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Judgment of the Court (Fifth Chamber) of 19 February 1998. - SPAR Österreichische Warenhandels AG v Finanzlandesdirektion für Salzburg. - Reference for a preliminary ruling: Verwaltungsgerichtshof - Austria. - Article 33 of the Sixth Directive - Turnover taxes - Levy to finance chambers of commerce ("Kammerumlage"). - Case C-318/96.

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Keywords

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Prohibition against levying other national taxes characterised as turnover taxes - Purpose - Definition of `turnover taxes' - Scope - Charging of a levy aimed at financing chambers of commerce - Excluded

(Council Directive 77/388, Arts 17(2) and 33)

Summary

The Sixth Directive (77/388) on the harmonisation of the laws of the Member States relating to turnover taxes, and in particular Articles 17(2) and 33 thereof, does not preclude a levy aimed at financing chambers of commerce which is payable by members whose turnover exceeds a certain amount, is calculated in principle on the basis of the VAT included in the price of the goods and services supplied to them, and is not deductible from the VAT payable by them on the commercial transactions which they carry out.

Such a levy is not imposed on the movement of goods and services and does not affect commercial transactions in a manner comparable to VAT. On the one hand, it is calculated not on the basis of the supply of goods, the provision of services and imports by the taxable person but, on the contrary, on the basis of those made on his behalf by his suppliers; the basis of assessment of the levy is not therefore the amount obtained or to be obtained by way of consideration for the business operations carried out by the taxable person. On the other hand, it is not charged at all stages of production and distribution and, in particular, it does not affect the final stage of the sale to the consumer.

Parties

In Case C-318/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Verwaltungsgerichtshof, Austria, for a preliminary ruling in the proceedings pending before that court between

SPAR Österreichische Warenhandels AG

and

Finanzlandesdirektion für Salzburg

on the interpretation of Articles 17 and 33 of the 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, D.A.O. Edward, J.-P. Puissochet (Rapporteur), P. Jann and L. Sevón, Judges,

Advocate General: S. Alber,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the Austrian Government, by Wolf Okresek, Ministerialrat at the Chancellery, acting as Agent,

- the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

- the Italian Government, by Umberto Leanza, Head of the Legal Department at the Ministry of Foreign Affairs, acting as Agent, assisted by Gianni de Bellis, Avvocato dello Stato,

- the Commission of the European Communities, by Jürgen Grunwald, Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Finanzlandesdirektion für Salzburg, represented by Helmet Huber, Head of Division in that directorate, and by Peter Quantschnigg, Head of Division at

the Federal Ministry of Finance, acting as Agents, of the Austrian Government, represented by Wolf Okresek, assisted by Professor Hans-Georg Ruppe, of the Italian Government, represented by Gianni de Bellis, and of the Commission, represented by Jürgen Grunwald, at the hearing on 9 October 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 November 1997,

gives the following

Judgment

Grounds

1 By order of 18 September 1996, received at the Court on 30 September 1996, the Austrian Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 17 and 33 of the 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, hereinafter `the Sixth Directive').

2 Those questions were raised in proceedings between SPAR Österreichische Warenhandels AG (hereinafter `SPAR') and the Finanzlandesdirektion für Salzburg concerning the imposition on that company of the Kammerumlage, a levy provided for in Paragraph 57(1) to (6) of the Handelskammergesetz (Austrian Law on Chambers of Commerce, BGBl No 182/1946, hereinafter the `HKG'), referred to as the Kammerumlage 1 (hereinafter `the KU 1').

3 The KU 1 is one of the levies aimed at financing chambers of commerce and the Federal Chamber of Commerce.

4 It is payable by the members of chambers of commerce, that is to say by all natural or legal persons and all limited partnerships and other profit-making associations which independently pursue craft, industrial or commercial activities in the finance, credit, insurance, transport or tourism sectors and whose turnover is in excess of ÖS 2 million.

5 Under Paragraph 57(1) of the HKG, the KU 1 is calculated in proportion to the use made of chambers of commerce by the member undertakings and in proportion to the ratio between the amount of the levy and the difference between the undertaking's purchase and selling prices.

6 The basis of assessment of the levy is in principle constituted by the amounts `payable by way of value added tax (hereinafter "VAT") on supplies of goods or other supplies made by other traders to the chamber member for the purposes of his business, with the exception of amounts payable on sales of businesses,' and by the amounts `payable by the chamber member by way of VAT on the importation or purchase of goods within the Community for the purposes of his business.' A special basis of assessment is, however, provided for in the case of credit institutions and insurance companies.

7 The rate of the levy, which may not exceed 4.3$ of the basis of assessment, is laid down by the Federal Chamber of Commerce. At the material time, the rate of the KU 1 was set at 3.9$.

8 The levy is collected by the tax authorities in accordance with the procedure laid down for the collection of VAT.

9 SPAR brought proceedings before the Verwaltungsgerichtshof seeking the annulment of the decision imposing that levy on it. It claimed, in particular, that the KU 1 was contrary to Article 33

of the Sixth Directive, according to which:

`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 characterised as turnover taxes.'

10 The Verwaltungsgerichtshof begins by querying the compatibility of the KU 1 with Article 17 of the Sixth Directive, which essentially provides, in paragraph 2, that the taxable person is entitled to deduct from the tax which he is liable to pay the VAT due or paid in respect of the goods and services used for the purposes of his taxable transactions. The national court points out in that regard that the KU 1 is based on the VAT due or paid on supplies of goods and services to the trader, is not deductible from the VAT payable by the latter and may, in those circumstances, be viewed as an increase in VAT input tax, which is not deductible from the VAT payable by the trader. Furthermore, the fact that it may not be deducted applies to all stages of the production and distribution process since the KU 1 is payable by all the traders participating therein.

11 The Verwaltungsgerichtshof goes on to question the compatibility of the KU 1 with Article 33 of the Sixth Directive. The KU 1 does not, in its view, resemble VAT since it is not based on the value added by the trader's business. However, the KU 1 appears likely to compromise the common system of VAT, inasmuch as it restricts the opportunities for deduction introduced by that directive and thus, in general terms, increases the amount of VAT.

12 In view of those doubts, the Verwaltungsgerichtshof decided to refer the following questions to the Court for a preliminary ruling:

`1. Does Article 17 of the 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, prohibit a Member State from charging a levy assessed at a fixed rate on the basis of :

(a) the turnover tax payable on supplies or other services provided by other traders to the person subject to the levy for the purposes of his business, with the exception of that payable on sales of businesses, and

(b) the turnover tax payable by the person subject to the levy on imports of goods for the purposes of his business or on purchases effected within the Community for the purposes of his business?

2. Does Article 33 of the Sixth Directive prohibit the charging of a levy such as that described in Question 1?'

The questions referred for a preliminary ruling

13 By those two questions, which it is appropriate to examine together, the national court is essentially asking whether the Sixth Directive, and in particular Articles 17(2) and 33 thereof, precludes a levy such as the KU 1, which is payable by members of chambers of commerce whose turnover exceeds a certain amount, is calculated in principle on the basis of the VAT included in the price of the goods and services supplied to them, and is not deductible from the VAT payable by them on the commercial transactions which they carry out.

14 The Finanzlandesdirektion für Salzburg, along with the Austrian, German and Italian Governments, take the view that the Sixth Directive does not preclude such a levy. They contend that a levy of that kind is not a turnover tax prohibited by Article 33 of the Sixth Directive since it is not comparable to VAT and does not affect the system of deduction provided for in Article 17 of the Sixth Directive.

15 On the other hand, the Commission considers that the Sixth Directive does preclude such a levy, which must be viewed as a turnover tax prohibited by Article 33 of the Sixth Directive and which affects the system of deduction provided for in Article 17 of the Sixth Directive.

16 In that connection, it is appropriate to recall the objectives pursued by the introduction of a common system of VAT.

17 It is apparent from the recitals in the preamble to the First Council Directive (67/227/EEC) of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14, hereinafter `the First Directive'), that the harmonisation of legislation concerning turnover taxes is intended to enable a common market to be established within which there is healthy competition and whose characteristics are similar to those of a domestic market by eliminating differences in the imposition of tax such as to distort competition and impede trade.

18 The introduction of a common system of VAT was achieved by the Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16, hereinafter `the Second Directive'), and by the Sixth Directive. That system was to contribute to the attainment of that objective by introducing, on a basis common to all the Member States, a general tax on consumption levied on the supply of goods, the provision of services, and imports of goods in proportion to their price, regardless of the number of transactions carried out as far as the final consumer, the tax being imposed only on the value added at each stage and being definitively borne by the final consumer.

19 In order to attain the objective of ensuring equal conditions of taxation for the same transaction, no matter in which Member State it is carried out, the common system of VAT was intended, according to the preamble to the Second Directive, to replace the turnover taxes in force in Member States.

20 Article 33 of the Sixth Directive accordingly permits a Member State to maintain or introduce taxes, duties or charges on the supply of goods, the provision of services or imports only if they cannot be characterised as turnover taxes (see Case 252/86 Bergandi [1988] ECR 1343, paragraph 10).

21 However, Community law, as it now stands, does not contain any specific provision excluding or limiting the power of Member States to introduce taxes, duties or charges other than turnover taxes (Joined Cases 93/88 and 94/88 Wisselink and Others [1989] ECR 2671, paragraph 13). It is clear even from the terms of Article 33 of the Sixth Directive that Community law permits systems of taxation to exist concurrently with VAT (see Case 73/85 Kerrutt [1986] ECR 2219, paragraph 22; Wisselink and Others, cited above, paragraph 14; and Case C-109/90 Giant [1991] ECR I-1385, paragraph 9).

22 In order to decide whether a tax, duty or charge can be characterised as a turnover tax within the meaning of Article 33 of the Sixth Directive, it is necessary, in particular, to determine whether it has the effect of compromising the functioning of the common system of VAT by levying a charge on the movement of goods and services and on commercial transactions in a way comparable to VAT (see Case 295/84 Rousseau Wilmot [1985] ECR 3759; Bergandi, cited above,

paragraph 14; Giant, cited above, paragraph 11; Case C-347/95 UCAL [1997] ECR I-4911, paragraph 33; Case C-28/96 Fricarnes [1997] ECR I-4939, paragraph 37; and Case C-130/96 Solisnor-Estaleiros Navais [1997] ECR I-5053, paragraph 13). In that connection, the Court has stated that taxes, duties and charges must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT (judgments in Case C-200/90 Dansk Denkavit and Poulsen v Skatteministeriet [1992] ECR I-2217, paragraph 11; UCAL, paragraph 33; Fricarnes, paragraph 37, and Solisnor-Estaleiros Navais, paragraph 14, cited above).

23 The Court has consistently held (see, in particular, the abovementioned judgments in Rousseau Wilmot, paragraph 15; Bergandi, paragraph 15; Wisselink and Others, paragraph 18; and Giant, paragraph 12) that the principle of the common system of VAT consists, by virtue of Article 2 of the First Directive, in the application to goods and services up to the retail stage of a general tax on consumption which is exactly proportional to the price of the goods and services, irrespective of the number of transactions which take place in the production and distribution process before the stage at which the tax is charged. However, VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the costs of the various price components. The procedure for deduction is so arranged by Article 17(2) of the Sixth Directive that taxable persons are authorised to deduct from the VAT for which they are liable the VAT which the goods or services have already borne.

24 A levy such as the KU 1 is not imposed on the movement of goods and services and does not affect commercial transactions in a manner comparable to VAT.

25 First, the national levy at issue in the main proceedings is calculated not on the basis of the supply of goods, the provision of services and imports by the taxable person but, on the contrary, on the basis of those made on his behalf by his suppliers. The KU 1 is determined according to the amount payable by the taxable person on goods and services acquired for the purposes of his business operations.

26 Second, the basis of assessment of a levy such as the KU 1 is not therefore the amount obtained or to be obtained by way of consideration for the business operations carried out by the taxable person. Nor is the levy proportional to the price of the goods and services supplied by the taxable person, as the Advocate General noted at points 43 and 44 of his Opinion.

27 Finally, a levy such as the KU 1 is not charged at all stages of production and distribution. In particular, it does not affect the final stage of the sale to the consumer, as the Advocate General noted at points 52 and 53 of his Opinion.

28 Furthermore, since the KU 1 does not exhibit the essential characteristics of VAT, Article 17(2) of the Sixth Directive does not require that the taxable person should be able to deduct it from the tax which he is liable to pay.

29 The answer to the questions submitted must therefore be that the Sixth Directive, and in particular Articles 17(2) and 33 thereof, does not preclude a levy such as the KU 1, which is payable by members of chambers of commerce whose turnover exceeds a certain amount, is calculated in principle on the basis of the VAT included in the price of the goods and services supplied to them, and is not deductible from the VAT payable by them on the commercial transactions which they carry out.

Decision on costs

Costs

30 The costs incurred by the Austrian, German and Italian Governments 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 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 Austrian Verwaltungsgerichtshof by order of 18 September 1996, hereby rules:

The 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, and in particular Articles 17(2) and 33 thereof, does not preclude a levy such as the Kammerumlage, provided for in Paragraph 57(1) to (6) of the Handelskammergesetz, which is payable by members of chambers of commerce whose turnover exceeds a certain amount, is calculated in principle on the basis of the VAT included in the price of the goods and services supplied to them, and is not deductible from the VAT payable by them on the commercial transactions which they carry out.