JUDGMENT OF THE COURT (Third Chamber)

12 January 2006 *

In Case C-246/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 26 May 2004, received at the Court on 10 June 2004, in the proceedings

Turn- und Sportunion Waldburg

v

Finanzlandesdirektion für Oberösterreich,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet, S. von Bahr, U. Lõhmus (Rapporteur) and A. Ó Caoimh, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Austrian Government, by H. Dossi, acting as Agent,

— the Commission of the European Communities, by G. Wilms and D. Triantafyllou, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the provisions of Article 13(B)(b) and (C) 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 Turn- und Sportunion Waldburg and the Finanzlandesdirektion für Oberösterreich with regard to whether it is possible for non-profit-making sports clubs leasing or letting immovable property to exercise the option for taxation granted to taxable persons by the national legislature pursuant to Article 13(C)(a) of the Sixth Directive.

Legal context

Community legislation

3 Article 13(A)(1) of the Sixth Directive provides:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(m) certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education;

...'

4 Under Article 13(B)(b) of the Sixth Directive, the leasing and letting of immovable property are exempt, with the exception of certain transactions which are not relevant to the present case.

5 Article 13(C) of that directive provides:

'Member States may allow taxpayers a right of option for taxation in cases of:

(a) letting and leasing of immovable property;

...

Member States may restrict the scope of this right of option and shall fix the details of its use.'

National legislation

6 Pursuant to Paragraph 6(1)(14) of the 1994 Law on turnover tax (Umsatzsteuergesetz,'the UStG 1994'), transactions of non-profit-making associations whose purpose under their statutes is the practice or furthering of physical sporting activities are

exempt from value added tax (VAT) and input tax may not be deducted. That exemption does not apply to services supplied as part of an agricultural or forestry undertaking, an artisanal, business or commercial activity within the meaning of Paragraph 45(3) of the Federal Tax Code (Bundesabgabenordnung).

7 Paragraph 6(1)(16) of the UStG 1994 exempts the leasing and letting of immovable property from tax. Making commercial and other premises available is to be regarded as leasing or letting of immovable property.

8 According to Paragraph 6(2) of the UStG 1994, a business may treat a transaction which is exempt under Paragraph 6(1)(16) of the UStG 1994 as subject to VAT.

9 Under Paragraph 6(1)(27) of the UStG 1994, the transactions of small businesses are exempt from tax. Under Paragraph 6(3) of the UStG 1994, a business whose transactions are exempt under Paragraph 6(1)(27) may inform the Finanzamt (Tax Office) in writing that it wishes to waive application of Paragraph 6(1)(27) of the UStG 1994.

The main proceedings and the questions referred for a preliminary ruling

10 The claimant in the main proceedings is a sports club classed as a non-profit-making association. In 1997 it commenced construction of an annexe to its clubhouse, part of which was intended to be used for the practice of sport, whilst the

other part, having a surface area equal to approximately a quarter of the total area of the annexe, was to be used as a refreshment bar and leased to a lessee. In the 1997 VAT declaration, the club deducted a total amount of ATS 39 285 in respect of the input VAT paid exclusively for that part of the annexe intended to be used for the bar. It opted to waive application of Paragraph 6(1)(27) of the UStG 1994 relating to small businesses.

11 By decision of 27 August 1999, the Finanzamt refused those deductions on the ground that a sports club exempt from tax under Paragraph 6(1)(14) of the UStG 1994 without having the right to make deductions could not, making use of the right of option, choose to waive exemption in respect of turnover resulting from the leasing and letting of immovable property. The individual exemption available to non-profit-making sports club under Paragraph 6(1)(14) of the UStG 1994 took precedence over the exemption of leasing and letting of immovable property under Paragraph 6(1)(16) of the UStG 1994.

12 The complaint brought against that decision was dismissed as unfounded on the ground that Paragraph 6(1)(14) of the UStG 1994, being a special law, prevails over point 16 of that paragraph. The tax authorities considered that the legal situation in question was not altered at all by the sports club's waiver of the rules relating to small businesses.

13 The claimant brought an action against that decision before the Verwaltungsgerichtshof (Higher Administrative Court). In its decision making the reference, that court took the view that the tax exemption of services supplied to persons not taking part in sport or physical education, such as the leasing or letting of a refreshment bar, is not covered by Article 13(A)(1)(m) of the Sixth Directive and cannot therefore be based on that provision. It was in doubt, however, whether the exemption of leasing or letting carried out by non-profit-making sports clubs could be based on Article 13(B)(b) of that directive.

14 Having held that, according to the UStG 1994, sports clubs cannot opt for taxation of their leasing and letting transactions, the national court was also in doubt with regard to the interpretation of Article 13(C) of the Sixth Directive and to the possibility of excluding certain taxable persons from the possibility offered to other taxable persons to opt for taxation.

15 In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May a Member State exercise its option under Article 13(C) of the Sixth ... Directive ... to give taxable persons the right, despite the tax exemption for the letting of immovable property provided for in Article 13(B)(b) of the directive, to opt for taxation only in a uniform manner or may the Member State distinguish by reference to types of transactions or groups of taxable persons?

(2) Does Article 13(B)(b) in conjunction with (C)(a) of the [Sixth] Directive permit Member States' legislation, such as Paragraph 6(1)(14) of the UStG 1994 in conjunction with Paragraph 6(1)(16) of the UStG 1994, under which the possibility of opting for taxation of leasing and letting transactions is limited in such a way that non-profit-making sports clubs do not have that option?'

16 The decision making the reference also related to a case between Edith Barris and the Finanzlandesdirektion für Tirol and, in that context, the Verwaltungsgerichtshof

referred a third question for a preliminary ruling. However, by order of 16 March 2005, received by the Court on 21 March 2005, it withdrew that third question.

The questions

Preliminary observations

17 The Austrian Government takes the view that the leasing of the immovable property in question constitutes an act of administration of assets within the meaning of Paragraph 32 of the Federal Tax Code which is indisputably covered by the exemption relating to sports clubs laid down by Paragraph 6(1)(14) of the UStG 1994. It considers that the questions, in this case, must be reformulated in order to assess whether Paragraph 6(1)(14) of the UStG 1994 correctly transposes Article 13 (A)(1)(m) of the Sixth Directive into Austrian law.

18 In its view, the question therefore arises whether acts of administration of immovable property, also exempt under Austrian law, carried out by a non-profit-making sports club, are closely linked to the supply of services by that club to persons who practise sport or physical education.

19 According to the Austrian Government, either that link exists, in other words the leasing of property with a view to the operation of a refreshment bar in a clubhouse

for sporting activities may be considered as linked to the services supplied by a sports club, or those services are in principle ancillary and therefore negligible.

20 In that regard, it is sufficient to point out that it is not for the Court, in the context of a reference for a preliminary ruling, to assess whether questions referred to it by a national court are relevant or to rule on the interpretation of national laws or regulations and to decide whether the referring court's interpretation of them is correct (see, to that effect, Case 52/77 *Cayrol* [1977] ECR 2261, paragraph 32; Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, paragraph 16; and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24).

21 The Court must take account, under the division of jurisdiction between the Community judicature and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42).

22 It is therefore appropriate to examine the questions referred for a preliminary ruling against the legislative framework as defined by the Verwaltungsgerichtshof in its order for reference.

The first question

23 By the first question, the national court essentially asks the Court whether the Member States, when giving taxable persons the right to opt for taxation under Article 13(C) of the Sixth Directive, may make a distinction by reference to the types of transactions or the group of taxable persons.

24 The Commission submits that the Member States have a wide discretion under the provisions of Article 13(B)(b) and (C) of the Sixth Directive with regard to exemption or taxation of leasing or letting. It cites case-law according to which certain transactions and categories of taxable persons may be excluded from the right to opt for taxation in accordance with Article 13(C) of the directive. That is the case, inter alia, where a Member State has found that that right is being used to evade taxation. Nevertheless, in exercising their discretion, the Member States must uphold the aims and principles of the Sixth Directive, in particular the principle of neutrality of VAT and that of proportionality.

25 As an initial point, it should be noted that the exemptions referred to 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 as between one Member State and another (see, inter alia, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 15, and Case C-269/00 *Seeling* [2003] ECR I-4101, paragraph 46).

26 According to established case-law, the taxation of leasing and letting transactions is a power which the Community legislature has conferred on the Member States in derogation from the general rule established in Article 13(B)(b) of the Sixth Directive, according to which leasing and letting transactions are exempt from VAT. The right to deduct attached to that taxation does not therefore operate automatically in that context, but only if the Member States have made use of the power under Article 13(C) of the Sixth Directive and subject to the taxable persons exercising the right of option allowed to them (see Case C-269/03 *Vermietungsgesellschaft Objekt Kirchberg* [2004] ECR I-8067, paragraph 20).

27 As the Court has previously held, it is clear from the wording of Article 13(C) of the Sixth Directive that Member States may, by virtue of this power, allow persons benefiting from the exemptions provided for by that directive to waive the exemption in all cases or within certain limits or subject to certain detailed rules (see Case 8/81 *Becker* [1982] ECR 53, paragraph 38).

28 Article 13(C) of the Sixth Directive thus allows the Member States to grant taxable persons the right to opt for taxation of lettings of immovable property, but also allows them to restrict the scope of that right or withdraw it (see Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 66).

29 It follows that the Member States have a wide discretion under Article 13(C) of the Sixth Directive. It is for them to assess whether they should or should not introduce the right of option, depending on what they consider to be expedient in the situation existing in their country at a given time (see Case C-381/97 *Belgocodex* [1998] ECR I-8153, paragraphs 16 and 17; Case C-12/98 *Amengual Far* [2000] ECR I-527, paragraph 13; and Case C-326/99 *'Goed Wonen'* [2001] ECR I-6831, paragraph 45).

30 Thus, in exercising their discretion with regard to the right of option, the Member States may also exclude certain transactions or certain categories of taxable persons from the scope of application of that right.

31 Nevertheless, as the Commission correctly points out, when the Member States use their ability to restrict the scope of the right of option and to determine the arrangements for its exercise, they are to observe the general objectives and principles of the Sixth Directive, in particular the principle of fiscal neutrality and the requirement for correct, straightforward and uniform application of the exemptions provided for (see, to that effect, Case C-283/95 *Fischer* [1998] ECR I-3369, paragraph 27, and *'Goed Wonen'*, paragraph 56).

32 The principle of fiscal neutrality, which is laid down in 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(I), p. 14) and which is inherent in the common system of VAT, as the fourth and fifth recitals in the preamble to the Sixth Directive state, requires that all economic activities should be treated in the same way (Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 38, and *Belgocodex*, paragraph 18). The same is true of economic operators carrying out the same activities (Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20).

33 In that regard, the Court has held that the principle of fiscal neutrality precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-267/99 *Adam* [2001] ECR I-7467, paragraph 36; Case C-109/02 *Commission* v *Germany* [2003]

ECR I-12691, paragraph 20; and Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 41).

34 It is clear from that case-law that the identity of the providers of services and the legal form by means of which they exercise their activities are, as a rule, irrelevant in assessing whether supplies of services are comparable (see Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraphs 24 and 25).

35 The answer to the first question must therefore be that Member States, when giving their taxable persons the right to opt for taxation under Article 13(C) of the Sixth Directive, may make a distinction by reference to types of transactions or groups of taxable persons provided that they observe the general objectives and principles of the Sixth Directive, in particular the principle of fiscal neutrality and the requirement of correct, straightforward and uniform application of the exemptions provided for.

The second question

36 By the second question, the national court essentially asks whether the provisions of Article 13(B)(b) and (C) of the Sixth Directive preclude national legislation which, by

exempting generally the transactions of non-profit-making sports clubs, restricts their right to opt for taxation of leasing and letting transactions.

37 The Commission points out in that regard that Paragraph 6(1)(14) of the UStG 1994 relating to sports clubs, which sets out the derogation, is drafted in more general terms than the corresponding provision of the Sixth Directive, namely Article 13(A)(1)(m). Consequently, the rule put in place by Austrian law on VAT lacks the requirements which are the precondition for an exemption under Article 13(A)(1)(m) of the Sixth Directive. Under the terms of that provision, the exemption must be for certain supplies of services closely linked to sport and with a link between the supplier of the services and the beneficiary.

38 Noting the obligation to interpret in a coherent manner parts A, B and C of Article 13 of the Sixth Directive, the Commission submits that it is perfectly possible for a sports club which does not fulfil the conditions laid down in Article 13(A)(1)(m) of that directive, having regard to the scheme of the directive, to opt for taxation of leasing or letting transactions.

39 As a preliminary point, it should be noted that the Sixth Directive does not contain a rule generally exempting all services linked to the practice of sport and physical education (see, to that effect, Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 22).

40 The transactions of non-profit-making sports clubs are exempt, as activities in the public interest, pursuant to Article 13(A)(1)(m) of the Sixth Directive, provided that they are closely linked to the practice of sport or physical education and that the

supplies are made to persons practising sport or physical education (see, to that effect, Case C-124/96 *Commission* v *Spain* [1998] ECR I-2501, paragraph 15; *Stockholm Lindöpark*, paragraph 19; and Case C-174/00 *Kennemer Golf* [2002] ECR I-3293, paragraph 19).

41 In the context of the present reference, the national court takes the view that the leasing of immovable property with a view to its use as a refreshment bar constitutes neither a supply closely linked to the practice of sport nor a service supplied to persons practising sport or physical education. On that view, exemption of the leasing of a refreshment bar cannot be based on Article 13(A)(1)(m) of the Sixth Directive but may, in principle, be based on Article 13(B)(b) of that directive.

42 With regard to the question whether the Member States may exclude non-profit-making sports clubs from the right of option by way of a general exemption of all their transactions, it must be noted that Article 13(C) of the Sixth Directive does not specify on what conditions and by what means the scope of this right of option may be restricted. It is therefore for each Member State to specify, in its national law, the scope of this right of option and to lay down the rules pursuant to which certain taxable persons may benefit from the right to opt for taxation of the leasing and letting of immovable property.

43 Nevertheless, as the Court has already held, Article 13(C) of the Sixth Directive does not confer upon the Member States the right to place conditions on or to restrict in any manner whatsoever the exemptions provided for by part B of that article. It merely reserves the right to the Member States to allow, to a greater or lesser degree, persons entitled to those exemptions to opt for taxation themselves, if they consider that it is in their interest to do so (see *Becker*, paragraph 39).

44 In accordance with Article 13(B) of the Sixth Directive, the Member States exempt the leasing or letting of immovable property under conditions which they lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse. The decision of a Member State, pursuant to Article 13(C) of that directive, to restrict the scope of the right to opt for taxation of leasing of immovable property may be justified, inter alia, by the same aims.

45 Such a decision must, however, observe the principle of neutrality reiterated in paragraphs 32 to 34 above.

46 It is for the national court to determine, having regard to the specific circumstances of the case in the main proceedings and to the case-law cited above, whether or not the application of a general exemption to all transactions, including the leasing of immovable property, effected by non-profit-making sports clubs entails a breach of the principle of fiscal neutrality.

47 Thus, there may be a breach of the principle of fiscal neutrality if a sports club having as its purpose under its statute the exercise or furthering of physical education could not opt for taxation where that is possible for other taxable persons carrying out comparable activities which are therefore in competition with those of that club.

48 In order to determine whether the limits of that discretion were exceeded in the main proceedings, the national court must also check whether there was a breach of

the requirement for a correct, straightforward and uniform application of the exemptions provided for. To that end, it must take account, in particular, of the fact that the exemption system instituted by the Sixth Directive provides for differentiated treatment of the transactions of non-profit-making associations only to the extent that they are connected to the practice of sport and the services are supplied to persons practising sport. In such a case, those transactions are exempt from VAT for reasons of the public interest.

49 The answer to the second question must therefore be that it is for the national court to determine whether national legislation which, by exempting generally the transactions of non-profit-making sports clubs, restricts their right to opt for taxation of leasing and letting transactions exceeds the discretion conferred on the Member States, having regard in particular to the principle of fiscal neutrality and the requirement of correct, straightforward and uniform application of the exemptions provided for.

Costs

50 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:

1. **Member States, when giving their taxable persons the right to opt for taxation under Article 13(C) 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, may make a distinction by reference to types of transactions or groups of taxable persons provided that they observe the general objectives and principles of the Sixth Directive, in particular the principle of fiscal neutrality and the requirement of correct, straightforward and uniform application of the exemptions provided for.

2. **It is for the national court to determine whether national legislation which, by exempting generally the transactions of non-profit-making sports clubs, restricts their right to opt for taxation of leasing and letting transactions exceeds the discretion conferred on the Member States, having regard in particular to the principle of fiscal neutrality and the requirement of correct, straightforward and uniform application of the exemptions provided for.**

[Signatures]