purpose of opposing the application of a national provision making it subject to VAT in respect of an activity in which it engages as a public authority, which is not listed in Annex D and whose treatment as non-taxable is not liable to give rise to significant distortions of competition .

Decision on costs

Costs

34 The costs incurred by the Italian Republic, the Netherlands Government and Commission of the European Communities, which have submitted observations to the Court, are not recoverable . Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court .

Operative part

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Commissione tributaria di secondo grado and the Commissione tributaria di primo grado, Piacenza, by orders of 8 May 1987 and 28 April 1988, respectively, hereby rules :

(1) The first subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that activities pursued "as public authorities" within the meaning of that provision are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders . It is for each Member State to choose the appropriate legislative technique for transposing into national law the rule of treatment as a non-taxable person laid down in that provision .

(2) The second subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that the Member States are required to ensure that bodies subject to public law are treated as taxable persons in respect of activities in which they engage as public authorities where those activities may also be engaged in, in competition with them, by private individuals, in cases in which the treatment of those bodies as non-taxable persons could lead to significant distortions of competition, but they are not obliged to transpose that criterion literally into their national law or to lay down precise quantitative limits for such treatment .

(3) The third subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that it does not require the Member States to transpose into their tax legislation the criterion of the non-negligible scale of activities as a condition for treating the activities listed in Annex D as taxable .

(4) A body governed by public law may rely on Article 4(5) of the Sixth Directive for the purpose of opposing the application of a national provision making it subject to VAT in respect of an activity in which it engages as a public authority, which is not listed in Annex D and whose treatment as non-taxable is not liable to give rise to significant distortions of competition .