OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 20 September 2001 [1]

I — Introduction

1. In this case the Commission, pursuant to Article 226 EC, requests the Court to declare that the Republic of Finland, by maintaining provisions exempting both the sale of works of art by the artist himself or by intermediaries and the importation of works of art purchased directly from the artist, has failed to fulfil its obligations under Article 2 of the 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 (hereinafter: 'the Directive'). [2] More specifically, the Commission is of the opinion that the Directive offers room for the exemption from VAT of services performed by artists during a transitional period, but that it does not make possible an exemption for goods supplied by them, for which the Finnish legislation provides.

1 — Original language: Dutch.

2 — OJ 1977 L 145, p. 1.

II — Legal framework

2. Article 2 of the Directive creates the basis for the levying of VAT by providing as follows:

'The following shall be subject to value added tax:

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

2. the importation of goods.'

3. Article 12 of the Directive creates a basis for the application of the reduced VAT rate. Paragraph 3(c) of the Directive states: [3]

'[The] Member States may provide that the reduced rate, or one of the reduced rates, which they apply in accordance with the third paragraph of (a) shall also apply to imports of works of art, collectors' items and antiques as referred to in Article 26a(A)(a), (b) and (c).

Where they avail themselves of this option, Member States may also apply the reduced rate to supplies of works of art, within the meaning of Article 26a(A)(a):

— effected by their creator or his successors in title;

— effected on an occasional basis by a taxable person other than a taxable dealer, where these works of art have been imported by the taxable person himself or where they have been supplied to him by their creator or his successors in title or where they have entitled him to full deduction of value-added tax.'

4. Article 13 of the Directive creates a basis for exemption from the levying of VAT. This article, under A(1)(n), provides for exemptions for 'certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned'.

5. Article 28(3) of the Directive, opening sentence and under (b), states:

'During the transitional period referred to in paragraph 4, Member States may:

...

(b) continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned.'

6. Annex F to the Directive gives a list of activities, which may be exempted pur-

3 — As this provision now reads after amendment by Council Directive 94/5/EC of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388/EEC — Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques (OJ 1994 L 60, p. 16).

suant to Article 28(3)(b) of the Directive. Item 2 of the Annex mentions: 'Services supplied by authors, artists, performers, lawyers and other members of the liberal professions, other than the medical and paramedical professions...'.

7. Annex XV, Title IX, to the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (hereinafter: 'the Act of Accession'), [4] deals with taxation. Paragraph 2(n) of this Title provides:

'(n) For the purposes of implementing Article 28(3)(b), and so long as the same exemption is applied by any of the present Member States, the Republic of Finland may exempt from value added tax:

— services supplied by authors, artists and performers referred to in point 2 of Annex F;

....'

4 — OJ 1994 C 241, p. 335.

8. Finnish tax legislation exempts from VAT the sale of a work of art of which the maker is the owner. This exception applies to both the sale of the work by the artist himself and its sale by an intermediary. The same exception applies to the importation of a work of art purchased directly from the artist.

III — Facts and procedure

9. On 16 February 1998 the Commission sent the Republic of Finland a letter of formal notice for having maintained provisions in breach of the Directive which in certain cases exempt the sale and importation of works of art from the levying of VAT.

10. The Finnish Government replied by means of a letter dated 6 April 1998. In its reply it stated that the provisions of the Act of Accession and Article 28(3) of and Annex F to the Directive, taking into consideration their objectives, permit the Republic of Finland to maintain the exception.

11. On 4 November 1998 the Commission issued a reasoned opinion. In reply the Finnish Government repeated the view which it had stated earlier. In response to this the Commission lodged the present application on 8 May 2000.

IV — Arguments of the parties

12. In its application the Commission first points to Article 2 of the Directive, which expresses the principle that the supply and importation of goods are subject to VAT. The Commission then states that the Directive does not provide an exception for the supply and importation of works of art. The Commission refers to Article 12(3)(c) of the Directive, which merely permits the Member States to apply a reduced rate. Finally, the Commission indicates that although Annex F to the Directive, which lists the activities which the Member States are permitted to exempt from VAT pursuant to Article 28(3) of the Directive, concerns the services of authors, artists and performers of works of art, it does not concern the sale and importation of works of art, as this involves goods rather than services. In short, in the opinion of the Commission the Republic of Finland has failed to fulfil the obligation arising from Article 2 of the Directive.

13. The Finnish Government states that upon accession to the European Union an exception was created permitting it to maintain the exemption for works of art of which the maker is also the owner. It points to the reference to Article 28(3)(b) of, in conjunction with Annex F to, the Directive in the Act of Accession.

14. The Finnish Government does not agree with the Commission's point of view regarding the first sale and the importation of a work of art. Even if a strict distinction is to be made between the concepts of 'goods' and 'services' in the Directive and if works of art as such are in general to be considered goods, the interpretation of the exception for artists should, according to the Finnish Government, still not be merely based on the wording of the provisions. A strictly literal interpretation would reduce the scope of the exception to virtually nil. For if, as the Commission would have it, the exception only concerns visual art in so far as this does not take the shape of a movable object, the exception only applies to the special situation where the work of art is directly applied by the artist to an immovable object, the purchaser of which is the owner. [5] According to the Commission's interpretation the transfer of a work of art made on commission, such as a portrait, would, according to the Finnish Government, also be included in the concept of 'good', and thus be excluded from the exemption.

15. This is connected with the fact that the concept of 'artist' in Annex F, item 2, to the Directive should, according to the Finnish Government, be interpreted as meaning visual artist, given that for other artists the concepts of 'performers of works of art' and 'authors' have been included. I understand this view to mean this: that, for example, in the art of music the performing artist is a performer of works of art and the composer is an author.

5 — One could think of a mural.

16. The Finnish Government is of the opinion that the object of the provision, the other provisions of the Directive concerning cultural activities and the principle of tax neutrality should be taken into account.

17. Further, the special nature of the first sale of a work of art should be taken into consideration. This activity should not be considered as equivalent to the production and sale of consumer goods. The Finnish Government also points to three — less recent — Commission Proposals in which an exemption from VAT is proposed for transfers of works of art by the artist himself. [6]

18. The Finnish Government also mentions a Commission report of 2 July 1992, [7] which would reveal some uncertainty as to the classification of the transfer of a work of art as a good or as a service. In its application, however, the Commission disputes that this report has any relevance to the present case.

19. A too narrow interpretation of the Directive would, according to the Finnish Government, moreover lead to the unequal treatment of the various artistic professions and thereby to the violation of the principle of tax neutrality. This principle is an important objective of the VAT system. The Finnish Government in this context refers to *Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and Others* [8] and to *Gregg*. [9]

20. The Finnish Government finally also refers to Article 13(A)(1)(n) of the Directive, which contains a permanent exemption for certain cultural services.

21. On the basis of the above, the Finnish Government concludes that the Act of Accession, as well as Article 28 of and Annex F to the Directive, imply that the first transfer of a work of art by the maker may be exempted from VAT. The Finnish Government deduces from Article 14(1) of the Directive that this is also true for the importation of works of art. Finally, I would like to point out that the Finnish Government recognises the validity of the application in so far as it concerns the commission payable on works of art of which the maker is the owner.

22. In response to the arguments put forward by the Finnish Government the Com-

6 — In its reply the Finnish Government further specifies that it was thereby not intended to also extend the material scope of the exception.

7 — SEC (92) 1006 def.

8 — Joined Cases 231/87 and 129/88 *Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and Others* v *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 22.

9 — Case C-216/97 *Gregg* v *Commissioners of Customs and Excise* [1999] ECR I-4947, paragraph 20.

mission recognises that the Republic of Finland is entitled to maintain exceptions on the basis of the Act of Accession. It disputes, however, that the Finnish Government comes within the scope of Annex F, item 2, to the Directive, to which the Act of Accession refers.

23. Annex F to the Directive provides a case-by-case list of exceptions, involving a merely temporary competence for the Member States to maintain exceptions. These must be interpreted strictly and literally. Here, the Commission refers to *Bulthuis-Griffioen* [10] and to *Skripalle*. [11] The same approach applies to the Act of Accession of Austria, Finland and Sweden. [12] The Commission finds that this approach is even more applicable in the present case, as the deviation may only be used for existing practices in the Member State. The Finnish Government's interpretation is contrary to the wording of the Annex and would, according to the Commission, even cause a book to be exempted from the levying of VAT, which is in violation of Annex H, item 6, to the Directive.

24. The Commission does not agree with the argument that its interpretation would reduce the scope of application of the exceptions of Annex F, item 2, to the Directive to virtually nil. The exception does not merely concern artists and performers of works of art (such as circus artists, singers and actors) but also concerns lawyers and other practitioners of the professions.

25. The Commission puts forward an economic consideration. Where the performance of a service is completed after the performance itself, a good may be sold repeatedly. In the case of the delivery of a work of art to, for example, a gallery, the exemption from levying VAT would as a consequence also make it impossible for the artist himself to deduct the VAT which he paid on the raw materials, like the paint and the canvas needed for a painting. The levying of VAT is transferred to the taxable person who buys the work of art, for example, the gallery. This effect goes against the objective of relieving taxes on art. This economic consideration was, the Commission states, an argument against the adoption of the proposals for the amendment of the Directive to which the Finnish Government refers. [13]

26. The Commission contests that its view gives rise to artificial distinctions as regards the supply of works of art. On the contrary, the difference in treatment arises from the type of contract which the artist has concluded. One may speak of the supply of a good, such as the sale of a painting or a sculpture, when the artist sells a work made by him. One may speak of the performance

10 — Case C-453/93 *Bulthuis-Griffioen* v *Inspecteur der Omzetbelasting* [1995] ECR I-2341, paragraph 19.

11 — Case C-63/96 *Finanzamt Bergisch Gladbach* v *Skripalle* [1997] ECR I-2847, paragraph 24.

12 — The Commission refers to Case C-233/97 *KappAhl* [1998] ECR I-8069, paragraph 23.

13 — See paragraph 17 of my Opinion.

of a service when the commissioning party is the owner of a work of art as from the moment of its creation, for example, when a portrait is commissioned.

27. The Commission points out that every distinction in the treatment of different activities is subjective in character. The principle of tax neutrality cannot here be invoked as an argument against the strict interpretation of the legislation.

28. The Commission further discusses Article 13(A)(1)(n) of the Directive. This provision contains a derogation from the principle of levying VAT and must consequently be interpreted strictly, says the Commission. Furthermore, the provision is directed at services. The derogation can only benefit the supply of goods when such supply is closely connected with, and thereby to a certain degree subordinate to, the performance of a service.

29. In rejoinder the Finnish Government emphasises once more that the view of the Commission renders the exception of Annex F, item 2, to the Directive virtually insignificant for artists. This does not alter the fact that this Annex is also applicable to professional groups other than artists. Secondly, the Finnish Government does not share the Commission's view that the distinction between works of art and consumer goods is subjective. The Directive after all provides a precise definition of a work of art. In the third place, the Finnish Government considers the Commission's proposition that a good can be transferred more than once, whereas a service cannot, untenable. As an example the Finnish Government points to the transfer of a melodic work by the performer. In the fourth place, the Finnish Government points out that the seller, when reselling a work of art, need only pay VAT on his own commercial margin, even when he obtained the work of art tax-free. Thus, no double taxation is involved, contrary to what the Commission seems to imply. Furthermore, artists often sell directly to consumers.

V — Assessment

30. The dispute in essence centred on the interpretation of the provisions of Article 28 of, in conjunction with item 2 of Annex F to, the Directive. Can the concept of 'services supplied by... artists' be understood to also include the first supply of a work of art by the maker? The Commission answers this question in the negative. It starts from the viewpoint that the provision involved must be read strictly and literally by reason of the fact that it contains a derogation. The Finnish Government answers this question in the affirmative, whereby it takes the context and purpose of the provision into consideration.

31. I share the Commission's point of view. It has already been established that the

provision is of a derogating nature and adversely affects the harmonisation of VAT systems as regulated by the Directive. The provision offers Member States the opportunity to deviate — temporarily — from the principle according to which VAT is owed. Such a provision has consequences for the weight of the tax burden. According to the Court's case-law, deviations like these are only allowed in cases expressly provided for by the Directive. [14] Furthermore, according to the Court's case-law, provisions constituting a deviation from a principle should be interpreted strictly. [15] Advocate General Fennelly, in his Opinion in the *Victoria Film* case, has already noted that 'there is no reason why the principle of strict construction of exemptions should not apply in respect of Annex F' to the Directive. [16]

32. Thus, for me, the primary point is the strict and literal interpretation of the derogating provision contained in the Act of Accession in conjunction with Article 28(3), opening sentence and under (b), of, and Annex F, item 2, to, the Directive. In so interpreting, I attach importance to the distinction between goods and services as made in Article 2(1) of the Directive. This distinction follows directly from the EC Treaty itself. The Directive obliges the Member States to levy VAT both on goods and for services. However, the exception referred to in Annex F, item 2, to the Directive concerns services only. The supply of goods, therefore, is subject to the levying of VAT.

33. I thereby point out that the legislature must have made a conscious choice to exclude the supply of goods from the exemption. In other parts of Annex F to the Directive goods are, after all, expressly mentioned, sometimes alongside the performance of services. In this context, I would especially wish to mention the formula used in item 5 of Annex F to the Directive, which reads 'services and supplies of goods incidental thereto' supplied by public postal services in the field of telecommunications. Article 13 of the Directive, using similar wording, exempts 'certain cultural services and the supply of goods closely linked thereto'.

34. The Finnish Government's line of argumentation is broadly to the effect that the distinction between services and goods in the activities of artists cannot be properly made or, at least, that it results in an undesirable outcome.

35. It escapes me how the Finnish Government could have arrived at the reasoning that a distinction between goods and services in the activities of visual artists cannot be properly made. Where this is concerned, the visual artist is no different from any

14 — See, *inter alia*, Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, paragraph 34, concerning the right to deduct VAT.

15 — See, *inter alia*, Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 19, concerning Article 12(3) of the Directive.

16 — Opinion in Case C-134/97 *Victoria Film* [1998] ECR I-7023. This case, like the present case, also concerned the interpretation of the Act of Accession in conjunction with Article 28(3), opening sentence and under (b), of, and Annex F, item 2, to, the Sixth Directive. The Court did not get round to interpretation.

other professional. I would mention writers. The activity of writing itself may be considered a service, while the book, which is the result of the writing, can be considered a good. The Finnish Government in this context also seems to contend that a work of art cannot be compared with a random consumer good. Undoubtedly many art lovers will share the Finnish Government's point of view, but legally speaking it evidently fails to be convincing.

36. Next, I point to the Finnish contention that a strict distinction between services and goods would cause the exemption to lose any practical significance — at least for artists. In my opinion this result could indeed occur. However, such a result, which may well be considered undesirable by a Member State from a policy perspective, cannot induce the Court to give a broad interpretation to an exemption in the Directive, which would conflict with the wording of the Directive. Only the Community legislature could, by amending the Directive, alter this result.

37. Still, however, it becomes clear from the way the Commission interprets the exemption that it is accorded some practical significance. The Commission states that commissioned works of art can profit from the exemption. Commissioned art would seem to me to be rather more ubiquitous than the example given by the Finnish Government: the mural in the artist's home or business premises.

38. Neither can I deduce from the object of the exemption provision, nor, for that matter, from other provisions of the Directive that concern cultural activities, that the Act of Accession in conjunction with Article 28(3), opening sentence and under (b), of, and Annex F, item 2, to, the Directive could also pertain to the supply of goods. It was obviously not the intention of the Community legislature to exclude all activities of artists from the levying of VAT. In the first place, I would point out that the exception, which the Finnish Government is relying on, is of an optional character. Moreover, the exception only applies during a transitional period. Further, the Directive itself contains an instrument which should enable the Member States to limit the burden of taxes on art: pursuant to Article 12(3) of the Directive they can apply a reduced rate. Article 13(A)(1)(n) of the Directive carries this still further for certain services and supplies. This provision provides an exemption from VAT when these services and supplies have been performed by bodies governed by public law or by other cultural bodies recognised by the Member State concerned.

39. It is my opinion that the Community legislature has thus opted for a balanced system for levying VAT on art. The temporary exemption pursuant to Article 28(3), opening sentence and under (b), of, and Annex F, item 2, to, the Directive is only of secondary importance. It is therefore out of the question that a

strict interpretation of this exemption would conflict with the object of the Directive, if a different interpretation would be possible at all.

40. In this dispute the effect of the principle of tax neutrality was also put forward. This principle underlies the common VAT system of which the Directive forms a part. It precludes entrepreneurs who carry out the same activities from being treated differently when it comes to the levying of VAT. [17] In this context, the Court has, more particularly, recently reconfirmed that double taxation goes against the principle of tax neutrality. [18]

41. In my view it cannot follow from this principle that the supply of works of art by the artist should be liable to fall under the exemption. The supply of a work of art and the performance of a service by the artist, such as, for example, painting a portrait on commission, cannot, after all, be considered to be the same activities. As the Commission rightly puts it, these are different activities whereby the determining factor is the type of contract the artist has concluded.

42. I would also point out that in various places the Directive distinguishes quite precisely activities which always come under the ordinary VAT rate, activities which come under the reduced VAT rate and activities which may even be exempted entirely. In a system of such detail activities with a somewhat comparable, though not identical, content will automatically be treated differently in some cases.

43. The Directive has thus created many borderline cases, which stem from the fact that the boundaries maintained are not always created naturally, but are determined by the way in which the Community legislature uses its margin of discretion. The boundary which is the most obviously natural is that between goods and services. I therefore fail to understand why upholding this boundary could be made impossible by invoking the principle of tax neutrality.

44. The dispute further also involves the question whether the exemption from taxation on works of art can lead to double taxation. As it already follows from the above that such an exemption does not fit in with the Directive's system, I will decline to discuss the risk of double taxation any further.

45. For what it may be worth, I would add the following. From the defence it can be

17 — See, *inter alia*, *Gregg*, above, footnote 9.

18 — Joined Cases C-322/99 and C-323/99 *Fischer and Brandenstein* [2001] ECR I-4049, paragraph 76.

deduced that during the negotiations concerning accession the Finnish Government also aimed to exempt the first supply of works of art from the levying of VAT. This aim cannot be taken into consideration in judging the present case. What the wishes of one of the parties to the negotiations were is not the point; what is decisive is the outcome of the negotiations as laid down in the text of the Act of Accession.

VI — Conclusion

46. In the light of the facts and circumstances set out above, I propose that the Court should:

(a) declare that, by maintaining legislation exempting both the sale of works of art by the artist himself or by intermediaries and the importation of works of art purchased directly from the artist, the Republic of Finland has failed to fulfil its obligations under Article 2 of the 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.

(b) order the Republic of Finland to pay the costs in accordance with Article 69(2) of the Rules of Procedure.