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Judgment of the Court (Second Chamber) of 11 August 1995. - W. Bulthuis-Griffioen v Inspecteur der Omzetbelasting. - Reference for a preliminary ruling: Gerechtshof Amsterdam - Netherlands. - Common system of value added tax - Sixth VAT Directive - Exemption - Services of a social nature performed by a private person - Exclusion. - Case C-453/93.

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Keywords

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Tax provisions ° Harmonization of laws ° Turnover tax ° Common system of value added tax ° Exemptions provided for by the Sixth Directive ° Strict interpretation ° Exemption of services linked to welfare and social security supplied by bodies governed by public law or other organizations recognized as charitable ° Services supplied by a natural person ° Excluded

(Council Directive 77/388, Art. 13 A(1)(g))

Summary

The exemptions provided for in Article 13 of the Sixth Directive (No 77/388) on the harmonization of the laws of the Member States relating to turnover taxes derogate from the general principle that value added tax is to be levied on all services supplied for consideration by a taxable person. The terms used to specify those exemptions must therefore be strictly interpreted. Consequently, and in view of the fact that some of the exemptions mentioned in Article 13 A(1) expressly refer to the concept of "body" or "organization", whereas others do not, exemption may be claimed in the first case only by legal persons whereas in the second it may also be claimed by natural persons, including traders.

A trader who is a natural person does not fall within the scope ratione personae of Article 13 A(1)(g) of the directive, which concerns services closely linked to welfare and social security supplied by bodies governed by public law or other organizations recognized as charitable by the Member State concerned; he cannot therefore claim exemption under that provision.

Parties

In Case C-453/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof, Amsterdam, for a preliminary ruling in the proceedings pending before that court between

W. Bulthuis-Griffioen

and

Inspecteur der Omzetbelasting,

on the interpretation of Article 13A of the Sixth Council Directive (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 (OJ 1977 L 145, p. 1),

THE COURT (Second Chamber),

composed of: F.A. Schockweiler (Rapporteur), President of the Chamber, G.F. Mancini and G. Hirsch, Judges,

Advocate General: G. Cosmas,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Mrs Bulthuis-Griffioen, by G.G.M. Kortenaar, Tax Consultant, acting as Agent,

° by H. Zuidersma, Inspecteur der Omzetbelasting (Inspector of Turnover Taxes), Zaandam,

° the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

° the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Bulthuis-Griffioen, the Netherlands Government, represented by J.S. van den Oosterkamp, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, and the Commission at the hearing on 23 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 8 June 1995,

gives the following

Grounds

1 By order of 21 July 1993, received at the Court on 26 November 1991, the *Gerechtshof* (Regional Court of Appeal) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 13A of Council Directive 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 (OJ 1977 L 145, p. 1, hereafter "the Sixth Directive").

2 That question was raised in proceedings between Mrs *Bulthuis-Griffioen* and the Inspector of Taxes concerning the application of an exemption from value added tax (hereafter "VAT") provided for in Article 11(1) of the *Wet op de Omzetbelasting 1968* (Law on Turnover Tax, hereafter "the 1968 Law").

3 In the Netherlands, Article 11(1)(f) of the 1968 Law provides for an exemption from VAT in respect of:

"supplies of goods and services of a social or cultural nature to be specified by general administrative measures, provided that the trader does not aim to make a profit and that there is no serious distortion of competitive conditions to the detriment of traders having a profit-making aim".

4 The "supplies of goods and services of a social ... nature" mentioned in that provision are defined by Article 7 of the *Uitvoeringsbesluit Omzetbelasting* (Turnover Tax Implementing Decree, hereafter "the Implementing Decree") 1968, which refers in that connection to its Annex B. Part B thereof lists various categories of bodies whose services are exempt from VAT provided that they do not pursue a profit-making aim. Listed amongst those bodies, in the version in force until 1 July 1989, are "children's holiday camps, crèches, day nurseries and outdoor schools". In the version in force after that date, that category corresponds to "day-care centres and schools for children suffering from long-term illness" (point 6).

5 Since August 1988 Mrs *Bulthuis-Griffioen* has been running a day nursery in the Netherlands. On that ground, she is considered to be a "trader" subject to VAT, for the purposes of Article 7 of the 1968 Law.

6 In 1989 and 1990 she achieved turnover of HFL 41 997 and HFL 41 947 respectively. The receipts exceeded the amount of costs incurred. The operating surpluses were paid to Mrs *Bulthuis-Griffioen* in the form of remuneration.

7 At the time when she submitted her tax declaration Mrs *Bulthuis-Griffioen* did not account for VAT. She took the view that the services offered by the nursery were covered by the exemption provided for in Article 11(1)(f) of the 1968 Law. The gains achieved amounted to HFL 11 926 in 1989 and to HFL 17 963 in 1990. If, on the other hand, the services offered by the nursery had not been exempt from VAT, the operating surpluses would have been limited to HFL 6 371 for 1989 and HFL 12 014 for 1990.

8 The Inspector of Taxes addressed to Mrs Bulthuis-Griffioen a tax recovery notice, taking the view that the abovementioned exemption was not applicable: since Mrs Bulthuis-Griffioen was pursuing a profit-making aim, she did not, in his view, satisfy the condition laid down in Article 11(1)(f) of the 1968 Law.

9 Mrs Bulthuis-Griffioen lodged an objection to the tax notice, which was dismissed by the Inspector of Taxes. She thereupon brought proceedings for the annulment of the Inspector's decision before the Gerechtshof, Amsterdam.

10 According to the national court, it is not disputed that the establishment run by Mrs Bulthuis-Griffioen constitutes a "day nursery" or "crèche" within the meaning of the old version of Annex B of the Implementing Decree, and a "day-care centre" within the meaning of the new version of that annex. On the other hand, the national court is not certain that the condition that no profit-making aim should be pursued is satisfied. In that respect, Mrs Bulthuis-Griffioen claimed that, although she in fact seeks to achieve an operating surplus from her activity, that surplus is still less than the hypothetical "salary" that she could obtain for the work she does; for that reason she considers her activity to be non-profit-making within the meaning of the 1968 Law.

11 The national court states that the exemption introduced by Article 11(1)(f) of the 1968 Law is based on Article 13A(1)(g) of the Sixth Directive, which is worded as follows:

"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:

...

(g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other organizations recognized as charitable by the Member State concerned."

12 The national court also points out that in making the grant of the exemption subject to the condition that the bodies enjoying the exemption should not systematically aim to make a profit, the national legislature availed itself of the possibility, given to Member States by Article 13A(2)(a) of the Sixth Directive, of making the grant of some of the exemptions provided for in paragraph 1 subject to certain conditions.

13 Article 13A(2)(a) in fact provides:

"Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (n) of this Article subject in each individual case to one or more of the following conditions:

° they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,

...

° exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax".

14 According to the national court, the condition that there should be no profit-making aim, laid down in Article 11(1)(f) of the 1968 Law, must have the same meaning as the corresponding condition laid down in Article 13A(2)(a) of the Sixth Directive, which is that the bodies in question

"shall not systematically aim to make a profit".

15 The national court therefore stayed the proceedings and requested the Court to give a preliminary ruling on the following question:

"Is a trader to be regarded as systematically aiming to make a profit within the meaning of Article 13A(2)(a) of the Sixth Council Directive (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, where he is a natural person who structurally sets out to achieve a positive result so that his income exceeds his expenditure, but that positive result cannot be higher than what may be regarded as reasonable remuneration for the work performed by the trader himself?"

16 By its question the national court is requesting the Court to interpret the condition, appearing in Article 13A(2)(a) of the Sixth Directive, that there should be no systematic aim to make a profit, to which the Member States may subject the application, to bodies other than those governed by public law, of the exemption provided for in paragraph 1(g) of that article.

17 In order to provide the national court with a reply which will assist in resolving the main proceedings it is first necessary to ascertain whether, in a case such as the present one, the conditions for the application of Article 13A(1)(g) are met. Since that provision exempts supplies of services closely linked to welfare and social security work performed by bodies governed by public law or by other organizations recognized as charitable by the Member State concerned, it must be determined whether a trader such as Mrs Bulthuis-Griffioen may be considered to be such a "body" or "organization".

18 It is settled case-law that the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law (see the judgment in Case 348/87 Stichting Uitvoering Financiële Acties [1989] ECR 1737, paragraph 11). That must also be true of the specific conditions laid down for those exemptions to apply and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption.

19 At paragraph 13 of the same judgment the Court held that the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person.

20 Certain of the exemptions mentioned in Article 13A(1) of the Sixth Directive, including the one provided for in paragraph (g) of that provision, expressly refer to the concept of "body" or "organization", whereas others do not. The position is, therefore, that in the former case the exemption may be claimed only by legal persons whereas in the latter case it may also be claimed by natural persons including traders.

21 Consequently, a trader such as Mrs Bulthuis-Griffioen, a natural person, is not a person covered by Article 13A(1)(g) of the Sixth Directive.

22 That fact is sufficient to bar that trader from the exemption available under Article 13A(1)(g) of the Sixth Directive.

23 In those circumstances it is no longer relevant to the outcome of the main proceedings to determine whether a trader who structurally sets out to achieve a positive result so that his income exceeds his expenditure but that positive result cannot be higher than what may be regarded as reasonable remuneration for the work performed by the trader is "systematically aiming to make a profit", within the meaning of Article 13A(2)(a) of the Sixth Directive.

24 In view of the foregoing considerations, the reply to be given to the national court must be that Article 13A(1) of the Sixth Directive is to be interpreted as meaning that a trader who is a natural person cannot claim exemption under paragraph (g) of that provision, which expressly reserves the exemption to bodies governed by public law or other organizations recognized as charitable by the Member State concerned.

Decision on costs

Costs

25 The costs incurred by the Netherlands Government and by 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 action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Gerechtshof, Amsterdam, by order of 21 July 1993, hereby rules:

Article 13A(1) of Sixth Council Directive (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, is to be interpreted as meaning that a trader who is a natural person cannot claim exemption under paragraph (g) of that provision, which expressly reserves the exemption to bodies governed by public law or other organizations recognized as charitable by the Member State concerned.