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Judgment of the Court (Sixth Chamber) of 9 October 2001. - Commissioners of Customs & Excise v Mirror Group plc. - Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) - United Kingdom. - Sixth VAT Directive - Exemption for the leasing or letting of immovable property - Meaning - Undertaking to become a tenant. - Case C-409/98.

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Summary

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Keywords

1. 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 - Meaning - Payment of a sum of money by the landlord to the future tenant - Excluded

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

2. 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 - Meaning - Option agreement in relation to leases of immovable property in return for a sum of money paid by the landlord - Excluded

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

Summary

1. The letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes essentially involves the landlord of property assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it. It is thus the landlord who makes a taxable supply of services and the tenant who, in return for the supply, pays consideration. Therefore, a person who does not initially have any interest in the immovable property and who enters into an agreement for lease of that immovable property with a landlord and/or accepts the grant of a lease of the property in return for a sum of money paid by the

landlord does not make a supply of services falling within Article 13B(b) cited above.

(see paras 31-32, 36 and operative part 1)

2. A person who does not initially have any interest in the immovable property and who enters into an option agreement in relation to leases of that immovable property in return for a sum of money paid by the landlord, on terms that the money will remain in a special account as security for its obligations under the option agreement, and who subsequently exercises the options under the option agreement and accepts the grant of leases of the immovable property in return for the release of the money in its special account, at no time makes a supply of services falling within Article 13B(b) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes.

(see para. 39 and operative part 2)

Parties

In Case C-409/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), for a preliminary ruling in the proceedings pending before that court between

Commissioners of Customs & Excise

and

Mirror Group plc,

on the interpretation of Article 13B(b) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) 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 (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric (Rapporteur), C. Gulmann, J.-P. Puissechot and R. Schintgen, Judges,

Advocate General: A. Tizzano,

Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

- Mirror Group plc, by D. Milne QC and G. Sinfield, Solicitor,*
- the United Kingdom Government, by M. Ewing, acting as Agent, N. Fleming QC and P. Whipple, Barrister,*
- the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,*
- the Commission of the European Communities, by E. Traversa and F. Riddy, acting as Agents,*

having regard to the Report for the Hearing,

after hearing the oral observations of Mirror Group plc, represented by D. Milne and G. Sinfield, the United Kingdom Government, represented by G. Amodeo, acting as Agent, N. Fleming QC and P. Whipple, the German Government, represented by W.-D. Plessing, and the Commission, represented by R. Lyal, acting as Agent, at the hearing on 16 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2001,

gives the following

Judgment

Grounds

1 By order of 15 October 1998, received at the Court on 17 November 1998, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 13B(b) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) 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 were raised in proceedings between Mirror Group plc (Mirror Group) and the Commissioners of Customs & Excise (the Commissioners), who are responsible for the collection of value added tax (VAT) in the United Kingdom, concerning the liability to VAT of an undertaking given by Mirror Group agreeing in essence to become a tenant.

Community legislation

3 Article 2, which constitutes Title II, headed Scope, 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;

....

4 Articles 5 and 6 of the Sixth Directive, which fall within Title V, headed Taxable Transactions, provide:

Article 5

Supply of goods

1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

...

Article 6

Supply of services

1. "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include *inter alia*:

...

- obligations to refrain from an act or to tolerate an act or situation,

....

5 Article 13 of the Sixth Directive governs exemptions from VAT so far as transactions within the territory of the country are concerned. Article 13B provides, *inter alia*:

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

Background and the questions referred for a preliminary ruling

6 In 1993, Mirror Group, a company incorporated in the United Kingdom, was looking at various sites in London to which to move its newspaper publishing operations. According to the national court, it could expect favourable terms as an anchor tenant.

7 On 20 June 1993, Mirror Group entered into the following agreements with Olympia & York Canary Wharf Ltd (in administration) (O & Y):

- an agreement to lease floors 20 to 24 of One Canada Square, London (the building) (the principal agreement);

- the actual lease of those five floors;

- an option agreement giving Mirror Group an initial option, exercisable within six months, to take a lease or leases of up to four more floors of the building and - if that option was not exercised in respect of more than two floors during the six-month period - a second option, exercisable within 18 months thereafter, to take a lease or leases of one or two more floors (the option agreement).

8 The principal agreement stipulated that O & Y would pay Mirror Group a net inducement of £12 002 590, plus VAT, on or before 2 July 1993. That sum was described therein as consideration for the tenant entering into the agreement and as an inducement to it to take on the lease.

9 In accordance with the principal agreement, the following arrangements for payment were implemented:

- approximately £6.5 million (exclusive of VAT) relating to floors 20 to 24 of the building was paid into an escrow account and was released to Mirror Group in several instalments corresponding to when Mirror Group ceased to have a right to determine the leases and was thus obliged to take leases of those floors for the full 25-year period.

- approximately £5.5 million (exclusive of VAT) was paid to Mirror Group and was immediately placed by it, as it was required to do, in an escrow account by way of security. Mirror Group exercised its option only in respect of three further floors and thus retained only about £4.1 million.

- VAT of approximately £2.1 million was paid into an escrow account until 26 July 1993, on which date it was paid to the Commissioners.

10 It was stipulated that no rent was payable in respect of floors 20 to 24 of the building for the first five years. Starting with the sixth year and until the end of the lease, rent was payable and increased progressively, but at no time did it amount to a full market rent. Provision was made for the leases of the additional floors, in respect of which Mirror Group exercised its option, to include essentially the same provisions about rent.

11 Under the principal agreement, Mirror Group was required to complete the fitting out of floors 20 to 24 of the building. It actually spent about £7.2 million on fitting out floors 20 to 24 and about £1.4 million on fitting out the additional floors, 17 to 19, in respect of which it exercised its option.

12 According to the VAT and Duties Tribunal, London (United Kingdom), the inducement was not, however, paid by O & Y to Mirror Group as consideration for the latter fitting out the premises.

13 Mirror Group claimed repayment of VAT of £2.1 million on the £12 million inducement, which the Commissioners refused by decision of 1 January 1997. It then appealed against the decision to the London VAT and Duties Tribunal.

14 In the Tribunal's view, the acceptance by Mirror Group of the terms of the principal agreement and its execution of the lease and the option agreement constituted things done in return for the inducement of £12 million. Therefore the Tribunal held that Mirror Group had made a supply of services for consideration.

15 As to the question of whether that supply of services was exempt, the VAT and Duties Tribunal pointed out that that would be the case only if the supply amounted to the leasing or letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive. According to the Tribunal, it follows from paragraph 9 of the judgment in Case C-63/92 Lubbock Fine [1993] ECR I-6665 that a supply made by a tenant who has surrendered an existing lease to a landlord in return for a capital sum is an exempt supply.

16 In those circumstances, there was no proper reason for excluding from Article 13B(b) of the Sixth Directive a transaction resulting in a lease where, in contrast to the standard situation, it was not the tenant who paid a sum to the landlord in order to enter into the lease but, as in the main proceedings, the landlord who agreed to pay consideration to the tenant to ensure that the latter entered into the lease and subsequently complied with its terms. As regards the £5.5 million, the Tribunal found that it was an inducement payment relating solely to the options and that therefore it was not exempt.

17 Both Mirror Group and the Commissioners appealed against that decision to the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court). By order of 15 October 1998, to which the decision of the VAT and Duties Tribunal was annexed, that court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Following the decision of the Court in Case C-63/92 (Lubbock Fine & Co. v Commissioners of Customs and Excise), does Article 13B(b) of Council Directive 77/388/EEC exempt from VAT a supply made by a person ("the person") who does not initially have any interest in the immovable property, where that person enters into an agreement for lease of that immovable property with a landlord and/or accepts the grant of a lease by the landlord in return for a sum of money paid by

the landlord?

2. Following the decision of the Court in Case C-63/92 (Lubbock Fine & Co. v Commissioners of Customs and Excise), does Article 13B(b) of Council Directive 77/388/EEC exempt from VAT a supply made by a person ("the person") who does not initially have any interest in the immovable property, where that person:

(a) enters into an option agreement in relation to leases of that immovable property in return for a sum of money being paid to the person, on terms that the money will remain in a special account as security for its obligations under the option agreement; and/or

(b) subsequently exercises the options under the option agreement and accepts the grant of leases of the immovable property in return for the release of the money in the special account to the person?

The first question

Arguments advanced in the observations submitted to the Court

18 Mirror Group argues that the result of Lubbock Fine is that supplies of services which are directly linked to the creation, alteration, transfer or termination of a right to occupy immovable property fall within the scope of Article 13B(b) of the Sixth Directive. Further, the supply of services made by a tenant as a result of entry into an agreement concerning the letting of immovable property cannot be treated any differently from a supply made by the landlord, given the requirement for a coherent application of the Sixth Directive and respect for the principle of the neutrality of VAT.

19 The United Kingdom Government submits that the logic of the Court's reasoning in the judgment in Lubbock Fine was that payments for the renegotiation of a lease should be characterised in the same way for tax purposes as payments made for the lease as originally negotiated. That is not the situation in the case before the national court. Since Mirror Group had no title to the immovable property at the time of the transaction, it did not itself make a supply of leasing or letting services. However, the wording of Article 13B(b) of the Sixth Directive presupposes that there will be such a supply of services in order for that provision to apply.

20 According to the United Kingdom Government, the supply of services by Mirror Group consisted in entering into a lease or an agreement to enter into a lease. At the hearing, the Government pointed out that Mirror Group, by transferring its business to the building, attracted other tenants.

21 The German Government's analysis is, in essence, the same as that of the United Kingdom Government and it further takes the view that the supply of services made by Mirror Group should be likened to the supply made by an estate agent acting as broker for a lease to be entered into by the parties.

22 In its written observations, the Commission submits that Mirror Group made a supply of services for the purposes of Article 6(1) of the Sixth Directive consisting in entering into a lease or an agreement to enter into a lease. That supply falls within the scope of Article 13B(b) of the Sixth Directive, if the Court's ruling in the judgment in Lubbock Fine is followed.

23 At the hearing, the Commission accepted that where, in a new building, a person becomes an anchor tenant, whose presence might attract other tenants, that could constitute a taxable supply of services to the landlord. It could amount to a form of advertising. However, such a supply of services is difficult to define. If there were no separate identifiable supply of services, it would be preferable to treat the payment at issue as an assessment of the value of the lease and, therefore,

as a payment inextricably linked to the lease.

Findings of the Court

24 It must be borne in mind that, under Article 2(1) of the Sixth Directive, a supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to VAT.

25 It is not disputed that Mirror Group, when it entered into a contract relating to the lease of the building and agreed to take a lease of that building, acted as a taxable person but did not make a supply of goods. Therefore, it is necessary to consider whether Mirror Group, in acting thus, made a supply of services for consideration and, if it did, whether that supply falls within the leasing or letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive.

26 As to whether a supply of services was made, it must be noted that a taxable person who only pays the consideration in cash due in respect of a supply of services, or who undertakes to do so, does not himself make a supply of services for the purposes of Article 2(1) of the Sixth Directive. It follows that a tenant who undertakes, even in return for payment from the landlord, solely to become a tenant and to pay the rent does not, so far as that action is concerned, make a supply of services to the landlord.

27 However, the future tenant would make a supply of services for consideration if the landlord, taking the view that the presence of an anchor tenant in the building containing the leased premises will attract other tenants, were to make a payment by way of consideration for the future tenant's undertaking to transfer its business to the building concerned. In those circumstances, the undertaking of such a tenant could be qualified, as the United Kingdom Government in essence submits, as a taxable supply of advertising services.

28 In that context, it is appropriate to point out that it is for the national court, in the light of the guidance given by the Court, to ascertain whether, in the case before it, Mirror Group made a supply of services for consideration to the landlord and, if it did, what that supply was.

29 However, an operation such as that carried out by Mirror Group, if it does actually amount to a supply of services, cannot be qualified as a supply of services covered by the term the leasing or letting of immovable property.

30 In that regard, it has consistently been 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 VAT is to be levied on all services supplied for consideration by a taxable person (see, *inter alia*, Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13; Case C-358/97 *Commission v Ireland* [2000] ECR I-6301, paragraph 52; Case C-359/97 *Commission v United Kingdom* [2000] ECR I-6355, paragraph 64; and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25).

31 The letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive essentially involves the landlord of property assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it (see, to that effect, *Commission v Ireland*, paragraphs 52 to 57, and *Commission v United Kingdom*, paragraphs 64 to 69, cited above, and Case C-326/99 *Goed Wonen* [2001] ECR I-6831, paragraph 55).

32 It is thus the landlord who makes a taxable supply of services and the tenant who, in return for the supply, pays consideration. That is not the case in the proceedings before the national court.

33 It is true that the Court ruled in *Lubbock Fine* that the leasing or letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive covers the case where a tenant surrenders his lease and returns the immovable property to his immediate landlord.

34 However, the Court must make clear that that judgment was given in respect of a tenant who had returned the immovable property leased to the landlord and who, consequently, for the purposes of taxation, had assigned his right to occupy the property back to the landlord by surrendering it. That is why the Court ruled, in paragraphs 9 and 12 of the judgment, that the tenant's surrender of the supply of services made by the landlord, which involves a change in the contractual relationship, has to be exempt where the supply itself is exempt.

35 Those conditions are not met in the case before the national court. *Mirror Group*, as a prospective tenant, is not surrendering its right to occupy the property to the landlord.

36 Therefore, the answer to be given to the first question must be that a person who

does not initially have any interest in the immovable property and who enters into an agreement for lease of that immovable property with a landlord and/or accepts the grant of a lease of the property in return for a sum of money paid by the landlord does not make a supply of services falling within Article 13B(b) of the Sixth Directive.

The second question

37 So far as the first part of the second question is concerned, the Commission rightly points out that a taxable person who merely enters into an option agreement of the kind at issue before the national court without a mutual exchange of supplies does not make a supply of services within the meaning of Article 2(1) of the Sixth Directive.

38 The second part of the second question raises the same issues as the first question referred by the national court. It is necessary to consider whether, on the exercise of the option and entry into the lease by the tenant in return for a sum of money paid by the landlord, the tenant merely entered into the lease or whether it made a specific supply to the landlord. In the first case, there is no supply of services within the meaning of Article 2(1) of the Sixth Directive. In the second case, nothing points to the tenant making a supply of services falling within Article 13B(b) of the Sixth Directive.

39 Therefore, the answer to be given to the second question is that a person who does not initially have any interest in the immovable property and who enters into an option agreement such as the one before the national court in relation to leases of that immovable property in return for a sum of money paid by the landlord, on terms that the money will remain in a special account as security for its obligations under the option agreement, and who subsequently exercises the options under the option agreement and accepts the grant of leases of the immovable property in return for the release of the money in its special account, at no time makes a supply of services falling within Article 13B(b) of the Sixth Directive.

Decision on costs

Costs

40 The costs incurred by the United Kingdom and German Governments and by 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 (Sixth Chamber),

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), by order of 15 October 1998, hereby rules:

- 1. A person who does not initially have any interest in the immovable property and who enters into an agreement for lease of that immovable property with a landlord and/or accepts the grant of a lease of the property in return for a sum of money paid by the landlord does not make a supply of services falling within Article 13B(b) 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.*
- 2. A person who does not initially have any interest in the immovable property and who enters into an option agreement such as the one before the national court in relation to leases of that immovable property in return for a sum of money paid by the landlord, on terms that the money will remain in a special account as security for its obligations under the option agreement, and who subsequently exercises the options under the option agreement and accepts the grant of leases of the immovable property in return for the release of the money in its special account, at no time makes a supply of services falling within Article 13B(b) of the Sixth Directive 77/388.*