

Downloaded via the EU tax law app / web

Case C-166/05

Heger Rudi GmbH

v

Finanzamt Graz-Stadt

(Reference for a preliminary ruling from the

Verwaltungsgerichtshof (Austria))

(Sixth VAT Directive – Place of supply for tax purposes – Article 9 – Supply of services connected with immovable property – Transmission of the fishing rights over a particular part of a stretch of water)

Summary of the Judgment

*Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Supply of services*

*(Council Directive 77/388, Art. 9(2)(a))*

The transmission of the right to fish by means of a transfer of fishing permits for valuable consideration constitutes a supply of services connected with immovable property within the meaning of Article 9(2)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes.

As the fishing rights can be exercised only in relation to the river in question and on the stretches of that river mentioned in the permits, the stretch of water itself makes up a constituent element of the fishing permits and, accordingly, of the transmission of the fishing rights. Since a supply of services consists in the transmission of an actual right of use of the property, in this case the river, that immovable property constitutes a central and essential element of that supply. Furthermore, the place where the immovable property is situated is the place of final consumption of the service. It follows from all those factors that there exists a sufficiently direct connection between the transmission of fishing permits and the stretches of water to which they relate.

(see paras 25-27, operative part)

JUDGMENT OF THE COURT (Third Chamber)

7 September 2006 (\*)

(Sixth VAT Directive – Place of supply for tax purposes – Article 9 – Supply of services connected

with immovable property – Transmission of the fishing rights over a particular part of a stretch of water)

In Case C-166/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the Verwaltungsgerichtshof (Austria), made by decision of 31 March 2005, received at the Court on 13 April 2005, in the proceedings

**Heger Rudi GmbH**

v

**Finanzamt Graz-Stadt,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, S. von Bahr, A. Borg Barthet (Rapporteur) and U. Löhmus, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Italian Government, by I.M. Braguglia, acting as Agent, and G. De Bellis, avvocato dello Stato,
- the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2006,

gives the following

## **Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 9(2)(a) 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 for assessment (OJ 1977 L 145, p. 1; ‘the Sixth Directive’).

2 The reference was made in the course of proceedings between Heger Rudi GmbH (‘Heger’) and the Finanzamt Graz-Stadt, successor to the Finanzlandesdirektion für die Steiermark, concerning a request for a refund of the value added tax (‘VAT’) paid in connection with transfers of fishing permits.

## **Legal context**

### *Community law*

3 Pursuant to Article 5(1) of the Sixth Directive, ‘supply of goods’ is to mean ‘the transfer of the right to dispose of tangible property as owner’. According to Article 5(3)(a) and (b) Member

States may consider the following to be ‘tangible property’: ‘certain interests in immovable property’ and ‘rights *in rem* giving the holder thereof a right of user over immovable property’.

4 Article 6(1) of the Sixth Directive defines the supply of services as ‘any transaction which does not constitute a supply of goods within the meaning of Article 5’. Such transactions may include inter alia ‘assignments of intangible property whether or not it is the subject of a document establishing title’ or ‘obligations to refrain from an act or to tolerate an act or situation’.

5 Article 9(1) of the directive establishes the following general rule:

‘The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.’

6 Article 9(2) of the Sixth Directive sets out a number of exceptions. Thus, Article 9(2)(a) states:

‘The place of the supply of services connected with immovable property, including the services of estate agents and experts, and of services for preparing and coordinating construction works, such as the services of architects and of firms providing on-site supervision, shall be the place where the property is situated.’

7 The arrangements for the refund of VAT in respect of cross-border supplies are governed by Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes – **Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p 11; ‘the Eighth Directive’)**. In essence, the effect of that directive is that the right to refund of input VAT arises when the taxable person is established in another Member State and has not carried out any onward taxable transaction in the territory of the country in which the input VAT has been charged. By contrast, when the taxable person has effected onward taxable transactions in that territory, he no longer has the right to a refund of that VAT under the Eighth Directive, since the general rule of deduction set out in Article 17 and seq. of the Sixth Directive is applicable.

#### *National legislation*

8 Paragraph 3a(6) of the 1994 Austrian Law on turnover tax (Umsatzsteuergesetz 1994, BGBl. 663/1994) in essence repeats the provisions of Article 9(2)(a) of the Sixth Directive.

#### **The main proceedings and the question referred**

9 Heger is a company established in Germany, which has no business premises in Austria. In 1997 and 1998, Heger bought fishing quotas for the Gmundner Traun, a river in Upper Austria, from a company established in Austria, Flyfishing Adventure GmbH (‘Flyfishing’). Those permits authorised their holders to fish on certain stretches of that river at certain times of year. Heger sold on those permits to a large number of customers residing in different Member States.

10 In addition to the sale price of the permits in question, Flyfishing invoiced Heger Austrian VAT at a rate of 20%, totalling ATS 252 000 (that is, about EUR 18 300).

11 In December 1999, Heger applied to the competent Austrian authority for refund of the VAT paid in relation to the acquisition of fishing permits in 1997 and 1998, relying on the provisions transposing the Eighth Directive into Austrian law.

12 It appears from the order for reference that that application was rejected on the ground that the onward sale of the fishing permits by Heger to its customers constituted a supply of services connected with immovable property situated in Austria, so that a refund of the input VAT paid could not be given.

13 Heger contested that decision before the Verwaltungsgerichtshof, which has decided to stay proceedings and refer to the Court the following question for a preliminary ruling:

‘Does the transmission of the right to fish by means of a transfer of fishing permits for valuable consideration constitute a “supply of services connected with immovable property” within the meaning of Article 9(2)(a) of [the Sixth Directive]?’

### **On the question for a preliminary ruling**

14 The referring court is essentially asking whether Article 9(2)(a) of the Sixth Directive must be interpreted as meaning that the transfer, for valuable consideration, of fishing permits for a river constitutes a supply of services connected with immovable property within the meaning of that provision.

15 In that regard, it should be noted that Article 9(1) of the Sixth Directive contains a general rule for determining the place of supply for tax purposes whilst Article 9(2) gives a number of specific instances of such places.

16 In respect of the relationship between the first two paragraphs of Article 9 of the Sixth Directive, the Court has already held that Article 9(1) in no way takes precedence over Article 9(2). In each situation, the question which must be asked is whether it corresponds to one of the instances mentioned in Article 9(2) of that directive. If not, that situation falls within the scope of Article 9(1) (see, to that effect, Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 21, and Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraph 33).

17 It follows that Article 9(2)(a) of the Sixth Directive must not be regarded as an exception to a general rule, which must be narrowly construed (see, to that effect, Case C-108/00 *SPI* [2001] ECR I-2361, point 17).

18 It is therefore necessary to examine whether a transaction such as that in question in the main proceedings can fall within the ambit of Article 9(2) of the Sixth Directive. In order that the onward sale of the fishing permits in question may be regarded as a supply of services connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive, it is necessary first of all that the transmission of those rights constitute a ‘supply of services’ and that the stretches of river to which the permits relate can be classified as ‘immovable property’.

19 As the Advocate General pointed out in points 28 and 29 of her Opinion, since it does not appear that the Republic of Austria made use of the option granted to Member States by Article 5(3) of the Sixth Directive to treat certain interests in immovable property and/or certain rights *in rem* giving the holder thereof a right of user over such goods, as ‘tangible property’, the transmission for valuable consideration of the fishing rights in question in the main proceedings cannot be classified as a supply of goods within the meaning of Article 5(1) of the Sixth Directive. That transmission therefore constitutes a supply of services within the meaning of Article 6(1) of

that directive.

20 As far as the concept of 'immovable property' is concerned, one of the essential characteristics of such property is that it is attached to a specific part of the earth's surface. In that respect, the Court has previously held that a piece of land which is permanently delimited, even if it is underwater, can be classified as immovable property (see, to that effect, Case C-428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527, paragraph 34).

21 Fishing rights such as those acquired and sold on by Heger allow the exercise of such a right over certain very specific parts of the stretch of water concerned. Those rights, which relate not to the quantities of water which flow in the river and are constantly replaced, but to certain geographical areas, where those rights may be exercised, are thus connected with a surface covered in water, which is permanently delimited.

22 Consequently, the stretches of river to which the fishing permits relate must be regarded as immovable property within the meaning of Article 9(2)(a) of the Sixth Directive.

23 In those circumstances it must still be assessed whether the connection between the service in question and that immovable property is sufficient. It would be contrary to the general scheme of Article 9(2)(a) of the Sixth Directive to place within the scope of that special rule every supply of services provided that it has a connection, even a very tenuous one, with immovable property, since a large number of services are connected in one way or another with immovable property.

24 Thus, only supplies of services which have a sufficiently direct connection with immovable property come under Article 9(2)(a) of the Sixth Directive. Such a connection is moreover characteristic of all the supplies of services listed in that provision.

25 The fishing rights at the centre of the dispute in the main proceedings can be exercised only in relation to the river in question and on the stretches of that river mentioned in the permits. The stretch of water itself, therefore, makes up a constituent element of the fishing permits and, accordingly, of the transmission of the fishing rights. Since a supply of services such as that in question in the main proceedings consists in the transmission of an actual right of use of the property, in this case the river, that immovable property constitutes a central and essential element of that supply. Furthermore, the place where the immovable property is situated is the place of final consumption of the service.

26 It follows from all those factors that there exists a sufficiently direct connection between the transmission of fishing permits and the stretches of water to which they relate. Consequently, a service such as that provided by Heger is connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive.

27 The answer to the question referred for a preliminary ruling must therefore be that the transmission of the right to fish by means of a transfer of fishing permits for valuable consideration constitutes a supply of services connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive.

## **Costs**

28 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On these grounds, the Court (Third Chamber) hereby rules:

**The transmission of the right to fish by means of a transfer of fishing permits for valuable consideration constitutes a supply of services connected with immovable property within the meaning of Article 9(2)(a) 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 for assessment.**

[Signatures]

\* Language of the case: German.