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Judgment of the Court (Fifth Chamber) of 12 February 1998. - Elisabeth Blasi v Finanzamt München I. - Reference for a preliminary ruling: Finanzgericht München - Germany. - Sixth VAT Directive - Exemption - Letting of immovable property - Exclusion of accommodation in the hotel sector or in sectors with a similar function. - Case C-346/95.

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Keywords

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Exemptions provided for by the Sixth Directive - Exemption for the letting of immovable property - Exclusion covering provision of accommodation in the hotel sector or in sectors with a similar function - Scope - National legislation applying, for the purpose of distinguishing accommodation in the hotel sector from the letting of dwelling accommodation, the criterion of the duration of the accommodation - Permissible

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

Summary

Article 13.B(b)(1) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes may be construed as meaning that the provision of short-term accommodation for guests is taxable, as constituting the provision of accommodation in sectors with a function similar to that of the hotel sector.

In that regard, Article 13.B(b)(1) does not preclude taxation in respect of letting agreements concluded for a period of less than six months, if that duration is deemed to reflect the parties' intention. It is, however, for the national court to determine whether, in a case before it, certain factors (such as the automatic renewal of the letting agreement) suggest that the duration stated in the letting agreement does not reflect the parties' true intention, in which case the actual total duration of the accommodation, rather than that specified in the letting agreement, would have to be taken into consideration.

A distinction drawn by Member States, who enjoy a margin of discretion in this regard, between accommodation in the hotel sector and the letting of dwelling accommodation on the basis of its duration constitutes an appropriate criterion of distinction, since one of the ways in which hotel accommodation specifically differs from the letting of dwelling accommodation is the duration of the stay, and the use to this end of the criterion of the provision of short-term accommodation, being defined as less than six months, appears to be a reasonable means by which to ensure that the transactions of taxable persons whose business is similar to the essential function performed by a hotel, namely the provision of temporary accommodation on a commercial basis, are subject to tax.

Parties

In Case C-346/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht München (Germany) for a preliminary ruling in the proceedings pending before that court between

Elisabeth Blasi

and

Finanzamt München I

">on the interpretation of Article 13B(b)(1) 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),

THE COURT

(Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet (Rapporteur), J.C. Moitinho de Almeida, D.A.O. Edward and J.-P. Puissochet, Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal 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 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 Mrs Blasi, represented by Hans-W. Weindl, Rechtsanwalt, Munich; the German Government, represented by Ernst Röder and by Claus-Dieter Quassowski, Regierungsdirektor in the Federal Ministry of Economic Affairs, acting as Agent; and the Commission, represented by Jürgen Grunwald, at the hearing on 5 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 25 September 1997,

gives the following

Judgment

Grounds

1 By order of 20 September 1995, received at the Court on 9 November 1995, the Finanzgericht München (Finance Court, Munich) referred for a preliminary ruling under Article 177 of the EC Treaty three questions concerning the interpretation of Article 13B(b)(1) 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) (`the Sixth Directive').

2 Those questions arose in a dispute between Mrs Blasi and the Finanzamt München I (Munich I tax office) (`the Finanzamt') concerning Mrs Blasi's liability to pay value added tax (`VAT') in respect of the provision of accommodation treated under German law as being short-term because the letting agreements were entered into for periods of less than six months.

3 According to the order for reference, the provisions of German legislation applicable to the facts in the main proceedings which correspond to Article 13B(b)(1) of the Sixth Directive are contained in the 1980 version of the Umsatzsteuergesetz (Law on Turnover Tax) (`the UStG').

4 Under Paragraph 4(12), first sentence, letter (a), and second sentence, of the UStG:

`Among the transactions referred to in Paragraph 1(1)(1) to (3), the following are exempted:

...

12.

(a) leasing and letting of immovable property, rights governed by provisions of civil law relating to immovable property, and sovereign rights of the State in regard to immovable goods and property;

(b) ...

(c) ...

The letting of living and sleeping accommodation which a trader keeps available for the short-term accommodation of guests ("Fremden") shall not be exempted ...'.

5 Mrs Blasi let a number of buildings in Munich and, from 1984, provided accommodation in those buildings for refugee families from countries of central and eastern Europe sent to her by the

municipal social services department.

6 It appears from the order for reference that the buildings used for accommodation

were normal residential buildings each containing several dwellings. Fully furnished rooms equipped with cooking facilities were made available to the families. The rooms were cleaned by the refugees themselves. Mrs Blasi supplied and washed the bedlinen and also saw to the cleaning of the landings, staircases, bathrooms and lavatories. Occupants were not supplied with meals. There was no reception area in the buildings, nor any lounges or other common amenity rooms.

7 The City of Munich did not have any right to allocate accommodation, but acted as an intermediary and sent persons to Mrs Blasi when it learned that she had dwellings available.

8 For the accommodation costs, which were met by the City of Munich, the municipal social services department issued Mrs Blasi with certificates attesting that it would pay the costs incurred, which were usually valid for one month and could be extended if necessary. Payment was made on the basis of a daily charge, fixed by agreement between Mrs Blasi and the City of Munich. That charge was DM 25 per person per day in the year at issue, 1984.

9 Letting agreements were concluded on an individual basis between Mrs Blasi and the tenants sent by the City of Munich social services department. In most cases, the actual duration of the refugees' stay was greater than six months. It appears from the order for reference that, in a number of letters sent to the City of Munich, Mrs Blasi had refused to accept refugees who wished to stay with her for only a short period and expressed her desire to let only to those who wished to stay with her for at least six months. However, the letting agreements concluded between Mrs Blasi and her tenants were always signed for a period of less than six months.

10 By a tax assessment notice of 7 April 1987, Mrs Blasi was assessed on the basis of her tax return and VAT was determined in the amount of DM 82 043. Pursuant to the findings of an audit report of 28 December 1990, the Finanzamt, by an amending decision of 13 July 1993, fixed the VAT at DM 151 278, on the ground that Mrs Blasi had failed to declare all her taxable transactions for the period from 1 January 1984 to 30 June 1984.

11 After unsuccessfully lodging an objection against that decision, Mrs Blasi instituted proceedings before the Finanzgericht München.

12 Mrs Blasi argued that the tax assessment notice, the amending decision and the decision dismissing her objection should be amended and the claim against her for VAT for 1984 consequently set aside. The Finanzamt submitted that the action should be dismissed.

13 The Finanzgericht München first of all points out that, according to the case-law of the Bundesfinanzhof (Federal Finance Court) on Paragraph 4(12) of the UStG, the provision of hotel accommodation will be treated as taxable if the operator's intention is to make the premises available for temporary accommodation only. The actual duration of the let is of little importance, since, according to well-established case-law, where accommodation provided for emigrants or asylum-seekers is guaranteed by public authorities, consideration must be given to the duration provided for under the letting agreement. The let is deemed to be short-term if the agreement is for a period of less than six months.

14 The Finanzgericht München points out that, if those criteria are applied in the case before it, it would appear that the transactions carried out by Mrs Blasi could not be exempted from VAT because, even if she intended the dwellings in question to be for long-term lets, no long-term agreement was ever concluded. Only in retrospect is it possible to determine that the letting of dwellings through the intermediary of the City of Munich related to several years, the actual

average length of a let being, according to Mrs Blasi's calculations, 14.4 months.

15 The Finanzgericht München also points out that the exception to the exemption introduced by the second sentence of Paragraph 4(12) of the UStG is based on Article 13B(b)(1) of the Sixth Directive, which provides 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 the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(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;

...'.

16 Since Article 13B(b)(1) of the Sixth Directive merely states that the provision of accommodation in sectors with a function similar to that of the hotel sector is excluded from the exemption enjoyed by the leasing or letting of immovable property, without referring specifically to the provision of short-term accommodation, the Finanzgericht München is uncertain whether the second sentence of Paragraph 4(12) of the UStG is compatible with that exclusion. It has accordingly referred the following questions to the Court for a preliminary ruling:

`1. Is Article 13B(b)(1) of the Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (Sixth VAT Directive) to be interpreted as meaning that the "provision of accommodation ... in the hotel sector or in sectors with a similar function" means no more than the short-term accommodation of guests?

2. If Question 1 is answered in the affirmative:

(a) What period of accommodation can properly be regarded as short-term?

Is it no longer "provision of accommodation in the hotel sector" if the operator keeps rooms available for long-term accommodation and this finds expression in the conclusion of a long-term letting agreement (longer than six months)?

(b) Is a tax exemption under Article 13B(b)(1) for a proportion of the time possible if it transpires that all the accommodation was let on either a short or a long-term basis?

3. If Question 1 is answered in the negative:

On the basis of what temporal, spatial and conceptual criteria must the phrase "provision of accommodation ... in the hotel sector or in sectors with a similar function" be defined and which of them must necessarily be present?'

17 In its questions, which should be examined together, the national court is in substance asking whether Article 13B(b)(1) of the Sixth Directive may be construed as meaning that what is defined in German law as the provision of short-term accommodation for guests constitutes, within the meaning of Community law, the provision of accommodation in sectors with a function similar to that of the hotel sector, thus being subject to VAT. The national court is also asking whether it is compatible with Article 13B(b)(1) of the Sixth Directive to draw a distinction between taxable

transactions and transactions that are exempted on the basis of the duration of the accommodation, such exemption being reserved for those letting transactions that involve the conclusion of a letting agreement for more than six months, irrespective of the actual total duration of the let.

18 It must first be noted that the Court has consistently 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 (Case 348/87 Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën [1989] ECR 1737, paragraph 13, and Case C-453/93 Bulthuis-Griffioen v Inspecteur der Omzetbelasting [1995] ECR I-2341, paragraph 19).

19 The phrase `excluding ... the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function' in Article 13B(b)(1) of the Sixth Directive introduces an exception to the exemption which Article 13B provides for the leasing or letting of immovable property. It thus subjects the transactions to which it refers to the general rule laid down in the Directive, namely that VAT is to be charged on all taxable transactions, except in the case of derogations expressly provided for. That phrase cannot therefore be interpreted strictly.

20 It should be added that, as the Advocate General has noted at paragraph 18 of his Opinion, the words `sectors with a similar function' should be given a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax.

21 In defining the classes of provision of accommodation which are to be taxed by derogation from the exemption for the leasing or letting of immovable property, in accordance with Article 13B(b)(1) of the Sixth Directive, the Member States enjoy a margin of discretion. That discretion is circumscribed by the purpose of the derogation, which, in regard to making dwelling accommodation available, is that the - taxable - provision of accommodation in the hotel sector or in sectors with a similar function must be distinguished from the exempted transactions of leasing and letting of immovable property.

22 It is consequently a matter for the Member States, when transposing Article 13B(b)(1) of the Sixth Directive, to introduce those criteria which seem to them appropriate in order to draw that distinction.

23 Where accommodation in the hotel sector (as a taxable transaction) is distinguished from the letting of dwelling accommodation (as an exempted transaction) on the basis of its duration, that constitutes an appropriate criterion of distinction, since one of the ways in which hotel accommodation specifically differs from the letting of dwelling accommodation is the duration of the stay. In general, a stay in a hotel tends to be rather short and that in a rented flat fairly long.

24 In this connection, as the Advocate General has stated at paragraph 20 of his Opinion, the use of the criterion of the provision of short-term accommodation, being defined as less than six months, appears to be a reasonable means by which to ensure that the transactions of taxable persons whose business is similar to the essential function performed by a hotel, namely the provision of temporary accommodation on a commercial basis, are subject to tax.

25 Furthermore, in regard to the definition of the concept of `short-term' in German law, the requirement derived from the case-law of the Bundesfinanzhof, to the effect that, in order to qualify for the exemption, it is necessary to prove the intention, evidenced by a letting agreement or other contract, to let property for a minimum period of six months, appears to be a criterion that is easily applied and appropriate to attain the objective sought by Article 13B of the Sixth Directive, which is to ensure a correct and straightforward application of the exemptions for which it provides.

26 It must, however, be recognised that, in certain circumstances, which will probably be exceptional, it is possible that some clauses in a letting agreement, including that relating to duration, will not fully reflect the reality of the contractual relations, the taxable person being, for instance, unable to fix the duration of the let freely with his tenants where it depends on certificates from the public authorities attesting that they will pay the costs incurred. In such circumstances, it is ultimately for the national court to determine whether, for those reasons, reflected in particular in the automatic renewal of letting agreements, it might not be appropriate to take into consideration the actual total duration of the accommodation rather than that specified in the letting agreement.

27 In the light of the foregoing, the answer to be given to the national court must be that Article 13B(b)(1) of the Sixth Directive may be construed as meaning that the provision of short-term accommodation for guests is taxable, as constituting the provision of accommodation in sectors with a function similar to that of the hotel sector. In that regard, Article 13B(b)(1) does not preclude taxation in respect of agreements concluded for a period of less than six months, if that duration is deemed to reflect the parties' intention. It is, however, for the national court to determine whether, in a case before it, certain factors (such as the automatic renewal of the letting agreement) suggest that the duration stated in the letting agreement does not reflect the parties' true intention, in which case the actual total duration of the accommodation, rather than that specified in the letting agreement, would have to be taken into consideration.

Decision on costs

Costs

28 The costs incurred by the German 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

(Fifth Chamber),

in answer to the questions referred to it by the Finanzgericht München by order of 20 September 1995, hereby rules:

Article 13B(b)(1) 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 may be construed as meaning that the provision of short-term accommodation for guests is taxable, as constituting the provision of accommodation in sectors

with a function similar to that of the hotel sector. In that regard, Article 13B(b)(1) does not preclude taxation in respect of agreements concluded for a period of less than six months, if that duration is deemed to reflect the parties' intention. It is, however, for the national court to determine whether, in a case before it, certain factors (such as the automatic renewal of the letting agreement) suggest that the duration stated in the letting agreement does not reflect the parties' true intention, in which case the actual total duration of the accommodation, rather than that specified in the letting agreement, would have to be taken into consideration.