61998J0158

Judgment of the Court of 29 June 1999. - Staatssecretaris van Financiën v Coffeeshop "Siberië" vof. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Sixth Directive - Scope - Supply of a table for the sale of narcotic drugs. - Case C-158/98.

European Court reports 1999 Page I-03971

Keywords

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Sixth Directive - Scope - Supply of space for the sale of narcotic drugs - Covered

(Council Directive 77/388, Art. 2)

Summary

$$Article 2 of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is to be interpreted as meaning that renting out a space for the sale of narcotic drugs - effected with the agreement of the supplier of the service - falls within the scope of that directive.

Renting out such space is, in principle, an economic activity and the fact that the activities pursued there constitute a criminal offence, which may make the renting unlawful, does not alter the economic character of the renting and does not prevent competition in the sector, including that between lawful and unlawful activities. Accordingly, not to charge VAT thereon would undermine the principle of fiscal neutrality of the VAT scheme.

Parties

In Case C-158/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hoge Raad der Nederlanden, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Staatssecretaris van Financiën

and

Coffeeshop `Siberië' vof

" on the interpretation of Article 2 of Directive 77/388/EEC: Sixth Council Directive 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,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Rapporteur) (Presidents of Chambers), J.C. Moitinho de Almeida, D.A.O. Edward, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: N. Fennelly,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Coffeeshop `Siberië' vof, by G.A.C. Beckers, of the Maastricht Bar,

- the Netherlands Government, by J.G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by E. Traversa and H. van Vliet, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 March 1999,

gives the following

Judgment

Grounds

1 By judgment of 22 April 1998, received by the Court on 24 April 1998, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 2 of Directive 77/388/EEC: Sixth Council Directive 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 The question arose in the course of a dispute between Coffeeshop `Siberië' vof (`Siberië') and the Netherlands tax authorities concerning a demand for payment of additional turnover tax for the years 1990 to 1993.

3 Article 2 of the Sixth Directive provides:

`The following shall be subject to value added tax:

1. The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. The importation of goods.'

4 Article 4(1) of the Sixth Directive provides:

`"Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.'

5 Siberië runs a `coffeeshop' in Amsterdam, that is to say an establishment in which `soft' drugs are sold and consumed. During the period covered by the demand for payment it made a table available in its establishment to a third party (hereinafter `the authorised dealer'), who used it to sell cannabis products to anyone interested. Siberië was aware of that activity.

6 The financial consideration paid by the authorised supplier for the use of the table appears in Siberië's accounts under the heading `tafelhuur' (table rent).

7 Siberië did not pay value added tax on that rent and therefore the tax authorities sent him a demand for payment thereof for the period from 1 January 1990 to 31 December 1993 under the Wet op de Omzetbelasting (Turnover Tax Law) 1968.

8 Ruling on the objection lodged by Siberië against that decision, the Gerechtshof (Regional Court of Appeal) Amsterdam held that renting a table to an authorised supplier involved complicity in the offence of dealing in `soft' drugs and was therefore not subject to VAT. The fact that there was generally no prosecution for such offences in the Netherlands could not alter that conclusion, which was in any event in accordance with the judgment in Case 289/86 Happy Family v Inspecteur der Omzetbelasting [1988] ECR 3655. In that case the Court held that the supply of narcotic drugs was not subject to VAT because they have special characteristics since, because of their very nature, they are subject to a total prohibition on marketing in all the Member States.

9 The Netherlands tax authorities appealed against that judgment, claiming in essence that making a place available for the sale of `soft' drugs was not wholly banned by law under either Netherlands or international law and should be distinguished from the supply of drugs itself. Consequently, the conclusion reached by the Court in Happy Family did not apply.

10 The Hoge Raad, hearing the appeal, is in doubt as to the applicability of the judgment in Happy Family in the circumstances of this case. It observes, first, that providing a third party with the opportunity to sell narcotic drugs amounts to complicity, which is a criminal offence in the Netherlands. That is, moreover, consistent with the provisions of the Single Convention on Narcotic Drugs signed in New York on 30 March 1961 and ratified by all the Member States of the Community.

11 However, that criminal aspect does not alter the fact that making available a place of sale is in itself a supply of services for the purposes of the Community legislation on VAT which falls within the scope of Article 2 of the Sixth Directive.

12 In so far as the activity at issue in the main proceedings constitutes a supply of services within the meaning of the legislation on turnover tax, the Hoge Raad asks whether the judgment in Happy Family extends to making available a place for the sale of cannabis products, with the result that no tax can be levied. It considers that if the reply is in the affirmative, the result would be to reduce considerably the scope of the Sixth Directive when in fact, in some Member States, the general view of the illegal nature of dealing in `soft' drugs has become more liberal since the judgment was delivered in Happy Family, which raises the question of whether that line of case-law should be maintained.

13 Accordingly, the Hoge Raad decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

`Must Article 2 of the Sixth Directive be interpreted as meaning that no liability to turnover tax arises in respect of the person who, for consideration, offers another person the opportunity to deal in cannabis products?'

14 It should be noted at the outset that the Court has held that the principle of fiscal neutrality prevents there being any general distinction in the levying of VAT as between lawful and unlawful transactions. However, that is not true in the case of the supply of products such as narcotic drugs which have special characteristics, inasmuch as, because of their very nature, they are subject to a total prohibition on marketing in all the Member States, with the exception of strictly controlled economic channels for use for medical and scientific purposes. In a specific situation of that kind, where all competition between a lawful economic sector and an unlawful sector is precluded, the fact that no liability to VAT arises cannot affect the principle of fiscal neutrality (see inter alia Happy Family, paragraph 20, and Case 269/86 Mol v Inspecteur der Invoerrechten en Accijnzen [1988] ECR 3627, paragraph 18).

15 Siberië considers that those judgments are fully applicable in the main proceedings, with the result that the rent for the table is not subject to VAT. Providing a table for an authorised dealer and informing customers of the café thereof should be regarded as collusion in drug dealing and undoubtedly amounts to a criminal offence which must be treated in the same way as the supply of drugs itself.

16 The Netherlands Government and the Commission maintain that VAT must be charged on the activity in question. A distinction must be made between supplying drugs and actions ancillary thereto. Renting out the table is an act which is not prohibited as such; there is a lawful market in that regard, which is in competition with the unlawful market. Consequently, such a supply is subject to VAT, as the Court held with regard to the unauthorised export of computer systems (Case C-111/92 Lange v Finanzamt Fürstenfeldbruck [1993] ECR I-4677), counterfeit perfumes (Case C-3/97 Goodwin and Unstead [1998] ECR I-3257) and the organisation of illegal gaming (Case C-283/95 Fischer v Finanzamt Donaueschingen [1998] ECR I-3369), on the ground that they were not goods or services outside normal economic channels or in a situation where all competition between a lawful economic sector and an unlawful sector was precluded.

17 Should the Court nevertheless rule that the activity in question is subject to the same rules as the actual supply of drugs, it will be necessary, the Netherlands Government submits, to take into account the significant change in the attitude of the authorities in the Netherlands with regard to the use of `soft' drugs over the last few years. Whilst the sale of `soft' drugs in coffeeshops remains a criminal offence in the Netherlands, so-called `instructions' issued by the Netherlands Public Prosecutors indicate that such activity in coffeeshops may be tolerated subject to certain

conditions, including agreement at local level between the municipal authorities, the police and the Public Prosecutor's Office. In those circumstances, there is no longer a total prohibition on placing `soft' drugs on the market to justify exemption from the principle of fiscal neutrality.

18 In addition, the Commission points out that the Court has consistently held that economic activities must be assessed for the purposes of applying the common system of VAT itself independently of their purposes or effects and in the light of the economic reality (Case 235/85 Commission v Netherlands [1987] ECR 1471, paragraph 8, and Case C-260/95 Commissioners of Customs and Excise v DFDS [1997] ECR I-1005, paragraph 23).

19 It should be noted that the activity to be taxed in this case is not the sale of narcotic drugs, but a supply of services consisting in making available a place where the sale of those products is effected with the agreement of the supplier of the service. Consequently, the reasoning in Happy Family cannot be transposed directly to the facts in this case.

20 It is therefore necessary to consider whether the reasoning is to be extended to activities linked in any way at all to dealing in drugs.

21 As noted in paragraph 14 of this judgment, the Court has consistently held that the principle of fiscal neutrality prevents any general distinction in the levying of VAT as between lawful and unlawful transactions. Consequently, the mere fact that conduct amounts to an offence is not sufficient to justify exemption from VAT. The exception applies only in specific situations where, owing to the special characteristics of certain products or certain services, any competition between a lawful economic sector and an unlawful sector is precluded.

22 In this case, however, there is no such special situation. Renting out a place intended for commercial activities is, in principle, an economic activity and therefore falls within the scope of the Sixth Directive. The fact that the activities pursued there constitute a criminal offence, which may make the renting unlawful, does not alter the economic character of the renting and does not prevent competition in the sector, including that between lawful and unlawful activities. Not to charge VAT thereon would undermine the principle of fiscal neutrality of the VAT scheme.

23 Consequently, the reply to the question referred by the national court must be that Article 2 of the Sixth Directive is to be interpreted as meaning that in the circumstances of the main action renting out a space for the sale of narcotic drugs falls within the scope of that directive.

Decision on costs

Costs

24 The costs incurred by the Netherlands Government and the Commission, 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,

in answer to the question referred to it by the Hoge Raad der Nederlanden by judgment of 22 April 1998, hereby rules:

Article 2 of Directive 77/388/EEC: Sixth Council Directive 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 is to be interpreted as meaning that in the circumstances of the main action renting out a space for the sale of narcotic drugs falls within the scope of that directive.