Case C-58/09

Leo-Libera GmbH

v

Finanzamt Buchholz in der Nordheide

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Reference for a preliminary ruling – Value added tax – Directive 2006/112/EC – Article 135(1)(i) – Exemption of betting, lotteries and other forms of gambling – Conditions and limitations – Discretionary power of the Member States)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions – Exemption of betting, lotteries and other forms of gambling

(Council Directive 2006/112, Art. 135(1)(i))

Article 135(1)(i) of Directive 2006/112 on the common system of value added tax must be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the exemption from value added tax provided for by that provision allows those States to exempt from that tax certain forms only of gambling.

That provision leaves a broad discretion to the Member States as regards the exemption or the taxation of the transactions concerned, for it allows those States to fix the conditions and the limitations to which entitlement to that exemption may be subject. In addition, its wording does not contain any indication to suggest that the Community legislature intended to put in place any form whatsoever of quantitative restriction in order, inter alia, to ensure that at least 50% of the forms of gambling operated and organised in a Member State or at least 50% of the turnover generated by the operation and organisation of those forms of gambling could come within the value added tax exemption provided for in that provision. Moreover, the principle of fiscal neutrality, in accordance with which supplies of similar services, which are therefore in competition with each other, must not be treated differently for value added tax purposes, does not preclude such legislation. That principle cannot, if it is not to deprive Article 135(1)(i) of Directive 2006/112 and the broad discretion which that provision grants to Member States of all effectiveness, be interpreted as precluding one form of gambling from being exempt from the payment of value added tax while another form of gambling is not, in so far, however, as the two forms of gambling are not in competition with one another.

(see paras 26-27, 34-35, 39, operative part)

JUDGMENT OF THE COURT (First Chamber)

10 June 2010 (*)

(Reference for a preliminary ruling – Value added tax – Directive 2006/112/EC – Article 135(1)(i) – Exemption of betting, lotteries and other forms of gambling – Conditions and limitations – Discretionary power of the Member States)

In Case C?58/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 17 December 2008, received at the Court on 11 February 2009, in the proceedings

Leo-Libera GmbH

v

Finanzamt Buchholz in der Nordheide,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, E. Levits, A. Borg Barthet, J.?J. Kasel (Rapporteur) and M. Berger, Judges,

Advocate General: Y. Bot,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 4 March 2010,

after considering the observations submitted on behalf of:

– Leo-Libera GmbH, by B. Hansen, Rechtsanwalt,

– the German Government, by M. Lumma, C. Blaschke and B. Klein, acting as Agents,

– the Belgian Government, by L. Van den Broeck and C. Pochet, acting as Agents, assisted by P. Vlaemminck, Y. T'Jampens and A. Hubert, advocaten,

– Ireland, by D. O'Hagan, acting as Agent, and by N. Travers, BL,

– the United Kingdom Government, by S. Ossowski, acting as Agent, and by N. Shaw, Barrister,

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

after hearing the Opinion of the Advocate General at the sitting on 11 March 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 135(1)(i) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

(OJ 2006 L 347, p. 1).

2 The reference has been made in the course of proceedings between the company Leo-Libera GmbH (‘Leo-Libera’) and the Finanzamt (German tax authority) Buchholz in der Nordheide (‘the Finanzamt’) concerning the charging of value added tax (‘VAT’) on revenue generated through the organisation of gambling by means of gaming machines.

Legal context

European Union legislation

3 Article 131 of Directive 2006/112 provides:

‘The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.’

4 Article 135(1)(i) of Directive 2006/112 provides:

‘Member States shall exempt the following transactions:

…

(i) betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State’.

5 Before the entry into force of Directive 2006/112, the relevant provision of Community law was Article 13B(f) 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’). Article 135(1)(i) of Directive 2006/112 and Article 13B(f) of the Sixth Directive are worded identically.

National legislation

6 According to the first sentence of point 1 of Paragraph 1(1) of the Law on Turnover Tax (Umsatzsteuergesetz 2005, BGB1. 2005 I. p. 386), in the version applicable to the dispute in the main proceedings (‘the UStG’), VAT is chargeable on ‘supplies of goods and services which a trader, in the course of his business, makes for consideration within Germany’.

7 Until 5 May 2006, Paragraph 4(9)(b) of that Law provided that, among the transactions coming within the scope of Paragraph 1(1), point 1, the following transactions were exempt:

‘transactions which come within the scope of the Law on horse-race betting and lotteries, and transactions of licensed public casinos which are linked to their activity as casinos. Transactions which come within the scope of the Law on horse-race betting and lotteries and which are exempt from horse-race betting and lotteries tax, or on which that tax is generally not levied, shall not be exempt’.

8 Following the judgment of 17 February 2005 in Joined Cases C?453/02 and C?462/02 *Linneweber and Akritidis* [2005] ECR I-1131, Paragraph 4(9)(b) of the Umsatzsteuergesetz 2005 was amended (Gesetz zur Eindämmung missbräuchlicher Steuergestaltungen (Law to combat abusive tax arrangements) (StEindämmG) of 28 April 2006 (BGBl. 2006 I, p. 1095)) with effect from 6 May 2006. The following are now exempt from VAT:

'transactions which come within the scope of the Law on horse-race betting and lotteries. Transactions which come within the scope of the Law on horse-race betting and lotteries and which are exempt from horse-race betting and lotteries tax, or on which that tax is generally not levied, shall not be exempt'.

9 In accordance with the combined application of the UStG and the Law on horse-race betting and lotteries (Rennwett- und Lotteriegesetz (the 'RennwLottG')), the following are exempt from VAT: betting on public horse racing ('horse-race betting'), fixed-odds bets, lotteries and draws.

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

10 Leo-Libera operates a gaming hall equipped with gaming machines. In its VAT return for January 2007, it declared the operations in connection therewith. Following determination of its provisional payment on account by the Finanzamt, it lodged a complaint against that determination, claiming that those transactions were exempt from VAT. It expressed the view that the amendment made to Paragraph 4(9)(b) of the Umsatzsteuergesetz 2005 by the StEindämmG was contrary to Community law.

11 Following the Finanzamt's rejection of that complaint as unfounded, Leo-Libera brought an action before the Finanzgericht (Finance Court). That court dismissed the action on the ground that the transactions at issue were not exempt under Paragraph 4(9)(b) of the UStG. The only transactions which were exempt under that provision were, in the view of the Finanzgericht, those which came within the scope of the RennwLottG. Transactions relating to gaming machines were not, however, included in the category of exempt transactions. That court added that Article 135(1)(i) of Directive 2006/112 allows Member States to provide for derogations from the tax exemption.

12 In support of its appeal on a point of law ('Revision') brought before the Bundesfinanzhof (Federal Finance Court), Leo-Libera maintains that, in accordance with Article 135(1)(i) of Directive 2006/112, a Member State cannot exempt from VAT only betting and lotteries, but must also exempt 'other forms of gambling' from that tax. National legislatures are, admittedly, empowered to make that exemption subject to conditions and limitations. However, it argues, they are precluded from taxing 'other forms of gambling' in a general way. Inasmuch as the German legislation makes approximately 63% of all gambling transactions occurring within German territory subject to VAT, only a minority of the transactions still enjoy the exemption provided for by Directive 2006/112. The national legislation therefore does not comply with Community law. Furthermore, it submits, that legislation infringes the principle of fiscal neutrality since it places the operators of gaming machines at a disadvantage in relation to public casinos, inasmuch as the latter can pass VAT on to gamblers.

13 The Bundesfinanzhof expresses doubts as to whether Paragraph 4(9)(b) of the UStG is compliant with Community law. That court takes the view that, under Article 13B(f) of the Sixth Directive, as interpreted by the Court of Justice, the organisation and operation of gambling must, as a matter of principle, be exempted from VAT. The same finding applies with regard to Article 135(1)(i) of Directive 2006/112 since the wording of the two Community provisions in question is identical.

14 Paragraph 4(9)(b) of the UStG restricts that exemption to a limited number of forms of gambling, namely lotteries and betting, even though these account for only a minor proportion of all gambling transactions conducted in Germany and of the turnover generated by that activity within that territory.

15 The Bundsfinanzhof consequently inquires whether, in its legislative reform of 2006, the German legislature did not overstep the parameters of the discretion conferred on it by Community law.

16 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 135(1)(i) of … Directive 2006/112 … to be interpreted as meaning that Member States are permitted to have a rule under which only specified forms of (race) betting and lotteries are exempt from tax, and all “other forms of gambling” are excluded from the tax exemption?’

The application to have the oral procedure reopened

17 By application lodged at the Registry of the Court on 17 March 2010, Leo?Libera requested that the oral procedure be reopened pursuant to Article 61 of the Rules of Procedure.

18 In that regard, it should be recalled that the Court may order that the oral procedure be reopened, in accordance with Article 61 of its Rules of Procedure, if it forms the view that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Joined Cases C-270/97 and C?271/97 *Deutsche Post* [2000] ECR I?929, paragraph 30, and Case C?299/99 *Philips* [2002] ECR I-5475, paragraph 20).

19 In the present case the Court considers, after hearing the views of the Advocate General, that it has all the material necessary to enable it to give a decision on the reference for a preliminary ruling before it and that the case does not have to be examined in the light of an argument that has not been debated before it.

20 Consequently, the application for an order reopening the oral procedure must be rejected.

The question referred for a preliminary ruling

21 By its question, the referring court asks, in essence, whether Article 135(1)(i) of Directive 2006/112 must be interpreted as meaning that the exercise of the power of the Member States to fix conditions and limitations on the VAT exemption provided for by that provision allows those States to exempt from VAT only certain forms of gambling.

22 In order to reply to that question, it should be noted at the outset that the Court’s case-law provides that the terms used to specify exemptions such as those provided for in Article 135(1) of Directive 2006/112 must 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, by analogy, with regard to the Sixth Directive, Case C-89/05 *United Utilities* [2006] ECR

I?6813, paragraph 21).

23 Moreover, the interpretation of the terms used in that provision must be consistent with the objectives pursued by those exemptions and must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT (see, by analogy, *United Utilities*, paragraph 22).

24 With more specific regard to betting, lotteries and other forms of gambling, the exemption from which they benefit is based on practical considerations, in that gambling transactions do not lend themselves easily to the application of VAT, and not, as is the case with certain public interest services supplied in the social sector, on a desire to afford those activities more advantageous VAT treatment (*United Utilities*, paragraph 23).

25 It is in the light of those considerations that it is necessary to examine whether the Member States may validly restrict the scope of the VAT exemption provided for in Article 135(1)(i) of Directive 2006/112 in such a way that only a minor proportion, determined according to either the number of authorised forms of gambling or the turnover which they generate, of the gambling organised within the territory of those States can benefit from that exemption.

26 In this regard, first, it stems from the actual wording of Article 135(1)(i) of Directive 2006/112 that that provision leaves a broad discretion to the Member States as regards the exemption or the taxation of the transactions concerned since it allows those States to fix the conditions and the limitations to which entitlement to that exemption may be made subject.

27 Secondly, it must be stated that the wording of Article 135(1)(i) of Directive 2006/112 does not contain any indication to suggest that the Community legislature intended to put in place any form whatsoever of quantitative restriction in order, inter alia, to ensure that at least 50% of the forms of gambling operated and organised in a Member State or at least 50% of the turnover generated by the operation and organisation of those forms of gambling could come within the VAT exemption provided for in that provision.

28 In this context, the fact that the Court has repeatedly held that the organisation and operation of gambling and gambling machines is in principle to be exempted from VAT (see, inter alia, Case C-283/95 *Fischer* [1998] ECR I-3369, paragraph 25, and *Linneweber and Akritidis*, paragraph 23) cannot, regard being had to the objective pursued by Article 135(1)(i) of Directive 2006/112 and the general scheme on which that directive is based, be construed as calling into question that finding.

29 As regards, first, the purpose of the exemption at issue, it must be recalled that, so far as gambling is concerned, the Member States are not only free to lay down the conditions and limitations of the exemption provided for in Article 135(1)(i) of Directive 2006/112 (*Fischer*, paragraph 25, and *Linneweber and Akritidis*, paragraph 23), but also have a discretion which allows them to prohibit activities of that kind, totally or partially, or to restrict them and to lay down more or less rigorous procedures for controlling them (Case C-275/92 *Schindler* [1994] ECR I?1039, paragraph 61, and Case C-124/97 *Läärä and Others* [1999] ECR I?6067, paragraph 35).

30 It follows, as the Advocate General observed in point 47 of his Opinion, that a Member State may be minded to restrict, within its territory, the available forms of gambling to those forms of gambling which lend themselves to the application of VAT in such a way that the practical considerations on which, as recalled in paragraph 24 of this judgment, the exemption is based do not apply to them.

31 An interpretation of Article 135(1)(i) of Directive 2006/112 to the effect that that provision, as

Leo-Libera submits, nevertheless obliges a Member State which has opted for an approach such as that described in the preceding paragraph to exempt from the payment of VAT at least 50% of the authorised forms of gambling and/or the authorised forms of gambling generating at least 50% of the turnover made on the national market from all gambling would thus be clearly contrary both to the objective pursued by the Community legislature and to the principle, mentioned in paragraph 22 of this judgment, that provisions providing for exemptions from the general principle must be interpreted strictly.

32 As regards, secondly, the scheme of Directive 2006/112, in so far as it is common ground that the turnover generated by, respectively, the forms of gambling which are exempt from VAT and those which are not may vary significantly over time, the exemption from VAT enjoyed by a certain form of gambling might, if the interpretation suggested by Leo?Libera were to be upheld, be alternately consistent with or contrary to Article 135(1)(i) of Directive 2006/112.

33 Such an interpretation would thus not only be such as to create significant legal uncertainty but would also be contrary to the spirit of Article 131 of that directive, which requires the correct and straightforward application of exemptions from VAT (see, to that effect, Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I?589, paragraph 31).

34 Finally, it must be added that, contrary to what Leo-Libera submits, the principle of fiscal neutrality, which provides that supplies of similar services, which are therefore in competition with each other, must not be treated differently for VAT purposes, also does not preclude legislation such as that at issue in the main proceedings.

35 That principle cannot, if it is not to deprive Article 135(1)(i) of Directive 2006/112 and the broad discretion which that provision grants to Member States of all effectiveness, be interpreted as precluding one form of gambling from being exempt from the payment of VAT while another form of gambling is not, in so far, however, as the two forms of gambling are not in competition with one another.

36 As is apparent from the file before the Court, the national legislation at issue in the main proceedings does not treat differently, for VAT purposes, similar forms of gambling which may be regarded as being in competition with one another.

37 The fact that the forms of gambling exempt from payment of VAT may only constitute, as in the case in the main proceedings, a minor proportion of the forms of gambling authorised in the national territory and/or generate only a minor part of the total turnover realised in the gambling sector in that same territory is therefore not relevant in the light of the principle of fiscal neutrality.

38 Likewise, and contrary to what Leo-Libera submits, the fact that the amount of an unharmonised tax on gambling, payable by certain organisers and operators of forms of gambling subject to VAT, may be adjusted according to the VAT owed in respect of that activity, is irrelevant in the light of that principle, since the principle of fiscal neutrality is not designed to apply to such a tax (see, to that effect, *Fischer*, paragraph 30).

39 In the light of the foregoing considerations, the answer to the question referred is that Article 135(1)(i) of Directive 2006/112 must be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the VAT exemption provided for by that provision allows those States to exempt from that tax only certain forms of gambling.

Costs

40 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 (First Chamber) hereby rules:

Article 135(1)(i) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the exemption from value added tax provided for by that provision allows those States to exempt from that tax only certain forms of gambling.

[Signatures]

* Language of the case: German.