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Opinion of Mr Advocate General Léger delivered on 16 January 1997. - Julius Fillibeck Söhne GmbH & Co. KG v Finanzamt Neustadt. - Reference for a preliminary ruling: Bundesfinanzhof - Germany. - Sixth VAT Directive - Supply of services for consideration - Definition - Transport of workers by the employer. - Case C-258/95.

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Opinion of the Advocate-General

1 The Bundesfinanzhof (Federal Finance Court) has referred three questions to the Court concerning the interpretation of certain provisions of the Sixth VAT Directive (1) (hereinafter `the Directive'). The Court is essentially asked to consider the manner in which free collective transport provided by an employer to its employees, from their home to the workplace, should be treated for VAT purposes.

Facts and procedure

2 According to the order for reference, the facts in this case are as follows.

3 Julius Fillibeck Söhne GmbH & Co. KG (the applicant and appellant on a point of law, hereinafter `the applicant') runs a building firm. In the years in question, 1980 to 1985, it provided transport for some of its employees free of charge from their homes to the various building sites where they were required to work. Employees were mainly transported in vehicles belonging to the employer, although some were transported by another employee in his own private vehicle on the employer's behalf. In neither case was any specific charge made to employees using the transport, nor was any deduction made from their wages.

4 Those transport services were provided pursuant to the Bundesrahmentarifvertrag für das Baugewerbe (Federal Collective Framework Agreement for the Building Industry) where the employees' homes and the building sites were more than a minimum distance apart (six kilometres).

5 In that context, the Finanzamt (Tax Office) (the defendant and respondent on a point of law, hereinafter `the defendant') considered there to be taxable transactions within the meaning of the German legislation on turnover tax. (2)

6 In its appeal, the applicant challenged the view that those transport services were taxable. It claimed, in that respect, that the judgment of the Bundesfinanzhof of 11 March 1988 (3) did not apply to circumstances such as those in the present case and on that ground the transport at issue could therefore not be regarded as a taxable supply for the purposes of the provisions of the UStG 1980 cited above. (4)

Both the defendant and the Finanzgericht (Finance Court), before which its action was unsuccessful, it claimed, failed to recognize that the transport services at issue were not provided to employees for their own private use, but were provided by the employer predominantly in the interests of its business and pursuant to its obligation, in its capacity as a building firm, under the Collective Framework Agreement for the Construction Industry.

7 The national court considers that this case raises `questions relating to the taxation of so-called benefits in kind provided by an employer to its employees where the employees do not have to provide any specifically agreed, fixed return for the benefit in kind'. (5) It therefore referred the following questions to the Court for a preliminary ruling:

`(1) Does the transport provided by an employer constitute a service "effected for consideration" within the meaning of Article 2(1) of Directive 77/388/EEC - that is to say, effected for a proportion (to be estimated) of the work performed by the employees - where, pursuant to a collective agreement, the employer conveys employees (without specially agreed and calculated consideration) from their homes to the workplace where they are more than a specified distance apart, and the work performed - which has no actual connection with such transport services - is already to be carried out in return for the agreed money wages as in the case of the other employees?

(2) Does Article 6(2) of Directive 77/388/EEC cover the use of goods forming part of the assets of the business or a service carried out free of charge even where - as in the case of free transport for employees from their homes to the workplace and back in a company vehicle - it does not serve purposes other than those of the business as far as the employer is concerned, but does serve the employees' private purposes and the employees are not charged turnover tax in this respect (on account of their use free of charge of the transport service)?

(3) In the event that Question 2 is answered in the affirmative: Does Article 6(2) of Directive 77/388/EEC also cover a case where the employer does not convey the employees in its own vehicles, but commissions a third party (in this case, one of its own employees) to effect the transport?'

First question

8 The Bundesfinanzhof is in doubt, first, as to whether, and if so the extent to which, the transport services provided by the employer to its employees in this case constitute supplies `effected for consideration' (in the form of a proportion - to be estimated as appropriate - of the work performed) within the meaning of Article 2(1) of the Directive.

9 Article 2(1) provides that:

`The following shall be subject to value added tax:

1. The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'. (6)

10 It is not disputed that in this case the transport services constitute a supply of services by a taxable person for the purposes of the Directive; the national court's only question is whether the supply is effected for consideration.

11 The question of whether a supply of services is effected for consideration has been addressed in numerous cases and has now been settled.

12 According to the Court, in order for a supply of services to be regarded as effected for consideration, and thus to be taxable, there must be a direct link between the service provided and the consideration received.

13 That principle was first laid down in Case 154/80 Coöperatieve Aardappelenbewaarplaats, (7) which concerned the so-called `Second VAT Directive'. (8)

14 In Case 102/86 Apple and Pear Development Council, (9) the Court confirmed that decision, this time in the context of the Sixth VAT Directive, and held that the body in question which, in pursuit of its task of defending the common interests of growers of apples and pears, carried out collective advertising campaigns financed by a mandatory annual charge, was not supplying services for consideration, in the absence of any direct link between the service provided and the consideration received.

The Court held that if individual growers did receive benefits, then those benefits were only derived indirectly from those accruing generally to the industry as a whole and, furthermore, that there was no link between the level of benefit derived by individual growers from the services of the Apple and Pear Development Council and the level of the mandatory charge which they had to pay.

15 It is also useful to refer to Case C-16/93 Tolsma, (10) in which the Court held that a supply of services is effected `for consideration' within the meaning of Article 2(1) of the Directive, only

`... if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.' (11)

On that occasion, the Court recalled that it

`... has already held with reference to the concept of the "provision of services against payment" in Article 2(a) of the Second Directive, whose wording is similar to that of Article 2(1) of the Sixth Directive, that taxable transactions, within the framework of the VAT system, presuppose the existence of a transaction between the parties in which a price or consideration is stipulated. The Court concluded that, where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT (judgment in Case 89/81 Staatssecretaris van Financiën v Hong Kong Trade Development Council [1982] ECR 1277, paragraphs 9 and 10)'. (12)

And that,

`In its judgments in Case 154/80 Coöperatieve Aardappelenbewaarplaats [1981] ECR 445, paragraph 12, and Case 230/87 Naturally Yours Cosmetics [1988] ECR 6365, paragraph 11, the Court stated on this point that the basis of assessment for a provision of services is everything which makes up the consideration for the service and that a provision of services is therefore taxable only if there is a direct link between the service provided and the consideration received (see also the judgment in Case 102/86 Apple and Pear Development Council v Commissioners of Customs and Excise [1988] ECR 1443, paragraphs 11 and 12).' (13)

16 The three following criteria can be identified from those decisions, which makes it possible to define the concept of the supply of services effected `for consideration': (14)

- there must be a direct link between the service supplied and the consideration received; (15)

- the consideration must be capable of being expressed in money; (16)

- the consideration must be the subjective value given to it by the parties. (17)

17 The three conditions which the case-law of this Court requires to be satisfied in order for a supply of services to be regarded as being effected for consideration and, as such, subject to value added tax, are not satisfied here.

18 A mere `proportion (to be estimated) of the work performed by the employee', to use the words of the national court, cannot be considered real consideration for the transport services received by the employee.

19 In the present case, no direct link can be observed between the service supplied and the consideration received.

20 The service which, in this case, consists of the transport services is supplied independently of any consideration received. Employees using the free collective transport made available to them by the employer do not make any payment, nor is any sum deducted from their wages as consideration for that service. Furthermore, the wages cannot be regarded as comprising consideration for that service, since they are only paid as consideration for the work performed.

Just as in Apple and Pear Development Council, cited above, in which all apple and pear growers paid the same charge to the body in question and there was no link between the charge paid and the benefits derived, the employees in this case are required to perform the same work and receive the same salary, irrespective of whether they derive a benefit from the free transport; there is no consideration which has a direct link with the transport provided by the employer.

The employer is required to make free transport available for all its employees under the relevant collective agreement, but they are free to choose whether or not to make use of it.

21 A distinct proportion of the work performed by the employee cannot therefore be regarded as the (estimated) value of the consideration for the transport services.

22 Furthermore, in the course of the proceedings, neither party proposed any estimation of the distinct proportion of the work performed which represents the consideration for the transport services.

23 As a result, in so far as no consideration having a direct link with the service supplied can be identified, it is, a fortiori, impossible in this case to express the consideration `in money', as required by the case-law cited above, and to recognize a `subjective' value given to it by the parties.

24 Since transport services provided free of charge by an employer to its employees cannot be regarded as effected `for consideration' within the meaning of Article 6(2) of the Directive, those services do not fall within the scope of that provision and on that basis cannot therefore be subject to value added tax.

25 The first question should therefore be answered in the negative.

Second question

26 In the event that the first question is answered in the negative, the national court asks whether the transport services at issue fall within the definition of taxable transactions for the purposes of Article 6(2) of the Directive.

27 That provision reads as follows:

`2. The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible,

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition'.

28 According to Article 11(A)(1)(c) of the Directive, the taxable amount of the transactions referred to in Article 6(2) is `the full cost to the taxable person of providing the services'.

29 The wording of the national court's question seems to suggest that a distinction should be made between `the use of goods forming part of the assets of the business' (Article 6(2)(a)) and `supplies of services carried out free of charge' (Article 6(2)(b)).

However, that distinction does not seem to me to be necessary in the circumstances of this case. Only the expressions `private use of the taxable person or of his staff' and `purposes other than those of his business', which are used in both provisions, are relevant.

30 To summarize, either the transport at issue is regarded as being effected for the private use of the staff, for purposes other than those of the business, or, alternatively, it is regarded as serving the purposes of the business, in which case it is not subject to any tax under Article 6(2) of the Directive.

31 Arguments were submitted in favour of both approaches during the proceedings.

32 First, the applicant claimed that the transport provided for employees directly and exclusively serves the purposes of the business and therefore falls within the employment relationship and does not concern the `private' domain of employees. It submits, in that respect, that even if the transport did theoretically concern the employees' `private sphere', it would have been brought within the employment relationship by virtue of the collective agreement pursuant to which it is provided. It concluded therefore that Article 6(2) does not apply in this case.

33 In contrast, the other parties considered that the free transport of employees serves their private purposes and thus serves purposes other than those of the business; Article 6(2) therefore applies.

34 The United Kingdom Government and the Commission, however, consider that the special circumstances of this case should be taken into account and justify non-taxation under Article 6(2).

35 I support that view.

36 First, it seems difficult to deny that the transport provided for employees from their home to the workplace is a matter which in principle concerns their private life.

37 The employee decides where his home will be with regard, where appropriate, to his place of work, and that determines the distance between the two and the means of transport he is free to choose for that journey. The employer is not involved in any way in those decisions, since the employee's only obligation towards him is to report to his place of work at the agreed time. The employee is responsible for taking the necessary steps to arrive at the workplace and he alone is responsible for deciding how to do so. As a result, under normal circumstances, transport provided for an employee from his home to the workplace is `for the private use' of staff, and is effected for purposes `other than those of the business'. That is not altered by the fact that the transport may be organized by the employer, who makes free collective transport available to those employees wishing to use it.

38 In general, therefore, the transport provided for employees by an employer free of charge using a company vehicle must be considered to be subject to value added tax, since it is treated as a supply of services effected for consideration in accordance with Article 6(2) of the Directive.

39 That principle is consistent with the aim of that provision, which `is designed to prevent the non-taxation of business goods used for private purposes'. (18)

40 However, I believe that, in exceptional cases and under special circumstances, which in this case relate to the nature of the business, transport provided by an employer could be regarded as being supplied for purposes which are not other than those of the business.

41 The particular characteristic of a building firm is that its employees are required to work on building sites in various locations according to the needs of the company's customers, rather than working on a permanent basis at a place of work agreed in advance with the employer. The place in which they are required to work can change from one day to the next, or even in the course of a single day. Employees must be prepared to move as soon as the employer asks them to do so. That is a specific characteristic which distinguishes employees in the building sector, in this case, from employees who are required to work in a place determined in advance, for example on the premises of the company employing them. Employees are consequently unable to exercise any degree of choice or control over the length of the journey between their home and the workplace.

42 The places where the employees concerned are required to work are generally difficult to reach by traditional means, since they are building sites which may be situated, for example, on industrial estates or in outlying areas.

43 Furthermore, because those building sites may be some distance from the employees' homes, depending on where they are required to work, working hours in the building sector can mean that employees have to get up particularly early in the morning in order to reach their place of work in time.

44 In those circumstances, the risk involved for the employer in leaving employees to choose for themselves how to travel from their homes to the workplace could be detrimental to the successful operation of the company. It is possible that other more traditional means of transport, such as public transport, might prove to be inadequate or even non-existent in those circumstances.

45 Therefore, transport organized by an employer for its employees from their homes to their places of work may, in certain special circumstances, such as those in the present case, be necessary to meet fundamental requirements for the proper operation of the business. Although it cannot be denied that the employees derive a benefit from the transport made available to them, that benefit seems to be of secondary importance compared to the purposes of the business in

respect of which the free collective transport was organized.

46 Although the fact that a collective agreement expressly provides for such transport is not conclusive, it is none the less indicative of the fact that the building sector involves an activity with special characteristics, which must be taken into account.

47 I therefore consider that the answer to the second question should be that, although in general the transport provided for employees from their homes to the workplace using a vehicle belonging to the employer must be regarded as serving the private purposes of those employees and, on that basis, subject to tax under Article 6(2) of the Directive, that is not the case when, as a result of special circumstances inherent, for example, in the nature of the business, those transport services serve purposes which are not other than those of the business. Such a situation falls outside the scope of Article 6(2) and the transaction is not taxable.

Third question

48 By this question, the Bundesfinanzhof asks the Court, in the event that the second question is answered in the affirmative, whether the fact that an employee may be commissioned to provide the transport at issue, using his own private vehicle, is relevant.

49 In view of the suggested answer to the second question, there is no need to answer the third question in this case.

50 However, if the circumstances were not such as to justify regarding the transport as being provided for purposes which are not other than those of the business, the answer to the third question would not differ from that given to the previous question. An employee commissioned to carry out a task on behalf of the taxable person, within the meaning of the Directive, is not acting independently within the meaning of Article 4(1) thereof: transport services supplied by an employee must be regarded as comparable to transport services supplied by the taxable trader, since they are carried out on behalf of that trader.

Conclusion

51 For those reasons, I propose that the questions referred by the Bundesfinanzhof should be answered as follows:

(1) Article 2(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States on turnover taxes - Common system of value added tax: uniform basis of assessment, is to be interpreted as meaning that an employer who provides transport for employees free of charge from their homes to the workplace, in the absence of any real connection either with the work performed or the wages received, does not effect a supply of services `for consideration' within the meaning of that provision.

(2) Article 6(2) of the Directive is to be interpreted as meaning that it applies where employees are conveyed free of charge by the employer from their homes to the workplace and back, in so far as the transport provided serves, in principle, the employee's private purposes and thus serves purposes other than those of the business. That provision does not, however, apply where, as in this case, because of the specific nature of the business, the supply of those transport services is not effected for purposes other than those of the business and therefore serves the purposes of the business.

(3) The first sentence of the answer to Question 2 also applies when the employer does not convey the employees in its own vehicles, but commissions a third party (in this case, one of its own employees) to do so.

(1) - Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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).

(2) - Paragraph 1(1)(1), second sentence, (b), of the Umsatzsteuergesetz of 1980 (1980 Law on turnover tax - hereinafter `the UStG 1980').

(3) - V R 30/84 and V R 114/83 (BFHE 153, 155, 162, BStBl II 1988, 643, 651).

(4) - The national court points out (point II.1 of the order for reference) that, in that judgment, the Bundesfinanzhof abandoned the former case-law. Whereas a notional part of the work performed by the employees had previously been treated as consideration for the transport supplied by the employer, it now considers that it is impossible to ascertain the value of that notional part of the work constituting consideration.

(5) - Page 8 of the English translation [amended] of the order for reference.

(6) - Emphasis added.

(7) - [1981] ECR 445, paragraphs 12 and 13.

(8) - Second Council Directive 67/228/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967 (I), p. 16).

(9) - [1988] ECR 1443.

(10) - [1994] ECR I-743.

(11) - Paragraph 14.

(12) - Paragraph 12.

(13) - Paragraph 13.

(14) - See, to that effect, point 14 of the Opinion of Advocate General Lenz in Tolsma, cited above.

(15) - Coöperatieve Aardappelenbewaarplaats (paragraph 12), Apple and Pear Development Council (paragraph 11) and Naturally Yours Cosmetics (paragraph 11).

(16) - Coöperatieve Aardappelenbewaarplaats (paragraph 13) and Naturally Yours Cosmetics (paragraph 16).

(17) - Coöperatieve Aardappelenbewaarplaats (paragraphs 13 and 14) and Naturally Yours Cosmetics (paragraph 16).

(18) - Case C-193/91 Mohsche [1993] ECR I-2615, paragraph 8. See also Case 50/88 Kühne [1989] ECR 1925, paragraph 8.