JUDGMENT OF THE COURT (Fifth Chamber)
16 October 1997 *

In Case C-258/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Julius Fillibeck Söhne GmbH&Co. KG

and

Finanzamt Neustadt

on the interpretation of Articles 2(1) and 6(2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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 COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J. C. Moitinho de Almeida, P. Jann and L. Sevón (Rapporteur), Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Julius Fillibeck Söhne GmbH&Co. KG, by Klaus Heininger, accountant and tax adviser,

— Finanzamt Neustadt, by Reinhard Preuninger, Oberregierungsrat,

— the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same Ministry, acting as Agents,

— the United Kingdom Government, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, and Nicholas Paines, Barrister,

— the Commission of the European Communities, by Jürgen Grunwald, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Julius Fillibeck Söhne GmbH&Co. KG, represented by Klaus Heininger, of the Finanzamt Neustadt, represented by Werner Widmann, Leitender Ministerialrat at the Ministry of Finance of Rheinland-Pfalz, and of the Commission, represented by Jürgen Grunwald, at the hearing on 5 December 1996,

after hearing the Opinion of the Advocate General at the sitting on 16 January 1997,

gives the following

Judgment

1 By order of 11 May 1995, which was received at the Court on 31 July 1995, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions concerning the interpretation of Articles 2(1) and 6(2) the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

2 The questions were raised in proceedings between Julius Fillibeck Söhne GmbH&Co. KG (hereinafter 'Julius Fillibeck Söhne') and the Finanzamt [Tax Office] Neustadt, concerning the imposition of value added tax (hereinafter 'VAT') on the free transport provided by Julius Fillibeck Söhne for its employees from their homes to their place of work.

3 From 1980 to 1985, Julius Fillibeck Söhne, which runs a building undertaking, conveyed some of its employees in company vehicles free of charge from their homes to the various building sites where they were required to work. During the same period it also required one of its employees to convey other employees from their homes to their various places of work in his own private vehicle.

4 Julius Fillibeck Söhne provided that transport pursuant to the Bundesrahmentarifvertrag für das Baugewerbe (Federal Collective Framework Agreement for the Building Industry) where the employees' homes and their places of work were more than a minimum distance apart.

5 The Finanzamt Neustadt considered that that transport was subject to tax under the German VAT legislation.

6 Julius Fillibeck Söhne challenged the view that the transport was subject to VAT. Since its objection and the action it brought were unsuccessful, it appealed to the Bundesfinanzhof on a point of law; that court considered that the dispute raised questions concerning the interpretation of Articles 2(1) and 6(2) of the Sixth Directive.

7 Article 2(1) of the Sixth Directive provides:

'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.

8 Article 6(2) of the Sixth Directive provides:

'The following transactions shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

(...)'

9 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does transport provided by an employer constitute a service "effected for consideration" within the meaning of Article 2(1) of Directive 77/388/EEC — that is to say, effected for a proportion (to be estimated) of the work performed by the employees — where, pursuant to a collective agreement, the employer conveys employees (without specially agreed and calculated consideration) from their homes to the workplace where they are more than a specified distance apart, and the work performed — which has no actual connection with such transport services — is already to be carried out in return for the agreed money wages as in the case of the other employees?

(2) Does Article 6(2) of Directive 77/388/EEC cover the use of goods forming part of the assets of the business or a service carried out free of charge even where — as in the case of free transport for employees from their homes to the workplace and back in a company vehicle — it does not serve purposes other than those of the business as far as the employer is concerned, but does serve the employees' private purposes and the employees are not charged turnover tax in this respect (on account of their use free of charge of the transport service)?

(3) In the event that Question 2 is answered in the affirmative:

Does Article 6(2) of Directive 77/338/EEC also cover a case where the employer does not convey the employees in its own vehicles, but commissions a third party (in this case, one of its own employees) to effect the transport?'

The first question

10 In the first question, the national court asks whether Article 2(1) of the directive is to be interpreted as meaning that transport provided by an employer for employees free of charge from their homes to the workplace where they are more than a specified distance apart, in the absence of any real connection with either the work performed or the wages received, constitutes a supply of services effected for consideration within the meaning of that provision.

11 Article 2(1) of the Sixth Directive provides that VAT is chargeable on the supply of services effected for consideration within the territory of the country by a taxable person.

12 It is apparent from the case-law of the Court that the concept of the supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive presupposes the existence of a direct link between the service provided and the consideration received (see, in particular, the judgment in Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraph 12).

13 It is also settled case-law that the taxable amount for the supply of goods or services is represented by the consideration actually received for them. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria (see judgments in Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 13; Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 16; Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraph 19; Case C-38/93 *Glawe* [1994] ECR I-1679, paragraph 8; Case C-33/93 *Empire Stores* [1994] ECR I-2329, paragraph 18, and Case C-288/94 *Argos Distributors* [1996] ECR I-5311, paragraph 16).

14 Furthermore, according to the same case-law, that consideration must be capable of being expressed in money (judgments in *Coöperatieve Aardappelenbewaarplaats*, paragraph 13; *Naturally Yours Cosmetics*, paragraph 16, and *Argos Distributors*, paragraph 17).

15 It is clear from the order for reference that Julius Fillibeck Söhne provides transport for its employees from their homes to their workplace when they are more than a certain distance apart and that the employees do not make any payment, nor is any sum deducted from their wages in respect of that service.

16 Furthermore, since the work to be performed and the wages received are independent of the use or otherwise by employees of the transport provided to them by their employer, it is not possible to regard a proportion of the work performed as being consideration for the transport services.

17 In those circumstances, there is no consideration which has a subjective value and a direct link with the service provided. Consequently, the requirements relating to a supply of services effected for consideration are not satisfied.

18 The reply to the first question is therefore that Article 2(1) of the Sixth Directive is to be interpreted as meaning that an employer who provides transport for employees free of charge from their homes to the workplace where they are more than a specified distance apart, in the absence of any real connection either with the work performed or the wages received, does not effect a supply of services for consideration within the meaning of that provision.

The second question

19 In the second question, the national court is asking essentially whether transport provided for employees free of charge between their homes and their workplace by the employer in a company vehicle for purposes which are not other than those of the business but which, at the same time, serve the employees' private purposes, is to be treated as a supply of services for consideration within the meaning of Article 6(2) of the Sixth Directive.

20 First of all, it should be noted that the national court refers to Article 6(2)(a) and (b) without, however, establishing which of those two provisions applies to the case before it. The parties to the main proceedings consider that, in the present case, it is not necessary to determine whether subparagraph (a) or (b) applies. Furthermore, it is clear from the question that the requested interpretation of those provisions concerns, more specifically, the concepts of 'private use of the taxable person or of his staff' and 'purposes other than those of his business', which appear in both provisions. The two provisions should, consequently, be considered together.

21 The national court pointed out that the transport provided by Julius Fillibeck Söhne is for travel between the employees' homes and the company's various building sites where those employees are required to work.

22 At the hearing, Julius Fillibeck Söhne explained, in particular, that it has a number of building sites which are some distance apart, that it is often not possible to reach those building sites by public transport and that employees are moved between the different sites.

23 It also pointed out that, since the carriage of the employees directly serves the purposes of the business and consequently falls within the employment relationship, it does not concern the private domain of employees. Furthermore, the transport is provided pursuant to a collective agreement.

24 In contrast, the other parties who submitted observations claim that the transport provided by the employer free of charge falls within Article 6(2) of the Sixth Directive. The United Kingdom Government and the Commission pointed out, however, that certain circumstances may justify regarding the transport provided for the employees as serving the purposes of the business.

25 It should be recalled that the purpose of Article 6(2) of the Sixth Directive is to ensure equal treatment as between taxable persons and final consumers (see the judgment in Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 35). It is designed to prevent the non-taxation of business goods used for private purposes and of services provided free of charge by a taxable person for private purposes (see, to that effect, the judgments in Case 50/88 *Kühne* [1989] ECR 1925, paragraph 8, and Case C-193/91 *Mohsche* [1993] ECR I-2615, paragraph 8).

26 In that respect, it should be noted that it is normally for the employee to decide where his home will be with regard, where appropriate, to his place of work, and to determine the distance between the two and the means of transport he intends to use. The employer is not involved in those decisions, since the employee's only obligation is to be present at his place of work at the agreed times. Consequently, under normal circumstances, the transport services provided to employees are for the private use of the employee within the meaning of Article 6(2) of the Sixth Directive.

27 The fact that an employee must travel between his home and the workplace in order to be present at work and, consequently, to perform his duties, is not conclusive evidence that transport provided for an employee from his home to his workplace is not to be considered as being for the employee's private use within

the meaning of Article 6(2). Indeed, it would be contrary to the purpose of that provision if such an indirect link were sufficient, in itself, to prevent such travel being treated as a supply for consideration.

28 Article 6(2) of the Sixth Directive must be interpreted thus in the usual situation where an employee travels between his home and his fixed place of work, and has the possibility of using ordinary means of transport.

29 It should be acknowledged, however, that in certain circumstances the requirements of the business may make it necessary for the employer to provide transport for employees between their homes and the workplace. The fact that only the employer is able to provide suitable transport or that the workplace is not always the same but is liable to change may mean that the employer is obliged to provide transport for its employees.

30 In such special circumstances, the transport is organized by the employer for purposes which are not other than those of the business. The personal benefit derived by employees from such transport appears to be of only secondary importance compared to the needs of the business.

31 As regards the fact that the transport is provided pursuant to a collective agreement, even though such an obligation is not in itself sufficient to determine the character of the supply of those services for the purposes of Article 6(2) of the Sixth Directive, it indicates that the transport is provided for purposes which are not other than those of the business.

32 The special characteristics of building firms, as described in particular by Julius Fillibeck Söhne in the present case, suggest that the transport may be organized for purposes which are not other than those of the business.

33 It is for the national court to establish whether, in the light of the interpretations given by the Court, the particular characteristics of the case before it make it necessary, having regard to the requirements of the business, for the employer to provide transport for employees between their homes and the workplace.

34 The answer to the second question is therefore that Article 6(2) of the Sixth Directive is to be interpreted as meaning that transport provided for employees free of charge by the employer between their homes and the workplace in a company vehicle serves, in principle, the employees' private purposes and thus serves purposes other than those of the business. However, that provision does not apply when, having regard to certain circumstances, such as the difficulty of finding other suitable means of transport and changes in the place of work, the requirements of the business make it necessary for the employer to provide transport for employees, in which case the supply of those transport services is not effected for purposes other than those of the business.

The third question

35 In the third question, the national court asks essentially whether the answer to the second question also applies when the employer does not convey the employees in its own vehicles, but commissions one of its employees to provide the transport using his own private vehicle.

36 In that respect, it is sufficient to note that the question whether transport services serve the private purposes of employees of an undertaking or, more generally, serve purposes other than those of the business, within the meaning of Article 6(2) of the Sixth Directive, is not altered by the fact that, instead of providing the transport in its own vehicles, the employer commissions one of its employees to provide that transport using his own private vehicle.

37 Consequently, the answer to the third question must be that the answer to the second question also applies when the employer does not convey the employees in its own vehicles, but commissions one of its employees to provide the transport using his own private vehicle.

Costs

38 The costs incurred by the German Government, the United Kingdom Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 11 May 1995, hereby rules:

1. Article 2(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment is to be interpreted as meaning that an employer who provides transport for employees free of charge from their homes to the workplace where they are more than a specified distance apart, in the absence of any real connection either with the work performed or the wages received, does not effect a supply of services for consideration within the meaning of that provision.

2. Article 6(2) of the Sixth Directive 77/388/EEC is to be interpreted as meaning that transport provided for employees free of charge by the employer between their homes and the workplace in a company vehicle serves, in principle, the employees' private purposes and thus serves purposes other than those of the business. However, that provision does not apply when, having regard to certain circumstances, such as the difficulty of finding other suitable means of transport and changes in the place of work, the requirements of the business make it necessary for the employer to provide transport for employees, in which case the supply of those transport services is not effected for purposes other than those of the business.

3. The answer to the second question also applies when the employer does not convey the employees in its own vehicles, but commissions one of its employees to provide the transport using his own private vehicle.

Gulmann Wathelet Moitinho de Almeida

Jann Sevón

Delivered in open court in Luxembourg on 16 October 1997.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber