62004CC0415_EN
Opinion of the Advocate-General

Opinion of the Advocate-General

1. This reference for a preliminary ruling concerns an organisation which itself provides care for preschool children, and for school-age children outside school time, but which also puts parents in touch with independent day carers who provide the same service. In the latter case, it charges parents an hourly rate in addition to that which they pay to the carers, although it does not intervene further as between parents and carers, or accept any liability with regard to the service provided by the latter.

2. In the national proceedings, it is disputed whether that hourly rate charged by the organisation to the parents should be subject to VAT. In that connection, the Netherlands Hoge Raad (Supreme Court) asks whether the organisation's services as intermediary between parents and carers are exempt from VAT as services closely linked to welfare work, to the protection of children, or to children's education.

Relevant legislation

3. Under Article 2(1) of the Sixth VAT Directive, (2) supplies of services effected for consideration by a taxable person acting as such are subject to VAT.

4. A taxable person is defined in Article 4(1) and (2) as any person who independently carries out in any place any economic activity – that is to say all activities of producers, traders and persons supplying services, including mining and agricultural activities and activities of the professions – whatever the purpose or results of that activity.

5. Under Article 11A(1), with certain exceptions and qualifications which are not relevant here, the taxable amount for a supply of services comprises the consideration obtained by the supplier from the customer.

6. Article 13A of the Sixth Directive provides for exemption from VAT for certain activities in the public interest. Paragraph 1 of that provision reads as follows, in so far as is relevant:

'… 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:

…

(g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned;

(h) the supply of services and of goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned;

(i) children's or young people's education, school or university education, vocational training or

retraining, including the supply of services and of goods closely related thereto, provided by bodies governed by public law having such as their aim or by other organisations defined by the Member State concerned as having similar objects;

…'

7. Paragraph 2(b) provides, however:

'The supply of services or goods shall not be granted exemption as provided for in (1)(b), (g), (h), (i), (l), (m) and (n) above if:

– it is not essential to the transactions exempted,

– its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.'

Facts and proceedings

8. According to the order for reference, Stichting Kinderopvang Enschede ('the Foundation') is a non-profitmaking organisation. Its objectives are essentially to maintain and develop the provision of a range of childcare facilities responding to the childcare needs of working parents, and to act as intermediary between parents and independent carers.

9. The Foundation itself runs a number of childcare centres for preschool children and for school-age children outside school time. It also maintains a list of independent carers (3) who look after children in their own homes. Carers are screened by the Foundation before inclusion on the list. Potential carers may attend a course paid for by the Foundation.

10. In response to a request from a parent, (4) the Foundation first explains the various forms of care which it proposes. If the parent decides to use an independent carer, a specialist from the Foundation discusses the parent's wishes. On the basis of that information, the Foundation introduces the most appropriate carer to the parent. If the contact is mutually satisfactory, a written agreement is concluded between the carer and the parent, under which the parent pays an hourly rate for the care of each child. In 1998 that hourly rate was NLG 5. (5)

11. The Foundation does not accept any liability which might arise in connection with the agreement. Nor does it guarantee that independent care will in fact be provided during the hours requested; it undertakes only to endeavour to bring a parent into contact with an appropriate carer. A parent may however use the Foundation's own services if either party wishes to discontinue the agreement or if its terms are not observed.

12. In 1998 the Foundation charged, for the services which it provided to parents, NLG 3.45 (6) per child for each hour during which an independent carer was used. None of that amount was passed on to the carer.

13. In regard to that provision of services, the Foundation was assessed for NLG 6 424 (7) in VAT for the period January to March 1998. It appealed against the assessment, arguing that the services in question were exempt by virtue of the Netherlands legislation implementing Article 13A(1)(g) and (h) of the Sixth Directive.

14. The regional appeal court found that the Foundation operated in the area of childcare, and that its activities as intermediary with regard to independent carers could not easily be regarded as 'other than serving exclusively the purposes of the childcare' (8) even though they did not constitute direct involvement in that care. Consequently, those activities came within the scope of

the exemption in issue.

15. The tax authorities have now appealed on a point of law to the Hoge Raad, arguing that when acting as intermediary the Foundation provides a separate commercial service bringing together supply and demand in a specific area. That service does not amount to provision of childcare and is not provided in the Foundation's capacity as an 'establishment for the provision of childcare as such' within the terms of the Netherlands legislation implementing the exemption in issue. Nor is the service so closely linked to the childcare provided by the Foundation itself that it can be regarded as provided by an establishment engaged in the provision of childcare as such.

16. The Hoge Raad considers that the appeal raises the question whether the service in issue falls within the exemption in Article 13A(1)(g), or possibly (h) or (i), of the Sixth Directive. It has therefore referred the following question for a preliminary ruling:

'Must Article 13A(1)(g), (h) and (i) of the Sixth Directive be construed as meaning that the service provided as described above, consisting in intermediary activities in connection with the care of children under school age and of schoolchildren outside of school hours in the homes of host parents, falls to be regarded as a service covered by one or more of those provisions?'

17. The Hoge Raad specifies further that it is common ground that the Foundation's own childcare services are exempt and that, in that respect, the Foundation is to be regarded as a recognised organisation for the purposes of the relevant provisions of the Sixth Directive; under Netherlands legislation, it is a recognised organisation for the provision of childcare, with regard both to actual childcare and to the services in issue.

18. Written observations have been submitted by the Foundation, the Netherlands Government and the Commission. No hearing has been requested and none has been held.

Assessment

Preliminary remarks

19. The Hoge Raad's question concerns the classification of the service provided by the Foundation when it acts as intermediary between parents and independent carers.

20. The dispute between the Foundation and the tax authorities concerns the levying of VAT on the sums charged to parents by the Foundation in respect of each hour a child is looked after by an independent carer.

21. It is clear from Articles 2(1) and 11A(1) of the Sixth Directive that, when a service is taxable, what is taxed is the consideration for the service. Consequently, a provision of services is taxable only if there is a direct link between the service provided and the consideration received. (9)

22. The existence of a direct link between the Foundation's services as intermediary and the amounts which it receives in respect of each hour of independent childcare is not questioned in the order for reference; it does not appear to be in issue before the Hoge Raad. Nor have any observations been submitted to the Court in that regard.

23. In those circumstances, I shall confine my analysis to the question actually posed by the Hoge Raad.

24. I merely note, none the less, that certain features of the arrangements as they have been presented might suggest that there is no substantial link between the service and the consideration in issue. For example: the payment is made not at the time of the initial service but

on repeated occasions over a subsequent period; it may vary considerably both in duration and in total amount, but the variation is not determined by any feature of the initial service; the amount is relatively high and appears to be calculated so as to ensure that the hourly cost to parents is the same whether care is provided by the Foundation itself or by an independent carer; and the Foundation does not accept liability in respect of the independent care provided, on the basis of which the payment is calculated.

The question posed

Scope

25. The question is whether the Foundation's services as intermediary, as described in the order for reference, are exempted under Article 13A(1)(g), (h) or (i).

26. For that to be the case, they must be closely linked (or related (10)) to an activity defined in one of those subparagraphs.

27. The Foundation's services as intermediary are specified by the Hoge Raad to be 'in connection with the care of children … in the homes of host parents'.

28. They thus cannot be linked to the childcare which the Foundation provides itself – with regard to which it cannot be said to act as 'intermediary' and in respect of which it does not charge the hourly payment in issue – but only to that provided by independent carers.

29. I agree with the Netherlands Government that there are no grounds for supposing that such childcare can fall within the category of education in Article 13A(1)(i) of the Sixth Directive. It is of course possible to combine childcare with an element of education, whatever the age of the child, and it may be the case that certain independent carers do in fact feel that they have an educational role to play, but it is not suggested that education is envisaged as an inherent part of the childcare in issue here.

30. However, childcare does in principle seem capable of falling within the scope of 'welfare and social security work' and/or 'protection of children and young persons' within the meaning of Article 13A(1)(g) and (h) respectively, and no suggestion to the contrary has been made. Since the conditions for the application of each of those exemptions are identical, it is unnecessary to decide between the two.

31. It is accepted that the Foundation is an organisation recognised as charitable by the Member State concerned, within the meaning of Article 13A(1)(g) and (h).

32. The Foundation stresses moreover that i t is only through its activities as intermediary that parents have access to the services of the independent carers on its list and in particular, thanks to its screening and advice, to those of the most appropriate carer. Its service must be regarded as a prerequisite for the provision of the childcare, and thus as ancillary thereto.

33. However, the Netherlands Government and the Commission submit both that the Foundation's services as intermediary do not qualify as 'closely linked' to the childcare provided by independent carers, and that that childcare cannot serve as a basis for exempting linked supplies since it is not itself an exempt service.

34. The Netherlands Government further submits, in the alternative, that exemption is precluded by Article 13A(2)(b) because, on the one hand, the service is not essential to the provision of the childcare in question and, on the other, it is intended to obtain additional income for the Foundation by providing a service in competition with commercial services subject to VAT.

35. It thus seems to me that, although the Foundation's intermediary services may clearly be linked, at least in a broad sense, to the independent childcare services, there are a number of possible obstacles to exemption. In that regard, the following questions are relevant:

(i) Are the intermediary services 'closely linked' to the childcare services?

(ii) Can exemption be founded on a link to the childcare services if they are not themselves exempt?

(iii) Are the intermediary services essential for the childcare services?

(iv) Is the basic purpose to obtain additional income, and is there competition with commercial services subject to VAT?

36. If the answer to any of the first three questions is no, or to the fourth question yes, then there can be no exemption for the services described. All of those questions involve factual assessments but, at least with regard to the first three, there are also matters of interpretation which may be clarified by this Court.

37. Finally, it may be pointed out that the effects of exemption from VAT can vary according to circumstances. When a particular transaction is exempt, the supplier cannot deduct any input tax incurred on goods or services which he acquired for the purpose of the transaction; nor can the customer deduct any of that tax which will remain, latent and invisible, in the cost of the transaction. The Foundation may be presumed to have considered its situation when seeking exemption for the disputed service, but it is difficult to predict that exemption will always be advantageous for others who may provide a comparable service. A balanced and neutral approach to the interpretation of the relevant provisions is therefore appropriate.

(i) Are the intermediary services 'closely linked' to the childcare services?

38. The list of exemptions in Article 13A(1) makes extensive reference to supplies which are in some way connected with activities in the public interest.

39. In addition to subparagraphs (g), (h) and (i), subparagraphs (b), (l), (m) and (n) specify a criterion of 'close' connection. The terminology used is not always identical, and the variations differ from one language version to another, but it seems to me that the same concept must be intended in each case.

40. By contrast, some other subparagraphs specify a looser connection, using terms such as 'incidental', 'with a view to' or 'in connection with' (subparagraphs (a), (k) and (o) respectively; again there is variation as between language versions).

41. In that light, I do not consider the Court's judgment in Dudda , (11) from which the Foundation seeks to draw an analogy, to be of assistance. Not only did it relate to determination of the place of supply, rather than the existence of an exemption, but it was specifically concerned with the supply of services defined as 'relating' or 'ancillary' to certain cultural or similar activities, under Article 9(2)(c) of the Sixth Directive. The degree of connection in issue there is clearly of the looser rather than the closer kind.

42. The Commission and the Netherlands Government refer to Commission v Germany , (12) in which the Court took the view that research projects undertaken by State universities for remuneration are not closely related to university education within the meaning of Article 13A(1)(i) because, first, the exemption is designed to ensure that access to education is not hindered by the increased costs that would follow if closely related goods or services were subject to VAT (and there would be no such hindrance as a result of taxing remunerated research projects) and, second, although such projects may be of assistance to university education, they are not essential to attain the objective of teaching students to enable them to pursue a professional activity.

43. As regards the first aspect, it seems arguable that taxing a single charge in respect of the service of introducing a parent to a carer would not hinder access to childcare. Where the charge for the service represents a significant proportion of the payment for each hour of childcare for as long as that care is provided, that may not be true. In that regard, however, the question of the link between the service and the payment is again raised. (13)

44. As regards the second aspect, I would hesitate to agree that the existence of a close link between a supply and an activity necessarily implies that the supply must be essential in order to attain the objectives of the activity.

45. However, since all the provisions of Article 13A(1) which apply the criterion of a close link are also subject to the condition in the first indent of Article 13A(2)(b) that the supply must be essential to the exempted transactions, the point is immaterial in the present context. I shall deal with it below, under (iii).

(ii) Can exemption be founded on a link to the childcare services if they are not themselves exempt?

46. The Commission and the Netherlands Government suggest that, even if there is a close link between the Foundation's services as intermediary and the childcare provided by independent carers, it is necessary for that childcare itself to qualify for exemption under Article 13A(1)(g) and (h) in order for the linked service to qualify also. In other words, the childcare must in particular be provided by 'bodies governed by public law or by other organisations recognised as charitable'.

47. The provisions of Article 13A(1)(b), (g), (h), (i), (l), (m) and (n) have in common that they all use the concept of a close connection between a supply and an activity in the public interest, the supply in question being made by an entity of a public, charitable, cultural, associative, non-profitmaking or other similar nature, and are all subject to the provisos in Article 13A(2)(b).

48. They vary however in the way in which the connection is expressed: ‘hospital and medical care and closely related activities’ ((b)); ‘the supply of services and of goods closely linked to’ welfare, child protection and similar activities ((g) and (h)); education ‘including the supply of services and of goods closely related thereto’ ((i)); services ‘and goods closely linked thereto’ for the benefit of members of certain organisations ((l)); ‘certain services closely linked to sport or physical education’ ((m)); certain cultural services ‘and goods closely linked thereto’ ((n)).

49. On a literal reading, one might argue that (b), (i), (l) and (n) exempt a particular activity in the public interest together with other supplies closely linked to that exempt activity; whereas (g), (h) and (m) exempt certain supplies closely linked to a particular activity, whether that activity is itself exempt or not.

50. The latter limb of that argument does not however seem viable. It appears inconsistent, as the Commission submits, with the logic of the provisions and, as the Netherlands Government points out, with the wording of the first indent of Article 13A(2)(b), which stipulates that the supplies in question must be ‘essential to the transactions exempted’.

51. It seems therefore that, in order for the closely related supplies to be exempt, the principal activity must also be exempt and must thus satisfy all the conditions for exemption – including the requirement that it is performed by a body governed by public law or other organisation recognised as charitable. (14)

52. Accordingly, where the Foundation acts only as an intermediary, for its services in that capacity to be exempted under Article 13A(1)(g) or (h), the independent childcare to which they are linked must also satisfy the conditions for exemption under those provisions.

53. Clearly the independent carers are not bodies governed by public law. It is not for this Court to determine whether they are recognised as charitable organisations. Recognition is a matter for the national authorities, who enjoy a degree of discretion, to be exercised in accordance with Community law and subject to judicial review. (15) With regard to the possibility of recognising independent carers, reference may be made to the Court’s judgments in Bulthuis-Griffioen (16) and Gregg , (17) from which it would appear that natural persons may qualify for such recognition only if they are ‘running a business’.

(iii) Are the intermediary services essential for the childcare services?

54. It seems difficult to suppose that a parent can use childcare services without first being put in touch with the carer. The Foundation stresses that the childcare services in question are accessed only through its activities as intermediary. The Netherlands Government however argues that other channels are also available, including advertisements or commercial agencies.

55. It seems to me that if the Foundation were to do no more than keep a list of all people known to offer childcare and to make that list available to parents, the service could in no way be described as essential. There are many other ways in which parents can enter into contact with would-be carers.

56. However, if the Foundation’s screening and training activities are such that its services as intermediary provide access to only such competent and trustworthy carers as parents would otherwise have been unable to identify, then the latter services may be viewed as essential in order to gain access to childcare of that quality, even if the Foundation does not accept responsibility for any shortcomings in the childcare actually provided.

57. I am thus of the view that the relevant factual assessment is whether the care to which access is provided is of such a kind or quality as parents could not be assured of without the Foundation's services as intermediary.

(iv) Is the basic purpose to obtain additional income, and is there competition with commercial services subject to VAT?

58. This is again a factual question which cannot be determined by this Court, and no particular problem of interpretation has been raised with regard to it in the present case. There is no confirmation in the case-file that commercial agencies do in fact provide a similar service to that of the Foundation, although the Netherlands Government asserts that to be the case. If it is necessary to assess the purpose of the service offered, it might be appropriate to take into account, on the one hand, the Foundation's non-profitmaking status and, on the other hand, the amount and mode of calculation of the disputed charge.

Conclusion

59. In the light of the above considerations, I am of the opinion that the Court should give the following answer to the Hoge Raad:

Where a body governed by public law or an organisation recognised as charitable by the Member State concerned acts as intermediary between persons seeking and persons offering childcare services, its service as intermediary may be exempted from VAT under Article 13A(1)(g) or (h) 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 only if:

– subjection to VAT would hinder access to the childcare services by increasing their cost;

– the childcare services themselves qualify for exemption under the same provision(s);

– the childcare services are of a kind or quality of which those seeking those services could not be assured if they did not use the intermediary services; and

– the basic purpose of the intermediary services is not to obtain additional income by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

(1) .

(2) – 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); hereinafter 'the Sixth Directive'.

(3) – Known as 'host parents'; I shall however refer to them as 'carers' in order to avoid any confusion between parents and host parents.

(4) – Or an employer; apparently some employers use the Foundation's services to provide childcare for their employees. In what follows, 'parent' may be taken to include such employers.

(5) – Approximately EUR 2.27; it appears from the Foundation's website that the rate in 2005 is EUR 2.50 or 3.30 per hour, depending on the number of children.

(6) – Approximately EUR 1.57; the rate in 2005 is EUR 2.89, including VAT. The total per hour is

thus EUR 5.39 or 6.19. The hourly charge for childcare provided by the Foundation itself in 2005 varies in normal cases from EUR 5.34 to 6.07.

(7) – Approximately EUR 2 920.

(8) – '… niet uitsluitend aan de kinderopvang dienstbaar', in the words of the Hoge Raad.

(9) – See also Case 102/86 Apple and Pear Development Council [1988] ECR 1443, paragraphs 11 and 12, Case C-16/93 Tolsma [1994] ECR I-743, paragraph 13, and Case C-174/00 Kennemer Golf [2002] ECR I-3293, paragraph 39.

(10) – The use of the word 'related' in subparagraph (i), where subparagraphs (g) and (h) use 'linked', appears to be a quirk of the English version; other language versions use the same term in the three provisions, and there is no reason to suppose that any difference in meaning was intended.

(11) – Case C-327/94 [1996] ECR I-4595.

(12) – Case C-287/00 [2002] ECR I-5811, in particular at paragraph 45 et seq.; see also Case C-76/99 Commission v France [2001] ECR I-249.

(13) – See my remarks at point 24 above.

(14) – See also Case C-498/03 Kingscrest [2005] ECR I-0000, at paragraph 30.

(15) – See Kingscrest , in particular at paragraph 48 et seq.

(16) – Case C-453/93 [1995] ECR I-2341.

(17) – Case C-216/97 [1999] ECR I-4947, especially at paragraphs 14 to 19.