# OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 9 October 2008 [1]

1. Certain activities in the public interest, including hospital and medical care and closely related activities, are exempt from VAT. And, where persons whose activities are exempt form groups to provide their members with services directly necessary for the exercise of those activities, such services are also exempt if the groups merely claim from their members 'exact reimbursement of their share of the joint expenses' and if there is no likelihood of distortion of competition.

2. The issue in this reference for a preliminary ruling from the Netherlands Hoge Raad (Supreme Court) is essentially whether the latter exemption extends to services provided to one or more members individually. Or is Community VAT law to be guided in that regard by the musketeers' motto: 'All for one, and one for all'?

1 — Original language: English.

**Relevant legislation**

3. The proceedings before the national court concern services provided between 1994 and 1998, so that the relevant Community legislation is the Sixth VAT Directive. [2]

4. Article 13A of that directive is entitled 'Exemptions for certain activities in the public interest'. Paragraph 1 provides, in so far as is relevant:

'Without prejudice to other Community provisions, Member States shall exempt the

2 — 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, amended on numerous occasions; 'the Sixth Directive'). It has been replaced, with effect from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), the aim of which is to present the applicable provisions clearly and rationally in a recast structure and wording without, in principle, bringing about material changes in the existing legislation (see recital 3 in the preamble).

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:

…

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

…

(f) services supplied by independent groups of persons whose activities are exempt from or are not subject to value added tax, for the purpose of rendering their members the services directly necessary for the exercise of their activity, where these groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to produce distortion of competition;

…'[3]

## Facts, proceedings and question referred

5. Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing ('the Stichting') is a foundation whose members are various medical and sickness insurance bodies and, in some cases, the individual members of those bodies, such as individual hospitals. The activities of the Stichting's members are exempt from VAT. Its own overall aim is to promote quality in medical care. To that end, it provides various services to its members. Most of those services (related in particular to defining and upholding professional standards for medical and nursing staff) are provided to hospitals, and the costs are apportioned among them

3 — The same provisions are now to be found, with no material alteration, in Articles 131 and 132(1)(b) and (f) of Directive 2006/112.

according to the number of beds. Such services (which are ultimately paid for by government funding) are agreed by the tax authorities to be exempt pursuant to the national provisions implementing Article 13A(1)(f) of the Sixth Directive.

6. The Stichting also provides other services to individual members on an occasional basis. Examples include providing a staff member to chair a group working on a project on appropriate medical care for one of the affiliated bodies, and delegating staff to speak at a colloquium on antiviral drugs and cardiac failure organised by another affiliated body. Such services are invoiced individually to the member organisation concerned. According to the order for reference, it is not disputed that those services are directly necessary for the exercise of the members' exempt activities and that there is no question of distortion of competition. The tax authorities consider, however, that the criterion of 'reimbursement of their share of the joint expenses' is not met.

7. The dispute is now before the Hoge Raad, which seeks a preliminary ruling on the question:

'Must Article 13A(1)(f) of [the Sixth Directive] be construed as covering also services supplied by groups coming within the scope of that provision to their members which are directly necessary for the exercise of those members' exempt activities or activities for which they are not subject to tax and by way of payment for which no more is invoiced than represents the costs incurred in respect of those services, if those services are supplied only to one or more members?'

8. The Stichting, the Netherlands Government and the Commission have all submitted both written and oral observations.

**Assessment**

*Distortion of competition*

9. The Netherlands Government queries the referring court's assumption that the contested services give rise to no distortion of competition. It points out in particular that national implementing provisions defining

the scope of the exemption in Netherlands law specifically exclude the provision of personnel, precisely on the basis that it is a service likely to cause serious distortion of competition.

10. Whether there is any actual or likely distortion of competition is, of course, a matter to be decided by the appropriate national court, as is the interpretation and application of the relevant national implementing rules. With regard to the likelihood of distortion, it may be noted simply that exemption must be refused if it may by itself, immediately or in the future, give rise to distortions of competition. [4]

11. I would, however, point out one further aspect. The national court's question refers to services 'for which no more is invoiced than represents the costs incurred'. That phrasing could cover services invoiced at less than cost price, in contrast to the exact reimbursement specified in the Sixth Directive. [5] Clearly, any supply of services at less than cost price will have implications in terms of competition vis-à-vis commercial undertakings, which must be taken into account by the competent national court in its factual assessment.

*Strict interpretation*

12. As the Netherlands Government and the Commission have pointed out, the Court has consistently held that, as exceptions to the general principle that VAT is levied on all supplies made for consideration by a taxable person, the terms used to designate the exemptions referred to in Article 13 of the Sixth Directive must be construed strictly. [6]

4 — See Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraphs 58 to 65.

5 — I note that, of the language versions in which the Sixth Directive was adopted in 1977, all include the word 'exact' in Article 13A(1)(f) except the Dutch, which refers simply to 'mere reimbursement' ('enkel terugbetaling') rather than 'merely … exact reimbursement'. Article 13A(1)(f) is implemented in Netherlands law by Article 11(1)(u) of the Wet op de Omzetbelasting (Law on Turnover Tax), which also refers to 'merely reimbursement' ('slechts terugbetaling').

6 — See, with specific regard to Article 13A(1)(f), Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13, and *Taksatorringen*, cited in footnote 4, paragraph 61.

13. However, the Court has further stated that it is not the purpose of that case-law to impose an interpretation which would make the exemptions set out in that provision almost inapplicable in practice. [7]

*The question posed*

15. The Stichting and the Commission submit that the Hoge Raad's question should be answered to the effect that, provided that the other criteria in Article 13A(1)(f) are met, that provision covers services supplied by groups coming within its scope even if those services are supplied only to one or more members.

14. I would also suggest that the strictness of the interpretation — and strict interpretation must not be confused with narrow interpretation [8] — may be tempered according to the nature of the exemption concerned. Hospital and medical care is exempted, in the interests of society as a whole, in order to lessen its cost to patients. The rationale of that exemption extends to necessary supporting services which, for reasons of economy of scale, are delegated to jointly-run entities. [9] If 'hospital and medical care' is itself subject to strict interpretation, is it appropriate to subject necessary supporting services to an additional degree of strict interpretation, tightening the noose even further? [10]

16. The Netherlands Government considers that the provision cannot cover services provided and invoiced individually to members. At the hearing, it elaborated on its position, arguing that the crucial distinction is between services provided in the collective interest, which are covered, and those provided in a member's individual interest, which are not.

17. Essentially, I agree with the Stichting and the Commission. If all the other conditions in Article 13A(1)(f) are satisfied — if the services are directly necessary for the exercise of an exempt or untaxed activity, if there is exact reimbursement of the expenses incurred and if there is no likelihood of distortion of

7 — *Taksatorringen*, paragraph 62.

8 — See the Opinion of Advocate General Jacobs in Case C-267/00 *Zoological Society of London* [2002] ECR I-3353, points 17 to 19.

9 — See the Opinion of Advocate General Mischo in *Taksatorringen*, cited in footnote 4, points 9 and 117 to 124, especially points 117 to 119.

10 — See also Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 23 of the judgment and points 20 to 23 of the Opinion of Advocate General Fennelly, together with the case-law cited there.

competition — it seems to me that an over-literal interpretation of the words 'share' and 'joint' would place an unwarranted and artificial restriction on the scope of the exemption.

18. Clearly, where a single type of service is provided to all members of the group during each tax period, each can be charged a 'share of the joint expenses' in the fullest sense of the term. The reality of such groups is, however, likely to be more complex. The group may well provide a range of different services, some required by all members and others by only some members. The needs of the members are likely to vary from one tax period to the next, so that, in a given period, certain services will be provided to all members, others to several members and yet others perhaps to a single member only. Yet the cost of providing all those services is still in a very real sense joint expenditure, having been incurred by the group set up for that purpose by all the members, and cost accounting methods are quite capable of identifying the precise share of that expenditure attributable to each individual service provided.

19. In its written observations, the Netherlands Government submitted that the purpose of the exemption is to avoid placing a VAT burden on services provided by a group for its members when the same services would have borne no such burden if they had been provided internally by each individual member. [11] Such services are thus assimilated to internal transactions. When a service is provided to a single member, the Netherlands Government argues, it is comparable to a transaction on the open market, with the provider at arm's length from the recipient, and should not benefit from such treatment.

20. I am unconvinced by that argument. Whether a particular service is provided by a group to one, several or all of its members does not change the relationship between provider and recipient or the nature of the arrangement whereby resources are shared in order to achieve economies of scale.

21. At the hearing, the Netherlands Government placed greater stress on the need for services, in order to qualify for exemption, to be provided in the collective interest of all the group's members rather than in the individual interest of specific members. It illustrated the distinction by referring to a school complaints board which provides all schools in the

11 — See the Opinion of Advocate General Mischo in *Taksatorringen*, points 118 and 119.

Netherlands with assistance in adjudicating on complaints. That service is provided in the collective interest of all schools, even if some schools do not require it in a given period, or even at all, and it should therefore be exempt under Article 13A(1)(f). By contrast, if a school were to obtain legal advice, say on VAT matters, from the board's lawyers, that would be a service in the school's individual interest, and should not be exempt.

22. Whilst I would tend to agree with the result which the Netherlands Government reaches when analysing its example, I do not agree with the method it uses. In the circumstances described, the VAT advice would not qualify for exemption because it is not a service directly necessary to enable the school to exercise its exempt activity of providing education, and probably also because it is not one of the services for the purposes of which the board was set up. On the other hand, a service which did fall within the board's purposes and which was directly necessary for the exercise of the exempt activity of providing education should qualify for exemption regardless of the actual number of schools in receipt of it.

23. It seems to me, moreover, that the distinction between collective and individual interest is of no great relevance as an independent criterion. Unless members are obliged to benefit from every service offered by the group, they will choose to take advantage of those services which are of individual interest to them. And the availability of such services for all members will necessarily be in their collective interest — provided, as always, that the services are 'supplied by independent groups of persons whose activities are exempt from or are not subject to value added tax, for the purpose of rendering their members the services directly necessary for the exercise of their activity'.

24. Since the Hoge Raad poses its question on the explicit assumption that the only point in issue is whether the criterion of 'reimbursement of their share of the joint expenses' is met, I would answer that question in the affirmative.

## Conclusion

25. Consequently, I am of the opinion that the Court should rule, in reply to the Hoge Raad's question:

Article 13A(1)(f) of the Sixth VAT Directive covers services supplied to their members by groups coming within its scope, even if those services are supplied to only one or more members, provided that the remaining conditions laid down in the provision are satisfied.