OPINION OF ADVOCATE GENERAL JACOBS

delivered on 13 December 2001 [1]

1. In accordance with the second indent of Article 13(A)(2)(a) of the Sixth VAT Directive, [2] Member States may make certain VAT exemptions subject to the condition that the entity benefiting from the exemption is managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest in the results of the activities concerned.

2. The High Court of Justice of England and Wales wishes to know, essentially, how that condition is to be interpreted when the entity in question has, on the one hand, one or more governing bodies whose members are unpaid and, on the other, one or more paid directors or other management staff who are not members of those bodies.

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 (hereinafter 'the Sixth Directive').

The Sixth Directive

3. Under Article 2 of the Sixth Directive, a supply of goods or services effected for consideration by a taxable person acting as such is subject to VAT. According to Article 4(1), a taxable person is a person who carries out an economic activity, whatever the purpose or result of that activity. However, certain transactions are or may be exempted from VAT under the terms of the directive.

4. Article 13(A) is headed 'Exemptions for certain activities in the public interest', and paragraph (1) lists a number of activities which must be exempted by Member States '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'. Those activities include, under (n), '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. Under Article 28(3)(a) read in conjunction with Annex E, point 5, Member States were not obliged to exempt transactions under Article 13(A)(1)(n) during the transitional period; however, that possibility was withdrawn with effect from 1 January 1990. [3]

6. Article 13(A)(2) provides for a number of limitations to be imposed on certain of the exemptions in Article 13(A)(1), including those under subparagraph (n). Subparagraph (2)(a) lists conditions which Member States may impose in each individual case on the granting of such exemptions to bodies other than those governed by public law. The condition set out in the second indent is that the bodies in question 'shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned'.

United Kingdom legislation

7. According to the order for reference, although Article 13(A)(1)(n) had to be applied from 1 January 1990, it was not implemented in the United Kingdom until the Value Added Tax (Cultural Services) Order 1996 ('the 1996 Order') came into force on 1 June 1996. That Order amended the Value Added Tax Act 1994 by introducing a new category of exempt supplies for the supply by an eligible body of the right of admission to, *inter alia*, a zoo. An 'eligible body' is defined as any body (other than a public body) which, *inter alia*, 'is managed and administered on a voluntary basis by persons who have no direct or indirect interest in its activities'. The omission of the word 'essentially' does not appear to give rise to any dispute; it is accepted that the Order must be interpreted in conformity with the Sixth Directive.

The proceedings

8. Following the entry into force of the 1996 Order, eligible bodies were invited to submit claims to the Commissioners of Customs & Excise ('the Commissioners') for the refund of VAT charged since 1 January 1990. The Zoological Society of London ('the Society') had, in accordance with United Kingdom legislation as it previously stood, charged VAT on admissions to the two zoos which it maintains. Considering itself to be an eligible body, the Society applied to the Commissioners

3 — See Article 1 of the Eighteenth Council Directive 89/465/EEC of 18 July 1989 on the harmonisation of the laws of the Member States relating to turnover taxes — Abolition of certain derogations provided for in Article 28(3) of the Sixth Directive, 77/388/EEC, OJ 1989 L 226, p. 21.

for the refund of that VAT, amounting to some GBP 6 000 000. The Commissioners, however, took the view that the Society was not 'managed and administered on a voluntary basis by persons who have no direct or indirect interest in its activities' and refused to refund the VAT claimed.

9. The difference of opinion stems from differing interpretations of the way the Society is organised and administered. The following facts are however common ground between the parties.

10. The principal object of the Society (which is not a public body) is the advancement of zoology and it may under its charter carry on a number of activities in pursuance of that object. In that context it owns and operates London Zoo and Whipsnade Wild Animal Park, to which members of the public are admitted for a charge.

11. The Society comprises some 4 000 individual members who elect a president, secretary, treasurer and council. None of the officers or members of the Society or of its council receives any remuneration from, or has any financial interest in, the Society. Members of the council, including the officers, may receive only reimbursement of proper expenses. The council is the governing body of the Society, with general responsibility for management, control and administration of its revenue, property and affairs. It meets six times a year to deal with business, and has also appointed seven management boards or committees with responsibility for supervising specific aspects of that business; they meet between four and eight times a year and their members are again unpaid but receive reimbursement of expenses in the same way as council members.

12. In addition, the Society employs several hundred staff, including a director general and four directors, who must not be members but to whom it may pay 'reasonable and proper' remuneration. The director general and directors are involved with the Society's activities in accordance with their areas of responsibility, and attend meetings of the council and the management boards and committees as appropriate but are not members thereof. There is a finance director, a personnel director and one director for each of the Society's two zoos, the latter being responsible for the day-to-day operation of the zoos.

13. The disagreement between the Commissioners and the Society concerns the extent to which the Society's paid staff, in particular the directors, are involved in the management and administration of its activities for the purposes of the exemption.

14. Following rejection of its claim for a refund, the Society brought proceedings

before the VAT and Duties Tribunal which found in its favour on the preliminary issue of the meaning of the words 'managed and administered on an essentially voluntary basis'. The tribunal took the view that the condition referred to the central controlling management of the entity in question as a whole rather than of its different activities and did not preclude the employment of persons performing functions of management or administration under the effective direction of the body or bodies exercising such central control.

15. The Commissioners then appealed to the High Court seeking the reversal of the tribunal's decision in that regard. Before giving judgment, Mr Justice Lightman decided to seek a preliminary ruling from this Court on the following questions:

'How are the words "managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned" in the second indent to Article 13(A)(2)(a) of Council Directive 77/388/EEC of 17 May 1977 to be interpreted, having regard to the facts of the present case? In particular:

(a) what are the criteria for determining by whom a body is managed and administered for the purposes of the provision; do these words refer

(i) only to the members of the senior controlling organs of the body,

or

(ii) to any individuals involved in any managerial or administrative function whatsoever? If so, what are the criteria for determining whether a person is involved in a relevant managerial or administrative function?

(b) what are the criteria for determining whether management and administration of a body is conducted on an essentially voluntary basis; do these words refer

(i) to the extent to which the management and administration of the body is conducted by remunerated and unremunerated persons respectively, and if so, how is the test to be applied;

or

(ii) to the individual financial basis upon which each of the persons conducting the management and administration of the body performs that role (for example, none of those persons must receive more than nominal remuneration);

or

(iii) to some other test or criterion, and if so, what is that test or criterion?'

16. The Society, the United Kingdom Government and the Commission have all submitted both written and oral observations.

Analysis

The approach to interpretation

17. All three parties submitting observations refer to the established rule that the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive 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, [4] together with its corollary that any limitations on such exemptions should be construed broadly.

18. The Society further submits that it is necessary to ascertain the underlying purpose of the exemption within the context of Article 13(A) as a whole. An exemption may even be extended beyond its actual wording in order to give effect to its underlying purpose, [5] and a discretionary exemption must be exercised in line with that purpose. [6] The Commission points out that 'strict' does not necessarily mean 'restrictive'; the terms of an exemption which have been unambiguously laid down do not call for a particularly narrow interpretation. [7]

19. I agree that exemptions from VAT should be strictly interpreted but should not be whittled away by interpretation. The

4 — See, for recent examples in the case-law, the judgments in Case C-408/98 *Mirror Group*, [2001] ECR 7175, paragraph 30 of the judgment, and Case C-108/99 *Cantor Fitzgerald International*, [2001] ECR 7257, paragraph 25.

5 — Case 173/88 *Skattemmisteriet* v *Henriksen* [1989] ECR 2763, paragraphs 10 to 17 of the judgment.

6 — Case C-346/95 *Blasi* [1998] ECR I-481, paragraphs 21 to 22 of the judgment.

7 — See Case C-76/99 *Commission* v *France* [2001] I-249, in particular paragraphs 20 to 23 of Advocate General Fennelly's Opinion and the case-law cited there (confirmed in paragraphs 21 to 23 of the judgment).

Commission is right in that regard to contrast the notions of 'strict' and 'restrictive' interpretation. As a corollary, limitations on exemptions should not be interpreted narrowly, but nor should they be construed so as to go beyond their terms. Both the exemptions and any limitations on them must be interpreted in such a way that the exemption applies to that to which it was intended to apply and no more. Thus, I would agree with the Society that it is appropriate to consider the purpose of the relevant provisions in their context.

The purpose of the provisions

20. In the Society's view, the rationale of the exemption is that bodies which promote cultural activities other than for commercial gain are acting in the public interest and are hence entitled to exemption. In the optional limitation in question, the focus is on the management and administration not of the activities, but of the body which carries them out. The aim is to preclude the exemption where a body is ostensibly non-commercial but those operating it in fact do so for commercial gain.

21. The Commission takes a broadly similar view, but points out that the interpretation of the condition in question must be appropriate to the circumstances not only of Article 13(A)(1)(n) but also of subparagraphs (b), (g), (h), (i), (l) and (m), to which it may also be applied. Moreover, although Member States are free to apply or not any of the discretionary conditions in Article 13(A)(2)(a), each one must be interpreted uniformly throughout the Community and not as each Member State thinks fit. Those conditions allow the Member States to confine the exemption to activities carried out on a non-commercial basis and to avoid distortion of competition with taxable commercial undertakings. The second indent reinforces the first [8] by ensuring that a formally non-profit-making organisation does not produce private profit for those who direct its activities.

22. The United Kingdom however considers that the purpose of Article 13(A)(2)(a) is to give each Member State discretion to tailor conditions of exemption as it thinks fit in the light of circumstances prevailing in its territory. One relevant factor is the need to maintain fiscal neutrality by giving equal tax treatment to commercially-run cultural bodies (such as zoos) and their professionally-managed equivalents run by

8 — Under which a Member State may make the granting of the exemption subject to the condition that the beneficiaries must not systematically aim to make a profit but that any profits nevertheless arising are not to be distributed but assigned to the continuance or improvement of the services supplied.

non-profit-making bodies, which are in competition with each other. At the hearing, it also stated that the particular condition in question allows Member States to pursue the social aim of encouraging voluntary work.

23. I am unconvinced by the United Kingdom's arguments in this regard. The need to maintain fiscal neutrality as between commercial and non-commercial undertakings was indeed clearly a concern when Article 13(A) of the Sixth Directive was being drafted, but it is amply and explicitly dealt with in that provision. In three subparagraphs of Article 13(A)(1), the exemption is specifically subject to the proviso that it must not be 'likely to cause distortion of competition' and seven exemptions — including the one in issue here — may under the fourth indent of Article 13(A)(2)(a) be subjected to the condition that 'exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises subject to value added tax'. It may be assumed that, for the remaining exemptions, the legislature considered the public interest in exempting the relevant supplies more important than the concern to prevent distortion of competition.

24. In those circumstances, it is unwarranted in my view to read such a concern into the second indent of Article 13(A)(2)(a), in issue here. If a Member State wishes to ensure that the exemption in Article 13(A)(1)(n) does not give rise to any distortion, it may apply the condition in the fourth indent of Article 13(A)(2)(a) (which the United Kingdom does not appear to have done).

25. It seems clear to me from the wording that the condition in question reflects another concern which was manifestly felt in the drafting of Article 13(A), that of ensuring that certain activities should not benefit from exemption if they are run for commercial profit. Two exemptions are explicitly confined to 'non-profit-making organisations' [9] and the same group of seven, including Article 13(A)(1)(n) in issue here, may be subjected under the first indent of Article 13(A)(2)(a) to the condition that 'they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied'.

26. The second indent reflects a slightly different aspect of the same concern. Rather than focusing, like the first indent, on the approach of the entity to the making and use of profit, it seeks specifically to

9 — See my Opinion in Case C-174/00 *Kennemer Golf and Country Club* ECR I-3293, ECR I-3296, delivered today.

exclude the possibility that the persons who manage or administer that entity may have any direct or indirect interest in the financial results of its activities. The condition 'on an essentially voluntary basis' may thus be seen as reinforcing that basic prohibition.

27. With those considerations in mind, I turn to the principal issue in this case, namely the meaning to be ascribed to the words 'managed and administered'.

The meaning of 'managed and administered'

28. It is clear that acts of management and administration, in the broadest sense, are carried out at different levels in almost every organisation. In themselves, the terms are not specific and might apply wherever decisions must be taken; in turn, decisions may be taken in any field from that of general policy formation to that of its detailed implementation. It has been pointed out in the context of the present case that the director of London Zoo, its head keeper and the keeper of, say, the reptile house may all in some way be described — together with many other staff — as carrying out management and administration functions. However, other than at the very highest and very lowest levels, duties are likely to involve a combination of both decision-making and purely executive functions. The issue here is the level at which the Community legislature intended the second indent of Article 13(A)(2)(a) of the Sixth Directive to be capable of application.

29. Whilst underpinning its views with an interpretation of the intended purpose of the provision with which I have disagreed above, the United Kingdom relies also on the use of the words 'management *and administration*' (and their equivalents in other language versions) to argue that all functions above the purely routine were intended to be covered. The Society, on the other hand, considers that the concept can apply only to the senior controlling organs of the body concerned, not to paid managers or administrators who have no interest in its financial results; there would be no coherent purpose in withholding the exemption from bodies as soon as they employ a single paid manager. Both the Society and the Commission point out that paid managers and administrators are not only common but necessary in many of the areas of activity to which the indent may be applied — such as hospitals and educational establishments. The Commission's view is that not all persons exercising management functions in a broad sense

need be volunteers; the presence of salaried staff is not precluded where they have no decisive influence over central decision-making — determining the organisation's policy, in particular financial policy, and directing its activities — but merely perform management tasks of an executive nature under the direction of those who have real decision-making authority.

30. In line with the view I have taken above, [10] the second indent of Article 13(A)(2)(a) concerns those who run the organisation in question and seems clearly designed to preclude their being in a position to run it in such a way as to further their own enrichment.

31. If a Member State applies that indent alone, the aim and effect appear to be a 'separation of powers'. Certain individuals may have an interest in 'the results of the activities concerned' but must not be in a position to influence those results, whilst others, who may be in a position to influence the results, must have no interest in them, so that whatever decisions they take will be unaffected by considerations of private gain, whether direct or indirect.

32. I therefore take the view that the management and administration referred to concern activities which may influence financial results — and indeed also the use made of the resources thereby arising, in so far as both those aspects may have an effect on the interests of the persons concerned. In a commercial undertaking such activities would correspond broadly to those of a board of directors. They cannot however be defined on the basis of the powers of any such board, or of the governing body of a non-profit-making organisation, as laid down in any national legal system, but must have a uniform Community definition. I agree with the Commission that they are characterised by the taking rather than the implementation of policy decisions and take place at a correspondingly higher level.

33. In the present case, such management and administration undoubtedly fall within the realm of the 'central controlling management' exercised by the Society's council and management boards, but might also include some of the responsibilities of its directors; even if those persons are not empowered to take the relevant decisions themselves, they may none the less have a significant influence on policy if for example their recommendations to the council and/or boards are generally followed. Their day-to-day operational management and administration duties however, including the power to take decisions

10 — At paragraph 26.

merely implementing policy laid down at a higher level, would be excluded. It is of course for the national court to examine the exact scope — in practice, and not merely in terms of the constitutive documents of the organisation — of the directors' duties and to ascertain whether they take or significantly influence policy decisions such as determine the results of the Society's activities.

The meaning of 'on an essentially voluntary basis'

34. The national court's second question has given rise to little real disagreement before the Court. Such argument as has been presented concerns primarily whether the focus should be on the body or on the individuals carrying out the management and administration.

35. In its written observations, the Society submitted that the notion of 'essentially voluntary' referred to the body and not to whether a director was 'essentially' paid or unpaid. A body is essentially voluntary when the members of the central controlling management of the body receive no more than nominal remuneration. The United Kingdom Government considered that the expression did not refer to the body but meant that the individuals involved in management and administration must provide their services on an essentially voluntary basis, for no more than nominal remuneration.

36. In the Commission's view, it should be taken to mean that substantially all the management and administration of the body in question — as outlined above — must be conducted by unremunerated persons. However, the fact that paid staff intervene in such activities occasionally or in a peripheral manner, or that nominal or token payments are made to the persons responsible for management and administration, is not contrary to that requirement.

37. It appeared at the hearing that both the Society and the United Kingdom Government were willing to concur in the Commission's proposed answer. Since I too agree with what the United Kingdom's representative described as a 'perfectly sensible and workable' result, I shall not pursue this question any further.

Conclusion

38. I am therefore of the opinion that the Court should give the following answer to the questions raised by the High Court of England and Wales:

In the second indent of Article 13(A)(2)(a) of the Sixth VAT Directive, the concept of management and administration is to be interpreted as referring to the taking of policy decisions such as determine the results of the activities of the body in question, including the exertion of a significant influence on those decisions but excluding day-to-day operational management and administration or the taking of decisions which merely implement policy laid down at a higher level.

The requirement in the same indent that management and administration be conducted on an essentially voluntary basis is to be interpreted as meaning that substantially all the management and administration, thus defined, of the body in question must be conducted by unremunerated persons. However, the fact that paid staff intervene in such activities occasionally or in a peripheral manner, or that nominal or token payments are made to the persons responsible for management and administration, is not contrary to that requirement.