JUDGMENT OF THE COURT (Fourth Chamber)

15 February 2017 (*)

(Reference for a preliminary ruling — Value added tax — Sixth Directive 77/388/EEC — Article 13A(1)(n) — Exemptions for certain cultural services — No direct effect — Determination of the exempt cultural services — Discretion of the Member States)

In Case C?592/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal of England and Wales (Civil Division) (United Kingdom), made by decision of 16 October 2015, received at the Court on 13 November 2015, in the proceedings

Commissioners for Her Majesty's Revenue and Customs

v

British Film Institute,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 September 2016,

after considering the observations submitted on behalf of:

– British Film Institute, by D. Milne QC, Z. Yang, Barrister, P. Drinkwater and A. Lee, Solicitors,

– the United Kingdom Government, by S. Brandon, acting as Agent, and S. Singh, Barrister,

– the European Commission, by R. Lyal and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 September 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13A(1)(n) 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') and Article 132(1)(n) 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 request has been made in proceedings between the Commissioners for Her Majesty's Revenue and Customs ('the revenue authorities') and the British Film Institute (BFI) concerning the liability of BFI to value added tax (VAT) on its supplies of services consisting in the grant of rights of admission to showings of films.

Legal context

EU law

3 Article 13A(1)(n) of the Sixth Directive, 'Exemptions for certain activities in the public interest', 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 possible evasion, avoidance or abuse:

…

(n) certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned;

…'

4 Directive 2006/112, in accordance with Articles 411 and 413 of that directive, repealed and replaced the EU legislation on VAT, including the Sixth Directive, with effect from 1 January 2007.

United Kingdom law

5 The United Kingdom of Great Britain and Northern Ireland did not transpose Article 13A(1)(n) of the Sixth Directive until 1 June 1996, when Group 13 of Schedule 9 of the Value Added Tax Act 1994 entered into force.

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

6 BFI is a non-profit-making body with the task of promoting cinema in the United Kingdom. In the period from 1 January 1990 to 31 May 1996 ('the period at issue') BFI paid VAT at the standard rate on rights of admission to showings of films.

7 On 30 March 2009 BFI applied to the revenue authorities for reimbursement of the VAT paid during the period at issue, submitting that those rights of admission constituted exempt cultural services under Article 13A(1)(n) of the Sixth Directive. The application was refused.

8 The action brought by BFI against that refusal succeeded in the First-tier Tribunal (Tax Chamber) (United Kingdom). In its decision of 5 December 2012, the tribunal held that the exemption provided for in that provision was of direct effect.

9 The revenue authorities appealed against that decision to the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), which dismissed the appeal, finding that the exemption in that provision was sufficiently clear and precise and was therefore of direct effect. The term ‘certain’ in that provision was to be interpreted as meaning that the exemption applied to ‘those’ cultural services supplied by bodies governed by public law or other cultural bodies recognised by the Member State concerned. The revenue authorities were given leave to appeal to the Court of Appeal of England and Wales (Civil Division) (United Kingdom).

10 According to the order for reference, if Article 13A(1)(n) of the Sixth Directive were to be interpreted as applying to ‘those’ cultural services supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned within the meaning of that provision, that would mean that BFI, which is such a body, could rely directly on that provision to benefit from the exemption for its supplies of rights of admission to showings of films in the period from 1 January 1990 to 31 May 1996. BFI could even continue to rely directly on that provision after 31 May 1996, even though the services it supplies do not fall within the cultural services exempted by United Kingdom legislation from that date.

11 In those circumstances, the Court of Appeal of England and Wales (Civil Division) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Are the terms of Article 13A(1)(n) of the Sixth Directive, in particular the words “certain cultural services”, sufficiently clear and precise such that Article 13A(1)(n) is of direct effect so as to exempt the supply of those cultural services by bodies governed by public law or other recognised cultural bodies, such as the supplies made by [BFI] in the present case, in the absence of any domestic implementing legislation?

2. Do the terms of Article 13A(1)(n) of the Sixth Directive, in particular the words “certain cultural services”, permit Member States any discretion in their application by means of implementing legislation and, if so, what discretion?

3. Do the same conclusions as above apply to Article 132(1)(n) of [Directive 2006/112]?’

Consideration of the questions referred

Question 1

12 By its first question, the referring court essentially asks whether Article 13A(1)(n) of the Sixth Directive, exempting ‘certain cultural services’, must be interpreted as being of direct effect, so that in the absence of transposition that provision may be relied on directly by a body governed by public law or other cultural body recognised by the Member State concerned supplying cultural services.

13 According to settled case-law, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the State has failed to implement the directive in domestic law within the period prescribed or where it has failed to implement the directive correctly (see, inter alia, judgments of 19 January 1982, *Becker*, 8/81, EU:C:1982:7, paragraph 25; of 15 January 2014, *Association de médiation sociale*, C?176/12, EU:C:2014:2, paragraph 31; and of 7 July 2016, *Ambisig*, C?46/15, EU:C:2016:530, paragraph 16 and the case-law cited).

14 With respect to Article 13A(1)(n) of the Sixth Directive, it should be recalled that the

exemption laid down in that provision refers to ‘certain cultural services’. The provision does not therefore specify which cultural services the Member States are required to exempt. It does not set out an exhaustive list of cultural services to be exempted, or lay down an obligation of the Member States to exempt all cultural services, but refers only to ‘certain’ of those services. Consequently, the provision leaves it to the Member States to determine the cultural services that are to benefit from the exemption.

15 BFI submits, referring to the Court’s case-law according to which the exemptions in Article 13A(1) of the Sixth Directive are independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (see, inter alia, judgment of 21 February 2013, *Žamberk*, C?18/12, EU:C:2013:95, paragraph 17), that the expression ‘certain cultural services’ must be interpreted as referring to all cultural services supplied by bodies governed by public law or other cultural bodies recognised by the Member State concerned, and is therefore sufficiently clear and precise.

16 However, it must be noted that such an interpretation does not correspond to the ordinary meaning of the term ‘certain’ used in Article 13A(1)(n) of the Sixth Directive, and deprives of effectiveness the use of that term in that provision.

17 Furthermore, the interpretation proposed by BFI is liable to extend the scope of the exemption under that provision beyond that term to cover all cultural services, contrary to the Court’s case-law stating that the terms used to specify the exemptions in Article 13A(1) of the directive are to be interpreted strictly (see, to that effect, judgments of 14 June 2007, *Horizon College*, C?434/05, EU:C:2007:343, paragraph 16; of 22 October 2015, *Hedqvist*, C?264/14, EU:C:2015:718, paragraphs 34 and 35; and of 25 February 2016, *Commission* v *Netherlands*, C?22/15, not published, EU:C:2016:118, paragraph 20 and the case-law cited).

18 It also follows from the Court’s case-law that, contrary to BFI’s submissions, the requirement of ensuring the uniform application of the exemptions in Article 13A(1) is not absolute. While the exemptions in that article are independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another, the EU legislature may confer on the Member States the task of defining certain terms of an exemption (see, to that effect, judgments of 28 March 1996, *Gemeente Emmen*, C?468/93, EU:C:1996:139, paragraph 25; of 4 May 2006, *Abbey National*, C?169/04, EU:C:2006:289, paragraphs 38 and 39; and of 9 December 2015, *Fiscale Eenheid X*, C?595/13, EU:C:2015:801, paragraph 30 and the case-law cited).

19 The literal interpretation of Article 13A(1)(n) of the Sixth Directive is confirmed by the history of the directive and the objectives pursued by the EU legislature.

20 As the Advocate General observes in points 20 and 21 of his Opinion, the EU legislature did not accept the European Commission’s original proposal with an exhaustive list of the cultural services to be exempted (see proposal for a 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 (COM(73) 950 final of 20 June 1973)), but by using the terms ‘certain cultural services’ opted for a version of the exemption which allows the Member States to determine the cultural services they are to exempt.

21 As the Commission stated in its written observations submitted to the Court, although it later proposed to replace the original wording of Article 13A(1)(n) of the Sixth Directive by an exhaustive list of exempt cultural services (see proposal for a 19th Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes, amending Directive 77/388/EEC — Common system of value added tax (COM(84) 648 final of 5 December 1984)), the

EU legislature kept the original wording which, according to the analysis in the Commission's first report to the Council on the application of the common system of value added tax in accordance with Article 34 of the Sixth Directive 77/388 (COM(83) 426 final of 14 September 1983), leaves the definition of the content of the exemption to the discretion of each Member State.

22 As the Advocate General observes in point 23 of his Opinion, the decision of the EU legislature to leave the Member States a discretion to determine the exempted cultural services may be explained by the great diversity of cultural traditions and regional heritage within the Union, and sometimes within the same Member State.

23 It must therefore be considered that, by referring to 'certain cultural services', Article 13A(1)(n) of the Sixth Directive does not require the exemption of all cultural services, so that the Member States may exempt 'certain' of them while subjecting others to VAT.

24 In so far as that provision allows the Member States a discretion in determining the exempted cultural services, it does not satisfy the conditions deriving from the case-law cited in paragraph 14 above for being capable of being relied on directly before the national courts.

25 That finding is not called in question by the considerations in paragraphs 34 to 37 of the judgment of 17 February 2005, *Linneweber and Akritidis* (C?453/02 and C?462/02, EU:C:2005:92), and paragraphs 59 to 61 of the judgment of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C?363/05, EU:C:2007:391), according to which a discretion that may be allowed to the Member States does not necessarily exclude direct effect of the exemptions concerned.

26 As the Commission noted in its written observations, the line of case-law deriving from the judgment of 17 February 2005, *Linneweber and Akritidis* (C?453/02 and C?462/02, EU:C:2005:92), concerns the possibility for the Member States to establish conditions for the application of an exemption, not their discretion to determine the scope of an exemption, such as follows in particular from the words 'certain cultural services' in Article 13A(1)(n) of the Sixth Directive.

27 As regards the judgment of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C?363/05, EU:C:2007:391), it must be noted that Article 13A(1)(n) of the Sixth Directive may be distinguished from the exemption at issue in that case in that it requires only the exemption of 'certain' cultural services.

28 In the light of the above considerations, the answer to Question 1 is that Article 13A(1)(n) of the Sixth Directive, exempting 'certain cultural services', must be interpreted as not being of direct effect, so that in the absence of transposition that provision may not be relied on directly by a body governed by public law or other cultural body recognised by the Member State concerned supplying cultural services.

Questions 2 and 3

29 In view of the answer to Question 1, there is no need to answer Questions 2 and 3.

Costs

30 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 (Fourth Chamber) hereby rules:

Article 13A(1)(n) 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, exempting 'certain cultural services', must be interpreted as not being of direct effect, so that in the absence of transposition that provision may not be relied on directly by a body governed by public law or other cultural body

recognised by the Member State concerned supplying cultural services.

von Danwitz

Juhász

Vajda

Jürimäe

Lycourgos

Delivered in open court in Luxembourg on 15 February 2017.

A. Calot Escobar

T. von Danwitz

Registrar

President of the Fourth Chamber

* Language of the case: English.