OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 18 July 2007 [1]

1. In this reference for a preliminary ruling from Austria, the Vienna Division of the Unabhängiger Finanzsenat (Independent Tax Tribunal) wishes to know whether the concept of 'leasing or letting of immovable property' in Community VAT law includes the grant of the right to fish in a given body of water, in the form of a 10-year lease granted by the owner of the property on which the body of water is located or by the holder of fishing rights in respect of a body of water located on public land.

Community legislation

2. At the material time in the main proceedings, VAT was harmonised by the Sixth Directive, [2] Article 13B of which provided, inter alia:

'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:

...

(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;

1 — Original language: English.

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 but not as regards the provisions relevant here). On 1 January 2007, the Sixth Directive was repealed and replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).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;

...'[3]

3. Article 13C(a) authorised Member States to allow taxpayers — subject to any restrictions and detailed rules determined by the State — a right of option for taxation in cases of leasing and letting of immovable property.[4]

Austrian law

4. Paragraph 6(1)(16) of the Umsatzsteuergesetz 1994 (1994 Law on turnover tax, 'the UStG') exempts from VAT the leasing and letting of immovable property, including 'entitlements to which the rules of civil law on immovable property apply, and sovereign rights relating to the use of land', subject to the same exceptions as in Article 13B(b) of the Sixth Directive.

5. The referring tribunal explains that the notion of immovable property within the meaning of Paragraph 6(1)(16) of the UStG is that used in civil law. The Austrian Civil Code classifies rights as movable unless they are connected with the ownership of immovable property, that is to say, enjoyed by virtue of that ownership, as in the case of real servitudes. A real servitude is a right in rem, generally established by registration.[5] Fishing rights in private waters are normally an extension of the right of ownership of the waters. Where they are enjoyed by virtue of ownership of a different property they are

3 — See now Articles 131 and 135(1)(l) and (2) of Directive 2006/112.

4 — See now Article 137(1)(d) and (2) of Directive 2006/112.

5 — There is no indication that Austria has used the option in Article 5(3) of the Sixth Directive (now in Article 15(2) of Directive 2006/112) in order to treat as tangible property rights in rem giving the holder a right of use over immovable property. See Case C-166/05 *Heger* [2006] ECR I-7749, paragraph 19, and point 28 of my Opinion in that case.

real servitudes. Otherwise they may be granted as irregular personal servitudes and independent rights in rem, which can be freely transferred by sale and inheritance (hunting rights, however, may no longer be established as independent rights in rem but always follow the ownership of the property). Game and fish in the wild [6] are ownerless and not part of or accessory to land. The Civil Code classifies them as immovable property until caught or killed, thus making it clear that the right to take them stems from land ownership and not from a pre-existing right over them as independent movable property. It is not the animal, but the right to hunt or fish, that forms part of land ownership.

6. Paragraph 4 of the NÖ Fischereigesetz 2001 (Lower Austrian Law on fisheries) defines fishing rights variously as comprising the entitlement to conserve, capture, acquire and kill aquatic animals, and to permit their capture and/or acquisition by others; as inseparable from an obligation to manage fishing waters appropriately and sustainably; and as independent rights not connected with land, which may be acquired and held in accordance with the general rules on private rights, subject to the jurisdiction of the ordinary courts.

6 — 'In freier Natur'. The point is not mentioned in the present case, but one might wonder whether the term would include, say, managed fish stocks in closed ponds given over specifically to angling.

Facts and procedure

7. Gabriele Walderdorff owns and operates an agricultural and forestry holding at Zwettl, in Lower Austria, in respect of which she is subject to VAT at the normal rate. The assets include registered fishing rights in respect of certain publicly-owned waters. In addition, there are ponds on the holding in respect of which she has fishing rights as land owner.

8. Ms Walderdorff leased both those sets of fishing rights to a local angling club for a period of 10 years from 1 January 1996. Under the contract, the annual rent was ATS 60 000. If Ms Walderdorff opted for taxation for VAT, that was to be broken down as ATS 50 000 net, plus VAT at 20%. In fact, she did not opt for taxation, and therefore did not invoice VAT to the club.

9. Following an inspection, the tax authority decided that the rent should be subject to VAT at the normal rate, as it did not relate to an exempt letting of an immovable property right under the UStG. It therefore issued assessment notices for VAT of 20%.

10. Ms Walderdorff appealed against those assessments and applied for exemption from VAT on the basis of Paragraph 6(1)(16) of the UStG. The appeal is now before the referring tribunal.

11. The tax authority relies on the view taken by the Federal Ministry of Finance, that fishing rights are independent of the land and cannot be regarded as equivalent to the use of land. Their letting by a taxable person is not therefore exempt under Paragraph 6(1)(16) of the UStG, but subject to the normal rate of taxation.

12. Ms Walderdorff submits that Paragraph 6(1)(16) of the UStG covers rights which are not components of immovable property, but may in themselves be the subject of a lease. Hunting rights do not fall within that definition, since they can no longer be established as independent rights in rem registrable as such. However, fishing rights can be enjoyed by someone other than the land owner, in which case they are servitudes registrable in the land register. They are therefore immovable property rights within the meaning of Paragraph 6(1)(16) of the UStG.

13. Uncertain as to the position under Community law, the Unabhängiger Finanzsenat has referred the following question to the Court for a preliminary ruling:

'Is Article 13B(b) of the [Sixth Directive] to be interpreted as meaning that the grant of the entitlement to fish, for consideration, in the form of a lease concluded for a period of 10 years

(1) by the owner of the property on which the body of water in respect of which the entitlement was granted is located,

(2) by the holder of fishing rights in respect of a body of water located on public land

constitutes "the leasing or letting of immovable property"?'

14. Only the Commission has submitted written observations, and no hearing has been requested or held.

Assessment

15. The order for reference provides extensive information on the nature and classification of rights related to immovable property, and in particular of fishing and hunting rights, in Austrian law. The argument before the referring tribunal also appears to be based largely on that classification.

16. However, the question referred concerns the interpretation of 'leasing or letting of immovable property' in Article 13B(b) of the Sixth Directive, and the Court has consistently held that the exemptions provided for in Article 13 constitute independent concepts of Community law, whose purpose is to avoid divergences in the application of the VAT system from one Member State to another. [7]

17. Consequently, the classification of fishing rights in Austrian law — or their differentiation from hunting rights — will not be decisive when determining whether granting them may constitute 'leasing or letting of immovable property' for the purposes of the exemption in Article 13B(b). Nor is it conclusive that the contract in question is designated as a lease (*Pachtvertrag*) in Austrian law.

18. A question which may be latent in the order for reference is however whether fishing rights may themselves constitute immovable property capable of being leased or let within the meaning of Article 13B(b), if they are classifiable as immovable rights in Austrian law — and indeed perhaps in other legal systems.

7 — See, for example, Case C-434/05 *Horizon College* [2007] ECR I-4793, paragraph 15, and the case-law cited there; and, in a case concerning the VAT classification of hunting rights, Case C-43/04 *Stadt Sundern* [2005] ECR I-4491, paragraph 24.

19. In my view, it would be artificial to interpret the Community law concept of immovable property in that way in the context. The concept of leasing or letting of immovable property is appropriate only to actual material property, not to rights which are by nature themselves immaterial, whatever they may relate to. The Court has held immovable property to be limited to that which is not mobile nor easily movable. [8] Such a limitation must, *a fortiori*, exclude property of an immaterial nature. That view appears to be confirmed by the Court's statement that one of the essential characteristics of immovable property is that it is attached to a specific part of the earth's surface. [9]

20. I am not swayed in that regard by the referring tribunal's reference to a statement in the Council minutes relating to the adoption of the Sixth Directive, to the effect that the possibility of restricting the scope of the exemption in Article 13B(b) was introduced in particular in order to give the Member States the option to make, inter alia, hunting and fishing subject to VAT, with the possible implication — in the referring tribunal's view — that hunting and fishing would normally, in that context, be classified as immovable property. Whatever the implication, it is settled case-law that, where no reference is made to their content in the provision to which they relate, such statements have no legal significance and cannot be used for the purpose of interpreting a directive. [10]

21. The Court has defined the letting of immovable property, within the meaning of Article 13B(b) of the Sixth Directive, as an arrangement whereby the landlord assigns to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it. [11] It has also held that land which is wholly or partly under water may still be categorised as immovable property which can be leased or let. [12]

22. A body of water is therefore capable of being leased or let within the meaning of Article 13B(b) of the Sixth Directive, and it is established in the present case that the

8 — See Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 30 et seq.

9 — See *Heger*, cited in footnote 5, paragraph 20.

10 — See, for example, in the field of taxation, Joined Cases C-197/94 and C-252/94 *Bautiaa* [1996] ECR I-505, paragraph 51, and Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraph 26, together with the case-law cited there.

11 — See Case C-428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527, paragraph 30, and the case-law cited there.

12 — Ibid, paragraph 34. See also, as regards the classification as immovable property of a stretch of water in respect of which fishing permits may be issued, *Heger*, cited in footnote 5, paragraphs 20 to 22.

contract in question assigns rights over specified bodies of water for an agreed period in exchange for an annual rent. Those aspects are consistent with the criteria set out in the Court's case-law. It may further be noted that the right to take fish from the waters, and the obligation to manage those waters appropriately and sustainably, seem typical of the kind of lease referred to in the German version of Article 13B(b) of the Sixth Directive as '*Verpachtung*'. [13]

23. However, it is not enough for a contract to comprise certain elements which are typical of the leasing or letting of immovable property if it does not meet all the essential criteria in the Community law definition of leasing or letting. One such criterion is the extent to which the contract assigns the right to occupy the property and to exclude other persons from it.

24. A first question is whether a contract granting access to and enjoyment of actual immovable property for the sole purpose of fishing can be regarded as a lease or let.

25. It is of course not unusual for a lease to specify that the property concerned is to be used, or is not to be used, for one or more particular purposes. Nor does there appear to be anything intrinsic in the activity of fishing which precludes a contract granting access and enjoyment for that use from being classified as a lease.

26. Each contract must however be examined in order to determine whether it assigns the right to occupy the property and to exclude other persons from it.

27. In the present case, the contract — a copy of which is included in the file forwarded to the Court by the referring tribunal — mentions no purpose other than fishing for which the angling club may have access to the land or waters. It contains nothing to suggest that Ms Walderdorff may not herself use the ponds on her land, or authorise others to use them, for purposes other than fishing (though it may be implicit that any such use must not interfere with the enjoyment of the fishing rights). Similarly (and subject to the same proviso), there is no suggestion that her fishing rights in the publicly-owned waters, assigned to the angling club for the duration of the contract,

13 — The distinction between '*Vermietung*' and '*Verpachtung*' is drawn in some but not all language versions, and reflects a distinction often made in national legal systems. See point 76 of the Opinion of Advocate General Jacobs in Case C-326/99 *Stichting Goed Wonen* [2001] ECR I-6831.

entitle her or the club to prevent others from pursuing other activities in those waters.

28. It therefore seems to me difficult to reconcile the situation described with the Court's consistent definition of leasing or letting as involving an assignment of the right to occupy property and to exclude other persons from it.

29. Moreover, a distinction may be drawn between the granting of an exclusive right to fish in a particular body of water, with an attendant right to prevent others from fishing there, and the issuance of fishing permits authorising individuals to fish in the company of other permit holders. Such permits, although they confer an actual right of use of the property in question, [14] do not normally allow the holder to exclude other persons and therefore in my view fail to meet that criterion in the Court's definition of letting. [15]

30. In the present case, the contract contains no indication that the rights granted are exclusive in the sense that the angling club may decide who may and who may not fish in the waters concerned. It does, however, state that Ms Walderdorff reserves the right to fish freely in the waters for herself and for one guest authorised by her per day. It further stipulates that Ms Walderdorff is to be entitled to free membership of the club for the duration of the contract, and provides that, in the event of its dissolution, she will give its 12 members a priority right to conclude new individual contracts with her for the same purpose.

31. It is true that a right of unrestricted access such as that granted in the present case is a typical, and perhaps essential, element of a lease or let. Here, however, not only does the granter explicitly reserve her own right of access to use the waters for the same purpose as that for which access is granted to the club — as opposed to a purpose other than use or enjoyment, such as, for example, upkeep for which the landowner remains liable [16] — but she also reserves the right to grant the same access to third parties.

14 — *Heger*, cited in footnote 5, paragraph 25.

15 — See also points 34 and 35 of the Opinion of Advocate General Jacobs in Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493.

16 — See Case C-284/03 *Temco* [2004] ECR I-11237, paragraphs 24 and 25, where certain restrictions on the right of exclusive occupancy (such as the landlord's right to visit, or shared use of certain parts of the property with other tenants) are stated not to be incompatible with classification as a lease or let.

32. Moreover, if the club were to be dissolved and separate contracts entered into with each of its former members, those contracts would appear (although still referred to as *Pachtverträge*) to amount to little more than long-term individual fishing permits — and there is nothing to indicate that in that case she could not conclude further contracts of the same kind.

33. These are, of course, matters for the referring tribunal to determine but, in my view, the concept of leasing or letting immovable property, as defined in the Court's case-law on Article 13B(b) of the Sixth Directive, must be limited to contracts under which the right of access to, and enjoyment and use of, such property is exclusive, in the sense that the lessee is not obliged to tolerate the same access, enjoyment or use on the part of the lessor and/or of other persons authorised by the lessor.

34. The above considerations lead to a result — exclusion from the exemption — which is consistent with the Court's recurrent dictum that the terms used to specify exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. [17]

35. Finally, having reached the conclusion that a grant of fishing rights in the form described does not fall within the concept of leasing or letting of immovable property in Article 13B(b) of the Sixth Directive, I find there is nothing to be gained from seeking to categorise it more closely. It is clearly a supply of goods or services, for consideration, by a taxable person acting as such in the context of an economic activity. [18] Such supplies are subject to VAT at the standard rate unless they fall within the scope of a particular exemption, reduced rate or special scheme. No reduced rate, no special scheme, and no exemption other than Article 13B(b), has been suggested or seems applicable.

17 — See, for example, *Horizon College*, cited in footnote 7, paragraph 16, and the case-law cited there. None the less, the concept of leasing or letting in Article 13B(b) of the Sixth Directive may be broader than that existing in the various national laws — it may include, for example, hotel accommodation and usufruct. See Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 54; *Goed Wonen*, cited in footnote 13, paragraph 49.

18 — See Articles 2(1), 4(1) and (2), 5(1) and (3) and 6(1) of the Sixth Directive. There may be a supply of goods if Austria has used the option in Article 5(3) — see footnote 5 above.

Conclusion

36. I am therefore of the opinion that the Court should answer the question referred as follows:

The concept of leasing or letting of immovable property in Article 13B(b) of Sixth Council Directive 77/388/EEC involves assigning the right to occupy the property and to exclude other persons from it. It does not extend to a situation in which the owner of the property assigns the right to use it for a specific purpose but retains the right to use the property himself, or to authorise others to use it, for the same purpose or for other purposes.