JUDGMENT OF THE COURT (First Chamber)

18 July 2007 *

In Case C-277/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (France), made by decision of 18 May 2005, received at the Court on 5 July 2005, in the proceedings

Société thermale d'Eugénie-les-Bains

v

Ministère de l'Économie, des Finances et de l'Industrie,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, E. Juhász (Rapporteur), K. Schiemann and E. Levits, Judges,

* Language of the case: French.

Advocate General: M. Poiares Maduro,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 4 July 2006,

after considering the observations submitted on behalf of:

— Société thermale d'Eugénie-les-Bains, by X. Vuitton, avocat,

— the French Government, by G. de Bergues and J. Gracia, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, assisted by P. McGarry BL and E. Fitzsimons SC,

— the Portuguese Government, by L. Fernandes and C. Lança, acting as Agents,

— the Commission of the European Communities, by R. Lyal and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2006,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 2(1) and 6(1) 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 Société thermale d'Eugénie-les-Bains ('Société thermale') and the Ministère de l'Économie, des Finances et de l'Industrie (Ministry of the Economy, Finance and Industry) concerning the application of value added tax ('VAT') to deposits collected by Société thermale on the reservation of rooms and retained by it following the cancellation of some of those reservations.

Legal context

Community law

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 VAT.

4 Article 6(1) of the Sixth Directive provides:

'1. "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include inter alia:

...

— obligations to refrain from an act or to tolerate an act or situation,

— ...'

5 Under Article 11(A)(1)(a) of the Sixth Directive, the taxable amount in respect of supplies of services is to be 'everything which constitutes the consideration which has been or is to be obtained by the supplier from ... the customer or a third party for such supplies ...'.

National law

6 Under Article 256-I of the Code général des impôts (General Tax Code), supplies of movable property or of services, effected for consideration by a taxable person acting as such, are subject to VAT.

7 Article 256-IV-1° of that code provides that transactions other than supplies of goods are to be regarded as supplies of services.

8 Article L. 114-1 of the Code de la consommation (Consumer Code), resulting from Article 3-1 of Law No 92-60 of 18 January 1992, strengthening the protection of consumers, is worded as follows:

'Save where otherwise provided in the contract, sums paid in advance shall be deposits, with the result that either party to the contract may go back on its undertaking, the customer losing the deposit, the business returning double the amount.'

9 Under Article 1590 of the Code civil (Civil Code), where a promise to sell has been made with a deposit, each party to the contract is at liberty to withdraw: the party who has given the deposit, by losing it, and the one who has received the deposit, by returning double the amount.

The main proceedings and the question referred for a preliminary ruling

10 Société thermale, a company established in Eugénie-les-Bains (France), is engaged in the operation of thermal establishments, including the provision of hotel and restaurant facilities. It collects, by way of deposits, sums paid in advance by clients of those establishments when reserving rooms. Those sums are either deducted from the amount to be paid for the accommodation later or retained by the company in cases where clients cancel their reservations.

11 In 1992, Société thermale underwent an accounting inspection in relation to the period from 1 January 1989 to 30 April 1992. As a result of that inspection, the tax authorities formed the view that VAT should have been applied to the deposits which the company had collected from the client at the time of making room reservations and retained where the client cancelled the reservation. On 8 December 1994, the company was accordingly charged the sum of FRF 84 054 (EUR 12 814) by way of supplementary tax payable for the period in question. Société thermale filed a complaint, which was dismissed by the tax authorities on 14 February 1995.

12 Société thermale brought an action against that decision before the Tribunal administratif de Pau (Administrative Court, Pau). That action was dismissed by judgment of 18 November 1999. The Tribunal administrative de Pau held that, where a deposit is retained by the company in the event of cancellation by the client, it constitutes the remuneration for the supply of a service consisting in client reception formalities, opening a booking file for the client and entering into an undertaking to reserve accommodation for him.

13 Société thermale brought an appeal before the Cour administrative d'appel de Bordeaux (Administrative Court of Appeal, Bordeaux) which, by judgment of 18 November 2003, dismissed that appeal. As a basis for ruling that VAT should

have been applied to deposits paid by Société thermale's clients and retained by the company where the reservation was cancelled, that court held that such deposits had to be regarded, in those circumstances, as the direct consideration and the remuneration for the supply of identifiable services consisting in the opening of a client file and the reservation of accommodation for that client.

14 Société thermale applied to the Conseil d'État (Council of State) to have that judgment set aside, maintaining that the deposits must be regarded as payments made by way of compensation for its loss as a result of client default and, as such, not subject to VAT.

15 The Conseil d'État decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must sums paid as deposits in the context of sales contracts in relation to supplies of services which are subject to [VAT] be regarded, where the purchaser makes use of the cancellation option available to him and those sums are retained by the vendor, as remuneration for the reservation service and, as such, subject to [VAT], or as cancellation payments made to compensate for the loss suffered as a result of the default of the customer, which have no direct connection with any service supplied for consideration and, as such, are not subject to [VAT]?'

The question referred for a preliminary ruling

16 By its question, the national court is asking, in essence, whether a sum paid as a deposit by a client to a hotelier is, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, to be regarded as

consideration for the supply of a reservation service, which is subject to VAT, or as fixed compensation for cancellation, which is not subject to VAT.

17 At the outset, it must be pointed out, first, that the definition of the concept of a 'deposit' can vary from one Member State to another and, second, that the exercise of the cancellation option which is linked to the deposit may entail different consequences depending on which national law is applicable. Thus, it is clear from the observations of the French Government that, in French law, the exercise of that option as a rule completely releases the resiling party from the consequences of the non-performance of the contract, whereas in several Member States, a right remains, in such a situation, to exact damages exceeding the amount of the deposit retained.

18 In the present case, the situation to be examined is that in which the party who has paid a deposit is free to go back on his undertaking, thereby forfeiting that deposit, while the other party may exercise the same option, whereupon it must return double the amount of the deposit. There is no need to examine the rights which may be relied upon by either of those parties if the other exercises that option.

19 It follows from the case-law of the Court that a reply in favour of the first approach outlined in the question referred for a preliminary ruling may be given only if there is a direct link between the service rendered and the consideration received, the sums paid constituting genuine consideration for an identifiable service supplied in the context of a legal relationship in which performance is reciprocal (see, to that effect, Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11, 12 and 16; Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14; Case C-174/00 *Kennemer Golf* [2002] ECR I-3293, paragraph 39; and Case C-210/04 *FCE Bank* [2006] ECR I-2803, paragraph 34).

20 In the present case, those conditions are not met.

21 The conclusion of a contract and the resulting existence of a legal link between the parties do not usually depend on the payment of a deposit. Since a deposit is not a constituent element of a contract for accommodation, it seems to be no more than an optional element within the parties' freedom of contract.

22 Thus, a client may make a request by mail, or even orally, for the reservation of accommodation, which can be accepted by the hotelier — depending on its contractual practice — by mail, or even orally, without a deposit being required. The acceptance in such a manner of a booking request gives rise no less to the existence of a legal link between the parties, entailing an obligation for the hotelier to open a file in the name of that client and to reserve the accommodation for him.

23 Moreover, the payment of a deposit by the client, on the one hand, and the obligation of the hotelier, on the other, not to contract with anyone else in such a way as to prevent it from honouring its undertaking towards that client cannot — contrary to the French Government's submission — be classified as reciprocal performance, because the obligation in those circumstances arises directly from the contract for accommodation, not from the payment of the deposit.

24 In accordance with the general principles of civil law, each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder. The obligation to fulfil the contract does not therefore arise from the conclusion, specifically for that purpose, of another agreement. Nor does the obligation of full contractual performance depend on the possibility that otherwise compensation or a penalty for delay may be due, or on the lodging of security or a deposit: that obligation arises from the contract itself.

25 Thus when, following a reservation, the hotelier provides the agreed service, he does no more than honour the contract entered into with his client, in accordance with the principle that contracts must be performed. Accordingly, the fulfilment of that obligation cannot be classified as consideration for the payment of a deposit.

26 Since the obligation to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit, there is no direct connection between the service rendered and the consideration received (*Apple and Pear Development Council*, paragraphs 11 and 12; *Tolsma*, paragraph 13; and *Kennemer Golf*, paragraph 39). The fact that the amount of the deposit is applied towards the price of the reserved room, if the client takes up occupancy, confirms that the deposit cannot constitute the consideration for the supply of an independent and identifiable service.

27 Since the deposit does not constitute the consideration for the supply of an independent and identifiable service, it must be examined, in order to reply to the referring Court, whether the deposit constitutes a cancellation charge paid as compensation for the loss suffered as a result of the client's cancellation.

28 In that regard, it should be noted that the contracting parties are at liberty — subject to the mandatory rules of public policy — to define the terms of their legal relationship, including the consequences of a cancellation or breach of their obligations. Instead of defining their obligations in detail, they may nevertheless refer to the various instruments of civil law.

29 Thus the parties may make contractual provision — applicable in the event of non-performance — for compensation or a penalty for delay, for the lodging of security or a deposit. Although such mechanisms are all intended to strengthen the contractual obligations of the parties and although some of their functions are identical, they each have their own particular characteristics.

30 As regards, specifically, deposits, it must be noted first that they mark the conclusion of a contract, since their payment implies a presumption that the contract exists. Secondly, a deposit encourages the parties to perform the contract, because otherwise the party who has paid it stands to lose the corresponding sum, while the other party must, if responsible for the non-performance, return double that amount. Thirdly, the deposit constitutes fixed compensation, since its payment releases one of the parties from the need to prove the amount of the loss suffered if the other party goes back on the agreement.

31 The raison d'être for deposits in the hotel sector corresponds, as a rule, to the above characteristics. Such deposits serve therefore to mark the conclusion of the contract, to encourage its performance and, as the case may be, to provide fixed compensation.

32 Whereas, in situations where performance of the contract follows its normal course, the deposit is applied towards the price of the services supplied by the hotelier and is therefore subject to VAT, the retention of the deposit at issue in the main proceedings is, by contrast, triggered by the client's exercise of the cancellation option made available to him and serves to compensate the hotelier following the cancellation. Such compensation does not constitute the fee for a service and forms no part of the taxable amount for VAT purposes (see, to that effect, as regards interest applied on account of late payment, Case 222/81 *BAZ Bausystem* [1982] ECR 2527, paragraphs 8 to 11).

33 That conclusion is not undermined, contrary to the Portuguese Government's submission, either by the fact that, in most cases, the amount of the loss suffered is not the same as the amount of the deposit retained or by the fact that the vacancies brought about by the cancellation may be filled by new clients. Given that the compensation is fixed, it is only to be expected that the amount of that loss may be higher or lower than the amount of the deposit retained by the hotelier.

34 Furthermore, the rule that, where non-performance of the contract is attributable to the hotelier, the sum returned is to be double the amount of the sum paid as a deposit supports the classification of that deposit as fixed compensation for cancellation and not as remuneration for the supply of a service. In such circumstances, the client is obviously not providing any service to the hotelier.

35 Since, on the one hand, the deposit paid does not constitute the fee collected by a hotelier by way of genuine consideration for the supply of an independent and identifiable service to his client and, on the other hand, the retention of that deposit, following the client's cancellation, is intended to offset the consequences of the non-performance of the contract, it must be held that neither the payment of the deposit, nor the retention of that deposit, nor the return of double its amount is covered by Article 2(1) of the Sixth Directive.

36 In view of the foregoing, the reply to the question referred must be that Articles 2(1) and 6(1) of the Sixth Directive are to be interpreted as meaning that a sum paid as a deposit, in the context of a contract relating to the supply of hotel services which is subject to VAT, is to be regarded, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, as a fixed cancellation charge paid as compensation for the loss suffered as a result of client default and which has no direct connection with the supply of any service for consideration and, as such, is not subject to that tax.

Costs

37 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 (First Chamber) hereby rules:

Articles 2(1) and 6(1) 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 are to be interpreted as meaning that a sum paid as a deposit, in the context of a contract relating to the supply of hotel services which is subject to value added tax, is to be regarded, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, as a fixed cancellation charge paid as compensation for the loss suffered as a result of client default and which has no direct connection with the supply of any service for consideration and, as such, is not subject to that tax.

[Signatures]