OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 18 March 1999 *

1. By this reference for a preliminary ruling, the Audiencia Provincial (Provincial Court) of Mallorca has asked the Court to clarify whether Spanish law, by making subject to value added tax (hereinafter 'VAT') as a general rule, the letting or lease of immovable property in which an economic activity is pursued, has correctly transposed the Sixth Directive of the Council on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [1] (hereinafter 'the Sixth Directive').

Community provisions

2. The Sixth Directive introduced under Title x (Articles 13 to 16) a system of exemptions, by which some operations are not taxable and do not allow the deduction of VAT at the preceding stage. Cases of exemption include, in particular, the leasing or letting of immovable property. Article 13B, which is the subject of the reference for interpretation, provides:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

(a) ...

(b) the leasing or letting of immovable property, excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

* Original language: Italian.

1 — Council Directive 77/388/EEC of 17 May 1977 (OJ 1977 L 145, p. 1).

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption; ...'

National provisions

3. Under Spanish law, the levying of VAT is at present regulated by Law No 37/1992 of 28 December 1992 which replaced the previous Law No 20/1985 of 2 August 1985. Under Article 11(2) of Law No 37/1992, all lettings with or without the option to purchase are liable to the tax. Article 20(23)(a) provides for exemptions for lettings for 'building or parts of buildings to be used exclusively for dwelling purposes'.[2] Lettings of business premises are therefore not exempt.

Facts of the case

4. The main proceedings before the Audiencia Provincial, which is the referring court, concern the termination, on the ground of failure to pay, of the contract by which Miguel Amengual Far leased business premises to his brother, Juan Amengual Far. At the time of the agreement — which was verbal — the parties did not agree specifically on whether the rent should include VAT, payable by the landlord under Spanish tax laws. The order for reference states that the tenant originally considered that it should not be included. Juan Amengual Far made a first offer of payment which did not include VAT. The landlord did not accept the offer and took action to have him evicted for failure to pay before the Court of First Instance in Inca. During the proceedings, the tenant repeated his offer, and also lodged the sums due in court, but still not including the VAT. However, he later sent the sum due for VAT to his brother.

2 — The same Law, however, provides for a series of cases in which exemption does not apply.

In view of the repeated offers to pay, and the payments made, even though they were late, the application for termination of the contract was dismissed at the Court of First Instance. The landlord then brought an appeal at the Audiencia Provincial on various grounds, including the fact that the tenant should have paid the monthly rent including VAT in advance. For his part, the defendant disputed the right of the landlord to charge him VAT, which was not specifically requested when the contract was concluded and thus until payment to the tax authorities.

Under Spanish legislation, any taxes payable to the tax administration form an integral part of the rent, so that failure to pay them constitutes an automatic ground for termination, without the need for any special notification. Consequently, the Audiencia Provincial considered that it should first of all establish whether VAT was payable on the lease in question: the possibility was raised that Spanish law, which provides for the payment of VAT in respect of all lettings of business premises as a general rule, does not comply with Article 13B of the Sixth Directive, which, in the opinion of the referring court, lays down a general principle of exemption for lettings of immovable property.

The questions referred for a preliminary ruling

5. The Audiencia Provincial of Mallorca therefore submitted the following questions:

'(1) Has the Spanish Law on VAT, by making subject to that tax any letting or lease of immovable property in which an economic activity is pursued, transposed correctly Article 13B of Directive 77/388/EEC?

(2) Should the Court rule that Article 13B of Directive 77/388/EEC has not been correctly transposed, is that Community provision, in so far as it lays down a general exemption from VAT in respect of leases of immovable property, directly applicable?'

The first question

6. The first question asks whether the Spanish Law implementing the Sixth Directive which subjects to tax any letting of immovable property in which an economic activity is pursued has correctly transposed

Article 13B of the Sixth Directive. This provision exempts the letting and lease of immovable property, except in specific situations — relating to the hotel sector, sites for parking vehicles, permanently installed equipment and machinery, and safes — also stating that Member States may 'apply further exclusions to the scope of this exemption'.

7. The Spanish Government, which intervened to argue that the rules of implementation comply with the Sixth Directive, observes that the doubt concerning interpretation is in fact caused by an error in the drafting of the Spanish version of Article 13B, final subparagraph, of the Sixth Directive, which is worded as follows: 'Los Estados miembros podrán ampliar el ambito de aplicación de esta exención a otros supuestos.' The provision would therefore appear to exclude the power of Member States to limit the scope of the exemptions. However, from a comparison with the other language versions, it is clear that this version is not correct. [3] Moreover, as the Agent for the Spanish Government pointed out, a provision which aims to extend the scope of a general rule would not be meaningless in the tax scheme. In actual fact, the Directive allows the States to provide for further exceptions to the exemption cases.

This explanation is useful, but it does not eliminate the doubt concerning interpretation. The referring court clearly starts from the presumption that, as stated in the case-law of the Court of Justice, Community law allows Member States to establish further exceptions in addition to those specifically listed in Article 13B. However, it states that, under Spanish tax law, the subjecting of business lettings to VAT is the result of the application of a general rule, not of an exception to the general principle of exemption laid down in the directive.

8. We must therefore ascertain whether Spanish law respects the relationship between the rule (of exemption) and exception established by the Council regarding the letting of property. The Commission considers that the choices of the Spanish legislator are essentially correct. It notes in particular that the general application of VAT to business premises is in agreement with the general aspect of VAT, a tax which is levied on all supplies of goods and

3 — For example, the Italian text is as follows: 'Gli Stati membri possono stabilire ulteriori esclusioni al campo di applicazione di tale esenzione'; the French version reads 'Les États membres ont la faculté de prévoir des exclusions supplémentaires au champ d'application de cette exonération'; the German version is: 'Die Mitgliedstaaten können weitere Ausnahmen vom Geltungsbereich dieser Befreiung vorsehen'; finally, the English version reads, 'Member States may apply further exclusions to the scope of this exemption.'

provisions of services, and whose application is in principle laid down for all stages of the production process. The general application also means that the person liable to the tax can recover any tax paid on purchases. [4] As already stated by Advocate General Darmon in the *Lubbock Fine* case, a system of value added tax achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all the stages of production and distribution, and the provision of services. [5] For this reason, the exemptions, which constitute an exception to the general principle of taxation, are interpreted restrictively. [6] This criterion has been consistently followed in the case-law of this Court. [7] Likewise, therefore, the power of the Member States to apply exceptions to the exemptions listed in the directive must be construed broadly. This was recently confirmed in the *Blasi* case. [8]

9. In fact, apart from the provisions under discussion, the directive as a whole allows the Member States a wide margin for assessing the economic situation. It is particularly significant that, even though Article 13B places the letting of immovable property generally amongst the exempt operations, Article 13C allows the Member States to give persons liable to tax the right to opt for taxation in the case of lettings and leases. [9] An observation should be made here. Even though the power of Member States to derogate from the cases of exemption indicated in the directive is to be defined broadly, in this case, unlike those previously submitted to the Court, it is not a question of analysing a specific case to assess whether it falls within the general clause of exemption or within the exceptions; instead, we should assess whether or not the general category of business premises can be subject to VAT. In my opinion,

4 — The person liable to tax recovers the tax he pays on purchases by obtaining credit with the State and recovers the tax payable to the State by the right of recovery towards those who purchase his goods and services. Therefore, the exemption only benefits the final consumer who purchases the goods or service at a cost to which VAT is not added; it can even by disadvantageous for the person liable to tax who carries out exempt operations, as the exempt operations have limitations concerning the right to deduct VAT on purchases. See Tesauro, F., *Istituzioni di diritto tributario*, Milan, 1995, p. 211.

5 — See Opinion in Case C-63/92 *Lubbock Fine & Co* v *Commissioners of Customs and Excise* [1993] ECR I-6665, at paragraphs 13 and 15.

6 — As observed by Advocate General Darmon 'there is all the more reason to construe exemptions restrictively since they may disrupt the chain of deductions between taxable persons and give rise to a tax burden owing to the fact that tax paid at the preceding stage ("input tax") cannot be deducted'. See his Opinion in Case C-63/92 *Lubbock Fine*, cited above, at paragraph 20.

7 — In Case 107/84 *Commission* v *Germany* [1985] ECR 2655, at paragraph 20, the Court interpreted Article 13A(a) strictly literally, and barred this provision from including services provided by public postal services. The need to follow a restrictive interpretation is stated generally in Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, at paragraph 13; see also Case C-185/89 *Velker International Oil Company* [1990] ECR I-2561, at paragraph 19.

8 — Case C-346/95 *Blasi* v *Finanzamt München I* [1998] ECR I-481, at paragraph 18 (the provision of short-term accommodation for persons other than friends and family is considered to be taxable as the provision of accommodation). See also Case 173/88 *Henriksen* [1989] ECR 2763 (closed garages are included in the concept of 'letting of premises and sites for parking vehicles', exception to the principle of exemption stated in Article 13B(b)).

9 — See paragraph 17 of the judgment in Case C-381/97 *Belgocodex* v *Belgian State* [1998] ECR I-8153: 'the Member States have a wide discretion under Article 13B and C. It is for them to assess whether they should or should not introduce the right of option, depending on what they consider to be expedient in the situation existing in their country at a give time.'
In addition, regarding a different aspect, the Council has provided ample possibility for derogating from the provisions in Article 10 concerning the moment when the tax becomes payable. See Case C-144/94 *Italittica* [1995] ECR I-3653, at paragraph 15.

we should look at the compatibility of the choices made by the Spanish legislator, concerning the general and neutral nature of the tax, but also concerning the logic followed by the Council in providing for and regulating the cases of exemption. The directive is intended to be applied uniformly throughout the Community and for this purpose it establishes a harmonised system of exemptions. [10] Therefore, I do not agree with the opinion expressed by the Agent for the Spanish Government when he states that the directive allows Member States to derogate from the exemption relating to lettings of property without any limit, if only for the reason that it make the scope of the exemptions derisive. Rather than resorting to quantitative criteria, we should consider whether the reasons on the basis of which the Council defined the cases of exemption apply. As Advocate General Jacobs observed in the *Blasi* case, the levying of VAT is not generally justified in regard to the letting of property, which, he stated, 'is normally a passive activity, not entailing significant added value'. Advocate General Jacobs concluded in that case that the common characteristic of the operations excluded from exemption under Article 13B(1) to (4) lies in the fact that they 'entail a more active exploitation of the immovable property, justifying further taxation, in addition to that levied upon its initial sale'. [11]

10. I now come to the national legislation under examination. The tax applies to an operation which is part of an active production process, following the reasoning of Jacobs. In exercising the power provided for in Article 13B to establish further exclusions from the scope of the exemption in relation to the letting of property, the Spanish legislature therefore legitimately subjected to tax the letting of premises used, in the course of business activity, for taxable operations.

The second question

11. Given my answer to the first question, it is not necessary to answer the second. I shall merely point out that, if the Spanish legislation were to be incompatible with the directive, according to the known and settled case-law of the Court, an individual could not invoke against another individual the provision of the directive not correctly transposed into national law. [12]

10 — As shown in the eleventh recital of the preamble to the directive, it was considered appropriate 'that a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States.'

11 — Opinion in Case C-346/95 *Blasi*, cited above, at paragraphs 15 and 16.

12 — See, *ex multis*, Case 152/84 *Marshall* [1986] ECR 723, at paragraph 48, and most recently Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, at paragraph 24.

Conclusion

12. In view of the foregoing, I therefore propose that the Court answer the questions referred to it by the Audiencia Provincial of Mallorca (Third Chamber) as follows:

The Sixth Directive allows the Member States to extend the scope of the exclusions from the exemptions to cases not provided for, which may include, as in this case, the letting of property as an economic activity.