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Opinion of Mr Advocate General Jacobs delivered on 25 September 1997. - Elisabeth Blasi v Finanzamt München I. - Reference for a preliminary ruling: Finanzgericht München - Germany. - Sixth VAT Directive - Exemption - Letting of immovable property - Exclusion of accommodation in the hotel sector or in sectors with a similar function. - Case C-346/95.

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Opinion of the Advocate-General

1 The present case, referred to the Court by the Finanzgericht (Finance Court) München, raises the question whether Article 13B(b) of the Sixth VAT Directive (`the Directive') (1) permits a Member State to impose VAT on the provision of temporary accommodation for asylum-seekers and emigrants.

Relevant Community and national provisions

2 In so far as is relevant Article 13B of the 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 the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

...

Member States may apply further exclusions to the scope of this exemption.'

3 It is clear from the ruling in Henriksen (2) that, while a Member State may restrict the scope of the exemption laid down in Article 13B(b) by applying further exclusions, it may not exempt from tax the transactions which are excluded from exemption. The transactions mentioned in Article 13B(b)(1) are therefore compulsorily taxable.

4 The relevant provisions of German law are to be found in the Umsatzsteuergesetz 1980 (Law on Turnover Tax, `the UStG'). Under Paragraph 4(12), first sentence, letter (a), of the UStG, as

interpreted by the German courts, the leasing of immovable property, including individual parts of a property such as living and sleeping rooms, is exempt from tax. However, under Paragraph 4(12), second sentence, of the UStG the letting of living and sleeping accommodation which a trader keeps available for the short-term accommodation of guests is taxable. The referring court states that, according to the case-law of the Bundesfinanzhof (Federal Finance Court), the criterion of short-term accommodation refers not to the actual length of stay but to the trader's intention. If a trader lets rooms to a public authority which uses them for the accommodation of third parties, what is decisive is whether the trader intends that the rooms be used for longer-term letting and has implemented that intention by entering into a long-term agreement with the public authority. According to the case-law of the Bundesfinanzhof, the practice of the tax authorities and academic opinion, a letting is to be regarded as short-term if it is for a period of less than six months.

The facts and the national court's questions

5 Since 1984 Mrs Blasi has provided accommodation in three buildings situated in Munich for emigrant families from Eastern European countries. The rooms in the buildings are fully furnished and equipped with cooking facilities and fridges. They are cleaned by the emigrants themselves, who in some cases install telephones at their own expense.

6 Every 14 days Mrs Blasi provides fresh bedding and cleans the landings, staircases, baths and lavatories. The emigrants are not supplied with meals or drinks. There are no lounges or common rooms in any of the buildings, nor is there a hotel reception.

7 The emigrants are put in contact with Mrs Blasi by the City of Munich, which at the material time paid her DM 25 per day for each guest. It appears that Mrs Blasi informed the City of Munich that she was not interested in taking emigrants who wanted to stay for short periods only and that, according to Mrs Blasi's calculations, the average length of stay is 14.4 months. However, there is no contractual provision requiring the lettings to be of a minimum length.

8 Having received an assessment to VAT in respect of the lettings for the year 1984 Mrs Blasi brought proceedings before the referring court, claiming that she had no liability to VAT. In its order for reference, the referring court raises doubts as to whether Paragraph 4(12), second sentence, of the UStG is compatible with Article 13B(b)(1) of the Directive. It notes that, whereas the Directive excludes from the exemption applicable to the leasing or letting of immovable property, the `provision of accommodation ... in the hotel sector or in sectors with a similar function', the UStG refers only to the short-term provision of accommodation. The referring court has therefore put the following questions to this Court:

`1. Is Article 13B(b)(1) of the Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (Sixth VAT Directive) to be interpreted as meaning that the "provision of accommodation" in the hotel sector or in sectors with a similar function means no more than the short-term accommodation of guests?

2. If Question 1 is answered in the affirmative:

(a) What period of accommodation can properly be regarded as short-term?

Is it no longer "provision of accommodation in the hotel sector" if the operator keeps the rooms ready for long-term accommodation and this finds expression in the conclusion of a long-term letting agreement (longer than six months)?

(b) Is a tax exemption under Article 13B(b)(1) for a proportion of the time possible if it transpires that all the accommodation can be let on a short or long-term basis according to choice?

3. If Question 1 is answered in the negative:

On the basis of what temporal, spatial and conceptual criteria must the phrase "provision of accommodation" in the hotel sector or in sectors with a similar function be defined and which of them must necessarily be present?'

Appraisal of the issues

9 The referring court's questions, which may be considered together, are posited on the basis that, if Article 13B(b)(1) is inapplicable to Mrs Blasi's services, there would be no basis in the Directive for taxing them. In particular the German provision could not be based on the last sentence of Article 13B(b), which allows Member States to `apply further exclusions to the scope of this exemption'. That finding is based on the Court's statement in Henriksen (3) that the last sentence of Article 13B(b) merely permits a Member State to add to the exclusions from exemption and not to restrict such exclusions; the referring court concludes that Germany cannot rely on that provision in order to restrict the exclusion from exemption in Article 13B(b)(1) to short stays.

10 However, that reasoning is plainly erroneous. It may be that, by failing to tax long stays in the hotel and similar sectors, the German provision is narrower than Article 13B(b)(1). If that were so, the provision would exempt from taxation transactions that are compulsorily taxable under the Directive, contrary to the Court's ruling in Henriksen.

11 However, that has no relevance to the present case. The issue here is not whether Germany may exempt Mrs Blasi's services but whether it may tax them. In so far as her services were not compulsorily taxable under Article 13B(b)(1), the German provision, by taxing them, would be adding to, rather than limiting, the exclusions from exemption.

12 The last sentence of Article 13B(b) is broadly worded so as to allow the Member States a large degree of discretion in placing limits on the scope of the exemption in Article 13B(b). As the Court stated in Henriksen, `Member States are free to limit the scope of the exemption by providing for additional exclusions'. (4) Unlike exemptions, which generally fall to be construed narrowly because they constitute exceptions to the general principle that turnover tax is levied on all supplies for consideration made by a taxable person, (5) the exclusion of transactions from exemption is in conformity with that general principle. I see no Community interest in seeking to interpret narrowly the discretion granted to Member States by that provision to bring further transactions within the scope of the charge to tax.

13 It might therefore have been possible for Germany to justify the provision on the basis of the last sentence of Article 13B(b). It argues however that the provision can be based on Article 13B(b)(1). I shall therefore turn to the referring court's questions, which concern that provision.

14 By its first and second questions the referring court asks in effect whether the short-term provision of accommodation is a sufficient criterion for the purposes of Article 13B(b)(1), and, if so, what period is to be regarded as short-term.

15 Under the Directive the supply and leasing of immovable property are in principle exempt from VAT. (6) Those exemptions reflect the particular difficulties in applying VAT to such goods. Unlike ordinary goods, land is not the result of a production process; moreover, buildings, once constructed, may change hands many times during their life, often without being subject to further economic activity. (7) Under the Directive the charge to VAT is therefore limited in principle (8) to the supply of building land or of new buildings and the land on which they stand. The preparation of land for development entails economic activity enhancing the value of the land; and the supply of a new building marks the end of a production process. Thereafter repeated taxation of immovable property each time it is sold would not be justified. The same applies to the letting of

such property, which is normally a comparatively passive activity not entailing significant added value; although an economic activity for the purposes of Article 4 of the Directive, (9) the letting of immovable property is therefore in principle exempt from tax.

16 However, while generally exempting the leasing or letting of immovable property, Article 13B(b) also provides for exclusion of certain transactions from exemption. The common feature of those transactions is that they entail more active exploitation of the immovable property justifying further taxation in addition to that levied upon its initial sale.

17 With more particular reference to Article 13B(b)(1), it may be noted, first, that its terms, in particular the phrases `accommodation, as defined in the laws of the Member States' and `sectors with a similar function', are somewhat imprecise. It seems to me that the intention was to leave the Member States some latitude in defining the precise limits of the exclusion.

18 Secondly, as already noted, Article 13B(b)(1) lays down an exclusion from the exemption and therefore does not fall to be construed strictly. Indeed it seems to me that the words `sectors with a similar function' should be given a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax.

19 As regards the German provision, it is true that the short-term letting of residential property may not entail all of the additional supplies of goods and services, such as provision of meals and drinks, cleaning of rooms, provision of bed linen etc., normally provided in hotels. Nevertheless, there can be no doubt that a taxable person offering, for example, short-term holiday lets of residential property fulfils essentially the same function as - and is in a competitive relationship with - a taxable person in the hotel sector. The essential distinction between such lettings and exempt lettings of residential property is the temporary nature of the accommodation. In any event, short-term lets are more likely to involve additional services such as provision of linen and cleaning of common parts of buildings or even of the accommodation itself (indeed a number of such services are provided by Mrs Blasi); moreover, they involve more active exploitation of the property than long-term lets in so far as greater supervision and management is required.

20 Against that background it seems to me that, although - unlike Article 13B(b)(1) - the German provision does not expressly focus on the nature of the establishment providing the accommodation or the sector in which it is provided, the criterion of the provision of short-term accommodation to guests which it employs represents a reasonable means of achieving the underlying aim of the provision. It ensures that the transactions of taxable persons whose business is similar to the essential function performed by a hotel, namely the provision of temporary accommodation on a commercial basis, are subject to tax. While it may be true that it is not unknown for persons to stay for long periods in hotels, any inadequacies of the German provision in that respect are not material to the present case and may in any event be of minimal practical significance.

21 Moreover, it seems to me that the requirement flowing from the case-law of the Bundesfinanzhof that, in order for the letting of an immovable property to qualify for exemption, there must be an intention, evidenced by a lease or other agreement, to let the property for a minimum period of six months is not unreasonable. It provides a workable and legally certain means of distinguishing between short-term accommodation similar to that provided in the hotel sector and the longer-term letting of residential property for which the Directive provides exemption. A hotel or hostel will be willing to accept guests for potentially short stays, whereas a landlord interested in more passive longer-term lets will require an agreement providing confirmation of the tenant's intention to stay for a longer period. I see no reason to interpret the Directive as imposing a maximum of three months as the Commission suggests.

22 It may be noted that the opening words of Article 13B require Member States to lay down conditions for ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse. Germany is in my view entitled to consider that the other criteria suggested by Mrs Blasi, such as whether the accommodation is the centre of interests of the persons concerned or whether additional services are provided, would be too uncertain and difficult to apply. For example, a residential caravan on a camping site in Spain might be regarded as the centre of interests of a retired person who sells his house and goes to live there throughout the year; it would be difficult for the camping site owner to apply such a criterion. Moreover, the level of services and facilities provided by hotels, hostels and camping sites varies considerably. There are hotels which offer no more than a room and camping sites which provide little more than a camping field. Moreover, the German Government might reasonably consider that such criteria would be less likely than one based on the period of stay to achieve the aim of competitive neutrality.

23 In so far as Mrs Blasi's genuine intention is to provide longer-term lets of residential property it would be open to her to enter into an agreement to that effect. If, on the other hand, the inherently temporary nature of the stays prevents her from doing so, then it is not unreasonable that the tax authorities should take the view that what is at issue is short-term commercial exploitation of immovable property and equate the accommodation which she provides with the taxable accommodation provided by a hostel or cheaper hotel. Indeed it is conceivable that the City of Munich might equally use such establishments for the temporary accommodation of asylum-seekers and emigrants.

24 With reference to question 2(b) put by the national court, I do not think the German authorities are obliged to grant exemption in respect of part of the period of a letting where a letting happens to exceed six months. The German authorities are in my view justified in considering that a letting is of a long-term nature and qualifies for exemption only if there is evidence of an intention from the beginning that accommodation is to be provided for a period of at least six months.

25 Finally, as I have already explained, in so far as the German rule were considered to go beyond the terms of Article 13B(b)(1) by taxing accommodation such as that provided by Mrs Blasi, it could in any event be based on the last sentence of Article 13B(b).

Conclusion

26 Accordingly, I am of the opinion that the questions referred by the Finanzgericht München should be answered as follows:

A national rule subjecting to VAT the provision of short-term accommodation to guests, that is to say, the provision of accommodation otherwise than under an agreement providing for a minimum stay of six months, is compatible with Article 13B(b)(1) of the Sixth VAT Directive.

(1) - 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.

(2) - Case 173/88 Skatteministeriet v Henriksen [1989] ECR 2763, paragraph 21 of the judgment.

(3) - Cited in note 2.

(4) - Paragraph 21 of the judgment.

(5) - See, for example, Case 348/87 Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën [1989] ECR 1737, paragraph 13 of the judgment.

(6) - Article 13B(b), (g) and (h).

(7) - Supplies consisting in the alteration or repair of buildings are in any event separately taxable as supplies of services.

(8) - Member States are permitted to grant taxable persons the right to opt to tax the supply or letting of immovable property under Article 13C of the Directive. The option is provided for with commercial property in mind. A vendor or lessor may prefer taxation of the supply or letting of commercial property to a taxable person who uses the property for the purposes of his economic activity and therefore has the right to deduct the tax charged. The vendor or lessor will then himself have the right to deduct any VAT incurred on the purchase, leasing, alteration or refurbishment of the property. The incurring of irrecoverable VAT by taxable persons in relation to the property is thereby avoided.

(9) - It may be noted however that it was thought necessary to include an express provision in Article 4(2) of the Directive to make it clear that the `exploitation of tangible ... property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity' within the meaning of the Directive.