Case C-116/10

État du Grand-Duché de Luxembourg

and

Administration de l’enregistrement et des domaines

v

Pierre Feltgen (in his capacity as administrator in the bankruptcy of Bacino Charter Company SA)

and

Bacino Charter Company SA

(Reference for a preliminary ruling from the

Cour de cassation (Luxembourg))

(Sixth VAT Directive – Exemptions – Article 15(4)(a) and (5) – Exemption for the hiring of sea-going vessels – Scope)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive – Exemption for chartering of vessels used for navigation on the high seas

(Council Directive 77/388, Art. 15, point 5)

Article 15(5) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 91/680, must be interpreted as meaning that the exemption from the value added tax provided for by that provision does not apply to services consisting of making a vessel available, for reward, with a crew, to natural persons for purposes of leisure travel on the high seas.

That article covers the hiring of vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities. In order for such a hiring service to be capable of exemption under that provision, the lessee of the vessel concerned must use it for an economic activity. It follows that if the vessel is leased to persons who use it exclusively for leisure purposes and not for financial gain, outside the sphere of any economic activity, the hire service does not meet the explicit conditions for value added tax exemption set out in Article 15(5) of the Sixth Directive.

(see paras 13-14, 21, operative part)

JUDGMENT OF THE COURT (Third Chamber)

22 December 2010 (*)

(Sixth VAT Directive – Exemptions – Article 15(4)(a) and 15(5) – Exemption for the hiring of sea-going vessels – Scope)

In Case C?116/10,

REFERENCE for a preliminary ruling under Article 267 TFEU by the Cour de cassation (Luxembourg), made by decision of 18 February 2010, received at the Court on 3 March 2010, in the proceedings

État du Grand-Duché de Luxembourg,

Administration de l’enregistrement et des domaines

v

Pierre Feltgen, in his capacity as administrator in the bankruptcy of Bacino Charter Company SA,

Bacino Charter Company SA,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and G. Arestis (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– État du Grand-Duché de Luxembourg and Administration de l’enregistrement et des domaines, by F. Kremer and P.-E. Partsch, avocats,

– Mr Feltgen, in his capacity as administrator in the bankruptcy of Bacino Charter Company SA, and Bacino Charter Company SA, by B. Felten, avocat,

– the German Government, by T. Henze, C. Blaschke and B. Klein, acting as Agents,

– the Cypriot Government, by D. Kallí, acting as Agent,

– the European Commission, by M. Afonso, acting as Agent,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 15(5) 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), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1), ('the Sixth Directive').

2 The reference has been made in proceedings between, on the one hand, the État du Grand-Duché de Luxembourg and the Administration de l'enregistrement et des domaines ('the tax authority') and, on, the other, Mr Feltgen, administrator in the bankruptcy of Bacino Charter Company SA, a company established under Luxembourg law ('Bacino'), and that company, concerning the payment by Bacino of the value added tax ('VAT') set out in the tax assessments for the financial years 1998 and 1999.

Legal context

European Union legislation

3 Under the heading 'Exemption of exports from the Community and like transactions and international transport', Article 15 of the Sixth Directive 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 such exemptions and of preventing any evasion, avoidance or abuse:

...

4. the supply of goods for the fuelling and provisioning of vessels:

(a) used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities;

(b) used for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ships' provisions;

...

5. the supply, modification, repair, maintenance, chartering and hiring of the sea-going vessels referred to in paragraph 4(a) and (b) and the supply, hiring, repair and maintenance of equipment – including fishing equipment – incorporated or used therein;

...'

National legislation

4 The Sixth Directive was transposed into Luxembourg law by the Law of 12 February 1979 on value added tax ('the Luxembourg Law'). Article 43(1)(i), second indent, of this Law, in the

version applicable at the time of the events in the main proceedings, provides that services carried out for the purposes of marine transport are exempted from VAT within the limits and under the conditions laid down by Grand-Ducal regulation.

5 Article 7(2)(a), first indent, of the Grand-Ducal Regulation of 16 June 1999 concerning exemption from value added tax of exports outside the Community, intra-Community supplies of goods and other operations states that services carried out for the purposes of marine transport, as set out in Article 43, are to be construed as covering the chartering and hiring of vessels, excluding yachts and other vessels for pleasure or sports, used for marine transport and carrying passengers or goods for reward or used for the purpose of commercial, industrial or fishing activities.

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

6 Between 10 July 1998 and 8 August 1999, Bacino regularly made available, for reward, a vessel which it owned, with a crew, to natural persons for purposes of leisure travel on the high seas. As it considered that transaction to be exempt from VAT, Bacino did not pay any VAT.

7 Taking the view that the exemption provided for in Article 43(1)(i), second indent, of the Luxembourg Law did not apply, in so far as the boat was not a commercial vessel but a yacht within the meaning of the Grand-Ducal Regulation mentioned in paragraph 5 of this judgment, the tax authority notified Bacino in 2001 of the tax assessments for the financial years 1998 and 1999, which set out the amounts of VAT owed by the company.

8 Following an unsuccessful objection, Bacino challenged that assessment before the Tribunal d’arrondissement de Luxembourg (District Court, Luxembourg), arguing that the transaction came within the scope of Article 43(1)(i), second indent, of the Luxembourg Law.

9 When that action was dismissed, Bacino appealed to the Cour d’appel (Court of Appeal), which upheld its claim. That court concluded, inter alia, that the principal service was vessel hire with crew and an ancillary transport service. Having noted that the boat owned by Bacino was engaged in navigation on the high seas and that the carriage of travellers was for reward, with the result that the hire of that boat constituted a commercial transaction, the Cour d’appel found that the two conditions set out in Article 15(5) of the Sixth Directive had been met.

10 The tax authority brought an appeal before the Cour de cassation (Court of Cassation), which, taking the view that an interpretation of European Union law was necessary to resolve the dispute in the main proceedings, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘May services provided by the owner of a vessel who, for reward, with a crew, makes it available for natural persons for the purpose of leisure travel on the high seas by those clients, be exempted under Article 15(5) of [the Sixth Directive] … where those services are considered to be both vessel-hire services and transport services?’

The question referred for a preliminary ruling

11 By its question, the national court essentially asks whether Article 15(5) of the Sixth Directive must be interpreted as meaning that the exemption from VAT, provided for by that provision, applies to the provision of services consisting of making a vessel available, for reward, with a crew, to natural persons for the purpose of leisure travel on the high seas.

12 In that regard, it should be borne in mind that, according to the Court’s settled case?law, in

interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, inter alia, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case C-34/05 *Schouten* [2007] ECR I?1687, paragraph 25; and Case C?433/08 *Yaesu Europe* [2009] ECR I?0000, paragraph 24).

13 It must be pointed out, in this regard, that the actual wording of Article 15(5) of the Sixth Directive, which contains a reference to Article 15(4)(a), covers the hiring of vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities. In order for such a hiring service to be capable of exemption under that provision, the lessee of the vessel concerned must use it for an economic activity.

14 It follows that if, as in the main proceedings, the vessel is leased to persons who use it exclusively for leisure purposes and not for financial gain, outside the sphere of any economic activity, the hire service does not meet the explicit conditions for VAT exemption set out in Article 15(5) of the Sixth Directive.

15 Furthermore, it should be pointed out that Article 15(5) of the Sixth Directive also exempts, in a reference to Article 15(4)(b), the leasing of vessels for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ships' provisions. However, the situations contemplated by these provisions are clearly irrelevant to the facts at issue in the main proceedings.

16 Moreover, the interpretation set out in paragraphs 13 and 14 of this judgment is corroborated by the objective of the exemption scheme set out in Article 15 of the Sixth Directive, which, in relation to exports and like transactions and international transport, is to respect the principle that the relevant goods or services should be taxed at their place of destination (see Case C-97/06 *Navicon* [2007] ECR I-8755, paragraph 29).

17 Under those conditions, the exemption set out in Article 15(5) of the Sixth Directive cannot benefit vessel-hire services for charterers who intend to use the vessel strictly for private purposes, as final consumers.

18 It should also be pointed out that the Explanatory Memorandum to the proposal for the Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, which was submitted by the Commission of the European Communities to the Council of the European Communities on 29 June 1973, explicitly states that pleasure boats are excluded from the exemption set out in Article 15(5) of that directive and that services supplied for final consumption relating to such boats must be subject to VAT. That memorandum confirms that hire services for vessels supplied to final consumers who intend to use them for leisure or pleasure purposes are excluded from the scope of that exemption.

19 Furthermore, according to settled case-law, VAT exemptions must be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is to be levied on each service supplied for consideration by a taxable person (see, inter alia, Case C-185/89 *Velker International Oil Company* [1990] ECR I-2561, paragraph 19, and Joined Cases C-181/04 to C-183/04 *Elmeka* [2006] ECR I?8167, paragraph 15).

20 Furthermore, the interpretation set out in paragraphs 13 and 14 of this judgment cannot be challenged by the classification in national law of the services at issue in the main proceedings, which has no bearing on the answer which must be given to the question referred by the national

court. It follows from the case-law of the Court and, in particular, from paragraphs 27 and 28 of the *Navicon* judgment, which related, specifically, to the interpretation of Article 15(5) of the Sixth Directive, that whether a specific transaction is subject to or exempt from VAT cannot depend on its classification in national law. According to settled case-law, although, as set out in the introductory sentence of Article 15, the Member States are to lay down the conditions for exemptions in order to ensure correct and straightforward application of those exemptions and to prevent any possible evasion, avoidance or abuse, those conditions cannot affect the definition of the subject-matter of the exemptions envisaged.

21 In the light of all of the foregoing, the answer to the question referred must be that Article 15(5) of the Sixth Directive is to be interpreted as meaning that the exemption from VAT provided for by that provision does not apply to services consisting of making a vessel available, for reward, with a crew, to natural persons for purposes of leisure travel on the high seas.

Costs

22 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 (Third Chamber) hereby rules:

Article 15(5) 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, as amended by Council Directive 91/680/EEC of 16 December 1991, must be interpreted as meaning that the exemption from value added tax provided for by that provision does not apply to services consisting of making a vessel available, for reward, with a crew, to natural persons for purposes of leisure travel on the high seas.

[Signatures]

* Language of the case: French.