Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

20 November 2019 *

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Sixth Directive 77/388/EEC – Article 13A(1)(f) – Exemptions – Services supplied by independent groups of persons – Services provided to members and non-members)

In Case C-400/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hof van Cassatie (Court of Cassation, Belgium), made by decision of 19 April 2018, received at the Court on 18 June 2018, in the proceedings

Infohos

v

Belgische Staat,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb (Rapporteur), T. von Danwitz, C. Vajda and A. Kumin, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Infohos, by F. Soetaert, advocaat,

– the Belgian Government, by J.-C. Halleux, P. Cottin and C. Pochet, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, R. Campos Laires, P. Barros da Costa and J. Marques, acting as Agents,

– the European Commission, by L. Lozano Palacios and W. Roels, acting as Agents,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 11 July 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13A(1)(f) 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 request has been made in the course of proceedings between Infohos and the Belgische Staat (Belgian State) concerning an adjustment of value added tax (VAT) for 2002 to 2004.

Legal framework

EU law

3 The Sixth Directive was repealed and replaced, from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, given the material time in the main proceedings, the case is still governed by the Sixth Directive.

4 The ninth and eleventh recitals of the Sixth Directive stated:

'Whereas the taxable base must be harmonised so that the application of the Community rate to taxable transactions leads to comparable results in all the Member States;

…

Whereas a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States'.

5 Article 2 of the Sixth Directive provided:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…'

6 Article 13 of the Sixth Directive, entitled 'Exemptions within the territory of the country', provided:

'A. Exemptions for certain activities in the public interest

1. 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:

…

(f) services supplied by independent groups of persons whose activities are exempt from or are not subject to value added tax, for the purpose of rendering their members the services directly necessary for the exercise of their activity, where these groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to produce distortion of competition;

…'

7 Article 13A(1)(f) of the Sixth Directive corresponds to Article 131 and to Article 132(1)(f) of Directive 2006/112.

Belgian law

8 Article 44(2)(1a) of the VAT Code, in the version applicable to the facts at issue in the main proceedings, provided for exemption from VAT in the case of 'the supply of services to their own members by independent groups of persons that carry on an activity which is exempted under this article or in relation to which they are not taxable persons, where those services are directly necessary for the carrying on of that activity and where the groups undertake to claim from their members only the exact reimbursement of the share of joint expenses for which each member is liable, provided that that exemption is not likely to cause distortion of competition; the King shall stipulate the conditions for the application of this exemption'.

9 Article 2 of Koninklijk Besluit nr. 43 met betrekking tot de vrijstelling op het stuk van de belasting over de toegevoegde waarde ten aanzien van de door zelfstandige groeperingen van personen aan hun leden verleende diensten (Royal Decree No 43 on the exemption from value added tax of supplies of services by independent groups of persons to their members), of 5 July 1991 (*Belgisch Staatsblad*, 6 August 1991, p. 17215), provided:

'The supply of services to their own members by independent groups of persons governed by Article 1 shall be exempt from tax provided that:

1. The activities of the group consist exclusively in the supply of services directly in the interest of the members themselves and all the members carry on an activity that is exempt under Article 44 of the [VAT] Code or in respect of which they are not taxable persons'.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 Infohos is an association which specialises in hospital information technology. It supplies hospital IT services firstly to hospitals which are affiliated to it as members and, secondly, to non-members.

11 On 5 September 2000, it concluded a cooperation agreement with IHC-Group NV for the joint development, but on the instructions of Infohos, of new or innovative software applications for the hospitals affiliated to it as members.

12 Infohos did not register itself as a taxable person for VAT purposes on the ground that it considered that it could not be regarded as such under Article 6 of the VAT Code, or that, at the very least, it was exempt under Article 44(2)(1a) of that code.

13 Following a tax inspection on 20 April 2005 by the Belgian tax authorities, those authorities considered that the services which Infohos and IHC-Group had provided to each other should be subject to VAT. Moreover, according to the tax authorities, the fact that taxable transactions had been performed for non-members meant that the transactions performed for members of Infohos should also be subject to VAT since Infohos was no longer entitled to benefit from the exemption under Article 44(2)(1a) of the VAT Code for the services provided to its members.

14 On 13 December 2005, the tax authorities drew up a record identifying those infringements and, subsequently, issued a summons for payment, which was declared enforceable.

15 On 22 May 2007, by an *inter partes* application lodged at the rechtbank van eerste aanleg Brugge (Court of First Instance, Bruges, Belgium), Infohos requested that that court declare that application admissible and well founded and, therefore, that it suspend the execution of the summons issued by the tax authorities, rule that the sums requested were not payable and, in the alternative, order the waiver of the fines imposed or, at the very least, reduce them substantially, order the reimbursement of all sums collected under that summons, together with default interest, and order the Belgian State to pay the costs.

16 By judgment of 23 February 2009, the rechtbank van eerste aanleg Brugge (Court of First Instance, Bruges) held that the conditions for applying the exemption under Article 44(2)(1a) of the VAT Code were not satisfied and that Infohos was liable for VAT in respect of all the services it had provided to both members and non-members.

17 Infohos brought an appeal against that judgment before the hof van beroep te Gent (Court of Appeal, Ghent, Belgium).

18 By judgment of 21 September 2010, that court held that Infohos could not rely on the exemption under Article 44(2)(1a) of the VAT Code as this would distort competition. Moreover, it held that, as a hybrid taxable person for the purposes of Article 46 of the VAT Code, Infohos was entitled to bring an action for compensation against the Belgian State.

19 The tax authorities then brought an appeal on a point of law before the Hof van Cassatie (Court of Cassation, Belgium).

20 By judgment of 31 October 2014, that court set aside the judgment of the hof van beroep te Gent (Court of Appeal, Ghent) on the ground that it was contradictory to hold, on the one hand, that Infohos could not invoke Article 44(2)(1a) of the VAT Code and that it therefore had to be regarded as a fully taxable person, and, on the other, that it could rightly claim that it was a hybrid taxable person.

21 The Hof van Cassatie (Court of Cassation) referred the case to the hof van beroep te Antwerpen (Court of Appeal, Antwerp, Belgium).

22 By judgment of 20 September 2016, the latter court held that Infohos could not rely on the exemption under Article 44(2)(1a) of the VAT Code since it also supplied services to non-members.

23 Infohos brought an appeal on a point of law against that judgment before the Hof van Cassatie (Court of Cassation) on the ground, inter alia, that the condition for applying the exemption from VAT, contained in Article 2(1) of Royal Decree No 43, in accordance with which the independent group of persons could provide services exclusively to its own members, was not contained in Article 13A(1)(f) of the Sixth Directive and was therefore contrary to that provision.

24 The referring court notes that the hof van beroep te Antwerpen (Court of Appeal, Antwerp) held that it followed from a narrow interpretation of Article 13A(1)(f) of the Sixth Directive – and, in particular, of the condition, laid down in that provision, that independent groups of persons merely claim from their members exact reimbursement of their share of the joint expenses – that that provision excluded services also being provided by those groups to persons who were not members. The hof van beroep te Antwerpen (Court of Appeal, Antwerp) also considered that, since it did not confine itself to providing services to its members, but also sold marketing application software to third parties, Infohos could not rely on the exemption for any of its activities.

25 The dispute that has thus arisen cannot be resolved, according to the referring court, without an interpretation of Article 13A(1)(f) of the Sixth Directive.

26 In those circumstances, the Hof van Cassatie (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Article 13A(1)(f) of [the Sixth Directive], now Article 132(1)(f) of [Directive 2006/112], be interpreted as permitting Member States to attach an exclusivity condition to the exemption provided for therein, whereby an independent group which also supplies services to non-members is also liable in full to VAT for the services supplied to its members?’

The question referred for a preliminary ruling

27 By its question, the referring court asks, in essence, whether Article 13A(1)(f) of the Sixth Directive must be interpreted as meaning that it precludes a provision of national law, such as that at issue in the main proceedings, which makes the grant of exemption from VAT subject to the condition that independent groups of persons supply services exclusively to their members, with the result that such groups which also supply services to non-members are liable in full to VAT, including for the services they supply to their members.

28 In order to answer that question, it should be recalled that, under Article 13A(1)(f) of the Sixth Directive, Member States are to exempt – under conditions which they are to lay down for the purposes of ensuring the correct and straightforward application of the exemptions provided for in that provision and of preventing any possible evasion, avoidance or abuse – services supplied by independent groups of persons whose activities are exempt from or are not subject to value added tax, for the purpose of rendering to their members the services directly necessary for the exercise of their activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to produce distortion of competition.

29 In that regard, it is clear from the ninth and eleventh recitals of the Sixth Directive that the directive is designed to harmonise the basis of assessment of VAT and that the exemptions from that tax constitute independent concepts of EU law which, as the Court has held, must be placed in the general context of the common system of VAT introduced by that directive (judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 29 and the case-law cited).

30 It is, moreover, settled case-law that the terms used to specify the exemptions set out in Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect. It is not the purpose of the case-law of the Court to impose an interpretation which would make the exemptions more or less inapplicable in practice (judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 30 and the case-law cited).

31 As regards the wording of Article 13A(1)(f) of the Sixth Directive, as mentioned in paragraph 28 of this judgment, the exemption laid down in that provision covers the supply of services by independent groups of persons to their members. However, it is not apparent from that wording that the supply of services by such groups to their members are excluded from that exemption where, in addition, those groups also supply services to non-members.

32 Thus, although, according to that provision, that exemption may be granted only in respect of the supply of services by independent groups of persons to their members, it cannot be inferred from its wording that it may be applied only if those groups are required to provide services only for their members.

33 According to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others*, C-197/18, EU:C:2019:824, paragraph 48).

34 As regards the context of Article 13A(1)(f) of the Sixth Directive, it must be pointed out that Article 13A of that directive is entitled 'Exemptions for certain activities in the public interest' and is in Title X of that directive which deals with exemptions. That heading indicates that the exemption provided for in Article 13A(1)(f) of that directive covers only independent groups of persons whose members carry on activities in the public interest (see, to that effect, judgment of 21 September 2017, *Commission* v *Germany*, C-616/15, EU:C:2017:721, paragraph 44).

35 It is not clear from that context whether that exemption is confined only to independent groups of persons which supply services exclusively to their members.

36 As regards the purpose of Article 13A(1)(f) of the Sixth Directive, it must be recalled that it is clear from the case-law of the Court that that provision seeks to create an exemption from VAT in order to avoid an entity offering certain services being required to pay that tax when it has found it necessary to cooperate with other entities by means of a common structure set up to undertake

activities essential to the provision of those services (judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 37).

37 Therefore, it must be considered that the aim of the provisions contained in Article 13A(1) of the Sixth Directive, as a whole, is to exempt from VAT certain activities in the public interest with a view to facilitating access to certain services and the supply of certain goods by avoiding the increased costs that would result if they were subject to VAT (see, to that effect, judgments of 5 October 2016, *TMD*, C-412/15, EU:C:2016:738, paragraph 30, and of 21 September 2017, *Aviva*, C-605/15, EU:C:2017:718, paragraph 28).

38 In accordance with the national provision at issue in the main proceedings, the exemption from VAT provided for in Article 13A(1)(f) of the Sixth Directive is systematically refused in respect of the supply of services to their own members by independent groups of persons when those groups also supply services to non-members and therefore all of the services are subject to VAT.

39 However, although an independent group of persons, such as Infohos, also supplies services to non-members, the fact remains that the services it supplies to its members contribute directly to the exercise of activities in the public interest referred to in that provision. Supplies of services by an independent group of persons are covered by the exemption laid down in Article 13A(1)(f) of the Sixth Directive where they contribute directly to the exercise of activities in the public interest mentioned in Article 13A(1) of the Sixth Directive.

40 In those circumstances, it must be found that the act of refusing to grant an independent group of persons, which meets all of the conditions laid down in Article 13A(1)(f) of the Sixth Directive, the exemption referred to in that provision solely because it also supplies services to non-members would restrict the scope of that provision by excluding from the exemption from VAT services supplied by that group to its members, and such a restriction of the scope of that provision is not supported by the purpose of that directive, as recalled in paragraph 36 of this judgment (see, by analogy, judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraphs 36 and 37).

41 Thus, the application of that provision to the supply of services by an independent group of persons directly to its own members, who must carry out an activity which is exempt from VAT or in relation to which they are not taxable persons, is consistent with the objective of Article 13A(1)(f) of the Sixth Directive since that objective does not prevent a group of that kind from supplying services to non-members.

42 That being the case, in accordance with Article 13A(1)(f) of the Sixth Directive, only the supply of services to members of the independent group of persons is exempt, since those services are supplied within the framework of the objectives for which such a group has been set up and are therefore provided in accordance with the purpose of that group (see, to that effect, judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 39). In that regard, it is for the referring court to ascertain whether the supply of services by Infohos satisfies all of the conditions laid down in Article 13A(1)(f) of the Sixth Directive.

43 By contrast, the supply of services to non-members may not benefit from that exemption and remains subject to VAT. Since the supply of those services does not fall within the scope of the exemption set out in Article 13A(1)(f) of the Sixth Directive, Article 2(1) of that directive requires that the supply of those services, effected for consideration within the territory of a Member State by a taxable person acting as such, is subject to VAT.

44 Therefore, in the light of the wording and the purpose of Article 13A(1)(f) of the Sixth Directive, the exemption from VAT provided for therein is not subject to the condition that the supply of services concerned is offered exclusively to members of the independent group of persons concerned.

45 The Belgian Government submits that Article 13A(1)(f) of the Sixth Directive does not preclude the national legislation at issue in the main proceedings in so far as that legislation seeks to prevent any distortion of competition in accordance with the condition laid down in Article 13A(1)(f) of the Sixth Directive.

46 It should be recalled that, under Article 13A(1)(f) of the Sixth Directive, the exemption laid down in that provision is to apply provided that it is not likely to cause distortion of competition.

47 In that regard, the Court has already held that it is the VAT exemption in itself which must not be liable to give rise to distortions of competition on a market in which competition will in any event be affected by the presence of an operator which provides services for its members and which is prohibited from seeking profits. It is thus the fact that the provision of services by a group is exempt, and not the fact that this group satisfies the other conditions of the provision in question, which must be liable to give rise to distortions of competition in order that this exemption may be refused (judgment of 20 November 2003, *Taksatorringen*, C-8/01, EU:C:2003:621, paragraph 58).

48 Accordingly, the Court has held that the grant of VAT exemption must be refused if there is a genuine risk that the exemption may by itself, immediately or in the future, give rise to distortions of competition (judgment of 20 November 2003, *Taksatorringen*, C-8/01, EU:C:2003:621, paragraph 64).

49 In order to determine whether the application of the exemption mentioned in Article 13A(1)(f) of the Sixth Directive to a specific activity is likely to cause distortion of competition, it is certainly possible for the national legislature to lay down rules which are easily managed and supervised by the competent authorities (see, to that effect, judgment of 21 September 2017, *Commission* v *Germany*, C-616/15, EU:C:2017:721, paragraph 65).

50 However, the condition relating to the absence of distortion of competition, mentioned in that provision, does not allow the scope of the exemption laid down therein to be limited in a general manner (see, to that effect, judgment of 21 September 2017, *Commission* v *Germany*, C-616/15, EU:C:2017:721, paragraph 67).

51 That is precisely the effect of the national provision at issue in the main proceedings, which establishes a general presumption as to the existence of a distortion of competition and limits, in a general manner, the scope of the exemption provided for in Article 13A(1)(f) of the Sixth Directive by excluding from the exemption from VAT services supplied by independent groups

of persons to their members when those groups also supply services to non-members, whereas, as is clear from paragraph 43 of this judgment, those services to non-members do not fall within the scope of that exemption and must therefore be subject to VAT.

52 Moreover, the Belgian Government submits that the national provision at issue in the main proceedings enables the prevention of any possible evasion, avoidance or abuse.

53 In that regard, it is sufficient to note that although, according to the introductory words of Article 13A(1) of the Sixth Directive, Member States are to lay down the conditions for exemptions in such a way as to ensure the correct and straightforward application of those exemptions and to prevent any possible evasion, avoidance or abuse, those conditions cannot affect the substantive definition of the exemptions (judgment of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 39). That is precisely the effect of the conditions provided for in the national legislation at issue in the main proceedings which establish, in respect of independent groups of persons which also supply services to non-members, a general and irrebuttable presumption of tax evasion, avoidance or abuse, but do not, however, identify precisely the type of tax evasion, avoidance or abuse that that legislation seeks to prevent.

54 In the light of all the foregoing considerations, the answer to the question referred must be that Article 13A(1)(f) of the Sixth Directive must be interpreted as meaning that it precludes a provision of national law, such as that at issue in the main proceedings, which makes the grant of exemption from VAT subject to the condition that independent groups of persons provide services exclusively to their members, with the result that such groups which also supply services to non-members are liable in full to VAT, including for the services they supply to their members.

Costs

55 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 (Second Chamber) hereby rules:

Article 13A(1)(f) 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 must be interpreted as meaning that it precludes a provision of national law, such as that at issue in the main proceedings, which makes the grant of exemption from value added tax (VAT) subject to the condition that independent groups of persons supply services exclusively to their members, with the result that such groups which also supply services to non-members are liable in full to VAT, including for the services they supply to their members.

[Signatures]