OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 20 January 1994 *

Mr President,
Members of the Court,

A — Introduction

1. In this request for a preliminary ruling the Gerechtshof, Leeuwarden, asks about the definition of a 'supply of services for consideration' within the meaning of Article 2 of the Sixth VAT Directive. [1] That article provides *inter alia* that:

'The following shall be subject to value added tax:

1. The supply of ... services effected for consideration within the territory of the country by a taxable person acting as such;

...'

2. In the main proceedings the plaintiff Mr Tolsma challenges a decision in which the respondent Inspecteur der Omzetbelasting (Inspector of Turnover Taxes, hereinafter referred to as 'the Inspecteur') charged certain sums as turnover taxes on the plaintiff's activity as the operator of a barrel organ.

3. The plaintiff uses that instrument to play music on the public highway, on which occasions he solicits 'remuneration' from passers-by by rattling his collecting tin.

4. In support of his case in the main proceedings, the plaintiff argued that he did not supply services for consideration, since he did not demand any 'consideration/remuneration'. The remuneration he received was given voluntarily.

5. The Inspecteur maintained on the other hand that the service was indeed supplied for

* Original language: German.

1 — 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), last amended by Council Directive 91/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47).

consideration, since the passers-by who paid remuneration did so because the taxpayer provided them with music. There was therefore a direct link between the service provided and the remuneration received, so that the service was effected for consideration. It was irrelevant that no remuneration had been stipulated.

6. In the circumstances the Gerechtshof, Leeuwarden, requested a preliminary ruling on the following questions:

1 (a) Must a service which consists in playing music on the public highway, for which no payment is stipulated but payment is nevertheless received, be regarded as a supply of services effected for consideration within the meaning of Article 2 of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes?

(b) Is it relevant for the purpose of answering this question that although the payment received is not stipulated, it is nevertheless solicited and, in view of customary usage, can be expected, although its amount is neither quantified nor quantifiable?

B — Opinion

7. I. To answer those questions, it appears to me to be important to examine in its context the concept of the 'supply of services for consideration' within the meaning of Article 2 of the Sixth Directive.

8. The Sixth Directive, as part of the common system of value added tax, fits into the scheme of the First Directive. [2] Article 2 of the latter directive provides as follows in its first two paragraphs:

'The principle of the common system of value added tax involves the application to goods and services of a general *tax on consumption exactly proportional to the price of the* goods and *services*, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated *on the price of the* goods or *services* at

2 — First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.' [3]

9. It was precisely that concept which found expression in Article 11 (A) (1) of the Sixth Directive with respect to the taxable amount. Under that provision the taxable amount is the '*consideration*' [4] which has been or is to be obtained by the supplier from the purchaser, the customer or a third party.

10. Both texts show that the common system of value added tax relates to the *stipulated exchange of mutually dependent services* — supply of goods or services on the one part, consideration on the other part. Thus in *Hong Kong Trade* [5] the Court of Justice held that:

'services provided free of charge are different in character from taxable transactions which, within the framework of the value added tax system, *presuppose the stipulation of a price or consideration*'. [6]

11. Consistently with this, Article 22 of the Sixth Directive obliges taxable persons *inter alia* to issue invoices or equivalent documents, in other words to document the 'consideration' he is entitled to under the *terms agreed*.

12. As to the article in question here, Article 2 (1), its provisions on the scope of the tax must be interpreted in the light of the above considerations. In the *Hong Kong Trade* case (in which what was lacking was not an agreement but the payment of consideration by the recipient of the service) the Court noted the importance of the provisions on scope for the interpretation of the value added tax system. It was held that:

'if [the economic activities of taxable persons] are free of charge in all cases they do not fall within the system of value added tax, since they cannot, according to Article 8, [7] constitute a basis of assessment'. [8]

3 — My emphasis.

4 — My emphasis.

5 — Judgment in Case 89/81 *Staatssecretaris van Financien* v *Hong Kong Trade* [1982] ECR 1277.

6 — Paragraph 10 of the judgment, my emphasis.

7 — This is a reference to Article 8 of the Second Directive (OJ, English Special Edition 1967, p. 16), which was the predecessor of Article 11 of the Sixth Directive.

8 — *Hong Kong Trade* judgment, paragraph 11.

13. It follows that, contrary to the opinion of the Netherlands Government, it is not sufficient in order to fulfil the requirement of 'consideration' that an individual actually receives income (possibly subject to income tax) for his activity and thus takes part in economic life. Despite the indisputably wide scope of the Sixth Directive, [9] to which the Netherlands Government draws attention, in principle that requirement is met, in view of its context, only in the case of operations which contain an element of contractual exchange in the above sense. [10]

14. II. Certain criteria have been developed in the case-law to define this principle more closely:

— There must be a direct link between the service supplied (which in this case would be the music provided) and the consideration received (in this case the payments by passers-by). [11] The link must be such that a relationship can be established between the level of the benefits which the recipients obtain from the services provided and the amount of the consideration. [12]

— The consideration must be capable of being expressed in money. [13]

— It must be a subjective value, [14] since the taxable amount is the consideration actually received and not a value estimated according to objective criteria. A service for which no subjective consideration is received is consequently not a service 'for consideration'. [15]

15. III. (1) On this basis I first address Question 1 (a) of the Gerechtshof, Leeuwarden.

9 — See the judgment in Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 17.

10 — Whether and under precisely what circumstances other economic operations can exceptionally be equated to the operations described in the provision need not be examined exhaustively here, since such an equation can in any event be excluded in the present case: see below, paragraph 25 et seq.

11 — Judgments in Case 154/80 *Staatssecretaris van Financiën* v *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12; Case 102/86 *Apple and Pear Development Council* v *Commissioners of Customs and Excise* [1988] ECR 1443, paragraph 11; and Case 230/87 *Naturally Yours Cosmetics Ltd* v *Commissioners of Customs and Excise* [1988] ECR 6365, paragraph 11.

12 — *Apple and Pear Development Council* judgment (see previous footnote), paragraph 15.

13 — *Coöperatieve Aardappelenbewaarplaats* judgment (see footnote 11), paragraph 13, and *Naturally Yours Cosmetics* judgment (see footnote 11), paragraph 16.

14 — See paragraph 23 below.

15 — *Coöperatieve Aardappelenbewaarplaats* judgment (see footnote 11), paragraphs 10 and 11; *Naturally Yours Cosmetics* judgment (see footnote 11), paragraph 16.

16. In this question the Gerechtshof assumes that 'no payment is stipulated but payment is nevertheless received' for the 'service' consisting in playing music on the public highway.

17. In my opinion, it is not possible in such circumstances to speak of a service 'for consideration'. In the absence of a price or some other value given in return which could be attributed in one way or another to an agreement on an exchange, [16] there is no *direct link* [17] between the service and the sums received. Instead the receipts originate in *voluntary* decisions by certain passers-by to pay an *amount of their choice*.

18. Moreover, that is consistent with the fact that the 'service' itself is not defined contractually in any way as regards either its principle or its extent. The Commission rightly points out that the plaintiff plays music voluntarily and can terminate his performance at any time. Conversely, the passer-by can decide freely how long he wishes to remain on the spot and listen. [18]

19. For the same reasons, it is not possible to establish the necessary relationship between the benefits which the passers-by obtain from the services and the fact of payment and its amount. [19] The persons concerned can decide freely, without being contractually bound, on all the factors which are of importance for that relationship. Thus many passers-by may deposit a comparatively large sum in the plaintiff's collecting tin without lingering, while others may listen to his performance for a considerable time without paying anything.

20. This also shows that the comparison made by the Netherlands Government with musicians who operate on the basis of contractual agreements with the individual listeners in their audience does not hold water, since in such a case the service and the consideration, and the relationship between the two, have been defined by the parties by agreement, whereas that is not the case here.

16 — Paragraphs 7 to 13 above.

17 — Paragraph 14 above, first indent.

18 — It may be noted that in such circumstances the very existence of a 'service' can be questioned. However, it appears from the wording and context of the questions referred that what the national court is concerned with is the characteristic defined by the words 'for consideration' in Article 2 of the Sixth Directive.

19 — See footnote 12 above and the text referred to there.

21. Contrary to the opinion of the German Government, the necessary 'inherent link' between the 'service' and the 'consideration' can also not be deduced from the fact that the passers-by 'only give money because the music has been played to them first'. Some passers-by certainly might be induced by the plaintiff's performance to hand over certain sums of money to him. Others who would in any event have been prepared to make a donation might perhaps decide on a larger amount than if the plaintiff did not make music but merely asked for money. However, the plaintiff and the passers-by do not determine the service and consideration as mutually dependent elements of a bargain. In those circumstances the motives which underlie the greater or lesser inclination of passers-by to make donations are irrelevant.

22. It is therefore clear that the requirement of an 'inherent link' as defined in the case-law is not fulfilled.

23. Moreover, I do not consider that the payments by the passers-by are a subjective value (or subjective consideration), [20] since there is no (subjective) relationship between service and consideration defined by the *parties*. The consideration for the benefits obtained by the passers-by could be valued, if at all, only according to objective criteria, [21] but that is not sufficient, according to the case-law cited above, with respect to the requirement of a service provided 'for consideration'.

24. Question 1 (a) of the Gerechtshof, Leeuwarden, should therefore be answered to the following effect:

The playing of music on the public highway, for which no payment is stipulated but for which a payment is received, cannot be regarded as a service effected for consideration within the meaning of Article 2 of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes.

25. (2) Question 1 (b) is distinguished from Question 1 (a) by the inclusion of an additional factor. For the purposes of Question 1

20 — See paragraph 14 above, third indent.

21 — For example, the average length of stay of individual passers-by, the average sum paid by them, etc.

(b) the national court assumes that a 'payment' is 'solicited and, in view of customary usage, can be expected, although its amount is neither quantified nor quantifiable'. By referring to this additional element, the Gerechtshof is in fact asking whether such a case can be equated with the case of a stipulated consideration.

26. In my opinion this question must be answered in the negative, so that my previous assessment remains.

27. Firstly, the circumstance that 'payment' is 'solicited' confirms that there is no legal entitlement to it. Consequently, that circumstance does not permit the present case to be equated with that of an agreed exchange of service and consideration.

28. The national court states that 'payment ... in view of customary usage, can be expected', but it is not entirely clear what precisely is meant thereby. If it meant that experience shows that a greater or lesser volume of payments can be expected, that would be of no relevance, since the amount donated by the individual passer-by, as can be seen from the very text of the question, is neither quantified nor quantifiable. The usage referred to by the national court would therefore not create any relationship between the performance by the plaintiff and the payment by the individual passers-by comparable with the relationship in the case of an agreed exchange of service and consideration.

29. The same would apply if in the opinion of the national court the average passer-by could be 'expected' on the basis of a *social custom* to comply with the plaintiff's request for a payment. Since the amount of the payment is not quantifiable, that too does not create a situation comparable with that of an agreed exchange of service and consideration.

30. Question 1 (b) should therefore be answered to the following effect:

It is immaterial in this respect that a payment is solicited and in view of customary usage can be expected to a greater or lesser but in any event neither quantified nor quantifiable extent.

C — Conclusion

31. In conclusion, I propose that the Court give the following answers to the questions of the Gerechtshof, Leeuwarden:

(1) A musical performance on the public highway, for which no payment is stipulated but a payment is received, is not to be regarded as a supply of services for consideration within the meaning of Article 2 of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes.

(2) It is immaterial in this respect that payment is solicited and in view of customary usage can be expected to a greater or lesser but in any event neither quantified nor quantifiable extent.