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61992J0063

Judgment of the Court of 15 December 1993. - Lubbock Fine & Co. v Commissioners of Customs and Excise. - Reference for a preliminary ruling: Value Added Tax Tribunal, London - United Kingdom. - Value added tax - Consideration paid for the surrender of a lease. - Case C-63/92.

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Keywords

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Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Exemptions provided for under the Sixth Directive ° Exemption for the letting of immovable property ° Definition ° Consideration paid for the surrender of a lease ° Included ° Tax demanded under the Member States' power to limit the scope of the exemption ° Not permissible

(Council Directive 77/388, Art. 13B(b))

Summary

The term "letting of immovable property" used in Article 13B(b) of the Sixth Directive (77/388) on the harmonization of the laws of the Member States relating to turnover taxes to define a transaction which is compulsorily exempt from VAT covers the case where a tenant, for consideration, surrenders his lease and returns the immovable property to his immediate landlord.

The same provision, which allows Member States to apply, in addition to the specified exceptions, further exclusions to the scope of the exemption for the letting of immovable property, does not authorize them to tax such consideration when the rent paid under the lease was exempt under the said rule. The relations created by a lease cannot be broken up.

Parties

In Case C-63/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Value Added Tax Tribunal, London Tribunal Centre, for a preliminary ruling in the proceedings pending before that court between

Lubbock Fine & Co

and

Commissioners of Customs & Excise

on the interpretation of Article 13B(b) and (g) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization 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,

composed of: O. Due, President, J.C. Moitinho de Almeida, M. Diez de Velasco, D.A.O. Edward (Presidents of Chambers), C.N. Kakouris, R. Joliet, F. Grévisse, M. Zuleeg and P.J.G. Kapteyn, Judges,

Advocate General: M. Darmon,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Lubbock Fine & Co, by David Goy QC,

° the United Kingdom, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and A.W.H. Charles, Barrister,

° the Greek Government, by Fokionas P. Georgakopoulos, member of the State Legal Service, acting as Agent,

° the Commission of the European Communities, by Thomas F. Cusack, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Lubbock Fine & Co, the United Kingdom Government, the German Government, represented by Claus-Dieter Quassowski, Regierungsdirektor, acting as Agent, the Greek Government and the Commission at the hearing on 28 April 1993,

after hearing the Opinion of the Advocate General at the sitting on 30 June 1993,

gives the following

Judgment

Grounds

1 By orders of 30 July 1991 and 26 February 1992, received at the Court on 3 March 1992, the Value Added Tax Tribunal, London Tribunal Centre, referred to the Court for a preliminary ruling

under Article 177 of the EEC Treaty three questions on the interpretation of Article 13B(b) and (g) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization 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 Those questions were raised in connection with an appeal by a firm of chartered accountants, Lubbock Fine & Co (hereinafter "Lubbock Fine") against an assessment to value added tax (VAT) made by the Commissioners of Customs and Excise (hereinafter "Customs and Excise") in respect of the consideration received by Lubbock Fine for the surrender of a lease. In 1971 Lubbock Fine took a lease of premises belonging to Esso Pension Trust Ltd for 25 years and one quarter. The premises were subsequently sold to Guildhall Properties Ltd. In 1990 Guildhall Properties Ltd and Lubbock Fine entered into an agreement under which Lubbock Fine surrendered the residue of the lease and returned the premises to Guildhall Properties Ltd with effect from 1 June 1990. The latter paid Lubbock Fine 850 000 by way of consideration for the surrender.

3 Customs and Excise took the view that under the relevant United Kingdom legislation, the Value Added Tax Act 1983 as amended by the Finance Act 1989, VAT was chargeable on the consideration and accordingly made an assessment upon Lubbock Fine in the sum of 110 869.56. Item 1 of Group 1 of Schedule 6 to the Value Added Tax Act 1983, as amended, exempts from VAT "the grant of any interest in or right over land or of any licence to occupy land ...". It follows from that provision, read in conjunction with an explanatory note, that in the United Kingdom the letting or sub-letting of immovable property and the assignment of a lease of immovable property are, in principle, exempt transactions. However, the surrender of a lease to the tenant' s immediate landlord is excluded from exemption.

4 In support of its appeal to the Value Added Tax Tribunal Lubbock Fine contended that the provision excluding surrenders from the scope of the exemption was contrary to Article 13B of the Sixth Directive.

5 That provision states:

"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:

(a) (...)

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption;

(...)

(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);

(...)".

6 Article 4(3) of the directive provides:

"Member States may ... treat as a taxable person anyone who carries out, on an occasional basis, ... in particular one of the following [transactions]:

(a) The supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand.

(...)

' A building' shall be taken to mean any structure fixed to or in the ground;

(...)".

7 Taking the view that Lubbock Fine' s liability to tax in respect of the consideration paid was dependent on the interpretation to be given to Article 13B of the Sixth Directive, the Value Added Tax Tribunal decided to refer the following three questions to the Court for a preliminary ruling:

"1. Whether the surrender of a lease of immovable property for consideration paid by the landlord to the tenant is a supply within the words 'the leasing or letting of immovable property' contained in Article 13B(b) of the Sixth Directive;

2. If the answer to Question 1 is in the affirmative: whether a Member State is entitled to exclude such a surrender from exemption, and thus tax it, by virtue of the final words of Article 13B(b) of the Sixth Directive, namely 'Member States may apply further exclusions to the scope of this exemption' ;

3. If the answer to Question 1 is in the negative: whether the surrender of a lease of buildings, or parts thereof, for consideration paid by the landlord to the tenant is a supply within the words 'the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(b)' contained in Article 13B(g) of the Sixth Directive."

The term "letting of immovable property"

8 The essence of the first question put by the national court is whether the term "letting of immovable property" used in Article 13B(b) of the Sixth Directive to define an exempt transaction covers the case where a tenant, for consideration, surrenders his lease and returns the immovable property to his immediate landlord.

9 Where a given transaction, such as the letting of immovable property, which would be taxed on the basis of the rents paid, falls within the scope of an exemption provided for by the Sixth Directive, a change in the contractual relationship, such as termination of the lease for consideration, must also be regarded as falling within the scope of that exemption.

10 Consequently, the reply to be given to the national court is that the term "letting of immovable property" used in Article 13B(b) of the Sixth Directive to define an exempt transaction covers the case where a tenant surrenders his lease and returns the immovable property to his immediate landlord.

The power to tax certain transactions that are in principle exempt

11 The essence of the second question put by the national court is whether Article 13B(b), which allows Member States to apply further exclusions to the scope of the exemption for the letting of immovable property, authorizes them to tax the consideration paid by one party to the other in connection with the surrender of the lease where the rent paid under the lease was exempt from VAT.

12 Article 13B allows Member States to exclude certain types of letting from the scope of the exemption and hence to subject them to tax. However, it cannot be construed as allowing them to tax a transaction terminating a lease where the grant of that lease was compulsorily exempt. The relations created by a lease cannot be broken up in this way.

13 Accordingly, the reply to be given to the second question is that Article 13B(b) of the Sixth Directive, which allows Member States to apply further exclusions to the scope of the exemption for the letting of immovable property, does not authorize them to tax the consideration paid by one party to the other in connection with the surrender of the lease where the rent paid under the lease was exempt from VAT.

The term "supply of buildings or parts thereof, and of the land on which they stand"

14 The national court seeks a reply to the third question only in the event that the consideration paid by one party to the other in connection with the surrender of a lease does not qualify for the exemption applicable to the "letting of immovable property". It is therefore unnecessary to reply to this question.

Decision on costs

Costs

15 The costs incurred by the German, Greek and United Kingdom Governments and the Commission of the European Communities, 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 proceedings 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 referred to it by the Value Added Tax Tribunal, London Tribunal Centre, by orders of 30 July 1991 and 26 February 1992, hereby rules:

1. The term "letting of immovable property" used in Article 13B(b) of the Sixth Council Directive of 17 May 1977 (Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes ° Common system of value added tax: uniform basis of assessment) to

define an exempt transaction covers the case where a tenant surrenders his lease and returns the immovable property to his immediate landlord.

2. Article 13B(b) of Directive 77/388, which allows Member States to apply further exclusions to the scope of the exemption for the letting of immovable property, does not authorize them to tax the consideration paid by one party to the other in connection with the surrender of the lease when the rent paid under the lease was exempt from VAT.