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Judgment of the Court (Fifth Chamber) of 26 June 1997. - Careda SA (C-370/95), Federación nacional de operadores de máquinas recreativas y de azar (Femara) (C-371/95) and Asociación española de empresarios de máquinas recreativas (Facomare) (C-372/95) v Administración General del Estado. - Reference for a preliminary ruling: Audiencia Nacional - Spain. - Tax on the use of gaming machines - Turnover tax - Passing on to consumers. - Joined cases C-370/95, C-371/95 and C-372/95.

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Keywords

Tax provisions - Harmonization of laws - Turnover taxes - Common system of value added tax - Prohibition on levying other national taxes characterized as turnover taxes - Purpose - Concept of `turnover taxes' - Tax on betting and gambling passed on to the consumer, where passing on is not expressly mentioned in the national law or recorded in an invoice or other document serving as invoice - Included

(Council Directive 77/388, Art. 33)

Summary

Since the purpose of Article 33 of the Sixth Directive 77/388 on the harmonization of the laws of the Member States relating to turnover taxes is to prevent the functioning of the common system of value added tax (VAT) from being compromised by fiscal measures of a Member State levied on the movement of goods and services, and charged on commercial transactions in a manner comparable to VAT, the classification of a national tax and, consequently, the appraisal of its compatibility with Community law must be based not only on the wording of the relevant national provisions, but also on the essential characteristics of the tax, and, in particular, the possibility of passing it on to the consumer. It follows that in order for a national tax to be characterized as a turnover tax, it is not necessary for the relevant national legislation expressly to provide that it may be passed on to consumers.

Furthermore, in order for such a tax to be characterized as a turnover tax, it is not necessary for the passing on of the tax to the consumer to be recorded in an invoice or other document serving as invoice. For the purposes of the application of the aforesaid provision, it is for the national court to establish whether the tax at issue is capable of being charged on the movement of goods and services in a manner comparable to VAT, by examining whether it exhibits the essential characteristics of VAT. That will be the case if it is generally applicable, if it is proportional to the price of the services, if it is charged at each stage of the production and distribution process and if it is imposed on the added value of the services.

Parties

In Joined Cases C-370/95, C-371/95 and C-372/95,

REFERENCES to the Court under Article 177 of the EC Treaty by the Audiencia Nacional, Spain, for a preliminary ruling in the proceedings pending before that court between

Careda SA (C-370/95),

Federación Nacional de Operadores de Máquinas Recreativas y de Azar (Femara) (C-371/95),

Asociación Española de Empresarios de Máquinas Recreativas (Facomare) (C-372/95)

and

Administración General del Estado,

on the interpretation of Article 33 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

(Fifth Chamber),

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

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Careda SA and Federación Nacional de Operadores de Máquinas Recreativas y de Azar (Femara), by Miguel Ángel García Campos, of the Madrid Bar,

- the Spanish Government, by Alberto José Navarro González, Director-General of Legal Coordination and Community Affairs, assisted by Gloria Calvo Díaz, Abogado del Estado, of the State Legal Service, acting as Agents,

- the Commission of the European Communities, by Miguel Díaz-Llanos La Roche, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Careda SA and Federación Nacional de Operadores de Máquinas Recreativas y de Azar (Femara), represented by Miguel Ángel García Campos, assisted by Zornoza Pérez, Professor of Law at the Carlos III University in Madrid, of the Spanish Government, represented by Luis Pérez de Ayala Becerril, Abogado del Estado, of the State Legal Service, acting as Agent, and of the Commission, represented by Carlos Gómez de la Cruz, of its Legal Service, acting as Agent, at the hearing on 16 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 27 February 1997,

gives the following

Judgment

Grounds

1 By orders of 4 July (C-370/95), 13 September (C-371/95) and 15 November (C-372/95) 1995, received at the Court on 30 November 1995, the Audiencia Nacional (National High Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 33 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, hereinafter `the Sixth Directive').

2 Those questions were raised in proceedings between Careda SA (hereinafter `Careda') and the Administración General del Estado (Spanish Ministry for the Economy and Finance) concerning an assessment under the tax heading of the supplementary charge to the fiscal levy on games of chance, betting and gambling, laid down by Article 38(2), point 2, of Law No 5/1990 of 29 June 1990 (BOE of 30 June 1990) and two applications brought by the Federación Nacional de Operadores de Máquinas Recreativas y de Azar (hereinafter `Femara') and the Asociación Española de Empresarios de Máquinas Recreativas (hereinafter `Facomare') for annulment of Ministerial Decree No 23472 of 6 September 1990 (BOE of 22 September 1990, hereinafter `the Decree of 6 September 1990'), which forms part of the legal basis of the tax in question.

3 Royal Decree-Law No 16/1977 of 25 February 1977 (BOE of 7 March 1977) regulates the penal, administrative and fiscal aspects of games of chance, betting and gambling in Spain. In particular, it introduced a fiscal levy on those activities (hereinafter `the gambling tax') which is defined by Article 3 as follows:

`Article 3. Irrespective of any national and local taxes to which they are subject by virtue of the legislation in force, companies or undertakings pursuing the activities to which this royal decree applies, casinos and other establishments, places of business or premises authorized for gambling, are subject to the fiscal levy on [gambling], as follows:

1. Taxable event: the taxable event is the authorization or organization of gambling.

2. Taxable persons: organisers and undertakings the activities of which include the organization of gambling are accountable for the tax.

The owners and operators of premises where gambling is organized are jointly and severally liable for payment of the tax.

3. Taxable base: the taxable base is the gross turnover which casinos derive from gambling or the sums that players spend on gambling which takes place in the various buildings, places of business or premises where games of chance, betting or gambling are organized.

The taxable base is calculated directly or at a fixed rate. In the first case, the taxable person must pay the tax in the manner and in the circumstances laid down by regulation.

4. Rate of tax: the rate of tax is: (a) in respect of casinos ...

(b) in respect of other buildings, places of business or premises: 20% of the taxable base.

...

5. Chargeable event:

1. The obligation to pay the tax arises, in general, at the moment the gambling is authorized or, failing that, organized.

2. As regards automatic gaming devices and machines the tax is chargeable by calender year and is due on 1 January of each year in respect of machines authorized during previous years. ...'

4 Article 3(4) of Decree-Law No 16/1977 has been amended a number of times. Thus, in respect of amusement machines with winnings, so-called Type B machines, tax is now charged at a fixed rate. This rate was updated by Article 38(2), point 1, of Law No 5/1990 as follows:

`Fixed rates: ...

A. Amusement machines with winnings or Type B:

(a) annual rate: PTA 375 000.

(b) [modification of rates according to whether the machine is for use by two or three or more players].'

5 Article 38(2), point 2, of Law No 5/1990 also introduced, in respect of 1990 only, a supplementary levy which applied specifically to Type B machines (hereinafter `the supplementary levy').

6 According to that provision, the amount of the supplementary levy is equal to the difference between the fixed rates set out in point 1 of Article 38(2) and those determined by Decree-Law No 7/1989 of 29 December 1989 (BOE of 30 December 1989, p. 8325). The sums to be collected by way of the supplementary levy were also specified in the Ministerial Decree of 6 September 1990.

7 In the proceedings which they brought before the Audiencia Nacional, Careda, Femara and Facomare claimed that the supplementary levy collected pursuant to the Ministerial Decree of 6 September 1990 was contrary to Article 33 of the Sixth Directive in so far as it exhibited the same essential qualities and characteristics as value added tax (hereinafter `VAT').

8 Article 13(B)(f) of the Sixth Directive provides:

`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:

...

(f) betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State;

...'.

9 However, the version of Article 33 of the Sixth Directive in force at the time the events material to this case arose provided:

`Without prejudice to other Community provisions, the provisions of this directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes.'

10 In order to determine whether the tax at issue and, more specifically, Law No 5/1990 and its legal base, the Decree of 6 September 1990, are compatible with Community law, the Audiencia Nacional considered it necessary to request a preliminary ruling from the Court on the following questions:

`1. Does the concept of passing on the tax to the consumer, within the meaning of the Sixth Directive (77/388/EEC) of 17 May 1977 and of the rest of the Community legal order, and for determining the concept of turnover tax, require always and in every case the law concerning the tax in question to lay down expressly that the said tax may be passed on to the consumer or is it sufficient, on the other hand, if the tax can be deemed, on a reasonable interpretation of such law, to be actually included in the price paid by the consumer?

2. May a tax which is levied as a fixed charge of a large amount on the total turnover or revenue generated and which takes account of such turnover, if it is ultimately paid by the consumer, be regarded as a turnover tax although there is no express record (invoice) of passing on the tax to the consumer, the transactions in question being automatic, by the use of coins, and there being a price for use. As so framed, does it infringe Article 33 of the Sixth Directive (77/388/EEC) on value added tax and is it therefore incompatible with that directive?'

First question

11 In its first question, the national court essentially asks whether Article 33 of the Sixth Directive is to be interpreted as meaning that, in order for a tax to be characterized as a turnover tax, the relevant national legislation must expressly provide that it may be passed on to the consumer.

12 In order to answer this question, it is first necessary to consider whether the concept of turnover tax, within the meaning of Article 33 of the Sixth Directive, necessarily implies that the tax may be passed on in the price of the goods or services in such a way that it is definitively borne by the consumer.

13 According to settled case-law (see, in particular, Case 295/84 Rousseau Wilmot [1985] ECR 3759, paragraph 16, and Case C-347/90 Bozzi [1992] ECR I-2947, paragraph 9), in leaving Member States free to maintain or introduce certain indirect taxes, such as excise duties, on the condition that they are not taxes which can be `characterized as turnover taxes', Article 33 of the Sixth Directive seeks to prevent the functioning of the common system of VAT from being compromised by fiscal measures of a Member State levied on the movement of goods and services, and charged on commercial transactions in a manner comparable to VAT.

14 Taxes, duties and charges which exhibit the essential characteristics of VAT must always be considered as such even if they are not identical in every respect to VAT. As the Court has already held on more than one occasion, these characteristics are as follows: VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods and services, irrespective of the number of transactions which take place; it is charged at each stage of the production and distribution process; and, finally, it is imposed on the added value of goods and services, since the tax payable on a transaction is calculated after deducting the tax paid on the previous transaction (see, in particular, Case 252/86 Bergandi [1988] ECR 1343, paragraph 15; Joined Cases 93/88 and 94/88 Wisselink and Others [1989] ECR 2671, paragraph 18; Case C-109/90 Giant [1991] ECR I-1385, paragraphs 11 and 12; Case C-200/90 Dansk Denkavit and Poulson Trading [1992] ECR I-2217, paragraph 11, and Bozzi, cited above, paragraph 12). The Court also pointed out in Bergandi, at paragraph 8, with regard to its essential characteristics, that VAT is definitively borne by the final consumer.

15 It follows from the above that, in order to be characterized as a turnover tax, within the meaning of Article 33 of the Sixth Directive, the tax in question must be capable of being passed on to the consumer.

16 It is now necessary to consider whether Article 33 of the Sixth Directive also requires, in order for a tax to be classified as a turnover tax, that the relevant national legislation should expressly provide that it may be passed on to the consumer.

17 In this respect, it should be noted that, in view of the purpose of Article 33 of the Sixth Directive, as recalled in paragraph 13 of this judgment, the classification of a tax and, consequently, the appraisal of its compatibility with Community law must be based not only on the wording of the relevant national provisions, but also on the essential characteristics of the tax.

18 The answer to the first question must therefore be that Article 33 of the Sixth Directive is to be interpreted as meaning that, in order for a tax to be characterized as a turnover tax, it is not necessary for the relevant national legislation expressly to provide that it may be passed on to the consumer.

Second question

19 In its second question, the national court essentially asks whether Article 33 of the Sixth Directive is to be interpreted as meaning that, in order for a tax to be characterized as a turnover tax, it is necessary for the passing on of the tax to the consumer to be recorded in an invoice or other document serving as invoice.

20 It is apparent from the file that, in practice, it is not possible for an invoice or any other document of that kind to be issued to users of amusement machines because of the automatic and repetitive nature, over a short period of time, of the activity in respect of which tax is charged.

21 Article 22(3)(a) of the Sixth Directive provides that the issue of an invoice is compulsory, first, in respect of goods and services supplied by a taxable person to another taxable person (first paragraph), and second, in respect of payments on account made by a taxable person to another taxable person before the supply of goods or services is effected or completed (second paragraph), without prejudice to the option granted to Member States by Article 22(8) of the directive to impose other obligations in order to ensure the correct levying and collection of the tax and the prevention of fraud.

22 Moreover, in order for a taxable person to be able to exercise the right to deduct set out in Article 17(2)(a) of the Sixth Directive, Article 18(1)(a) thereof requires him to hold an invoice drawn up in accordance with Article 22(3).

23 It is apparent from those provisions that the holding or issue of an invoice is not required, in all circumstances, by the directive, in particular, as the Advocate General notes in point 40 of his Opinion, in relations between taxable persons and the final consumer. The holding or issue of an invoice cannot therefore constitute an essential characteristic of turnover tax within the meaning of Article 33 of the Sixth Directive.

24 That being so, it should be noted that the purpose of Article 33 of the Sixth Directive is to prevent the introduction of taxes, duties and charges which could jeopardize the functioning of the common system of VAT.

25 In the main proceedings, the national court must therefore establish whether the tax at issue is capable of being charged on the movement of goods and services in a manner comparable to VAT, by examining whether it exhibits the essential characteristics of VAT. That will be the case if it is generally applicable, if it is proportional to the price of the services, if it is charged at each stage of the production and distribution process and is imposed on the added value of the services, and if, in the light of these conditions, it may be passed on to the consumer.

26 The answer to the second question must therefore be that Article 33 of the Sixth Directive is to be interpreted as meaning that, in order for a tax to be characterized as a turnover tax, it is not necessary for the passing on of the tax to the consumer to be recorded in an invoice or other document serving as invoice. For the purposes of the application of this provision, it is in any event for the national court to establish whether the tax at issue is capable of being charged on the movement of goods and services in a manner comparable to VAT, by examining whether it exhibits the essential characteristics of VAT. That will be the case if it is generally applicable, if it is proportional to the price of the services, if it is charged at each stage of the production and distribution process and if it is imposed on the added value of the services.

Decision on costs

Costs

27 The costs incurred by the Spanish Government 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

(Fifth Chamber),

in answer to the questions referred to it by the Audiencia Nacional by orders of 4 July, 13 September and 15 November 1995, hereby rules:

1. Article 33 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 is to be interpreted as meaning that, in order for a tax to be characterized as a turnover tax, it is not necessary for the relevant national legislation expressly to provide that it may be passed on to the consumer.

2. Article 33 of the Sixth Directive 77/388 is to be interpreted as meaning that, in order for a tax to be characterized as a turnover tax, it is not necessary for the passing on of the tax to the consumer to be recorded in an invoice or other document serving as invoice. For the purposes of the application of this provision, it is in any event for the national court to establish whether the tax at issue is capable of being charged on the movement of goods and services in a manner comparable to VAT, by examining whether it exhibits the essential characteristics of VAT. That will be the case if it is generally applicable, if it is proportional to the price of the services, if it is charged at each stage of the production and distribution process and if it is imposed on the added value of the services.