[DE] No Tax Reduction for Pay-TV

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In a ruling of 26 January 2006, the *Bundesfinanzhof* (Federal Court of Finance - BFH) confirmed that the standard rate of taxation applies to the turnover of pay-TV companies. Pay-TV providers cannot benefit from the tax reduction for cinemas provided for in Art. 12 para. 2 no. 7b of the *Umsatzsteuergesetz* (Turnover Tax Act - UStG 1980). The broadcast of a television programme is not the same as a film presentation in the sense of the aforementioned Act.

The plaintiff is a pay-TV provider whose customers can watch an encrypted television channel in return for a fixed monthly fee. In the year of the dispute, 1990, the plaintiff argued that its turnover should be subject to the lower taxation rate specified in Art. 12 para. 2 no. 7b of the UStG *1980* . The tax office concerned rejected this application, as well as a subsequent protest, with reference to Section 167.2.2 of the *Umsatzsteuer-Richtlinien* (Turnover Tax Guidelines - UStR 1996/2005) The *Finanzgericht München* (Munich Financial Tribunal - FG) dismissed a further appeal.

In its appeal to the BFH, the plaintiff claimed (i) that the FG had misinterpreted the concept of film presentation; (ii) that it also showed films and was in competition with cinema operators whose film presentations benefited from the reduced rate of taxation; and (iii) that Community law suggested that television programmes should be included in the definition of public film presentations. The plaintiff added that its ability to compete with public and private TV providers was restricted by the application of the standard rate of taxation.

The plaintiff proposed as an alternative solution that an application be made to the ECJ for a preliminary ruling. The ECJ could then clarify the compatibility of the different taxation levels for public and private TV broadcasters with the Community law principle of VAT neutrality.

The *BFH* dismissed this appeal as unfounded.

Art. 12 para. 2 no. 7b of the UStG 1980 lays down a preferential taxation rate for cinemas. The rate is reduced to 7% for "the sale of films to be used or shown, as well as film presentations". Television programmes are not film presentations in the sense of this provision, as illustrated by copyright law, where the concept of film presentations in Art. 19.4.1 UrhG (Copyright Act) is distinguished from that of broadcasts in Art. 20 UrhG.

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In addition, the different tax rates applicable to film presentations and TV programmes do not infringe the principle of equal treatment enshrined in Art. 3 of the Basic Law because watching a film on television at home is different in many ways from a film screening in a cinema. For example, films are never broadcast on television until they have been shown in cinemas.

Similarly, the remit of public service broadcasters, who are exempt from paying turnover tax, is not comparable with that of private TV companies, who have to pay the tax. Public service TV is not pay-TV, but a non-commercial activity. It is required by law to deliver programmes which would not be broadcast on a commercial channel or meet the required quality standards.

Even the principle of neutrality enshrined in Community law does not mean that pay-TV should be taxed at a lower rate. TV programmes are different from film presentations, just as pay-TV is different from public service TV, so they do not need to be taxed in the same way. Public service broadcasters should not be taxed, while commercial TV channels are liable to tax.

Since the Panel did not agree with the plaintiff's interpretation of Community law, it was not necessary to refer her questions to the ECJ because of a lack of relevance to the issues of the case.

Urteil des Bundesfinanzhofs, Az. VR 70/03, vom 26. Januar 2006

http://juris.bundesfinanzhof.de/cgi-bin/rechtsprechung/document.py?Gericht=bfh&Art=en&Datum=2006-1&nr=10951&anz=15&pos=3&Frame=2

Ruling of the Federal Court of Finance, case no. VR 70/03 of 26 January 2006

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