Case C-267/08

SPÖ Landesorganisation Kärnten

v

Finanzamt Klagenfurt

(Reference for a preliminary ruling from the Unabhängiger Finanzsenat, Außenstelle Klagenfurt)

(VAT – Entitlement to deduct input tax – Concept of ‘economic activities’ – Regional groups of a political party – Advertising activities benefiting the party’s local groups – Expenditure relating to those activities exceeding income)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Economic activities within the meaning of Article 4(1) and (2) of the Sixth Directive

(Council Directive 77/388, Art. 4(1) and (2))

Article 4(1) and (2) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is to be interpreted as meaning that external advertising activities carried out by a section of a Member State’s political party is not to be regarded as an economic activity. Such activities do not allow the generation of revenue on a continuing basis, as the only income obtained on a continuing basis comes from public funding and the party members’ contributions, that income having been raised in particular to cover losses made by the external advertising activity. By such advertising activities, a political party carries out a communication exercise in keeping with attainment of its political objectives, which seeks to spread its ideas as a political organisation. In carrying out such activities, a political party does not however participate in any market.

(see paras 21, 23-24, operative part)

JUDGMENT OF THE COURT (Second Chamber)

6 October 2009 (*)

(VAT – Entitlement to deduct input tax – Concept of ‘economic activities’ – Regional groups of a political party – Advertising activities benefiting the party’s local groups – Expenditure relating to those activities exceeding income)

In Case C?267/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Finanzsenat, Außenstelle Klagenfurt (Austria), made by decision of 16 June 2008, received at the Court on 20 June 2008, in the proceedings

SPÖ Landesorganisation Kärnten

v

Finanzamt Klagenfurt,

THE COURT (Second Chamber),

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

Advocate General: M. Poiares Maduro,

Registrar: K. Mala?ek, Administrator,

having regard to the written procedure and further to the hearing on 23 April 2009,

after considering the observations submitted on behalf of:

– the Finanzamt Klagenfurt, by J. Wogrin, acting as Agent, and by G. Lackner, Rechtsanwalt,

– the Greek Government, by O. Patsopoulou, S. Trekli and V. Karra, acting as Agents,

– the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(1) and (2) 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 VAT Directive’).

2 The reference was made in proceedings between the SPÖ Landesorganisation Kärnten, which is a section of the Austrian socialist party in the *Land* of Carinthia (‘the Landesorganisation’), and the Finanzamt Klagenfurt (Tax office, Klagenfurt) (Austria) concerning, treatment for value added tax purposes (‘VAT’) of certain advertising activities undertaken by that section, on behalf of the district and local organisations of that party in the *Land* of Carinthia from 1988 to 2004.

Legal context

Community legislation

3 Article 4 of the Sixth VAT Directive is worded as follows:

‘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.

…’

National legislation

4 Paragraph 1 of the Law on parties (Parteiengesetz), which has constitutional status, states:

‘(1) The existence and multiplicity of political parties are essential components of the democratic order of the Republic of Austria (Article 1 of the Austrian Federal Constitution).

(2) The tasks of the political parties include involvement in the development of informed political opinion.

…’

5 According to Paragraph 6 of the Tax Amendment Law of 1975 (Abgabenänderungsgesetz 1975) political parties are, for the purposes of the application of the tax rules laid down in Paragraph 3(3) of the Federal Tax Code (Bundesabgabenordnung), to be treated as bodies governed by public law if they have legal personality under Paragraph 1 of the Law on parties.

6 Paragraph 2 of the Law on turnover tax of 1994 (Umsatzteuergesetz 1994) defines the concepts of operator and undertaking. Subparagraph 3 of that Paragraph covers bodies governed by public law.

7 According to subparagraph 3, bodies governed by public law engage, as a rule, in commercial or professional activities only in so far as those activities are carried out by one of their establishments having a commercial nature within the meaning of Paragraph 2 of the Law on corporation tax of 1998 (Körperschaftsteuergesetz 1988), subject to exceptions which are not relevant to the present case.

8 Paragraph 2 of that law defines a commercial establishment of a body governed by public law as follows:

‘(1) A commercial establishment of a body governed by public law is any establishment that:

– is economically autonomous and

– exclusively or predominantly exercises a particular long-term private economic activity of economic significance and

– aims to secure revenue or, in the event of non-participation in the general economy, other economic benefits and

– is not connected with agriculture and forestry (Paragraph 21 of the Law on income tax of 1988 (Einkommensteuergesetz 1988)).

A profit-making intention is not necessary. The activities of the establishment shall always be regarded as a commercial operation.

...

(4) A commercial establishment is fully liable to taxation even if it is itself a body governed by public law. …

(5) A private economic activity within the meaning of subparagraph 1 is not present where the activity serves predominantly, for the exercise of public powers (public-authority operation). The exercise of public powers is to be presumed in particular in the case of services which their recipient is obliged to accept under a statutory or administrative rule.'

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

9 The main proceedings were brought by the Landesorganisation. That organisation, an entity having legal personality, carried out certain activities for district and local groups for which it was responsible in the field of public relations, advertising and information, activities deemed to be 'external advertising'. In particular, it purchased advertising material before the elections, which it then supplied, against invoice, to various district and local organisations in accordance with their requirements, and organised the SPÖ ball that was held each year.

10 The parties in the main proceedings disagree as to whether the Landesorganisation, in performing external advertising activities for the groups for which it was responsible, should be regarded, under the Sixth VAT Directive, as a taxable person which is entitled to deduct input tax incurred in that context.

11 According to the findings of the referring court, the income received by the Landesorganisation between 1998 and 2004 came predominantly from invoicing services to the regional and local groups and the sale of entrance tickets to the annual SPÖ ball. However, only a small proportion of the expenses of the provincial organisation was invoiced to the groups for which it was responsible. Those groups contributed to the expenditure of the Landesorganisation according to their financial resources – without there being any predetermined rules to be complied with – resulting in the Landesorganisation itself being obliged to cover the major part of the costs incurred in relation to the advertising at issue. It was able to counterbalance the resulting losses with money from public funds, members' contributions, subscriptions paid by the members and donations.

12 It was only from 2004 that the services which could not be attributed to a particular beneficiary were invoiced to the district groups in the form of a ‘publicity charge’. The amount of the charge was determined by the number of the relevant district’s party members and the number of members of parliament returned by that district.

13 In those circumstances, the Unabhängiger Finanzsenat, Außenstelle Klagenfurt (Independent Finance Tribunal, Klagenfurt) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 4(1) of [the Sixth VAT Directive] to be interpreted in such a way that “external advertising” (Außenwerbung) by the legally independent provincial organisation of a political party, taking the form of publicity, information provision, the staging of party events, the supply of advertising material to district organisations and the organisation and holding of an annual ball (the SPÖ Ball), is to be regarded as an economic activity if revenue is obtained from (partially) passing the expense of the “external advertising” on to the likewise legally independent party structures (district organisations, etc.) and from entrance fees from the holding of the ball?

(2) In the assessment of whether there is “economic activity” within the meaning of Article 4(1) and (2) of the Sixth [VAT] Directive, is it prejudicial that the activities mentioned in Question 1 are also “reflected” back to the provincial organisation and hence are beneficial to it too? It is in the nature of things that as a result of those activities the party as such and its political objectives and views are always also being publicised, if not in the forefront, nevertheless as an inevitable side effect.

(3) Can there still be “economic activity” in the above sense where the expenditure on “external advertising” persistently exceeds many times over the revenue obtained from that activity by passing on the expense and the revenue obtained from holding the ball?

(4) Is there an “economic activity” even where the passing on of the expense does not take place according to readily ascertainable economic criteria (allocation of charges according to cause or benefit) and it is essentially left to the subordinate organisations to determine whether and to what extent they wish to contribute to the expenditure of the provincial organisations?

(5) Is there an “economic activity” even where advertising services are invoiced to the subordinate organisations in the form of a charge the amount of which is determined firstly by the number of members in the relevant local organisation and secondly by the number of members it sends to representative assemblies?

(6) In determining whether there is “economic activity”, should subsidies from public funds which do not form part of the taxable consideration (such as, for example, the financing of parties under the Carinthian Law on the financing of parties) be taken into consideration as if it were as economic advantages?

(7) If the “external advertising”, viewed in isolation, constitutes an economic activity within the meaning of Article 4(1) and (2) of the Sixth [VAT] Directive, does the fact that publicity and election advertising is a central feature of the activity of political parties and a condition sine qua non for the implementing of political objectives and programmes preclude such activity from being classified as an “economic activity”?

(8) Are the activities performed by the appellant and described by it as “external advertising” of such a nature as to be comparable with, and/or correspond in content to, activities carried out by commercial advertising agencies for the purposes of Annex D (number 10) to the Sixth [VAT]

Directive? If that question is answered affirmatively, can the extent of the activities be described as “not insignificant” in the context of the revenue/expenditure structure prevailing at the material time for the purposes of the appeal?’

The questions referred for a preliminary ruling

14 By its questions, which it is appropriate to examine together, the referring court is seeking to ascertain essentially whether Article 4(1) and (2) of the Sixth VAT Directive is to be interpreted as meaning that advertising activities carried out by the section of a Member State’s political party are to be viewed as economic activities.

15 Taxable person means, under Article 4(1) of the Sixth VAT Directive, any person who independently carries out in any place any economic activity specified in paragraph 2 thereof, whatever the purpose or results of that activity. ‘Economic activities’ are defined in Article 4(2) as including all activities of producers, traders and persons supplying services and, in particular, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

16 In that context, it must be pointed out that, although Article 4 of the Sixth VAT Directive gives a very wide scope to VAT, only activities of an economic nature are covered by that provision (see Case C-284/04 *T?Mobile Austria and Others* [2007] ECR I-5189, paragraph 34; and Case C?369/04 *Hutchison 3G and Others* [2007] ECR I?5247, paragraph 28).

17 It is also apparent from settled case-law that an analysis of the definitions of taxable person and economic activities 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, inter alia, Case C?223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 47; *T-Mobile Austria and Others*, paragraph 35; and *Hutchison 3G and Others*, paragraph 29).

18 It is apparent from the order for reference that, in the case in the main proceedings, the activity pursued by the Landesorganisation consisted of carrying out public-relations activities, information provision, the staging of events, the supply of advertising material to other groups of the SPÖ and the holding of an annual ball.

19 In that regard, it must be pointed out, first, that the basis of assessment for a provision of services is everything which makes up the consideration for the service provided and that a provision of services is therefore taxable only if there is a direct link between the service supplied and the consideration received. It follows that a supply of services is effected ‘for consideration’ within the meaning of Article 2(1) of the Sixth VAT Directive, and hence is taxable only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (Case C-16/93 *Tolsma* [1994] ECR I-743, paragraphs 13 and 14 and the case-law cited).

20 Secondly, it is important to point out that, under Article 4(2) of the Sixth VAT Directive, in accordance with the requirements of the principle of neutrality of the common system of value added tax, the term ‘exploitation’ refers to all transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis (see, to that effect, Case C?77/01 *EDM* [2004] ECR I?4295, paragraph 48, and Case C-8/03 *BBL* [2004] ECR I-10157, paragraph 36).

21 In this connection, it should be pointed out that the activity at issue in the main proceedings,

as described in paragraph 18 of this judgment, is advertising. In the present case, that exploitation does not allow the generation of revenue on a continuing basis.

22 It must be held that, in order to ensure its continuity, the SPÖ is financed by subsidies from public funds in accordance with the Austrian national legislation on the financing of political parties, by various donations and by subscriptions paid by the members of that party.

23 Therefore, the only income obtained on a continuing basis comes from public funding and the party members' contributions, that income having been raised in particular to cover losses made by the activity at issue in the main proceedings.

24 By such activities, the SPÖ is therefore carrying out a communication exercise in keeping with attainment of its political objectives and which seeks to spread its ideas as a political organisation. More specifically, the SPÖ's activity, particularly through the intermediary of the Landesorganisation, is the development of informed political opinion with a view to participation in the exercise of political power. In carrying out that activity, the SPÖ does not however participate in any market.

25 Consequently, the activity at issue in the main proceedings cannot constitute an 'economic activity' within the meaning of Article 4(1) and (2) of the Sixth VAT Directive.

26 In the light of the foregoing, the answer is that Article 4(1) and (2) of the Sixth VAT Directive must be interpreted as meaning that external advertising activities carried out by the section of a Member State's political party are not to be regarded as an economic activity.

Costs

27 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 4(1) and (2) 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 must be interpreted as meaning that external advertising activities carried out by a section of a Member State's political party are not to be regarded as an economic activity.

[Signatures]

* Language of the case: German.