JUDGMENT OF THE COURT (Grand Chamber)

26 June 2007 (*)

(Sixth VAT Directive – Taxable transactions – Definition of 'economic activity' – Article 4(2) – Allocation of licences making it possible to use a defined part of the radio-frequency spectrum reserved for telecommunications services)

In Case C-369/04,

REFERENCE for a preliminary ruling under Article 234 EC from the VAT and Duties Tribunal, London (United Kingdom), made by decision of 24 August 2004, received at the Court on 26 August 2004, in the proceedings

Hutchison 3G UK Ltd,

mmO_2 plc,

Orange 3G Ltd,

T-Mobile (UK) Ltd,

Vodafone Group Services Ltd

v

Commissioners of Customs and Excise,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, P. Kūris, E. Juhász and J. Klučka, Presidents of Chambers, K. Schiemann, J. Makarczyk (Rapporteur) and U. Lõhmus, Judges,

Advocate General: J. Kokott,

Registrars: B. Fülöp and K. Sztranc-Sławiczek, Administrators,

having regard to the written procedure and further to the hearing on 7 February 2006,

after considering the observations submitted on behalf of:

– Hutchison 3G UK Ltd, mmO_2 plc, Orange 3G Ltd, T-Mobile (UK) Ltd and Vodafone Group Services Ltd, by K.P.E. Lasok QC, and J. Turnbull and P. Lomas, Solicitors,

– the United Kingdom Government, by M. Bethell and R. Caudwell, acting as Agents, P. Goldsmith QC, K. Parker QC, C. Vajda QC, and G. Peretz, Barrister,

– the Danish Government, by J. Molde, acting as Agent, and by K. Hagel-Sørensen, advokat,

– the German Government, by W.-D. Plessing and C. Schulze-Bahr, acting as Agents, and by K.-T. Stopp, Rechtsanwalt,

– the Spanish Government, by J. Rodriguez Cárcamo, acting as Agent,

– Ireland, by D. O'Hagan, acting as Agent, and by A. Aston, SC, and G. Clohessy, BL,

– the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

– the Commission of the European Communities, by K. Gross, R. Lyal and M. Shotter, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2006

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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'), and Article 4 of that directive in particular.

2 The reference was made in the course of proceedings brought by Hutchison 3G UK Ltd, mmO_2 plc, Orange 3G Ltd, T-Mobile (UK) Ltd and Vodafone Group Services Ltd against the Commissioners of Customs and Excise, who are responsible for the collection of value added tax ('VAT') in the United Kingdom, seeking the right to deduct the amount of VAT which those companies claim to have paid when the Secretary of State for Trade and Industry granted third-generation mobile telecommunications licences, known as 'UMTS' ('the licences at issue in the main proceedings'), to them in 2000 by auction.

Legal context

Provisions relating to VAT

Community legislation

3 Under Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to value added tax.

4 Article 4 of the Sixth Directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

…

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

…'

5 Article 17 of the Sixth Directive provides:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

…'

6 Item 1 of Annex D to the Sixth Directive refers to telecommunications.

National legislation

7 Section 4(1) of the Value Added Tax Act 1994 provides:

'VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.'

Provisions relating to the allocation of the licences at issue in the main proceedings

Community legislation

8 Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15) was in force until 25 July 2003.

9 Article 2(1) of Directive 97/13 provides:

'1. For the purposes of this Directive,

…

(d) "essential requirements" means the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. Those reasons shall be the security on network operations, the maintenance of network integrity and, where justified, the interoperability of services, data protection, the protection of the environment and town and country planning objectives, as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems. …'

10 As set out in the second sentence of Article 3(3) of Directive 97/13:

'Member States may issue an individual licence only where the beneficiary is given access to scarce physical and other resources or is subject to particular obligations or enjoys particular rights, in accordance with the provisions of Section III.'

11 Article 4(1) of Directive 97/13 specifies the conditions attached to general authorisations as follows:

'Where Member States subject the provision of telecommunications services to general authorisations, the conditions which, where justified, may be attached to such authorisations are set out in points 2 and 3 of the Annex. Such authorisations shall entail the least onerous system possible consistent with enforcing the relevant essential requirements and relevant other public interest requirements set out in points 2 and 3 of the Annex.'

12 Section III of Directive 97/13, which covers Articles 7 to 11, governs individual licences, where circumstances justify the grant of such licences. The first subparagraph of Article 8(1) of

that directive provides that '[t]he conditions which, in addition to those set out for general authorisations, may, where justified, be attached to individual licences are set out in points 2 and 4 of the Annex'. Under points 2.1 and 4.2 of that annex, this includes inter alia the conditions intended to ensure compliance with relevant essential requirements and specific conditions linked to the effective use and efficient management of radio frequencies.

13 Pursuant to Article 10(1) of Directive 97/13, Member States may limit the number of individual licences to the extent required to ensure the efficient use of radio frequencies. Under Article 10(2), first indent, they must, in this respect, give due weight to the need to maximise benefits for users and to facilitate the development of competition. The first subparagraph of Article 10(3) requires that Member States grant such individual licences on the basis of selection criteria which must be objective, non-discriminatory, detailed, transparent and proportionate.

14 It is apparent from Article 11(1) of Directive 97/13 that the grant of licences may give rise to the imposition of fees which 'seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences'. Furthermore, Article 11(2) provides:

'Notwithstanding paragraph 1, Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.'

15 Directive 97/13 was repealed and replaced as of 25 July 2003 by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

16 Article 9 of Directive 2002/21 provides:

'…

3. Member States may make provision for undertakings to transfer rights to use radio frequencies [to] other undertakings.

4. Member States shall ensure that an undertaking's intention to transfer rights to use radio frequencies is notified to the national regulatory authority responsible for spectrum assignment and that any transfer takes place in accordance with procedures laid down by the national regulatory authority and is made public. National regulatory authorities shall ensure that competition is not distorted as a result of any such transaction. Where radio frequency use has been harmonised through the application of Decision No 676/2002/EC [of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) (OJ 2002 L 108, p. 1)] or other Community measures, any such transfer shall not result in change of use of that radio frequency.'

National legislation

17 Under section 1(1) of the Wireless Telegraphy Act 1949 ('the WTA 1949'), no person is to establish or use any station for wireless telegraphy or install or use any apparatus for wireless telegraphy except under the authority of a licence in that behalf granted under that section by the Secretary of State. The WTA 1949 provides for the imposition of criminal penalties for infringement of that prohibition.

18 Section 2(1) of the Wireless Telegraphy Act 1998 ('the WTA 1998') lays down the guidelines for the award of licences and, in particular, permits the Secretary of State to prescribe sums that exceed the administrative charges required to cover costs. Under section 2(2)(c) of that act, the Secretary of State is to have regard, in prescribing those sums, to the desirability of promoting:

– the efficient use and management of the electromagnetic spectrum;

– any economic benefits arising from the use of wireless telegraphy;

– the development of innovative services, and

– competition in the provision of telecommunication services.

19 Section 3(1) of the WTA 1998 provides:

'Having regard to the desirability of promoting the optimal use of the electromagnetic spectrum, the Secretary of State may by regulations provide that, in such cases as may be specified in or determined by him under the regulations, applications for the grant of wireless telegraphy licences must be made in accordance with a procedure which:

(a) is set out in a notice issued by him under the regulations, and

(b) involves the making by the applicant of a bid specifying an amount which he is willing to pay to the Secretary of State in respect of the licence.'

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

20 In spring 2000, the Secretary of State allocated the licences at issue in the main proceedings by public auction.

21 The undertakings which obtained those licences were those that bid the most money for the frequency lots offered, one of those lots being reserved for a new entrant in the market. As a result of the auction, the tenderers as a whole paid a total sum of GBP 22 477 400 000.

22 The auction was carried out in the name of the Secretary of State by the Radiocommunications Agency, which is an executive agency of the Department of Trade and Industry. No reference to VAT was made during the auction procedure.

23 The licences thus allocated will expire on 31 December 2021 unless revoked earlier by the Secretary of State or surrendered by the licensee.

24 As they consider that those allocations were subject to VAT and that the VAT was included in the amounts paid, the tendering companies sought to recover the sums which they claim to have paid as VAT under the national legislation which transposed Article 17 of the Sixth Directive. As their claims were rejected on the ground that the grant of the licences at issue in the main proceedings was not subject to VAT, they brought an action before the VAT and Duties Tribunal, London.

25 In those circumstances, the VAT and Duties Tribunal, London, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) In the circumstances set out in the Agreed Statement of Facts …, is the term "economic activity" for the purposes of Article 4(1) and (2) of the Sixth Directive to be interpreted as including the issuing of third-generation mobile telecommunications licences by the Secretary of State … by auction of rights to use telecommunications equipment in defined parts of the electromagnetic spectrum ("the activity"), and what considerations are relevant to that question?

(2) In the circumstances set out in the Agreed Statement of Facts what considerations are relevant to the question whether or not the Secretary of State, in conducting the activity, was acting as a "public authority" within the meaning of Article 4(5) of the Sixth Directive?

(3) In the circumstances set out in the Agreed Statement of Facts, can the activity be (i) in part an economic activity and in part not, and/or (ii) partly carried out by a body governed by public law acting as a public authority and partly not, with the result that the activity would be partly chargeable to VAT under the Sixth Directive and partly not?

(4) How likely and how close in time to the carrying out of an activity such as the activity does a "significant distortion of competition" within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive have to be in order for the person carrying out that activity to be required by that subparagraph to be considered a taxable person in respect of that activity? To what extent, if any, does the principle of fiscal neutrality bear on that question?

(5) Does the word "telecommunications" in Annex D to the Sixth Directive (which is referred to in the third subparagraph of Article 4(5) of the Sixth Directive) include the issuing of third-generation mobile telecommunications licences by the Secretary of State auction of rights to use telecommunications equipment in defined parts of the electromagnetic spectrum, in the circumstances set out in the Agreed Statement of Facts?

(6) Where (i) a Member State chooses to implement Article 4(1) and (5) of the Sixth Directive by legislation conferring on a Government department (such as, in this case, the United Kingdom Treasury) a statutory power to make directions specifying which goods or services supplied by Government departments are to be treated as taxable supplies and (ii) that Government department makes, or purports to make, pursuant to that statutory power, directions specifying that certain supplies are taxable: is the principle set out in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, relevant to the interpretation of the domestic legislation and of those directions (and if so, how)?'

The questions referred for a preliminary ruling

The first question

26 By its first question, the national court wishes to ascertain whether an activity such as the issuing of the licences at issue in the main proceedings by the Secretary of State by auction constitutes an 'economic activity' within the meaning of Article 4(1) and (2) of the Sixth Directive.

27 Under Article 4(1) of the Sixth Directive, 'taxable person' means any person who independently carries out in any place any economic activity specified in paragraph 2 thereof, whatever the purpose or results of that activity. 'Economic activity' is defined in Article 4(2) as including all activities of producers, traders and persons supplying services, inter alia the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

28 In that regard, it must be pointed out that, although Article 4 of the Sixth Directive gives a very wide scope to VAT, only activities of an economic nature are covered by that provision (see, to that effect, Case C-306/94 *Régie dauphinoise* [1996] ECR I-3695, paragraph 15; Case C-77/01 *EDM* [2004] ECR I-4295, paragraph 47; and Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraph 18).

29 It is also apparent from settled case-law that an analysis of the definitions of 'taxable person' and 'economic activities' shows that the scope of the term 'economic activities' is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (see, inter alia, Case C-223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 47 and the case-law cited).

30 According to the order for reference, in the main proceedings the activity carried out by the Secretary of State consisted of allocating, by auction, rights to use certain frequencies in the electromagnetic spectrum to economic operators for a specified period. At the end of the awards procedure, those operators were issued with the authorisation to exploit the rights thus acquired to set up telecommunications equipment operating in defined parts of the electromagnetic spectrum.

31 Therefore it has to be established whether the issuing of such an authorisation is to be regarded, by its very nature, as the 'exploitation of … property' within the meaning of Article 4(2) of the Sixth Directive.

32 At the outset, it is important to point out that, in accordance with the requirements of the principle of neutrality of the common system of value added tax, the term 'exploitation' refers to all transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis (see, to that effect, Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 18; *EDM*, paragraph 48; and Case C-8/03 *BBL* [2004] ECR I-10157, paragraph 36).

33 In that regard, it must be stated that the activity at issue in the main proceedings consists of the issuing of authorisations which allow the economic operators who receive them to exploit the resulting frequency use rights by offering their services to the public on the mobile telecommunications market in return for remuneration.

34 Such an activity constitutes the means of fulfilling the conditions laid down by Community law, for the purpose, inter alia, of ensuring the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems and also the efficient management of radio frequencies, as is apparent from Article 2(1)(d) of Directive 97/13 read in conjunction with Articles 4(1) and 8(1) thereof.

35 Furthermore, it should also be pointed out that, under Directive 97/13, the WTA 1949 and the WTA 1998, the issuing of such authorisations falls exclusively within the competence of the Member State concerned.

36 Thus, an activity such as that at issue in the main proceedings constitutes a necessary precondition for the access of economic operators such as the applicants in the main proceedings to the mobile telecommunications market. It cannot constitute participation in that market by the competent national authority. Only the operators, who are the holders of the rights granted, operate on the relevant market by exploiting the property in question for the purpose of obtaining income therefrom on a continuing basis.

37 In those circumstances, an activity such as that at issue in the main proceedings cannot, by its very nature, be carried out by economic operators. In that regard, it must be pointed out that it is irrelevant that those operators thereafter have the right to transfer their rights to use radio frequencies. Such a transfer, apart from remaining subject to the control of the national

regulatory authority responsible for spectrum assignment, in accordance with Article 9(4) of Directive 2002/21, cannot be compared to the issuing of an authorisation by the State.

38 Therefore, in granting such an authorisation, the competent national authority is not participating in the exploitation of property, consisting in rights to use the radio-frequency spectrum for the purpose of obtaining income therefrom on a continuing basis. By means of that allocation procedure, that authority exclusively carries out the activity of controlling and regulating the use of the electromagnetic spectrum which has been expressly delegated to it.

39 Furthermore, the fact that the issuing of licences such as those at issue in the main proceedings gives rise to a payment cannot affect the legal status of that activity (see, to that effect, Case C-343/95 *Diego Calì & Figli* [1997] ECR I-1547, paragraph 24 and the case-law cited).

40 Consequently, the issuing of those licences cannot constitute an 'economic activity' within the meaning of Article 4(2) of the Sixth Directive.

41 That finding is not called into question by the argument that, having regard to Article 4(5) of the Sixth Directive, it is not inconceivable that a regulatory activity carried out by a body governed by public law may constitute an economic activity within the meaning of Article 4(2) of that directive, so that that body would have to be considered a taxable person in respect of that activity.

42 Even if such a regulatory activity could be classified as an economic activity, the fact still remains that the application of Article 4(5) of the Sixth Directive implies a prior finding that the activity considered is of an economic nature. It is apparent from the answer given in paragraph 40 of this judgment that that is not the case.

43 In the light of the foregoing, the answer to the first question must be that Article 4(1) and (2) of the Sixth Directive is to be interpreted as meaning that the issuing, by the national regulatory authority responsible for spectrum assignment, of licences such as those at issue in the main proceedings by an auction of rights to use telecommunications equipment does not constitute an economic activity within the meaning of that provision and, consequently, does not fall within the scope of that directive.

The other questions

44 In view of the answer given to the first question, there is no need to answer the other questions asked by the national court.

Costs

45 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 (Grand Chamber) hereby rules:

Article 4(1) and (2) 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 is to be interpreted as meaning that the issuing of licences, such as third generation mobile telecommunications licences known as 'UMTS', by auction by the national regulatory authority responsible for spectrum assignment of the rights to use telecommunications equipment does not constitute an

economic activity within the meaning of that provision and, consequently, does not fall within the scope of that directive.

Skouris	Jann	Timmermans
Rosas	Lenaerts	Kūris
Juhász	Klučka	Schiemann
Makarczyk		Lõhmus

Delivered in open court on 26 June 2007

R. Grass	V. Skouris
Registrar	President

* Language of the case: English.