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Parties
Grounds
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Parties

In Case C-223/03,

REFERENCE to the Court under Article 234 EC for a preliminary ruling, brought by the VAT and Duties Tribunal, Manchester (United Kingdom), by decision of 16 May 2003, received at the Court on 22 May 2003, in the proceedings

University of Huddersfield Higher Education Corporation,

v

Commissioners of Customs & Excise,

THE COURT (Grand Chamber)

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann, J. Makarczyk, Presidents of Chambers, S. von Bahr (Rapporteur), J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. K?ris, E. Juhász and G. Arestis, Judges,

Advocate General: M. Poiares Maduro,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2004,

after considering the observations submitted on behalf of:

– University of Huddersfield Higher Education Corporation, by K.P.E. Lasok QC, instructed by A. Brown, Solicitor,

– the United Kingdom Government, by R. Caudwell, acting as Agent, and by C. Vajda QC and M. Angiolini, Barrister,

– Ireland, by D.J. O’Hagan, acting as Agent, and by A.M. Collins, SC,

– the Italian Government, by I.M. Braguglia, acting as Agent, and by G. De Bellis, Avvocato dello Stato,

– Commission of the European Communities, by R. Lyal, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2005,

gives the following

Judgment

Grounds

1. This reference for a preliminary ruling relates to the interpretation of Articles 2(1), 4(1) and (2), 5(1) and 6(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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18, hereinafter 'the Sixth Directive')

2. The reference was made in proceedings brought by the University of Huddersfield Higher Education Corporation (hereinafter 'the University') against the Commissioners of Customs & Excise ('the Commissioners') relating to an amendment by the latter of a deduction made by the University under a tax saving scheme for input value added tax ('VAT') for the refurbishment of a mill.

Legal framework

Community legislation

3. Article 2(1) of the Sixth Directive provides that the supply of goods and services effected for valuable consideration within the territory of the country by a taxable person acting as such is to be subject to VAT.

4. Under Article 4(1) of the Sixth Directive, 'taxable person' means any person who independently carries out any economic activity specified in Article 4(2). 'Economic activities' are defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services, including the exploitation of tangible or intangible property for the purpose of obtaining trading income therefrom on a continuing basis.

5. The second subparagraph of Article 4(4) of the Sixth Directive states:

'Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links.'

6. Article 5(1) of the Sixth Directive states that '"supply of goods" means the transfer of the right to dispose of tangible property as owner'.

7. Article 6(1) of the Sixth Directive states that '"supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5'.

8. Article 13A(1)(i) of the Sixth Directive provides that the Member States are to exempt, among other things, university education from VAT.

9. Article 13B(b) of the Sixth Directive provides that the Member States are required to exempt the leasing or letting of immovable property. However, under Article 13C(a) Member States may allow taxpayers a right of option for taxation in respect of the leasing or letting of immovable property.

10. Article 17(2)(a) of the Sixth Directive provides:

'In so far as the goods and services are used for the purposes of his taxable transactions, the

taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person'.

11. As regards goods and services to be used by a taxable person both for transactions in respect of which VAT is deductible and for transactions in respect of which it is not, the first subparagraph of Article 17(5) of the Sixth Directive states that 'only such proportion of the value added tax shall be deductible as is attributable to the former transactions'.

12. According to the second subparagraph of Article 17(5), 'this proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person'.

The main proceedings and the question referred to the Court

13. According to the order for reference, the University for the most part supplies education services, which are exempt from VAT. However, as it also makes some taxable supplies, national law allows it to recover input VAT at its partial exemption recovery rate, which was 14.56% in 1996 and which has since fallen to 6.04%.

14. The referring tribunal observes that in 1995 the University decided to refurbish two derelict mills in which it had previously acquired a leasehold estate. Those two mills are known as West Mill and East Mill, and both are situated in Canalside, Huddersfield. Since the input VAT on the refurbishment costs would largely be irrecoverable in normal circumstances, the University sought a way in which to save tax or to defer its liability to it.

15. It first commissioned and paid for the works to West Mill. A discretionary trust ('the Trust') was established by deed of 27 November 1995. The deed included provisions vesting the power of appointment and removal of trustees in the University. The trustees appointed were three former employees of the University and the beneficiaries were the University, any student from time to time enrolled there, and any charity. On the same date, the University entered into a deed of indemnity with the trustees, whereby it indemnified them against all present and future liabilities arising out of various transactions.

16. The referring tribunal states that the sole reason for creating the Trust was to enable the tax saving scheme suggested in relation to West Mill to be implemented, thereby allowing the University to recover VAT on the refurbishment costs.

17. With respect to East Mill, which is the building directly concerned in the main proceedings, the order for reference states that, under the scheme proposed by its accountants, on 21 November 1996 the University opted to tax the lease of East Mill and, on 22 November 1996, the University granted a taxable 20-year lease of it to the Trust. The lease contained an option for the University to break it on the 6th, 10th and 15th anniversaries of its commencement. The initial yearly rent reserved was the nominal amount of GBP 12.50. On the same date, the Trust, having itself opted to tax its supplies, granted a taxable underlease back to the University for a term of 20 years less 3 days, at an initial yearly nominal rent of GBP 13.00.

18. It is also apparent from the order for reference that, on 22 November 1996, University of Huddersfield Properties Ltd ('Properties'), a wholly-owned subsidiary company of the University which was not part of the same VAT group for the purposes of the second subparagraph of Article 4(4) of the Sixth Directive, invoiced the University for GBP 3.5 million, plus VAT of GBP 612 500, for future construction services on East Mill. Properties contracted with the University to refurbish East Mill on 25 November 1996. On a date not disclosed, the University paid the invoice submitted

by Properties. The referring tribunal states that no evidence was adduced of any intention that Properties should make a profit in providing construction services to the University, and, in the absence of such evidence, it found that the University had no intention that Properties should make such a profit.

19. Properties engaged third-party contractors at arm's length to provide the necessary construction services for East Mill to the University.

20. In its VAT return for January 1997, the University, which had a net liability to VAT of over GBP 90 000, showed a repayment due to it of GBP 515 000, which sum the Commissioners, after verification, unconditionally paid to it, thereby allowing the University to recover the VAT invoiced by Properties.

21. Work on East Mill was completed by third-party contractors on 7 September 1998 and the University occupied the building on the same date. Subsequently, the rents due under the lease and underlease were increased to GBP 400 000 per annum and GBP 415 000 per annum, respectively.

22. The referring tribunal found that the sole reason for the use of a trust in relation to East Mill and the lease by the University to the Trust was that of facilitating the scheme for the reduction of VAT. It also found that the sole purpose of the underlease of East Mill by the Trust to the University was also that of facilitating that scheme. It found, finally, that it was the University's intention to obtain an absolute tax saving by terminating the VAT arrangements in respect of East Mill after 2 or 3 years, or on the 6th, 10th or 15th anniversary of the commencement of the term of the lease (thereby also terminating payment of VAT on the rents).

23. The referring tribunal also found that all the transactions were genuine: they resulted in supplies that were genuinely made. They were therefore not shams.

24. By letter of 26 January 2000, the Commissioners assessed the University to VAT of GBP 612 500 for January 1997 in respect of VAT on construction services supplied by Properties in relation to East Mill. The letter indicated that the tax had been incorrectly attributed to taxable supplies and that there had been an under-declaration of VAT.

25. The referring tribunal states that that letter shows that the Commissioners categorised the leases with the Trust as 'inserted steps', which could be disregarded for determining the validity of the input VAT claims made by the University. The Commissioners accordingly found that the input VAT charged to the University by Properties had been treated incorrectly by the University in so far as it had been attributed to taxable supplies and recovered in full.

26. The University brought an appeal before the VAT and Duties Tribunal against the assessment of VAT notified by the Commissioners in their letter of 26 January 2000.

27. According to the order for reference, the Commissioners contend that a transaction entered into solely or predominantly for the purposes of VAT avoidance is not a 'supply'. Similarly, it is not a step taken in the course or furtherance of an 'economic activity'.

28. In the alternative, the Commissioners maintain that such a transaction should, in accordance with the general principle of law preventing 'abuse of rights', be disregarded and, instead, the terms of the Sixth Directive should be applied to the true nature of the transaction at issue.

29. The University argues inter alia that the transactions in question were not, as the Commissioners claimed, 'solely or predominantly for the purpose of tax avoidance'. Whilst it is true

that the University's interpretation of the facts produced a large 'up front' repayment of input VAT, the same facts also gave rise to large payments of VAT over a period of time. Furthermore, even if a transaction had been entered into 'solely or predominantly for the purpose of tax avoidance', that simply means that the transaction is subject to any anti-avoidance rule that has been adopted by the Member State pursuant to some authorisation under Article 27(1) of the Sixth Directive. However, no such rule has been adopted by the United Kingdom.

30. The University considers that action may only be characterised as tax avoidance if:

(1) the objective consequence of the transaction is contrary to the spirit and purpose of the Sixth Directive, and

(2) the subjective intention of the trader was to bring about that result, which is not the case in the main proceedings.

31. The national tribunal also found that the transactions into which the University entered were carried out with the sole intention of obtaining a fiscal advantage. They had no independent business purpose. They amount to a deferral scheme with a built-in feature that allows absolute tax saving at a later date. The referring tribunal accordingly found that those transactions amounted to tax avoidance. Furthermore, the findings of fact clearly indicate that it was the University's, and the Trust's, subjective intention to bring about that result.

32. It was in those circumstances that the VAT and Duties Tribunal, Manchester, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Where:

1. a university waives its right to exemptions from VAT in respect of any supplies of certain real property owned by it and leases the property to a trust set up and controlled by the university,

2. the trust waives its right to exemption from VAT in respect of any supplies of the real property in question and grants to the university an underlease of the property,

3. the lease and underlease were entered into and carried out by the University with the sole intention of obtaining a fiscal advantage and had no independent business purpose,

4. the lease and leaseback amounted to, and was intended by the University and the trust to be, a deferral scheme (that is, a scheme for the deferral of payment of VAT) with a built-in feature that allowed an absolute tax saving at a later date,

a) are the lease and the underlease taxable supplies for the purposes of the Sixth VAT Directive?

b) do they qualify as economic activities within the meaning of the second sentence of Article 4(2) of the Sixth VAT Directive?'

The question on which a ruling is sought

33. By its question, the national court seeks essentially to ascertain whether transactions of the kind at issue in the main proceedings constitute supplies of goods or of services and an economic activity within the meaning of Article 2(1), Article 4(1) and (2), Article 5(1) and Article 6(1) of the Sixth Directive where they are carried out with the sole object of obtaining a tax advantage, without any other economic aim.

Observations submitted to the Court

34. The University maintains that in the circumstances referred to in the order for reference the lease and underlease are taxable transactions and economic activities within the meaning of the Sixth Directive.

35. The United Kingdom Government considers that where, in circumstances such as those found by the referring tribunal, a legal person, such as the University, grants a lease of a property to a connected and controlled person, such as the Trust, and the Trust grants an underlease back to the University with the sole intention of deferring or avoiding absolutely the payment of VAT that would otherwise be largely irrecoverable owing to the fact that the property would be used for the University's own exempt education business:

– the University is not engaging in an economic activity within the meaning of Article 4(2) of the Sixth Directive; in particular, a legal person, such as the University, is not engaged in the exploitation of immovable property for the purpose of obtaining income therefrom on a continuing basis when its purpose in entering into the transaction is that of avoiding VAT, and

– neither the lease nor the underlease constitute supplies of services within the meaning of Article 6(1) of the Sixth Directive.

36. Ireland submits that, in circumstances such as those of the main proceedings, the lease and the underlease do not qualify as economic activities within the meaning of the second sentence of Article 4(2) of the Sixth Directive and, as such, do not constitute taxable supplies for the purposes of that directive.

37. The Italian Government considers that in order to determine to what extent the goods or services in respect of which it is wished to deduct VAT are used both for transactions that give rise to a right of deduction and for those that do not, it is not possible to take into consideration the means or operations undertaken with the sole object of avoiding application of the pro rata mechanism (thereby enjoying full deduction), in so far as those means or operations do not constitute, for the persons authorised to make the deduction, an economic activity within the meaning of Article 4(2) of the Sixth Directive.

38. The Commission maintains that, in the application of the concepts of 'economic activity' and 'supplies of goods or services' within the meaning of Article 4, 5 and 6 of the Sixth Directive, account must be taken of the objective characteristics of the transactions and activities concerned. The aim of the supply is immaterial.

39. However, where a taxable person or a group of taxable persons with links between them undertake one or more transactions which have no economic justification but give rise to an artificial situation for the sole purpose of creating the conditions necessary to recover input VAT, those transactions should be disregarded since they constitute an abusive practice.

Findings of the Court

40. It must be remembered first of all that the Sixth Directive establishes a common system of VAT based, inter alia, on a uniform definition of taxable transactions (Case C-305/01 MGK-Kraftfahrzeuge-Factoring [2003] ECR I-6729, paragraph 38).

41. In that regard, under the Sixth Directive the scope of VAT is very wide in that Article 2 thereof, which concerns taxable transactions, refers not only to imports of goods but also to the supply of goods or services effected for consideration within the territory of the country by a taxable person

acting as such.

42. As regards, first, the term ‘supply of goods’, Article 5(1) of the Sixth Directive states that any transfer of the right to dispose of tangible property as owner constitutes such a supply.

43. It is clear from the case-law of the Court that that term covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property (see, in particular, Case C-320/88 Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 7, and Case C-25/03 HE [2005] ECR I-3123, paragraph 64).

44. As regards the term ‘supply of services’, it is clear from Article 6(1) of the Sixth Directive that it covers all transactions not constituting a supply of goods within the meaning of Article 5 of that directive.

45. Next, according to Article 4(1) of the Sixth Directive, any person who independently carries out any economic activity, whatever the purpose or results of that activity, is regarded as a taxable person.

46. Finally, the term ‘economic activity’ is defined in Article 4(2) of the Sixth Directive as comprising ‘all’ activities of producers, traders and persons supplying services and, according to the case-law, it includes all stages of production, distribution and the provision of services (see, in particular, Case C-186/89 Van Tiem [1990] ECR I-4363, paragraph 17, and MGK-Kraftfahrzeuge-Factoring , paragraph 42).

47. As the Court held in paragraph 26 of its judgment in Case C-260/98 Commission v Greece [2000] ECR I-6537, an analysis of those definitions shows that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (see also Case 235/85 Commission v Netherlands [1987] ECR 1471, paragraph 8, and, to that effect, in particular Case 268/83 Rompelman [1985] ECR 655, paragraph 19, and Case C-497/01 Zita Modes [2003] ECR I-14393, paragraph 38).

48. That analysis and that of the terms ‘supply of goods’ and ‘supply of services’ show that those terms, which define taxable transactions under the Sixth Directive, are all objective in nature and apply without regard to the purpose or results of the transactions concerned (see, to that effect, Joined Cases C-354/03, C-355/03 and C-484/03 Optigen and Others [2006] ECR I-0000, paragraph 44).

49. As the Court held in paragraph 24 of its judgment in Case C-4/94 BLP Group [1995] ECR I-983, an obligation on the tax authorities to carry out inquiries to determine the intention of the taxable person would be contrary to the objectives of the common system of VAT of ensuring legal certainty and facilitating application of VAT by having regard, save in exceptional cases, to the objective character of the transaction in question.

50. It follows that transactions of the kind at issue in the main proceedings are supplies of goods or services and an economic activity within the meaning of Article 2(1), Article 4(1) and (2), Article 5(1) and Article 6(1) of the Sixth Directive, provided that they satisfy the objective criteria on which those concepts are based.

51. Whilst it is true that those criteria are not satisfied where tax is evaded, for example by means of untruthful tax returns or the issue of improper invoices, the fact nevertheless remains that the question whether the transaction concerned is carried out for the sole purpose of obtaining a tax advantage is entirely irrelevant in determining whether it constitutes a supply of goods or services

and an economic activity.

52. In that context, it must however be noted that, as is clear from paragraph 85 of the judgment of today's date in Case C-255/02 Halifax and Others [2006] ECR I-0000, the Sixth Directive precludes any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice.

53. It follows that the answer to the question submitted to the Court must be that transactions of the kind at issue in the main proceedings constitute supplies of goods or services and an economic activity within the meaning of Article 2(1), Article 4(1) and (2), Article 5(1) and Article 6(1) of the Sixth Directive, provided that they satisfy the objective criteria on which those concepts are based, even if they are carried out with the sole aim of obtaining a tax advantage, without any other economic objective.

Costs

54. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national tribunal, the decision on costs is a matter for that tribunal. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

Operative part

On those grounds, the Court (Grand Chamber) hereby rules:

Transactions of the kind at issue in the main proceedings constitute supplies of goods or services and an economic activity within the meaning of Article 2(1), Article 4(1) and (2), Article 5(1) and Article 6(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, as amended by Council Directive 95/7/EC of 10 April 1995, provided that they satisfy the objective criteria on which those concepts are based, even if they are carried out with the sole aim of obtaining a tax advantage, without any other economic objective.