Case C-174/06

Ministero delle Finanze – Ufficio IVA di Milano

v

CO.GE.P. Srl

(Reference for a preliminary ruling from the Corte suprema di cassazione)

(Sixth Directive – VAT – Exempted transactions – Leasing or letting of immovable property – Property owned by the State)

Judgment of the Court (Second Chamber), 25 October 2007

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive

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

Article 13B(b) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that a legal relationship under which a person has been granted the right to occupy and use, including exclusively, public property, namely areas of State maritime property, for a specified period and against payment, is covered by the concept of ‘leasing or letting of immovable property’ within the meaning of that article. The fundamental characteristic of such a legal relationship, which it has in common with the leasing or letting of immovable property, consists in the provision of an area, that is, part of the State maritime property, in return for payment, together with the grant to the other contracting party of the right to occupy it or use it and to exclude all other persons from the enjoyment of that right. Consequently, observance of the principle of the neutrality of VAT and the requirement that the provisions of the Sixth Directive be applied consistently, in particular, those relating to exemptions, entail treating such a relationship in the same way as the leasing or letting of immovable property for the purposes of Article 13B(b) of that directive.

(see paras 34-36, operative part)

JUDGMENT OF THE COURT (Second Chamber)

25 October 2007 (*)

(Sixth Directive – VAT – Exempted transactions – Leasing or letting of immovable property – Property owned by the State)

In Case C?174/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte suprema di cassazione (Italy), made by decision of 13 January 2006, received at the Court on 3 April 2006, in the proceedings

Ministero delle Finanze – Ufficio IVA di Milano

v

CO.GE.P. Srl,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk (Rapporteur), J.-C. Bonichot and C. Toader, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Italian Republic, by S. Fiorentino, acting as Agent,

– the Commission of the European Communities, by A. Aresu and M. Afonso, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13B(b) 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; ‘the Sixth Directive’).

2 The reference was made in the course of proceedings between the Ministero delle Finanze – Ufficio IVA di Milano (‘the Ufficio’) and the limited liability company CO.GE.P., the business of which is the preparation and blending of petroleum by?products (‘CO.GE.P’), regarding the fiscal legality of invoices concerning value added tax (‘VAT’) issued to that company by the Consorzio Autonomo del Porto di Genova (Independent Consortium of the Port of Genoa, ‘the Consortium’) in respect of the concession of areas of State-owned maritime property for the storage, manufacture and handling of mineral oils.

Legal context

Community legislation

3 According to the eleventh recital in the preamble to the Sixth Directive, one of the aims of that directive was to draw up a common list of VAT exemptions so that the Communities own resources may be collected in a uniform manner in all the Member States.

4 Article 2(1) of the Sixth Directive makes 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' subject to VAT.

5 Article 4(1), (2) and (5) of that directive provides that:

'1. "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.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

…

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

Member States may consider activities of these bodies which are exempt under Article 13 or 28 as activities which they engage in as public authorities.'

6 Article 13B(b) of the Sixth Directive, which is found under Title X thereof, entitled 'Exemptions', provides:

'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 excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption’.

National legislation

7 Article 1 of Decree No 633 of the President of the Republic of 26 October 1972, which establishes and governs value added tax, provides:

‘Value added tax shall be imposed on supplies of goods and services effected in the territory of Italy in the exercise of an activity, trade or profession and on imports effected by any person’.

8 Under Article 10(8) of that decree, as amended by Article 35a of Decree-Law No 69 of 2 March 1989, now, after amendments, Law No 154 of 27 April 1989, the following are exempt from VAT: non?financial lettings and leases, and assignments, terminations and extensions thereof, of farm land and farms, land other than that used for the parking of vehicles, buildings, including fixtures, materials, and movable property in general used on a lasting basis to service immovable property which is let or leased, excluding those instruments which, by their nature, are not suitable for other uses without radical changes and those intended for use in civilian dwellings let by the undertakings which constructed them for sale.

9 Article 36 of the Italian Maritime Code, approved by Royal Decree No. 327 (Codice della navigazione approvato con Regio decreto n. 327) of 30 March 1942 (*Gazzetta ufficiale* No. 93 of 18 April 1942, Special Edition), provides that the maritime authorities, in a manner compatible with the requirements of public use, may grant occupation and use, including exclusive use, of property owned by the State and areas of territorial waters for a fixed term.

The main proceedings and the question referred for a preliminary ruling

10 After having classified the concession of areas of State maritime property as transactions not subject to VAT, the Consortium issued invoices to CO.GE.P without applying VAT. The tax authorities, by contrast, served VAT adjustment notices for the years 1991 to 1993 on that company.

11 By application lodged before the Commissione tributaria di primo grado di Milano (Milan Tax Court of First Instance) on 30 May 1996, CO.GE.P. challenged those adjustment notices, disputing that the services provided by the Consortium were subject to VAT on the ground, inter alia, that the conditions for charging VAT were not fulfilled.

12 That court granted the application by judgment of 19 November 1996.

13 On 2 February 1998, the Ufficio lodged an appeal against that judgment, on the ground that the transactions carried out should be subject to VAT inasmuch as they constituted supplies of services effected in the course of an economic activity.

14 By judgment of 20 September and 20 October 1999, the Commissione tributaria regionale della Lombardia (the regional tax court) dismissed the appeal, accepting CO.GE.P’s argument that concessions of State-owned property, unlike leases of immovable property in the strict sense, cannot be regarded either as assignments of property or as supplies of services for the purpose of the VAT legislation and, consequently, VAT may not be charged on them.

15 By document lodged on 13 March 2000, the Ufficio lodged an appeal in cassation before the referring court.

16 Before that court the Ufficio argued that the Consortium is indisputably a public economic entity.

17 The Ufficio also submitted that, although the concession implies a discretionary power of a public-law nature, it seems nevertheless to have been made in the course of economic and commercial activities, for the purpose of obtaining rental income to be used in the economic activity of the public entity. Furthermore, the concession of a coastal warehouse for the storage of mineral oils, as in the main proceedings, reflects purely economic objectives rather than objectives of common interest or public utility.

18 The referring court notes in this connection that, according to the Italian tax authorities, when the concession, as in the main proceedings, is granted by a port authority and not by the maritime authorities, that measure must be regarded as part of an economic or commercial activity because the port authority is a commercial and industrial entity.

19 The referring court gives details of some aspects of Italian law in this regard.

20 It thus points out that, although the relationship between grantor and grantee constitutes an administrative measure which is authoritative, unilateral and discretionary, such a measure invariably presupposes an expression of intent on the part of the person concerned to obtain the concession. The rules governing the relationship between the granting authority and the grantee are contained in a bilateral agreement.

21 The referring court does not accept, furthermore, that, as Italian law stands, concessions of State-owned port property can be regarded as ‘port services’.

22 Lastly, the order for reference shows that, according to the case-law of the Corte suprema di cassazione (Supreme Court of Cassation; judgments of 26 May 1992, No. 6281, and of 25 July 2001, No. 10097), in spite of their administrative nature, when concessions of State-owned property are issued by public port authorities, they cannot be brought within the model of the public-law concession granting exclusive use of such property. In fact, in so far as those measures form part of the economic activity carried out by those authorities, they are expressly treated in the same way as leases of immovable property, in spite of the different legal rules governing them. It follows that concessions of State-owned property must be regarded as transactions subject to VAT.

23 In those circumstances, the Corte suprema di cassazione decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Where a person is granted a right to use, including exclusively, public property without provision of services of a nature that prevails in relation to the permission to use the property, for a specified period and against payment of an amount much lower than the value of the property, and that grant is made, at the request of the person concerned, by the adoption by a public entity carrying on a business of an administrative measure, such as the concession of State-owned property under national law, rather than by contract, does that grant constitute the leasing or letting of immovable property exempt from VAT under Article 13B(b) of the Sixth Directive?’

On the question referred

24 It should be noted at the outset that it is apparent from the order for reference that the

Consortium is a public economic entity which, as regards the management of the State property entrusted to it, acts not in the name of and on behalf of the State, which remains the owner of that property, but on its own account, in so far as it administers that property, inter alia by making independent decisions.

25 Thus, so far as the Consortium is concerned, the cumulative conditions required to apply the rule of treatment as a non-taxable person under the first subparagraph of Article 4(5) of the Sixth Directive, namely, that the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority, are not fulfilled (see, to that effect, Case C?446/98*Fazenda Pública* [2000] ECR I?11435, paragraph 15).

26 As regards the question of whether the legal relationship at issue in the main proceedings is covered by the concept of ‘leasing or letting of immovable property’ within the meaning of Article 13B(b) of the Sixth Directive, it must be noted, first, that according to settled case-law the exemptions provided for in Article 13 of the Directive have their own independent meaning in Community law and must therefore be given a Community definition (see Case C?275/01*Sinclair Collis* [2003] ECR I?5965, paragraph 22; Case C?284/03*Temco Europe* [2004] ECR I?11237, paragraph 16; Case C?428/02*Fonden Marselisborg Lystbådehavn* [2005] ECR I?1527, paragraph 27).

27 Secondly, 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 358/97 *Commission* v *Ireland* [2000] ECR I?6301, paragraph 52; Case C?150/99*Stockholm Lindöpark* [2001] ECR I?493, paragraph 25; and *Sinclair Collis*, paragraph 23).

28 However, the requirement of strict interpretation does not mean that the terms used to specify exemptions must be construed in such a way as to deprive the exemptions of their intended effect (see *Temco Europe*, paragraph 17).

29 Thirdly, Article 13B(b) of the Sixth Directive does not define ‘leasing or letting’, nor does it refer to relevant definitions adopted under the laws of the Member States (see Case C?326/99 *Goed Wonen* [2001] ECR I?6831, paragraph 44).

30 That provision must therefore be interpreted in the light of the context in which it is used, and of the objectives and the scheme of the Sixth Directive, having particular regard to the underlying purpose of the exemption which it establishes (see, to that effect, *Goed Wonen*, paragraph 50, and *Fonden Marselisborg Lystbådehavn*, paragraph 28).

31 In its case-law, the Court has stated that the leasing or letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive is essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to that effect, *Goed Wonen*, paragraph 55; Case C?409/98*Mirror Group* [2001] ECR I?7175, paragraph 31; Case C?269/00*Seeling* [2003] ECR I?4101, paragraph 49; and *Temco Europe*, paragraph 19).

32 In the main proceedings, the legal relationship at issue is one in which a company has been granted the right to occupy and use, including exclusively, areas of State maritime property, namely a coastal warehouse for the storage, manufacture and handling of mineral oils, for a specified period and against payment of an amount much lower than the value of the property.

33 Having regard to its substance, such a relationship is similar to a contract forming part of the

industrial and commercial activities of the Consortium.

34 The fundamental characteristic of that relationship, which it has in common with the leasing or letting of immovable property, consists in the provision of an area, that is, part of the State maritime property, in return for payment, together with the grant to the other contracting party of the right to occupy it or use it and to exclude all other persons from the enjoyment of that right.

35 Consequently, observance of the principle of the neutrality of VAT and the requirement that the provisions of the Sixth Directive be applied consistently, in particular, those relating to exemptions, entail treating a relationship such as that at issue in the main proceedings in the same way as the leasing or letting of immovable property for the purpose of Article 13B(b) of that directive.

36 Having regard to all the foregoing, the answer to the question referred must be that Article 13B(b) of the Sixth Directive must be interpreted as meaning that a legal relationship such as that at issue in the main proceedings, under which a person has been granted the right to occupy and use, including exclusively, public property, namely areas of State maritime property, for a specified period and against payment, is covered by the concept of 'leasing or letting of immovable property' within the meaning of that article.

Costs

37 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 those grounds, the Court (Second Chamber) hereby rules:

Article 13B(b) of the Sixth Council Directive 77/388/EE**C 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 must be interpreted as meaning that a legal relationship such as that at issue in the main proceedings, under which a person has been granted the right to occupy and use, including exclusively, public property, namely areas of State maritime property, for a specified period and against payment, is covered by the concept of 'leasing or letting of immovable property' within the meaning of that article.**

[Signatures]

* Language of the case: Italian.