

JUDGMENT OF THE COURT (Third Chamber)

6 December 2007*

In Case C-451/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Unabhängiger Finanzsenat, Außenstelle Wien (Austria), made by decision of 24 October 2006, received at the Court on 6 November 2006, in the proceedings

Gabriele Walderdorff

v

Finanzamt Waldviertel,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Löhmus (Rapporteur), J.N. Cunha Rodrigues, A. Ó Caoimh and A. Arabadjiev, Judges,

* Language of the case: German.

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2007,

gives the following

Judgment

- ¹ This reference for a preliminary ruling relates to the interpretation of Article 13B(b) 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 was made in the course of proceedings between Gabriele Walderdorff and the Finanzamt Waldviertel ('the Finanzamt'), concerning the application of value added tax ('VAT') to transactions consisting of letting fishing rights.

Legal context

Community legislation

- 3 Article 2(1) of the Sixth Directive provides that deliveries of goods and supplies of services effected for consideration within the territory of the country by a taxable person acting as such are subject to VAT.

- 4 Under Article 13B of the Sixth Directive:

'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;
2. the letting of premises and sites for parking vehicles;
3. lettings of permanently installed equipment and machinery;
4. hire of safes.

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

...'

National legislation

- 5 Under Article 1(1) of the Law on turnover taxes 1994 (Umsatzsteuergesetz 1994, BGBl. 663/1994, 'the UStG'), deliveries and other supplies which an operator makes for consideration in Austria in the course of his business are subject to turnover tax.
- 6 Article 6(1)(16) of the UStG provides for the following exemptions:

'the letting and leasing of immovable property, rights governed by provisions of civil law relating to immovable property, and sovereign rights in regard to immovable goods and property; the grant of use of commercial or other premises under contracts of enjoyment is deemed to be a letting or leasing of immovable property. Private use is also exempted. The following are not exempted:

- letting (grant of use) of immovable property as dwelling houses, excluding private use;

- letting and leasing of equipment and machinery of any kind, which are part of an undertaking's operating plant, even where they are constituent parts of an immovable property;

- provision of accommodation in furnished living areas and sleeping areas;

- letting (grant of use) of premises or sites intended for the parking of vehicles of any kind;

- letting (grant of use) of sites developed for use as camping sites.'

The main proceedings and the question referred for a preliminary ruling

- 7 Gabriele Walderdorff manages an agricultural and forestry holding in Austria. The transactions which she carries out in the course of her business are subject to the general provisions of the VAT system.

- 8 On 21 November 1995, Ms Walderdorff and the Sportfischereiverein Zwettl (an angling club in Zwettl, 'the angling club') entered into a contract for a period of 10 years. Under this contract the angling club had the right, on payment of a consideration, to fish, first, in two ponds located within Ms Walderdorff's holding, where she has the fishing rights in her capacity as the land owner, and secondly, in publicly owned fishing waters where Ms Walderdorff has fishing rights registered in the Fisheries register (area 'Zwettl I/3'). The letting contract was concluded for the period from 1 January 1996 until 31 December 2005. Ms Walderdorff did not pay VAT in respect of those lettings. The tenants were not invoiced for VAT either.

- 9 Following a tax inspection for the years 1998 to 2000, the Finanzamt (tax authority) determined that those lettings should be subject to VAT at the normal rate, since the income obtained from the lettings in question was not received on the basis of a

letting, exempted under the UStG, of a right in rem to immovable property. The opinion of the Finanzamt was that the right to fish was a right which was independent of the land.

- 10 Accordingly, on 24 March 2003 the Finanzamt issued notices of assessment of Ms Walderdorff for those years, whereby the letting of the fishing rights was included within transactions subject to the normal rate of 20%. By letter of 24 April 2003, Ms Walderdorff appealed against those notices, and applied, on the basis of Article 6(1)(16) of the UStG, for exemption in respect of the lettings of fishing rights.

- 11 The Finanzamt rejected that appeal and then, at the request of Ms Walderdorff, brought the case before the Unabhängiger Finanzsenat, Außenstelle Wien (the Vienna Division of the Independent Tax Tribunal).

- 12 The issue in the proceedings before that court is whether the fees paid under the contract between Ms Walderdorff and the angling club are taxable at the normal rate of VAT under the general system or whether the exemption provided for in Article 6(1)(16) of the UStG is applicable.

- 13 In those circumstances the Unabhängiger Finanzsenat Außenstelle Wien decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 13B(b) of the Sixth Directive ... to be interpreted as meaning that the grant of the right to fish, for consideration, in the form of a letting for a period of 10 years

1. by the owner of the property on which the body of water in respect of which the right was granted is located,

2. by the holder of fishing rights in respect of a body of water located on public land,

constitutes “the leasing or letting of immovable property”?

The question referred for a preliminary ruling

¹⁴ By the question referred for a preliminary ruling, the referring court asks, in essence, whether Article 13B(b) of the Sixth Directive must be interpreted to mean that the grant for consideration, under a contract of let for a period of 10 years, of a right to fish, by the landowner in waters owned by that person, and by the holder of fishing rights in publicly owned waters, constitutes ‘a leasing or letting of immovable property’ within the meaning of that provision.

¹⁵ First, it can be stated that the contract entered into by Ms Walderdorff and the angling club relates to the grant of the right to fish in bodies of water. Accordingly, as a general rule, the lettings covered by that contract are subject to VAT in accordance with the Sixth Directive. What remains to be determined is whether they fall within the scope of the exemption provided for in Article 13B(b) of the Sixth Directive.

- 16 According to settled case-law, the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition (see Case C-358/97 *Commission v Ireland* [2000] ECR I-6301, paragraph 51; Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 25; Case C-275/01 *Sinclair Collis* [2003] ECR I-5965, paragraph 22; Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 16; Case C-428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527, paragraph 27; and Case C-455/05 *Velvet & Steel Immobilien* [2007] ECR I-0000, paragraph 15).
- 17 In the absence of a definition of ‘leasing’ and ‘letting of immovable property’ in Article 13B(b) of the Sixth Directive, the Court has defined the letting of immovable property, within the meaning of that provision, as the landlord of property assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude any other person from it (see, to that effect, Case C-326/99 ‘*Goed Wonen*’ [2001] ECR I-6831, paragraph 55; Case C-409/98 *Mirror Group* [2001] ECR I-7175, paragraph 31; Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 21; and also *Commission v Ireland*, paragraphs 52 to 57; *Sinclair Collis*, paragraph 25; *Temco Europe*, paragraph 19; and *Fonden Marselisborg Lystbådehavn*, paragraph 30).
- 18 In accordance with the case-law, the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive, including ‘leasing’ and ‘letting of immovable property’ are to be interpreted strictly, since those exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, inter alia, Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25; and also *Commission v Ireland*, paragraphs 52 and 55; *Sinclair Collis*, paragraph 23; *Temco Europe*, paragraph 17; and *Fonden Marselisborg Lystbådehavn*, paragraph 29).

- 19 In the main proceedings, it is common ground that Ms Walderdorff entered into a contract with the angling club whereby, on payment of consideration she granted the right to fish in several areas of water for a period of 10 years. The Court has already ruled that an area which is wholly or partly underwater can itself be categorised as immovable property that can be leased or let (see, to that effect, *Fonden Marselisborg Lystbådehavn*, paragraph 34, and Case C-166/05 *Heger* [2006] ECR I-7749, paragraph 20).
- 20 As the Advocate General rightly stated in point 23 of her Opinion, all the criteria of the definition of leasing or letting of immovable property, set out in paragraph 17 of this judgment, must be satisfied. That includes, in particular, the criterion that the leasing or letting of immovable property must confer the right to occupy that property and to exclude any other person from it. However, that is not the case in the facts of the main proceedings.
- 21 It is clear from the order for reference that, under the contract entered into by Ms Walderdorff and the angling club, the club only has the right to fish in the bodies of water concerned. It is also clear from the documents submitted to the Court that the provisions of the contract of let state that Ms Walderdorff reserves the right to fish in those waters for herself and for one guest per day authorised by her. Accordingly, under the contract in the main proceedings, the angling club does not have any right to exclude any other person from use either of the waters owned by Ms Walderdorff or of the publicly owned waters where she has fishing rights registered in the Fisheries register.
- 22 Consequently, it is unnecessary to rule on the issue whether a contract which grants fishing rights, such as that at issue in the main proceedings, relates to immovable property, since the Court must hold that one of the elements in the definition of the Community law concepts of leasing or letting immovable property which are employed within the Community system of VAT is lacking in the present case, given

that the contract for that grant, at issue in the main proceedings, does not confer on the angling club the right to occupy the immovable property concerned and to exclude any other person from it.

- 23 Accordingly, the answer which must be given to the question referred is that Article 13B(b) of the Sixth Directive must be interpreted to mean that the grant for consideration, under a contract of let for a period of 10 years, of the right to fish, by the landowner in waters owned by that person, and by the holder of fishing rights in publicly owned waters, does not constitute either a leasing or a letting of immovable property, inasmuch as that grant does not confer the right to occupy the immovable property concerned and to exclude any other person from it.

Costs

- 24 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 (Third Chamber) hereby rules:

Article 13B(b) of Sixth Council Directive 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 to mean that the grant for consideration, under a contract of let for a period of 10 years, of the right to fish, by the landowner in waters owned by that person, and by the holder of fishing rights in publicly owned waters, does not constitute either a leasing or a letting of immovable property, inasmuch as that grant does not confer the right to occupy the immovable property concerned and to exclude any other person from it.

[Signatures]