Case C-425/06

Ministero dell'Economia e delle Finanze, formerly Ministero delle Finanze

v

Part Service Srl, company in liquidation, formerly Italservice Srl

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

(Sixth VAT Directive – Articles 11A(1)(a) and 13B(a) and (d) – Leasing – Artificial division of the supply into a number of parts – Effect – Reduction of the taxable amount – Exemptions – Abusive practice – Conditions)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Sixth Directive – Transactions constituting an abusive practice*

(Council Directive 77/388)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Sixth Directive – Transactions constituting an abusive practice*

(Council Directive 77/388, Arts 11A(1) and 13B(a) and (d))

1. The Sixth Directive 77/338 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue.

(see para. 45, operative part 1)

2. It is for the national court to determine whether, for the purposes of the application of value added tax, leasing transactions having the following characteristics can be considered to be an abusive practice under the Sixth Directive 77/338 on the harmonisation of the laws of the Member States relating to turnover taxes:

– the two companies taking part in the leasing transaction are part of the same group;

– the service supplied by the leasing company is subject to a division, the financing element is entrusted to another company to be split into a credit service, an insurance service and a brokerage service;

– the service of the leasing company is therefore reduced to a service for renting a vehicle;

– the lease payments made by the customer are of an amount which is only slightly higher than the purchase cost of the vehicle;

– that service, considered in isolation, therefore seems to be economically unprofitable, so that the viability of the business cannot be ensured solely by means of contracts concluded with the customers;

– the leasing company receives the consideration of the leasing transaction only through the cumulative lease payments made by the customer and the amounts transferred from the other company of the same group.

It is also for the national court to assess if, the contractual structure of the transaction notwithstanding, the evidence put before the court discloses the characteristics of a single transaction. In that context, it may find it necessary to extend its analysis by seeking evidence of indications of the existence of an abusive practice. For that purpose, the national court must verify, first, whether the result sought is a tax advantage, the granting of which would be contrary to one or more of the objectives of the Sixth Directive and, then, whether that constituted the principal aim of the contractual approach adopted.

As regards the first criterion, that court can take into account that the anticipated result is the accrual of a tax advantage linked to the exemption, pursuant to Article 13B(a) and (d) of the Sixth Directive, of the services entrusted to the co-contracting company of the leasing company. That result would appear to be contrary to the objective of Article 11A(1) of the Sixth Directive, namely the taxation of everything which constitutes consideration received or to be received from the customer. Since the leasing of vehicles under leasing contracts constitutes a supply of services within the meaning of Articles 6 and 9 of the Sixth Directive, such a transaction is normally subject to value added tax, for which the taxable amount is determined in accordance with Article 11A(1) of the Sixth Directive.

As regards the second criterion, the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved, those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations.

(see paras 54-55, 57-63, operative part 2)

JUDGMENT OF THE COURT (Second Chamber)

21 February 2008 (*)

(Sixth VAT Directive – Articles 11A(1)(a) and 13B(a) and (d) – Leasing – Artificial division of the supply into a number of parts –Effect – Reduction of the taxable amount – Exemptions – Abusive practice – Conditions)

In Case C?425/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte suprema di cassazione

(Italy), made by decision of 10 March 2006, received at the Court on 16 October 2006, in the proceedings

Ministero dell'Economia e delle Finanze, formerly Ministero delle Finanze,

v

Part Service Srl, company in liquidation, formerly Italservice Srl,

THE COURT (Second Chamber),

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

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 October 2007,

after considering the observations submitted on behalf of:

– Part Service Srl, by S. Taverna, avvocato,

– the Italian Government, by I.M. Braguglia, acting as Agent, and by G. Lancia and S. Fiorentino, avvocati dello Stato,

– the Greek Government, by M. Apessos and by M. Papida and I. Pouli, acting as Agents,

– Ireland, by D. O'Hagan, Agent and by D McDonald SC, B. Conway BL and G. Clohessy BL,

– the Portuguese Government, by L. Fernandes and C. Lança, acting as Agents,

– the United Kingdom Government, by T. Harris, acting as Agent, and R. Hill, barrister,

– 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 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 (OJ 1977 L 145, p. 1) ('the Sixth Directive').

2 The reference has been made in the course of proceedings between the Ministero dell'Economia e delle Finanze (Ministry of the Economy and Finance) and Part Service Srl ('Part Service'), formerly Italservice Srl ('Italservice'), regarding a notice of adjustment of value added tax ('VAT') notified in respect of the 1987 financial year, for leasing transactions in connection, for the most part, with motor vehicles.

Legal context

Community legislation

3 Article 11A(1) of the Sixth Directive, relating to the taxable amount for VAT, provides:

‘The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies;

…’

4 Article 13B of the Sixth Directive provides for the exemption of certain transactions:

‘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:

(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents;

…

(d) the following transactions:

1. the granting and the negotiation of credit and the management of credit by the person granting it;

2. the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

3. transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring;

…’

National legislation

5 Article 3 of the Decree of the President of the Republic No 633 of 26 October 1972 which established and regulates value added tax (ordinary supplement No 1 to GURI No 292 of 11 November 1972, p. 2), as amended on a number of occasions (‘DPR No 633/72’) defined the supply of services as follows:

‘Supplies for consideration under contract for work, procurement, transport, representation, haulage, agency, brokerage, or deposit and generally under obligations to do or refrain from doing or to permit something to be done, whatever the basis thereof, constitute a supply of services.

When carried out for consideration, the following also constitute a supply of services:

(1) the letting, leasing and rental of property and similar services;

…’

6 Article 10 of DPR No 633/72 exempts certain transactions from VAT:

‘The following are exempt from tax:

(1) supply of the services of granting and negotiation of credit, credit management by the credit supplier, finance transactions; the negotiating and undertaking of commitments, securities and other deposits and guarantees and the management of credit guarantees by the credit supplier; payment deadlines, transactions, including negotiations, concerning deposit accounts, current accounts, payments, transfers, debts, cheques and other negotiable instruments, excluding debt collection; the management of unit trusts and pension investment trusts referred to in legislative Decree No 124 of 21 April 1993, similar periods and management activities and financial and postal services (bank – post office);

(2) insurance and re-insurance transactions, life annuity transactions;

…

(9) representation, brokerage and intermediation services relating to those transactions referred to in paragraphs 1 to 7, and relating to gold and foreign securities, also including deposits in a current account, carried out on transactions implemented by the Bank of Italy and the Italian currency exchange, within the meaning of the fifth paragraph of Article 4 of the present decree.’

7 The first paragraph of Article 13 of DPR No 633/72 defines the taxable amount for VAT purposes:

‘The taxable amount for the supply of goods and services comprises the total amount of consideration received or to be received by the supplier or provider according to the contractual terms, including the charges and expenses involved in performance and the debts or other obligations to third parties imposed on the transferee or the principal, increased by additional amounts directly linked to the consideration due from other parties.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 Throughout 1987 Italservice and the leasing company IFIM Leasing Sas (‘IFIM’), both belonging to the same financial group, were involved together in leasing arrangement transactions in connection, for the most part, with motor vehicles.

9 Those transactions were carried out under the following terms:

10 IFIM concluded a contract with a customer for the use of a motor vehicle with an option to purchase, in consideration of lease payments, the setting up of a surety corresponding to the costs of the vehicle not covered by the lease payments and the provision of an unlimited security.

11 Italservice concluded a contract with the customer under which it insured the vehicle against all risks except civil liability and guaranteed – by financing the surety and providing the unlimited security – the fulfilment of the obligations, in favour of IFIM, undertaken by that customer. In consideration thereof the customer paid, in advance, to Italservice an amount which reduced the total of the lease payments agreed between the customer and IFIM, reducing that total, in the majority of cases, to an amount barely above the cost of the vehicle, as well as a commission of

1% paid to a consultant.

12 The customer instructed Italservice to pay the amount financed to IFIM, on his behalf, by way of the surety provided for in the contract for use of the vehicle.

13 Italservice entrusted the performance of the contract with the customer to IFIM.

14 IFIM, as an intermediary, received additional remuneration from Italservice, and, in the event of default by the customer, an amount equivalent to that promised by Italservice to the customer, by way of refund, in the event of the customer fulfilling his obligations to make the lease payments.

15 Pursuant to Article 3 of DPR No 633/72, IFIM levied VAT on the customer's lease payments.

16 By contrast, on the basis of Article 10 of DPR No 633/72, the consideration paid by the customer to Italservice and by Italservice to IFIM was invoiced without VAT.

17 Following investigations carried out into Italservice the tax office held that, although the different agreements signed by the interested parties were contained in separate contracts, they together constituted a single contract concluded between three parties. According to that office, the consideration paid by the customer for the leasing arrangement had been artificially divided to reduce the taxable amount, as the role of lessor was split between Italservice and IFIM.

18 As a consequence, the tax office issued Italservice, on 1 September 1992, with an adjustment notice for VAT, in respect of the year 1987, in the amount of ITL 3 169 519 000, with interest and penalties of ITL 9 496 469 000.

19 Italservice contested that tax adjustment before the Commissione tributaria di primo grado di Modena (Tax Court of First Instance, Modena) (Italy). It claimed that it was not a single contract, but several linked contracts, that format having been chosen not for tax avoidance purposes, but for valid economic reasons associated with marketing (launching a new financial product with reduced premiums), with organisation (separation of the risk management tasks: insurance, securities and financing confined to Italservice; management of a fleet of vehicles entrusted to operational companies) and the guarantee (financing serving as the guarantee deposit for fulfilling the obligations of the customer).

20 The Commissione tributaria di primo grado di Modena upheld that appeal.

21 The tax office appealed that decision to the Commissione tributaria di secondo grado di Modena (Tax Court of Second Instance, Modena) (Italy), which dismissed its appeal.

22 It then appealed to the Corte d'appello di Bologna (Court of Appeal, Bologna) (Italy) which dismissed that appeal by judgment of 13 November 1998 - 12 January 1999.

23 The tax office brought an appeal on a point of law against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation).

24 That court is of the view that the decision to be taken requires resolution of the question whether the actions of the relevant parties, having regard to their reciprocal links, can be considered to be an abuse of rights or of legal form according to the definition given by Community case-law, notably in Case C-255/02 *Halifax and Others* [2006] ECR I-1609.

25 It considers that the division of the contracts has the effect of reducing the VAT burden to a lesser amount than that resulting from an ordinary leasing contract, since tax is levied only on the granting of use of the vehicle, the cost of which is practically equivalent to the purchase price of

that vehicle.

26 It is therefore necessary to determine whether, for the purposes of VAT collection, with regard to the economic objective sought, the contracts must be held to constitute a unitary whole, or whether each contract remains autonomous and, accordingly, subject to its own particular tax rules.

27 In order to answer that question, it must be determined whether the fact that a financing transaction – regarded in economic practice and in national case-law as an essential component of a leasing contract – is regulated by a separate contract concerning the granting of the use of the goods, can constitute an abuse.

28 The referring court is of the opinion that, on that point, clarifications are necessary, inter alia, as to the scope of the conditions imposed by *Halifax and Others* for a finding of the existence of an abuse.

29 It also considers that, in paragraph 86 of that judgment, the Court required – in addition to the binding condition that the transaction in question should result in the accrual of a tax advantage contrary to the objective of the relevant provisions of the Sixth Directive – that the transaction should have 'the essential aim of … obtain[ing] a tax advantage.'

30 It observes that, in paragraph 60 and the operative part of the judgment in that case, the Court also referred to transactions 'carried out with the sole aim of obtaining a tax advantage, without any other economic objective'.

31 It raises the question, therefore, whether the abuse of rights bar operates where the economic reasons, other than the accrual of a tax advantage, are wholly marginal or insignificant, and not a possible alternative explanation.

32 Against that background, the Corte suprema di cassazione stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Does the concept of abuse of rights defined in the judgment of the Court of Justice in [*Halifax and Others*] as *transactions, the essential aim of which is to obtain a tax advantage*, correspond to the definition transactions carried out for no commercial reasons other than a tax advantage, or is it broader or more restrictive than that definition?

2. For the purposes of VAT, may there be considered to be an abuse of rights (or of legal form), with the consequent loss of Community own revenue accruing from value added tax, where contracts for leasing arrangements (*locazione finanziaria*), financing, insurance and intermediation contracts are concluded separately with the effect that only the consideration paid in respect of the grant of the right to use the goods is subject to VAT, whereas a single contract of leasing in accordance with the practice and interpretation of national case-law would include the financing and would therefore make the whole of the consideration subject to VAT?'

The questions referred

Admissibility

33 Part Service claims that the present reference for a preliminary ruling is inadmissible. The questions referred bear no relation to the facts of the main action or its purpose. The problem raised is purely hypothetical and unrelated to Community law provisions and/or principles.

34 In that regard, it should be borne in mind that, according to settled case-law, the Court may

refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 25, and Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 33).

35 However, none of those conditions is fulfilled in the present case.

36 In its order for reference the national court, which has a dispute in a VAT matter before it, describes in detail the factual and legal background of the dispute in the main proceedings.

37 It then seeks the opinion of the Court on the Community law applicable to VAT, notably on the Community concept of ‘abusive practice’, in order to be in a position to assess whether the transaction, which is the subject of the dispute in the main proceedings, should be held to constitute such a practice and, accordingly, subject to VAT.

38 The interpretation of Community law sought thus has a bearing on the facts and purpose of the dispute in the main proceedings and is not hypothetical.

39 Consequently, the questions referred are admissible.

The first question

40 By its first question the referring court asks, in essence, whether the Sixth Directive should be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage is the principal aim of the transaction or the transactions in question, or if such a finding can only be made if the accrual of that tax advantage constitutes the sole aim pursued, to the exclusion of other economic objectives.

41 It must be observed that, in the context of the dispute in the main proceedings, the exemptions from VAT are under scrutiny and that, specifically in connection with those exemptions, Article 13 of the Sixth Directive requires Member States to ‘prevent… any possible evasion, avoidance or abuse’.

42 In paragraphs 74 and 75 of *Halifax and Others*, the Court first held that, in the context of interpreting the Sixth Directive, an abusive practice can be held to exist where:

– the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions;

– it is apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.

43 When, subsequently, it provided the referring court with details for guidance in interpreting the transactions in the case in the main proceedings, the Court once again referred, at paragraph 81, to transactions essentially seeking to obtain a tax advantage.

44 Therefore, when it stated, in paragraph 82 of that judgment, that in any event, the transactions at issue had the sole purpose of obtaining a tax advantage, it was not establishing that circumstance as a condition for the existence of an abusive practice, but simply pointing out that, in the matter before the referring court in that case, the minimum threshold for classifying a

practice as abusive had been passed.

45 The reply to the first question therefore is that the Sixth Directive must be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue.

The second question

46 By its second question the referring court asks, in essence, whether, for the purposes of the application of VAT, transactions such as those at issue in the dispute in the main proceedings can be considered to be an abusive practice under the Sixth Directive.

47 By way of a preliminary point, it must be recalled that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system. Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, taxpayers may choose to structure their business so as to limit their tax liability (*Halifax and Others*, paragraph 73).

48 Nevertheless, when a transaction involves the supply of a number of services, the question arises whether it should be considered to be a single transaction or as several individual and independent supplies of services requiring separate assessment.

49 That question is of particular importance, for VAT purposes, for applying the rate of tax or the exemption provisions in the Sixth Directive (see Case C-349/96 *CPP* [1999] ECR I-973, paragraph 27 and Case C-41/04 *Levob Verzerkeringen and OV Bank* [2005] ECR I-9433, paragraph 18).

50 In that regard it follows from Article 2 of the Sixth Directive that every transaction must normally be regarded as distinct and independent (see *CPP*, paragraph 29 and *Levob Verzerkeringen and OV Bank*, paragraph 20).

51 However, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent.

52 Such is the case for example, where, in the course of a purely objective analysis, it is found that there is a single supply in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service (see, to that effect, *CPP*, paragraph 30 and *Levob Verzerkeringen and OV Bank*, paragraph 21). In particular, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (*CPP*, paragraph 30 and the facts of the dispute in the main proceedings giving rise to that judgment).

53 It can also be held that there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Levob Verzekeringen and OV Bank*, paragraph 22).

54 It is for the national court to assess if, the contractual structure of the transaction notwithstanding, the evidence put before the court discloses the characteristics of a single transaction.

55 In that context, it may find it necessary to extend its analysis by seeking evidence of indications of the existence of an abusive practice, which is the concept with which the question referred is concerned.

56 The Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (*Halifax and Others*, paragraph 77).

57 In the present case, the transactions at issue in the main proceedings, as described by the referring court, have the following characteristics:

– the two companies taking part in the leasing transaction are part of the same group;

– the service supplied by the leasing company (IFIM) is subject to a division, the financing element is entrusted to another company (Italservice) to be split into a credit service, an insurance service and a brokerage service;

– the service of the leasing company is therefore reduced to a service for renting a vehicle;

– the lease payments made by the customer are of an amount which is only slightly higher than the purchase cost of the vehicle;

– that service, considered in isolation, therefore seems to be economically unprofitable, so that the viability of the business cannot be ensured solely by means of contracts concluded with the customers;

– the leasing company receives the consideration of the leasing transaction only through the cumulative lease payments made by the customer and the amounts transferred from the other company of the same group.

58 In order to assess whether those transactions can be held to constitute an abusive practice, the national court must verify, first, whether the result sought is a tax advantage, the granting of which would be contrary to one or more of the objectives of the Sixth Directive and, then, whether that constituted the principal aim of the contractual approach adopted (see paragraph 42 of this judgment).

59 As regards the first criterion, that court can take into account that the anticipated result is the accrual of a tax advantage linked to the exemption, pursuant to Article 13B(a) and (d) of the Sixth Directive, of the services entrusted to the co-contracting company of the leasing company.

60 That result would appear to be contrary to the objective of Article 11A(1) of the Sixth Directive, namely the taxation of everything which constitutes consideration received or to be received from the customer.

61 Since the leasing of vehicles under leasing contracts constitutes a supply of services within the meaning of Articles 6 and 9 of the Sixth Directive (see, inter alia, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 19 and Case C-155/01 *Cookies World* [2003] ECR I-8785, paragraphs 44 and 45), such a transaction is normally subject to VAT, for which the taxable amount is determined in accordance with Article 11A(1) of the Sixth Directive.

62 As regards the second criterion, the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved (*Halifax and Others*, paragraph 81), those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations.

63 Therefore the reply to the second question referred must be that it is for the national court to determine, in light of the ruling on the interpretation of Community law provided by the present judgment, whether, for the purposes of the application of VAT, transactions such as those at issue in the dispute in the main proceedings can be considered to constitute an abusive practice under the Sixth Directive.

Costs

64 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:

1. **The Sixth Council Directive 77/338/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, must be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue.**

2. **It is for the national court to determine, in light of the ruling on the interpretation of Community law provided by the present judgment, whether, for the purposes of the application of VAT, transactions such as those at issue in the dispute in the main proceedings can be considered to constitute an abusive practice under the Sixth Directive.**

[Signatures]

* Language of the case: Italian.