Case C-464/10

État belge

v

Pierre Henfling, Raphaël Davin and Koenraad Tanghe, acting as administrators in the insolvency of Tiercé Franco-Belge SA

(Reference for a preliminary ruling from the cour d'appel de Mons)

(Taxation – Sixth VAT Directive – Article 6(4) – Exemption – Article 13(B)(f) – Gambling – Services provided by a commission agent 'buraliste' acting in his own name but on behalf of a principal operating a business of taking bets)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions – Exemption for games of chance – Meaning

(Council Directive 77/388, Arts 6(4), and 13B(f))

Articles 6(4) and 13(B)(f) of the Sixth Directive 77/388 must be interpreted as meaning that, in so far as an economic operator acts in his own name, but on behalf of an undertaking carrying on a bet-taking business, in the collection of bets covered by the exemption from VAT under Article 13(B)(f), that latter undertaking is to be considered, in accordance with Article 6(4), to provide that operator with a supply of bets coming under that exemption.

(see para. 44, operative part)

JUDGMENT OF THE COURT (Seventh Chamber)

14 July 2011 (*)

(Taxation – Sixth VAT Directive – Article 6(4) – Exemption – Article 13(B)(f) – Gambling – Services provided by a commission agent 'buraliste' acting in his own name but on behalf of a principal operating a business of taking bets)

In Case C-464/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the cour d'appel de Mons (Belgium), made by decision of 17 September 2010, received at the Court on 24 September 2010, in the proceedings

État belge

v

Pierre Henfling, Raphaël Davin and Koenraad Tanghe, acting as administrators in the insolvency of Tiercé Franco-Belge SA,

THE COURT (Seventh Chamber),

composed of D. Šváby, President of the Chamber, R. Silva de Lapuerta and T. von Danwitz (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2011,

after considering the observations submitted on behalf of:

– P. Henfling, R. Davin and K. Tanghe, acting as administrators in the insolvency of Tiercé Franco-Belge SA, by O. Bertin, avocat,

– the Belgian Government, by M. Jacobs and L. Van den Broeck and by J.-C. Halleux, acting as Agents,

– the European Commission, by D. Recchia, B. Stromsky and C. Soulay, 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 Articles 6(4) and 13(B)(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').

2 The reference has been made in proceedings between the État belge (Belgian State) and Messrs Henfling, Davin and Tanghe acting as administrators of the insolvent company Tiercé Franco-Belge SA ('TFB') concerning the refusal of that State to exempt from value added tax ('VAT') services provided by betting-shops for TFB.

Legal context

European Union legislation

3 Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subject to VAT.

4 Under Article 5(1) and (4)(c) of the Sixth Directive, the supply of goods is to mean 'the transfer of the right to dispose of tangible property as owner' and 'the transfer of goods pursuant to

a contract under which commission is payable on purchase or sale'.

5 Article 6 of the Sixth Directive states:

'1. "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

...

4. Where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself.

...'

6 Article 13 of the Sixth Directive, headed 'Exemptions within the territory of the country', provides:

'...

B. Other exemptions

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:

...

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

...'

National legislation

7 Article 10(1) of the Belgian Value Added Tax Code (Code de la taxe sur la valeur ajoutée, 'the VAT Code') provides:

'Supply of goods means the transfer of the right to dispose of tangible property as owner.

In particular, this involves making goods available to a person acquiring them under a contract transferring property or declaring rights to property.'

8 Article 13(1) and (2) of the VAT Code provide:

'1. A buying agent is considered to be a buyer, and, in respect of his principal, seller of the goods which are bought by his intermediary; the selling agent is considered to be the seller, and, in respect of his principal, buyer of the goods which are sold by his intermediary.

2. A commission agent means not only someone who acts in his own name or under a company name on behalf of his principal, but also the intermediary in the purchase who receives from the seller, or the intermediary in the sale who delivers to the buyer, on any basis, an invoice, a debit note or any other writing similarly expressed in his own name.'

9 Article 18(1) of the VAT Code provides:

‘1. “Supply of services” means any transaction which does not constitute a supply of goods within the meaning of this Code.

The execution of a contract, the object of which is:

...

3. agency;

...

shall be considered as a supply of services.’

10 The first paragraph of Article 20(1) of the VAT Code provides:

‘... where any commission agent or intermediary, acting under the conditions laid down in Article 13(2), takes part in a supply of services, he shall be considered to have received those services himself and to have supplied those services himself.’

11 In the words of Article 44(3)(13) of that Code, ‘betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by the King’ are VAT exempt.

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

12 TFB, which was declared insolvent on 27 October 2008, is a public limited company registered for VAT in Belgium whose business comprises taking bets, in particular, on horse races in Belgium and in other States.

13 In the course of its business, TFB uses a network of local agents, called ‘buralistes’, situated throughout the territory of the Kingdom of Belgium. Those ‘buralistes’ are responsible for collecting betters’ stakes on horse races or other sporting events, registering the bets, issuing betting slips or tickets for betters and paying out winnings.

14 Each ‘buraliste’ is linked to TFB by an agreement called a ‘commission contract’.

15 Under that contract, TFB is the owner of the business that the ‘buraliste’ is responsible for managing. TFB makes available to the ‘buralistes’ premises with the necessary energy supplies, is responsible for property insurance and makes sure that the sign is put up and kept in good working order.

16 That contract also provides that TFB is to provide the ‘buraliste’ with the IT equipment to be used to record all bets made and winnings paid. The equipment and documents handed over by TFB to the ‘buraliste’ are provided free of charge and remain the exclusive property of TFB. The ‘buraliste’ undertakes to use the equipment entrusted to him by TFB with all due care and to inform TFB of any anomaly appearing in the use of that equipment, its repairs and maintenance being carried out by TFB at its own expense.

17 Furthermore, the ‘buraliste’ is obliged, under the ‘commission contract’ entered into with TFB, to observe the rules concerning taking bets, in particular, their recording, accounting and payment. The ‘buraliste’ undertakes to ensure the due operation of his agency and the opening of the agency in line with events linked to TFB’s activities and goods. The ‘buraliste’, however, has the right to decide freely how to organise his agency and is free to engage staff in order to best meet his obligations.

18 TFB authorises the ‘buraliste’ to receive all types of bets for which it is lawfully authorised, either under statute or as an agent, and allows him to carry out any other business provided that it is not contrary to the Law on betting outlets (loi sur les agences hippiques) and is not carried out on behalf of a direct competitor of TFB.

19 According to the general provisions of TFB’s regulations, the agency operator, who alone is authorised to register a bet, may always refuse to take a bet, in whole or in part, without being obliged to give reasons for his refusal. Furthermore, a winning better can claim his winnings only from the ‘buraliste’ with whom he made the bet.

20 The ‘buraliste’ is paid by means of commission, pegged to a percentage of the stakes placed on registered bets after deducting the amount of payments made. That commission is calculated and settled each month separately from the official operation of bets. The ‘buraliste’ does not address any invoices to TFB for charging his commission.

21 The betting slips issued by a ‘buraliste’ to gamblers in order to give the bet a physical form have, in front, at the top, the name of the ‘buraliste’, his registered business number and his VAT number. On the front of the betting slip is information written at the side, namely, at the bottom of the betting slips the wording ‘Belgische Tiercé’ and ‘Tiercé belge’ and at the top of them ‘Tiercé Franco Belge’. On the back of the betting slips the following text appears: ‘By participating, the better acknowledges that he has understood and agreed to the terms of the S.C. P.M.U. belge, S.A. Tiercé Franco-belge and Bingoal regulations.’

22 During an inspection, started in the month of July 2000, the Belgian tax authorities found that the commission made by the ‘buralistes’ between 1 January 1997 and 31 December 2000 had not been subject to VAT. Taking the view that the ‘buralistes’ worked in the name of TFB and that, therefore, their business had to be subject to VAT, in November 2001 those authorities sent TFB a VAT demand, increased by fines and late interest payments, for VAT due on that commission.

23 TFB brought an action before the tribunal de première instance of Liège and sought a ruling that VAT was not payable on the contested commission, claiming that, for the application of the VAT legislation, the ‘buralistes’ had to be considered to be commission agents acting in the context of a supply of services exempt from VAT.

24 By judgment of 20 September 2004, that court granted TFB’s application. On appeal by the Belgian State, the cour d’appel of Liège upheld that judgment in its entirety in a judgment of 5 October 2005. The Cour de cassation quashed that judgment and referred the case back to the referring court.

25 That court first examined the contract linking TFB with the ‘buralistes’ and held that it followed from the combination of the intrinsic and extrinsic elements of that contract that the ‘buralistes’ had received from TFB the contractual task of collecting and recording bets under a commission contract and not under an agency contract. Furthermore, that court noted that Article 13(2) of the VAT Code removes all interest in the question whether the intermediary acted as an agent rather than a commission agent. It concluded that the ‘buralistes’ acted directly in their own

name, under a commission contract, supplying services consisting of the recording of bets and the payment of winnings on behalf of the company TFB.

26 Secondly, the referring court sought to establish whether the commission paid by TFB to the buralistes is exempt from VAT. Taking the view that the outcome of the main proceedings depends on the interpretation of European Union ('EU') law, the cour d'appel of Mons decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 6(4) and 13(B)(f), of the Sixth Directive, be interpreted as precluding a tax exemption in respect of services supplied by a commission agent acting in its own name, but on behalf of a principal who organises supply of services referred to in Article 13(B)(f) …?'

Consideration of the question referred

27 By its question, the referring court asks whether Articles 6(4) and 13(B)(f) of the Sixth Directive must be interpreted as precluding an exemption from VAT for services supplied by a commission agent who acts in his own name, but on behalf of a principal who organises supplies of services referred to in Article 13(B)(f). More specifically, that question refers to the treatment, from the point of view of VAT, of the relationship between an undertaking operating the business of taking bets and an economic operator who takes part in collecting bets in his own name, but on behalf of that undertaking.

28 Under Article 13(B)(f) of the Sixth Directive, betting, lotteries and other forms of gambling are exempt from VAT, subject to conditions and limitations laid down by each Member State.

29 That exemption 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 (see Case C-89/05 *United Utilities* [2006] ECR I-6813, paragraph 23, and Case C-58/09 *Leo-Libera* [2010] ECR I-0000, paragraph 24).

30 The betting transaction referred to in Article 13(B)(f) is characterised by the offer to customers placing bets of a chance of winning in consideration for accepting the risk of having to pay for winnings (*United Utilities*, paragraph 26).

31 The Court held that the provision of call centre services to a telephone bookmaking organiser, which entails the staff of the supplier of those services accepting bets on behalf of the organiser, does not constitute a betting transaction within the meaning of Article 13(B)(f) and cannot, therefore, qualify for the exemption from VAT laid down by that provision (*United Utilities*, paragraph 29).

32 However, the case in the main proceedings is different in many respects from that giving rise to the judgment in *United Utilities*. First, the activity of 'buralistes' differs from that of a call centre, in particular in that 'buralistes' are known to the betters, they may refuse a bet without being obliged to give reasons for that refusal and they are also responsible for paying winnings to betters. Second, the case giving rise to that judgment concerned the acceptance of bets on behalf of their organiser, whereas the question referred in the main proceedings expressly refers to the situation of an economic operator who is involved on behalf of the organiser of bets, but in his own name in the collection of those bets.

33 Such involvement in his own name means that, unlike the case giving rise to the *United Utilities* judgment, as is stated in paragraph 27 thereof, a legal relationship is brought about not directly between the better and the undertaking on behalf of which the operator involved acts, but

between that operator and the better, on the one hand, and between that operator and that undertaking, on the other.

34 As regards the treatment of such involvement from a VAT point of view, Article 6(4) of the Sixth Directive provides that, where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he is considered to have received and supplied those services himself.

35 Accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client himself. It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purposes of VAT.

36 Since Article 6(4) of the Sixth Directive comes under Title V of that directive, headed ‘Taxable transactions’, and is couched in general terms, without containing restrictions as to its scope or its extent, the fiction created by that provision also concerns the application of VAT exemptions under the Sixth Directive. It follows that, if the supply of services in which the commission agent takes part is exempt from VAT, that exemption applies likewise to the legal relationship between the principal and the commission agent.

37 That conclusion applies also to the exemption under Article 13(B)(f) of the Sixth Directive, relating to the business of taking bets. Indeed, that exemption does not present – as compared with other exemptions – specific features which would justify limiting the scope of Article 6(4) of that directive and excluding bets from it. Furthermore, in the context of the application of Article 6(4), it is irrelevant that Article 13(B)(f) does not provide for exempting supplies by intermediaries or negotiation, whereas such an exemption is expressly provided for in Article 13(B)(a) and (d) of the Sixth Directive.

38 Nor, contrary to what the Belgian Government maintains, does the principle of fiscal neutrality preclude the application of the VAT exemption provided for in Article 13(B)(f) of the Sixth Directive to the relationship between the principal and the commission agent, although commission paid to an agent acting in the name of and on behalf of the principal is subject to VAT. Indeed, as is clear from Article 6(4) of the Sixth Directive, the latter itself lays down specific rules for services supplied by a commission agent, acting in his own name but on behalf of another, which differ from those governing services supplied by an agent, acting in the name of and on behalf of another.

39 As regards the question whether the ‘buralistes’ concerned in the main proceedings act, in fact, when collecting bets, in their own name within the meaning of Article 6(4) of the Sixth Directive, a question raised by the Belgian Government, it must be noted that the question referred, which reproduces the wording of Article 6(4), is based on the premiss that those ‘buralistes’ fall within the scope of Article 6(4).

40 In the procedure referred to in Article 267 TFEU, it is for the national court hearing a dispute concerning the application of Article 6(4) of the Sixth Directive to inquire, having regard to all the details of the case, and in particular the nature of the contractual obligations of the trader concerned towards its customers, whether or not that condition is met (see, to that effect, in relation to Article 26 of the Sixth Directive, Case C-163/91 *Van Ginkel* [1992] ECR I-5723, paragraph 21, and Case C?200/04 *ISt* [2005] ECR I?8691, paragraphs 19 and 20).

41 However, the Court of Justice, which is called on to provide an answer of use to the national court, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it (see Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraph 85, and Case C-73/08 *Bressol and Others* [2010] ECR I-0000, paragraph 65).

42 As regards the activity of the 'buralistes' at issue in the main proceedings, it must be noted that although the condition that the taxable person must act in his own name but on behalf of another, in Article 6(4) of the Sixth Directive, must be interpreted on the basis of the contractual relationship at issue, as follows from paragraph 40 of this judgment, the proper working of the common VAT system established by that directive none the less requires the referring court to check specifically so as to establish whether, in the light of all the facts in the case, those 'buralistes' were in fact acting, when collecting bets, in their own name.

43 In that regard, account must be taken, in particular, of whether or not the exercise of their activity requires possession of authorisation by the public authorities, of the fact that the betting slips issued by the 'buralistes' mention TFB's name, that the customers agree, according to the wording of those betting slips, to be subject to the regulations of that company, that the business run by the 'buralistes' carry the sign of TFB, which is the owner of those businesses, and, before the facts in the main proceedings, whether or not the 'buralistes' acted as agents. By contrast, the possible existence of a national provision on VAT extending the legal fiction under Article 6(4) of the Sixth Directive beyond the criteria laid down by that paragraph cannot be taken into consideration in determining whether or not the 'buralistes' acted in their own name. Indeed, if the conditions such as those resulting from Article 6(4) of the Sixth Directive alone were not fulfilled, the VAT exemption under Article 13(B)(f) of that directive as regards bets would not apply to the case in the main proceedings.

44 It follows from all the foregoing that the answer to the question referred is that Articles 6(4) and 13(B)(f) of the Sixth Directive must be interpreted as meaning that, in so far as an economic operator acts in his own name, but on behalf of an undertaking carrying on a bet-taking business, in the collection of bets covered by the exemption from VAT under Article 13(B)(f), that latter undertaking is to be considered, in accordance with Article 6(4), to provide that operator with a supply of bets coming under that exemption.

Costs

45 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 (Seventh Chamber) hereby rules:

Articles 6(4) and 13(B)(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, must be interpreted as meaning that, in so far as an economic operator acts in his own name, but on behalf of an undertaking carrying on a bet-taking business, in the collection of bets covered by the exemption from value added tax under Article 13(B)(f), that latter undertaking is to be considered, in accordance with Article 6(4), to provide that operator with a supply of bets coming under that exemption.

[Signatures]

* Language of the case: French.