Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 8 March 2007 [1]

Case C-434/05

Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College)
v
Staatssecretaris van Financiën
Case C-445/05
Werner Haderer
v

Finanzamt Wilmersdorf

(VAT – Exemptions – Teaching staff made available for consideration by one educational establishment to another – Tuition provided to students in an educational establishment, by an independent teacher paid by the establishment)

1. Two of the exemptions from VAT under the Sixth Directive [2] cover, in essence, education and closely related services provided by teaching establishments, and tuition given privately by teachers.

2. These two references for a preliminary ruling raise the questions whether those exemptions extend to, on the one hand, the supply of teachers by one school to another and, on the other hand, the provision of tuition within a school by an independent teacher.

The Sixth Directive

3. Under Article 2 of the Sixth Directive, [3] the supply of services for consideration, by a taxable person acting as such, is subject to VAT.

4. Article 4(1) defines a taxable person as one who 'independently carries out' an economic activity, which, under Article 4(2), includes all activities of persons supplying services. [4]

1 Original language: English.

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, amended on numerous occasions). From 1 January 2007, and thus after the material times in the present cases, the Sixth Directive has been repealed and replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), whose aim is, according to recital 3 in its preamble, to recast the structure and wording of – principally – the Sixth Directive without bringing about material changes. Such few substantive amendments as are nevertheless made appear to be without incidence on the issues in the present cases.

3 See also Article 2(1)(c) of Directive 2006/112.

4 See also Article 9(1), first and second subparagraphs, of Directive 2006/112.

5. A supply of services is defined in Article 6(1) as 'any transaction which does not constitute a supply of goods …'.[5] There is thus no list of services subject to VAT, but it is confirmed by Article 9(2)(c) and (e), on the place of supply of certain services, that services relating to educational activities, and supplies of staff, are in principle taxable.[6]

6. However, Article 13A ('Exemptions for certain activities in the public interest')[7] provides, inter alia:

'(1) Member States shall exempt the following …:

…

(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;

(j) tuition given privately by teachers and covering school or university education;

(k) certain supplies of staff by religious or philosophical institutions for the purpose of subparagraphs (b), (g), (h)[8] and (i) of this Article and with a view to spiritual welfare;

…

(2) (a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (n)[9] of this Article subject in each individual case to one or more of the following conditions:

– they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,

– they shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned,

– they shall charge prices approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to value added tax,

– exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax.;

(b) 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,

5 See also Article 24(1) of Directive 2006/112.

6 See also Articles 52(a) and 56(1)(f), respectively, of Directive 2006/112.

7 See also Articles 132 to 134 of Directive 2006/112.

8 Subparagraphs (b), (g) and (h) cover, essentially, hospital and medical care, welfare and social security activities, and the protection of children and young people.

9 Subparagraphs (l), (m) and (n) cover, essentially, the activities of political, trade-union, religious, patriotic, philosophical, philanthropic, sports, or cultural organisations.

– 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 national procedure in Case C-434/05 'Horizon College'

7. According to the order for reference, Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West Friesland (Horizon College) is a teaching establishment at Alkmaar in the Netherlands. For the purposes of Article 13A(1)(i) of the Sixth Directive, it appears to be an organisation defined by the Member State as having educational objects. It principally provides secondary-level and vocational education.

8. It also, at least between 1995 and 1999, seconded teachers in its employment to other such establishments, to meet temporary shortages of teaching staff. Under the secondment contract, the teacher was assigned work by the other establishment, which also paid for liability insurance. The teacher's salary continued to be paid by Horizon College, which claimed the bare cost back from the other establishment, without taking any profit or charging VAT.

9. The tax authorities however considered that the service provided was not covered by the exemptions in the Sixth Directive, and therefore issued an additional assessment to VAT for the years 1995 to 1999.

10. Horizon College has challenged that assessment. Its appeal is now before the Hoge Raad (Supreme Court), which notes that, when members of teaching staff in an educational establishment are temporarily unavailable, they must be replaced for the period of their unavailability in order to achieve the aim of providing education, and that the levying of VAT automatically increases the cost price of that education.

11. The Hoge Raad wonders whether the situation may fall within the concept either of 'education' or of 'services … closely related thereto'. It therefore seeks a preliminary ruling on the following questions:

'(1) Is Article 13A(1)(i) of the Sixth Directive to be interpreted as meaning that the provision of education includes the making available, for consideration, of a teacher to an educational institution in order that he may temporarily provide teaching services there within the area of responsibility of that educational institution?

(2) If the answer to that question is in the negative, can the concept of "services closely related to education" be interpreted as including the service described in Question 1 above?

(3) Are the answers to the above questions affected by the fact that the body which makes the teacher available is itself also an educational institution?'

Facts and national procedure in Case C-445/05 Haderer

12. According to the order for reference, Mr Haderer worked for a number of years for the *Land* of Berlin as a teacher in a freelance capacity. In 1990, he worked at various adult education centres [10] for a total of often more than 30 hours per week, providing 'help with schoolwork' and running a ceramics and pottery course.

10 Two *Volkshochschule* and an *Elternzentrum*.

13. His status was covered by regularly renewed contracts which expressly stipulated that they did not create an employment relationship. He was paid an hourly fee for work actually provided. If a course was cancelled for any reason, or if he was prevented from working by sickness or any other cause, he was not entitled to a fee. He did, however, receive a contribution to the costs of his health insurance and pension scheme, and a 'leave allowance' calculated as a percentage of his fees.

14. Mr Haderer did not file a VAT return in respect of his fees. The tax authorities considered that he should have done so, and assessed him for VAT.

15. Mr Haderer challenged that assessment, first, on the ground that he was not an independent contractor (and thus did not fall within the definition of 'taxable person') and, second, on the ground that his activity was in any event exempt from VAT under Article 13A(1)(i) and/or (j) of the Sixth Directive.

16. His appeal is now before the Bundesfinanzhof (Federal Finance Court), which accepts the finding of a lower court that Mr Haderer was indeed acting as an independent contractor [11] and confirms that his services cannot be exempted from VAT under any applicable provision of domestic legislation. [12] It wonders however whether the latter fact is fully compatible with Community law. It observes inter alia that:

– Mr Haderer is not an organisation 'defined by the Member State concerned as having similar objects' within the meaning of Article 13A(1)(i), because he is not so 'defined';

– tuition at the adult education centres at which he provided his services, as defined by domestic law, appears to fall within the concept of 'school or university education' in Article 13A(1)(j);

– it may none the less be questioned whether tuition given by a private teacher is exempt only where he or she provides that tuition directly to pupils or students, and is paid by them, or whether the services may be provided in a school or university.

17. The Bundesfinanzhof therefore seeks a preliminary ruling on the following question:

'Is tuition for school or university given by a private teacher [13] to be exempt from tax under Article 13A(1)(j) of Directive 77/388/EEC only where the private teacher provides his tuition services directly to the pupils/students as recipients of those services – and therefore is paid by them – or is it sufficient for the private teacher to provide his tuition services to a school or university as recipient of those services?'

Procedure before the Court of Justice

18. In Case C-434/05, written observations have been submitted by Horizon College, the Netherlands Government, the Greek Government and the Commission. In Case C-445/05, written observations have been submitted by the defendant tax authority, by the Italian and Greek Governments and by the Commission.

11 Although his precise degree of independence might seem questionable from some of the elements in the case-file (see points 12 and 13 above), this finding of fact accepted by the referring court is the basis on which the Court must proceed.

12 The Commission has stated in its observations that Paragraph 4(21)(b) of the Umsatzsteuergesetz (Law on Turnover Tax) was amended in 1999 in such a way that it now appears to exempt from VAT the services of self-employed teachers who teach in educational establishments meeting certain requirements.

13 This phrase is a literal rendering of the original German which itself follows closely the wording of Article 13A(1)(j) of the Sixth Directive and might thus have been translated, following the English of the same provision, as 'tuition given privately by a teacher and covering school or university education'.

19. The hearings in the two cases were held consecutively on 14 December 2006. In Case C-445/05 Mr Haderer, even though he had requested a hearing, was in the event not represented. Nor did the tax authority or the German Government present any oral argument. Submissions were however made by the Greek Government and the Commission. The same two parties, together with Horizon College and the Netherlands Government, also made oral submissions in Case C-434/05.

Assessment

The nature of exemptions under Article 13A of the Sixth Directive

20. It has been remarked that there is a paradox in the nature and terminology of Community VAT, which I shall attempt to elucidate below. A 'taxable person' does not normally bear any burden of the tax. Provided that all the goods and services which he acquires are taxed, he may recover the tax in question from that which he charges to his customers. If his acquisitions are 'exempt', however, their cost will generally reflect an embedded element of VAT which cannot be deducted or recovered. It has even been said that 'whoever grasps the meaning of this will not have any trouble understanding VAT'. [14]

21. While that last assertion may seem optimistic, at least when it comes to understanding fully the exemptions in Article 13A of the Sixth Directive, it is none the less worth pausing to consider the paradox before examining the relevant exemptions in their present context.

22. VAT is a general tax on consumption, applied (as 'output tax') to each supply of goods or services as a proportion of their price, however many transactions may have taken place earlier in the production and distribution process. It is chargeable on each transaction at the applicable rate, after deduction of the amount of VAT ('input tax') borne directly by the various cost components. [15]

23. The burden is thus normally borne by the final consumer who, not being a taxable person acting as such, and making no onward taxable supply, can charge no output tax and deduct no input tax.

24. As regards exemptions from VAT, a distinction may be drawn between two categories: those with the right to deduction [16] and those without the right to deduction. [17]

25. Where a transaction is exempted *with* the right to deduction of input tax, the result is that the supply of goods or services concerned is entirely freed (at that stage) of any burden of VAT. Where a transaction is exempted *without* that right to deduction, any input VAT which has been charged on cost components will remain sealed in the price.

26. To illustrate that, let us take a hypothetical example in which a service is supplied at a price of 100 (exclusive of tax), where part of the cost of providing that service represents inputs (goods or services) acquired at a taxable net price of 50, and where the applicable rate of VAT is 20%.

14 J. Reugebrink and M.E. van Hilten, *Omzetbelasting* (Deventer, 1997), p. 40, quoted in B. Terra and J. Kajus *A Guide to the European VAT Directives* (IBFD, 2006), Vol 1, p. 443.

15 See Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14), and Article 1(2) of Directive 2006/112. Deductions are governed by Articles 17 to 20 of the Sixth Directive (Articles 167 to 192 of Directive 2006/112).

16 Covering, essentially, supplies to a customer in another Member State or a non-member country and regulated by Articles 14 to 16 of the Sixth Directive; see also Articles 140 to 166 of Directive 2006/112. (By way of derogation from the general rule, certain Member States have also been authorised to retain 'zero-rating' for certain specified supplies, with the same effect as an exemption with the right to deduction.)

17 Namely, exemptions 'within the territory of the country' under Article 13 of the Sixth Directive; see also Articles 132 to 137 of Directive 2006/112.

27. In the normal case, where the supply is a taxable transaction, the service provider will pay 60 for the inputs, of which 10 is VAT, and will charge 120 for the service, of which 20 is VAT. From the 20, he will deduct the 10 he has paid out and hand over the balance to the tax authority. His customer, if a final consumer, will bear the full VAT burden of 20. If however that customer is another taxable person, for whom the service is a cost component in a further onward taxable supply, the burden of 20 will again be recoverable from the output tax which he charges to his own customers, and the cost to him will be only the net price of 100.

28. If the supply of the service is an exempt transaction *with* the right to deduct,[18] it will attract no VAT but the service provider will still be able to 'deduct' (that is to say, in such circumstances, to recover from the tax authority) the input tax of 10. The cost to the customer, whether a final consumer or a taxable person making a taxable onward supply, will be only 100.

29. If the supply of the service is an exempt transaction *without* the right to deduct, the service provider will have to either bear himself the burden of the input VAT of 10 (reducing his profit, if any,[19] by that amount) or, more probably, and to the extent that market forces permit, pass it on to his customers by charging a price of 110, none of which can constitute deductible VAT. In the latter case, the cost to the customer, if a final consumer, will be greater than if the transaction had been exempt with the right to deduct but less than if it had not been exempt at all. If the customer is a taxable person making onward taxable supplies, however, the cost will be greater than in either of the other cases, since there is no VAT which can be deducted or recovered. The input tax of 10 is embedded in the price paid. And, in that case, the increase in cost will normally be reflected in the price of those onward supplies.

30. The exemptions in Article 13A of the Sixth Directive are all exemptions *without* the right to deduct.[20] Many of them are likely to concern supplies to final consumers, for whom the result will thus be a lower cost. School and university education, for example, is generally supplied to students who are not taxable persons and for whom the education does not represent a cost component in any onward taxable supply.[21] This may in part explain why exempting a supply from VAT is intuitively perceived as being 'a good thing'.

31. However, that is not so in all cases. Vocational training or retraining of employees, for example, may well be paid for by the employer, for whom the fees will be a cost component of his outputs. In such cases, assuming that – as will usually be the case – the employer's outputs are taxable, the exemption will lead to a greater cost than if the supply of training had been subject to VAT,[22] and that increase will have repercussions on the price of those outputs.

32. Consequently, it may be seen that exemptions under Article 13A are not always beneficial in terms of alleviating the burden of VAT. That consideration may explain the nuanced approach which the Court has consistently taken in interpreting the terms of those exemptions. In *Commission* v *Germany*,[23] for example, in relation to Article 13A(1)(i), the Court stated, on the one hand, that the exemptions are to be interpreted strictly, since they derogate from the general principle that VAT is to be levied on all services supplied for consideration by a taxable person[24] and, on the other hand,

18 Or a zero-rated supply; see footnote 16.

19 Such exemptions often concern supplies by non-profitmaking entities, where the difference between the cost of taxable inputs and the price of exempt outputs may be accounted for mainly or entirely by staff costs or other expenditure falling outside the scope of VAT.

20 Being exemptions within the territory of the country; see footnote 17 above. For consideration of the relationship between the two types of exemption, see the recent judgment in Case C-240/05 *Eurodental* [2006] ECR I-0000, paragraph 23 et seq., and the Opinion of Advocate General Ruiz-Jarabo Colomer in the same case, at point 24 et seq.

21 In so far as fees are charged, the educational establishment will frequently contract with parents to provide education to their children, but the effect is the same.

22 See point 29 above.

23 Case C-287/00 [2002] ECR I-5811.

24 See paragraph 43 and the case-law cited there; see most recently Case C-401/05 *VDP Dental Laboratory* [2006] ECR I-0000, paragraph 23.

that the concept of services closely related to education does not require an especially strict interpretation, since the exemption is designed to ensure that access to the benefits of education is not hindered by the increased costs that would follow if supply of such services were subject to VAT. [25]

33. It seems to me that, in any event, circumspection is called for when interpreting the exemptions. Notwithstanding the principle that exceptions to any general rule are normally to be interpreted strictly, here neither a systematically strict nor a systematically broad approach appears necessarily appropriate. The effect on the public purse and on the private pocket is not systematically predictable. Nor should the question whether the cost of access to a service is increased by taxation be used as a strict criterion for determining whether an exemption is applicable. It seems inevitable that the cost of access to practically any exempt service will include at least some non-deductible input VAT. However, the apparent intention to alleviate the fiscal burden on individual consumers of various socially beneficial services, often provided by public or charitable bodies, [26] may afford helpful guidance for the interpretation of the exemptions, even if it cannot be decisive as regards their definition.

34. It may also be borne in mind that in 2000, the Commission stated: 'Increasing privatisation of activities which were traditionally the exclusive reserve of the public sector has led to greater distortions of competition between exempt, non-taxable and taxable services. The VAT system for such services needs to be modernised taking account of all interests involved, in particular those of users of these services. ... Exemptions without the right to deduction for social, educational, cultural and other activities also need to be reviewed to see whether they meet current needs.' [27]

35. So far, that communication has borne no fruit. [28] The answers to the questions raised in the present cases must be sought therefore in a somewhat cloudy legislative environment, characterised moreover by tension between a drive towards fiscal harmonisation at Community level and a desire for individual fiscal control on the part of each Member State. [29]

36. The Court has also noted – inter alia in *Commission* v *Germany* – that the exemptions in Article 13 of the Sixth Directive constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another, [30] and that the aim of Article 13A is not to exempt every activity performed in the public interest, but only those which are listed and described in detail in it. [31]

37. Bearing in mind all the above considerations, I shall therefore endeavour to reach as straightforward an interpretation as possible of the actual terms of the exemptions in issue. That is the approach which seems to me best to serve the interests of Community harmonisation and legal certainty.

25 See paragraph 47 and the case-law cited there.

26 The list of exemptions in Article 13A is unsystematic but was intended to cover, according to the explanatory memorandum to the Commission's proposal for a Sixth Directive, 'those already existing in the majority of the Member States' (*Bulletin of the European Communities*, Supplement 11/73, p. 7, at p. 15). The list originally in Article 14 of the proposal (ibid., at p. 41; OJ 1973 C 80, p. 1) was none the less extensively modified in the course of its progress through the Council.

27 Communication from the Commission to the Council and the European Parliament: a strategy to improve the operation of the VAT system within the context of the internal market, COM(2000) 348 final, Annex, point 2.1.

28 Even if it had, the communication itself was subsequent to the material time in the questions referred to the Court in these two cases.

29 As the Economic and Social Committee has stated: 'It is an indictment of the Member States that a concept which was accepted in principle thirty-three years ago still seems as far from realisation as it was then. The history of VAT legislation in Europe is a catalogue of failure, not on the part of the Commission, which has acted with commendable consistency and unrelenting effort in attempting to move the situation forward, but on the part of the Member States, who have continually frustrated these efforts.' (Opinion of the Economic and Social Committee on 'A strategy to improve the operation of the VAT system within the context of the internal market' (OJ 2001 C 193, p. 45).)

30 See paragraph 44 and the case-law cited there. See most recently Case C-13/06 *Commission* v *Greece* [2006] ECR I-0000, paragraph 9.

31 See paragraph 45 and the case-law cited there. See most recently *Eurodental*, cited in footnote 20, paragraph 43.

Parallels and divergences between the two cases

38. There are clearly objective differences between the situations of Horizon College and Mr Haderer. Those differences, moreover, clearly indicate that the situation of Horizon College must be assessed in the light of Article 13A(1)(i) and that of Mr Haderer in the light of Article 13A(1)(j). The service provided by Horizon College to other teaching establishments cannot fall within Article 13A(1)(j) as 'tuition given privately by teachers'. Nor is Mr Haderer an organisation 'defined by the Member State concerned' as having educational objects within the meaning of Article 13A(1)(i) (though it cannot be asserted that individuals can never be so defined [32]).

39. However, beyond the differences, there are parallels to be drawn.

40. In terms of the legislative provisions in question, the two subparagraphs call for a consistent approach, in so far as possible. Not only do they fall within the same broad category of exemptions in the public interest, but they also concern the same narrower category of education and tuition. It might be reasoned that subparagraphs (i) and (j) are designed to regulate, between them, all exemptions in that field. [33]

41. On a more specific level, the potential obstacle to exemption is in both cases the existence of an intermediary educational establishment. If the same teachers from Horizon College had taught the same students in the context of Horizon College's own activities, the exemption would have been clear. The fact that they did so in the context of a secondment to another school removes that clarity. The same is true of Mr Haderer. If he had provided tuition privately and directly to students on private premises (whether his or theirs), there would have been no problem. The fact that tuition was given in the context of adult education centres creates the problem.

42. From that perspective, it seems to me important to consider first, in both cases, the nature of the service provided and the identity of the recipient of the service, in order to arrive at a consistent interpretation. Thereafter, I shall examine certain remaining issues particular to each case.

The nature and the recipient of the service provided

43. A possible analysis might be that, on the facts described in the orders for reference, both Horizon College and Mr Haderer were providing a service only to the respective intermediary establishments, not to the students of those establishments. The students were in a contractual or comparable relationship with the intermediary establishment only. Horizon College's secondment arrangements stipulated that it was the intermediary establishment which both controlled and took responsibility for the teaching provided by the seconded teachers. In Mr Haderer's case, it is not specified how much control the education centres exerted over his teaching, but it seems clear from the payment arrangements described that the students paid the centre for his services, in exactly the same way as if it had employed him, and therefore would have a claim only against the centre in respect of the quality of those services.

32 Compare Case C-453/93 *Bulthuis-Griffioen* [1995] ECR I-2341 and Case C-216/97 *Gregg* [1999] ECR I-4947, especially at paragraphs 14 to 19.

33 Compare Case C-141/00 *Ambulanter Pflegedienst Kügler* [2002] ECR I-6833, paragraph 36, with regard to different types of medical care exempted by subparagraphs (b) and (c).

44. On that analysis, the educational service which the students received was provided to them by the intermediary establishments, even though it was Horizon College's employees and Mr Haderer who, concretely, did the teaching. By contrast, the service which Horizon College and Mr Haderer provided to the intermediary establishments was not education or tuition *per se*, because it was the students, not the establishments, who received such education or tuition. The service was, rather, the making available of persons (staff or, in the case of Mr Haderer, himself) to enable the intermediary establishments to provide education or tuition to their students.

45. Consequently, such a service could not be exempted as 'education' or 'tuition' under Article 13A(1)(i) or (j) respectively.

46. The Commission proposes a different analysis which distinguishes between the two situations.

47. In its view, the service provided by Horizon College was a supply of staff to the intermediary establishment, a service which is not covered by Article 13A(1)(i) or by any other exemption.[34] Mr Haderer's activity may however be categorised as a provision of tuition within the meaning of subparagraph (j), because he did personally provide tuition. The identity of the recipient of the service is not specified in the terms of the exemption, as is the case for certain other exemptions. It is thus of no consequence in that regard. Subparagraphs (i) and (j) are designed between them, essentially, to cover the whole range of exemptions for educational activities – (i) as regards legal persons and (j) as regards natural persons.

48. As regards Horizon College's situation, the Commission's analysis is shared, in its essentials, by the Greek and Netherlands Governments. Horizon College, however, stresses the aim of not increasing the cost of a public or charitable service.[35] It argues that the cost is borne ultimately by the taxpayer and that the teaching itself is provided directly to the students by the teachers rather than by the establishment which employs them. The intermediary establishment would be unable to fulfil its statutory duty towards its students without Horizon College's teachers. Since teachers provide education to students whether they are employed by the establishment in which they actually teach or by another establishment which makes them available, the service of making teachers available falls within the notion of education for the purposes of Article 13A(1)(i).

49. For my part, however, I agree with the Greek and Netherlands Governments and with the Commission in this regard. When one educational establishment makes teachers available to another such establishment, where they teach the latter's students under its instructions and responsibility, the supply made by the first establishment is not of 'education' but of teaching staff. And, as the Commission pointed out at the hearing, the 'education, vocational training or retraining' which students receive in an educational establishment is not merely what is provided by teachers from their own knowledge and skills. Rather, it includes the whole framework of facilities, teaching materials, technical resources, educational policy and organisational infrastructure within the specific educational establishment in which those teachers work.

50. It may admittedly seem paradoxical that when a supplier does no more than recover the precise cost to him of something which falls outside the scope of VAT (namely salaries paid to employees), without himself adding any value, the transaction should be subject to 'value added' tax. However, exemption from VAT does not, as we have seen, ensure exemption from paradox. Moreover, many or

34 Although the Commission does not specifically mention subparagraph (k), cited in point 6 above, which is the only exemption for supplies of staff, it seems clear that the secondment in question does not meet the conditions of being made by a religious or philosophical institution or being with a view to spiritual welfare.

35 In addition to Case C-76/99 *Commission* v *France* [2001] ECR I-249 and *Commission* v *Germany*, cited in point 32 above, Horizon College cites *Ambulanter Pflegedienst Kügler*, cited in footnote 33, paragraph 29, and Case C-174/00 *Kennemer Golf Club* [2002] ECR I-3293, paragraph 19.

most of those making taxable supplies have salary costs which they cannot deduct or ignore when calculating their output VAT, so it would not be equitable for suppliers of staff alone to do so. And many or most supplies of staff will be for profit and will compete with other such supplies, so it would not seem equitable to exempt only those who make no profit.

51. As regards Mr Haderer's situation, however, I find it more difficult to agree with the Commission's analysis, much though I sympathise with it.

52. Primarily, it seems to me that the situation in question is excluded by a normal reading of the terms of Article 13A(1)(j) – except, perhaps, in the German version, a circumstance which may have given rise to the order for reference.

53. In German, the expression 'von Privatlehrern erteilten Schul- und Hochschulunterricht' might perhaps be capable of interpretation as referring to any tuition given by a teacher who is not on the employed staff of an educational establishment.

54. In all the other language versions in which the Sixth Directive was originally adopted, however, the service described is clearly the provision of private tuition,[36] and that definition must in my view prevail over an only partly divergent wording in a single language version.

55. The most typical situation evoked is no doubt that of individual lessons given by a teacher in the teacher's or student's own home. I accept none the less that tuition given to groups of individuals may fall within the notion, that the contractual relationship does not have to be between the teacher and the individual student (as the Commission has pointed out, the contract may well be with the student's parents), and that the identity of the premises in which the tuition is provided is not decisive.

56. However, I do not think that tuition given to a class of students under the aegis of an educational establishment, organised by that establishment on its premises and under its responsibility, can be covered by the wording, particularly when the financial and contractual arrangements are conducted independently by the educational establishment with, on the one hand, the students and, on the other hand, the teacher. As the Italian Government argues, the concept of private tuition simply cannot include, on a normal understanding, that kind of arrangement.[37]

57. As regards the Commission's contention that Article 13A(1)(j) should be interpreted as intended to cover all tuition given to students by individual teachers, who are not covered by subparagraph (i), regardless of whether it is given in the context of a private relationship or of an educational establishment, I do not feel that it can be supported by the text or legislative history of the provisions.

58. In the original proposal for a Sixth Directive,[38] the exemption for educational supplies read as follows:

'the supply of services, and supplies of goods incidental thereto, having an educational purpose or being directly connected with education or vocational training or retraining, by:

– bodies governed by public law; or

36 '[P]rivattimer givet af undervisere' in Danish; 'privelessen die particulier door docenten worden gegeven' in Dutch; 'tuition given privately by teachers' in English; 'leçons données, à titre personnel, par des enseignants' in French; 'lezioni impartite da insegnanti a titolo personale' in Italian.

37 See also the judgment of the French Conseil d'État (Council of State) of 26 January 2000 in Case 169 626 (*Revue de droit fiscal* n° 47 (2000), p. 1553), and in particular the Opinion of M. Goulard, commissaire du gouvernement.

38 Cited in footnote 26; Article 14A(1)(i) of the proposal.

– private educational establishments placed under the supervision of the competent public authorities and authorised to prepare students for a qualification from a school or university or a professional qualification, recognised or approved by the State'.

59. That formulation, although different from Article 13A(1)(i) as finally adopted, seems to cover the same area in substance and clearly shares with the latter an intention to exempt public and publicly approved education, but to tax other educational services in the private sector.

60. There was in the original proposal no precursor to the present subparagraph (j). The latter was inserted into the Directive at a relatively late stage, without any (registered) previous commentaries, and is thus 'not burdened by a demonstrable legislative history'. [39]

61. In order to exempt the services of individual teachers in the way argued for by the Commission, it would have been a relatively simple matter to insert a reference to such teachers into subparagraph (i). The fact that that was not done may not be conclusive in itself, but the differences between the terms of subparagraphs (i) and (j) suggest that the latter (which relates solely to private tuition covering school or university education, not vocational training or retraining, and does not cover closely related supplies) was intended as a circumscribed exception to the principle of taxation of all educational supplies not covered by subparagraph (i). That being so, I am of the view that, in the interests of a clear, certain and harmonised interpretation, it should be interpreted on its terms rather than as an adjunct to subparagraph (i).

62. I am aware that the conclusion which I thus reach may not seem entirely satisfactory. For a teacher's services to be exempt from VAT if he provides them directly to students or if he is employed by a school, but not if he contracts independently with a school to teach the students, seems perverse, particularly if regard is had to the aim of not hindering access to education by burdening the cost of that education with VAT. It might be argued that a situation such as Mr Haderer's should not fall between two stools which together seem designed to support it. Moreover, it would seem unjust if Mr Haderer were now to find himself liable for a tax burden which should have been borne, if at all, by the adult education centres for which he worked.

63. However, against those objections, a number of counter-objections may be formulated.

64. I have already pointed out that the list of exemptions in Article 13A(1) is not, unfortunately, of a systematic nature, so that inferences as to intention cannot necessarily be extrapolated from one exemption to another. But if a supply of teaching staff to an educational establishment is not intended to be exempt as 'education, vocational training or retraining', there is no necessary justification for supposing that a supply of individual teaching services to such an establishment is intended to be exempt as 'tuition'. If that were the intention, it seems to me that a clarification of the wording of the exemptions would be called for.

65. Moreover, from a practical point of view, it seems likely that the kind of arrangement entered into by a person in Mr Haderer's situation is an alternative (for whatever reason) to a contract of employment with the educational establishment in question, rather than an alternative to a private arrangement with individual students. Indeed, if it were the latter, the educational establishment might be seen as providing a service to the teacher, rather than the reverse. However, it seems to me that, for the same net remuneration and benefit, a contract of employment might well entail greater cost for the educational establishment (in terms of social contributions and other levies, or the burden of various other obligations imposed on or assumed by employers vis-à-vis their employees) than a contract with an independent service provider not subject to VAT.

39 B. Terra and J. Kajus *A Guide to the Sixth VAT Directive* (IBFD, 1991), Vol. A, pp. 604 and 605.

66. In that case, subjection of the service provision to VAT might not necessarily increase the cost of education any more than would recourse to a more conventional contract of employment. While the aim of not increasing the cost of access to education should be borne in mind,[40] that consideration may have to be balanced against others which militate against permitting the evasion or avoidance of the cost of justifiable social protection. In the final analysis, the question whether recourse to independent (sub)contractors, as opposed to contracts of employment, is desirable is not a matter to be dealt with – one way or the other – by the application or non-application of a VAT exemption whose general aim is to alleviate the burden on consumers of certain services deemed to be in the public interest.

67. And, whilst it would certainly be regrettable if Mr Haderer were to bear a burden which he should not have borne, the role of this Court is not to determine the outcome of the national proceedings but to interpret Community law as it should be applied in general. It might yet be the case that Mr Haderer will be able to pass on the burden of any tax which he should have charged to the educational establishments at which he worked, retroactively and even at this stage.

68. In the light of the above considerations, I am of the view that a supply of teaching staff of the kind provided by Horizon College is not to be regarded as 'education' within the meaning of Article 13A(1)(i) of the Sixth Directive, and that teaching services of the kind provided by Mr Haderer is not to be regarded as 'tuition given privately by teachers' within the meaning of Article 13A(1)(j).

69. I turn now to the outstanding questions specific to each of the two cases.

Case C-434/05 Horizon College: closely related supplies

70. Article 13A(1)(i) of the Sixth Directive exempts not only education and vocational training but also supplies of goods or services closely related thereto. The Court has defined an ancillary service of that kind as one which 'constitutes not an end in itself but a means of enhancing the enjoyment or benefit of the principal service supplied by the provider'.[41]

71. Horizon College and the Commission submit that a supply of teaching staff by one educational establishment to another is in principle a supply of a service closely related to education. If students are receiving education, or vocational training, from an educational establishment, and that establishment suffers a temporary shortage of qualified teachers or instructors, then the benefit of the education or training received will be greatly enhanced by the secondment of qualified staff from another such establishment.

72. That view appears so immediately and obviously correct, as a matter of common sense, that a very powerful reason indeed would seem necessary in order to refute it. The Greek and Netherlands Governments have put forward arguments in support of their contention that Horizon College's supplies of staff cannot be exempted on that basis, but I do not consider those arguments sufficiently powerful.

40 It will be recalled, however, that if the education provided by an establishment in which a teacher such as Mr Haderer provides his services is exempt, its cost will already include non recoverable VAT on various inputs (including teaching equipment and materials such as, for example, potter's clay) but there will, pursuant to the aim of Article 13A, be no VAT burden on the profit, if any, taken by the establishment.

41 See Joined Cases C-394/04 and C-395/04 *Ygeia* [2005] ECR I-10373, paragraph 19 and the case-law cited there.

73. Both Governments submit that exemption is excluded because the supply in question (of Horizon College's teaching staff) is not made to the recipients of the education or vocational training (the students) but to the provider of that principal service (the other educational establishment). The Netherlands Government adds that the supply of staff is unconnected with the supply of education or training by Horizon College to its own students. It is thus not 'closely related' either to the principal exempt service supplied to the other establishment's students or to Horizon College's principal exempt activity.

74. The Netherlands Government in particular cites a number of judgments [42] to support the contention that, essentially, in order to qualify as 'closely related', a supply must be made within the same supplier/recipient relationship as the principal exempt supply. However, in none of those cases does the Court seem to have based its reasoning on such a criterion. In *Card Protection Plan*, for example, the Court did not even examine the question of the existence of a 'related service', [43] and in *Commission* v *Germany*, even though the two services (university education for students and research activities carried out by universities for consideration) were manifestly supplied to different recipients, the Court based its reasoning on the fact that the research activities were in no way necessary in order to provide the education. [44]

75. Moreover, in *Stichting Kinderopvang Enschede*, [45] the Court clearly accepted that, in principle, when an organisation which provides childcare services exempt under Article 13A(1)(g) or (h) of the Sixth Directive also, as an alternative, offers a service as an intermediary between other persons offering childcare and persons seeking childcare services, that separate service as an intermediary may qualify as 'closely linked' to childcare, even though the organisation does not in that case provide the childcare service itself to those particular recipients.

76. But the Court also made it clear in that judgment that a number of conditions must be satisfied in order to benefit from exemption.

77. In that context, it is appropriate to mention the Greek Government's contention that the supplies of staff made by Horizon College must be declared taxable because the Court has insufficient information at its disposal to ascertain whether they do indeed qualify as exempt.

78. However, the Court is asked whether 'the making available, for consideration, of a teacher to an educational institution in order that he may temporarily provide teaching services there within the area of responsibility of that educational institution' qualifies *in principle* as a service closely related to education or training within the meaning of Article 13A(1)(i). The service thus defined does in my view so qualify. In the final analysis, it will qualify *in fact* only if it meets a number of conditions, a matter which must be determined by the relevant national court. The fact that this Court does not have at its disposal all the information needed to reach a view neither authorises it to rule that the service cannot be exempt nor prevents it from offering guidance as to the assessment of the conditions to be met.

79. Those conditions flow from the terms of the Sixth Directive itself, as clarified by the judgment in *Stichting Kinderopvang Enschede*.

42 Case C-349/96 *Card Protection Plan* [1999] ECR I-973; *Commission* v *France*, cited in footnote 35; Case C-287/00 *Commission* v *Germany*, cited in footnote 23; Case C-472/03 *Arthur Andersen* [2005] ECR I-1719; *Ygeia*, cited in footnote 41.

43 See in particular paragraphs 22 to 24 of the judgment.

44 See in particular paragraph 48 of the judgment.

45 Case C-415/04 [2006] ECR I-1385.

80. First, since the main service to which the supply in issue is closely related is the education provided, not by Horizon College itself but by the intermediary establishment, that education must itself meet the conditions for exemption pursuant to Article 13A(1)(i).[46] In particular, it must constitute 'children's or young people's education, school or university education, vocational training or retraining' and it must be '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'.

81. Second, the supply of staff must be 'essential to the transactions exempted', in the words of Article 13A(2)(b), first indent. That means, to adapt the formulation in *Stichting Kinderopvang Enschede*,[47] that it must be of such a nature or quality that the intermediary establishments could not be assured of obtaining a service of the same value without the secondment of teaching staff from Horizon College.

82. In that regard, as has been pointed out by the Netherlands Government, the national court must determine whether a placement agency or other supplier of staff (whose services would be subject to VAT) could have provided a service of the same value. For example, it may or may not be the case that Horizon College's staff recruitment and training procedures are such that an exceptionally high standard of teaching staff is guaranteed, or that an agency will normally be better placed to supply temporary staff at very short notice. Such factors, and any others relevant to the quality of the service provided, must be assessed by the competent court.

83. Third, in accordance with Article 13A(2)(b), second indent, the basic purpose must not be to obtain additional income by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT. In that regard, as the Netherlands Government has indicated, it may not be enough to establish that Horizon College charged no more than the cost of the salaries and other expenses related to the employment of the teachers seconded. If it had not made the teachers available to other establishments, Horizon College would presumably have had to pay their salaries none the less. The Court has no information as to whether the teachers in question were partially employed within Horizon College and seconded elsewhere for the balance of each working week, or whether during the relevant periods their services were simply not required within Horizon College. In any event, the transaction provided additional income (and thus, overall, additional profit – or reduced loss) even though no specific profit may have been levied over and above the bare cost of the staff in question. Further findings of fact may be necessary in order to determine whether that was the basic purpose of the secondment arrangements, or merely an ancillary consequence.

84. Fourth, it should be noted that Member States are entitled to impose a number of other conditions for exemption, pursuant to Article 13A(2)(a) of the Sixth Directive.[48] The imposition of such additional conditions has not been mentioned in the present proceedings, so it may be surmised that none of them applies. If conditions are imposed pursuant to that provision, however, their fulfilment must clearly be verified by the national court.

85. Finally, in relation to the Hoge Raad's third question, it is of course necessary that the supply of staff be made by a body or organisation referred to in Article 13A(1)(i). It does not seem to be disputed that Horizon College is such an organisation.

46 See *Stichting Kinderopvang Enschede*, paragraphs 21 to 23 and operative part.

47 See paragraphs 25 to 28 and the operative part.

48 See point 6 above.

Case C-445/05 Haderer: school or university education

86. In its written observations to the Court, the defendant tax authority has put forward an objection of a specific kind to exemption in the case of Mr Haderer. His tuition in pottery, ceramics, and 'help with schoolwork', it contends, does not cover 'school or university education' as defined by various national provisions. In particular, it does not comply with the kind of predetermined programme that is a necessary feature of such education.

87. I have already reached the view that Mr Haderer's tuition cannot qualify for exemption in any event. However, it seems to me important to make clear that it should not be excluded on the basis put forward by the tax authority.

88. The referring court is itself satisfied that the areas covered by the teaching do indeed seem to constitute 'school or university education' and it is difficult to disagree with that assessment. On the one hand, 'help with schoolwork' must by definition fall within the category. On the other, instruction in making ceramic or pottery articles is very common in schools throughout Europe. Although not perhaps the most strictly academic activity, such training none the less provides development in manual and artistic skills of a kind which is commonly pursued in school education.

89. The concept of school or university education within the meaning of the exemption must be given a Community definition.[49] In my view, that definition should be relatively broad. If it were not, private tuition of many kinds designed to provide support for schoolchildren might find itself subject to VAT, contrary to the apparent intention of the exemption. There must of course be a defining line between exempt tuition and purely recreational activities of no educational value, but any subject or activity in which instruction is commonly given in schools or universities must in my view fall within the scope of the exemption, regardless of whether it follows a strictly defined programme or curriculum.

90. Moreover, it seems essential and inevitable that the term 'school or university education' must have the same definition in subparagraphs (i) and (j). If one were to follow the tax authority's argument, certain kinds of education and training actually provided in public educational establishments would thus be excluded from the exemption in (i), with highly problematical results.

Conclusion

91. I am therefore of the opinion that the Court should give the following answers to the questions raised by the Hoge Raad in Case C-434/05:

– On a proper construction of Article 13A(1)(i) of Sixth Council Directive 77/388/EEC, the temporary supply of a teacher to an educational establishment, in order to provide teaching services under the responsibility of that establishment, does not constitute provision of education or vocational training or retraining, but does in principle constitute the supply of a service closely related thereto.

– In order to qualify for exemption from VAT under that provision, the supply in question must be made by a body or organisation as referred to therein, and must comply with the requirements of Article 13A(2)(b) of the same directive, as clarified by the Court in its judgment in Case C-415/04 *Stichting Kinderopvang Enschede*, and, where applicable, with those of Article 13A(2)(a).

49 There is of course a certain amount of case-law on the concepts of education and training in connection with prohibitions of discrimination as regards access to those services, but it may not be wholly transposable to the field of exemptions from VAT.

92. In Case C-445/05, I am of the opinion that the Court should reply to the Bundesfinanzhof as follows:

– On a proper construction of Article 13A(1)(j) of Directive 77/388, the concept of tuition given privately by teachers does not include a situation in which a self-employed teacher contracts with an educational establishment to provide tuition to students in courses organised by that establishment on its premises and under its responsibility, for which the establishment and not the teacher receives payment from the students.