

Case C-3/09

Erotic Center BVBA

v

Belgische Staat

(Reference for a preliminary ruling from the hof van beroep te Gent)

(Sixth VAT Directive – Article 12(3)(a) – Annex H – Reduced rate of VAT – Concept of ‘admissions to a cinema’ – Individual cubicles for watching films on demand)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Member States’ option of applying a reduced rate to certain supplies of goods and services

(Council Directive 77/388, Annex H, Category 7, first para.)

The concept of admissions to a cinema, referred to in the first paragraph of Category 7 in Annex H to Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2001/4, must be interpreted as not covering the payment made by a customer so that he may watch on his own one or more films, or extracts from films, in a private space, such as an individual viewing cubicle.

In addition to the fact that the concept of admissions to a cinema must be interpreted in accordance with the usual meaning of those words, the various events and facilities listed in the first paragraph of Category 7 in Annex H to that directive have in particular the common feature that they are available to the public on prior payment of an admission fee giving all those who pay it the right collectively to enjoy the cultural and entertainment services characteristic of those events and facilities.

(see paras 16-17, 19, operative part)

JUDGMENT OF THE COURT (Eighth Chamber)

18 March 2010 (*)

(Sixth VAT Directive – Article 12(3)(a) – Annex H – Reduced rate of VAT – Concept of ‘admissions to a cinema’ – Individual cubicles for watching films on demand)

In Case C-3/09,

REFERENCE for a preliminary ruling under Article 234 EC from the hof van beroep te Gent (Belgium), made by decision of 23 December 2008, received at the Court on 8 January 2009, in the proceedings

Erotic Center BVBA

v

Belgische Staat,

THE COURT (Eighth Chamber),

composed of C. Toader, President of the Chamber, K. Schieman (Rapporteur) and P. K?ris, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2010,

after considering the observations submitted on behalf of:

- Erotic Center BVBA, by J. van Besien, advocaat,
- the Belgian Government, by M. Jacobs, acting as Agent,
- the European Commission, by D. Triantafyllou and W. Roels, 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 concept of ‘cinema’ in Category 7 in Annex H to 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 2001/4/EC of 19 January 2001 (OJ 2001 L 22, p. 17) (‘the Sixth Directive’).

2 The reference was made in the course of proceedings between Erotic Center BVBA (‘E. Center’) and the Belgische Staat (Belgian State) concerning the possible application of a reduced rate of value added tax (‘VAT’) on the amounts received by E. Center for the use of individual cubicles for watching films located on the premises of that company.

Legal context

European Union legislation

3 Article 12(3)(a) of the Sixth Directive provides:

'The standard rate of [VAT] shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. ...

...

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount, which may not be less than 5%, and shall apply only to supplies of the categories of goods and services specified in Annex H.'

4 Annex H to the Sixth Directive, entitled 'List of supplies of goods and services which may be subject to reduced rates of VAT', sets out various categories. Category 7 of that annex is worded as follows:

'Admissions to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities.

Reception of broadcasting services.'

National legislation

5 The first indent of Article 1 of Royal Decree No 20 of 20 July 1970, fixing the rates of value added tax and classifying goods and services according to those rates ('Royal Decree No 20') provides that VAT is levied at the reduced rate of 6% for goods and services designated in Table A of the annex to that decree.

6 The following services are listed in Table A thereof, under Heading XXVIII:

'Granting the right of admission to establishments for culture, sports or entertainment, as well as granting the right to make use thereof, with the exception of:

- (a) granting the right to make use of automated recreation devices;
- (b) providing movable goods.'

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

7 On 15 September 2004, the tax authorities carried out an audit on the premises of E. Center concerning the application of the provisions relating to VAT for the period from 1 January until 30 June 2004. Following that audit, those authorities drew up an official report on 9 November 2004 imposing a revised tax assessment and fine on E. Center on the ground that it had incorrectly applied the reduced rate of VAT of 6%, instead of the standard rate of 21%, to the income received from the provision of cubicles for watching films. The amounts of EUR 48 454.36 and EUR 4 840 were thus charged to E. Center, corresponding respectively to the VAT which was thus allegedly evaded and to a fine.

8 After a writ of execution for those amounts had been served on E. Center on 24 December 2004, the latter lodged an application dated 22 March 2005 with the Rechtbank van eerste aanleg te Brugge (Court of First Instance, Bruges) seeking to have that writ of execution set aside. As that application was dismissed by judgment of 10 September 2007, E. Center brought an appeal against that decision before the hof van beroep te Gent (Court of Appeal, Ghent).

9 Before that court, E. Center claims that the cubicles for watching films at issue are covered by the category 'establishment for culture, sports or entertainment' as referred to in Heading

XXVIII of Table A in the annex to Royal Decree No 20, because, in particular, such cubicles must be classified as a 'cinema' as referred to in Category 7 in Annex H to the Sixth Directive, as has moreover already been held by the Dutch courts. According to E. Center, the number of seats, the type of film shown or the method of projection used are, in particular, irrelevant for the purposes of such a classification.

10 The Belgian Government, on the other hand, is of the opinion that the services provided in those cubicles are covered by the concept of 'automated recreation devices' as referred to in Heading XXVIII, since the films are started by inserting coins into a device with the possibility of switching from one film to another. In the opinion of the Belgian Government, such cubicles cannot be classified as a 'cinema' since they are not spaces in which a group of people can together watch the same film, started without any intervention by the audience, which has paid for admission in advance.

11 The referring court argues that, by adopting Heading XXVIII of Table A in the annex to Royal Decree No 20, the Belgian legislator made use of the possibility envisaged by Article 12(3)(a) of the Sixth Directive in conjunction with Category 7 in Annex H thereto, with the result that Heading XXVIII must be interpreted as covering cinemas within the meaning of Category 7. That court considers that the need to interpret the national legislation in a way which is consistent with the Sixth Directive and with the uniform concepts specific thereto implies that, if the cubicles at issue must be considered to be cinemas within the meaning of that directive, they cannot be classified as automated recreation devices as referred to in Heading XXVIII and the reduced rate of 6% would have to be applied to them.

12 In those circumstances, the hof van beroep te Gent decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Should a cubicle consisting of a lockable space where there is room for only one person and where this person can watch films on a television screen for payment, where this person personally starts the film projection by inserting a coin and has a choice of different films, and during the time paid for can continually modify his choice of projected films, be regarded as a "cinema" as referred to in the Sixth ... Council Directive ..., Annex H, Category 7 ...?'

Consideration of the question referred for a preliminary ruling

13 As is apparent from its wording, the first paragraph of Category 7 in Annex H to the Sixth Directive relates to the 'admissions' to various cultural events and facilities listed therein (see Case C-109/02 *Commission v Germany* [2003] ECR I-12691, paragraph 25), including in particular 'cinemas'.

14 In the absence of a definition in the Sixth Directive of the concept of admissions to a cinema referred to in Category 7 in Annex H, that concept should be interpreted in the light of its context within the Sixth Directive (see, to that effect, Case C-83/99 *Commission v Spain* [2001] ECR I-445, paragraph 17).

15 In that regard, and as has previously been noted by the Court, it follows from Article 12(3)(a) of the Sixth Directive that the application of either one or two reduced rates of VAT is an option accorded to the Member States as an exception to the principle that the standard rate applies. Moreover, according to that provision, the reduced rates of VAT may be applied only to supplies of the goods and services specified in Annex H to that directive. It is settled case-law that provisions which are in the nature of exceptions to a principle must be interpreted strictly (see, inter alia, *Commission v Spain*, paragraphs 18 and 19 and the case-law cited).

16 It follows in particular that the concept of admissions to a cinema must be interpreted in accordance with the usual meaning of those words (see, to that effect, *Commission v Spain*, paragraph 20, and *Commission v Germany*, paragraph 23).

17 Furthermore, and as was stated by the Belgian Government and the European Commission, the various events and facilities listed in the first paragraph of Category 7 in Annex H to the Sixth Directive have in particular the common feature that they are available to the public on prior payment of an admission fee giving all those who pay it the right collectively to enjoy the cultural and entertainment services characteristic of those events and facilities.

18 It follows from the above that the concept of admissions to a cinema within the meaning of the first paragraph of Category 7 in Annex H to the Sixth Directive cannot, in light of the usual meaning of that term and the context of the provision within which it is included, be interpreted as meaning that it covers the payment made by a customer so as to be able to watch on his own one or more films, or extracts from films, in private cubicles such as those in issue in the main proceedings.

19 Therefore, the answer to the question referred for a preliminary ruling is that the concept of admissions to a cinema referred to in the first paragraph of Category 7 in Annex H to the Sixth Directive must be interpreted as meaning that it does not cover the payment made by a customer so as to be able to watch on his own one or more films, or extracts from films, in private cubicles such as those in issue in the main proceedings.

Costs

20 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 (Eighth Chamber) hereby rules:

The concept of admissions to a cinema referred to in the first paragraph of Category 7 in Annex H to 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 2001/4/EC of 19 January 2001, must be interpreted as meaning that it does not cover the payment made by a customer so as to be able to watch on his own one or more films, or extracts from films, in private cubicles such as those in issue in the main proceedings.

[Signatures]

* Language of the case: Dutch.