JUDGMENT OF THE COURT (Fifth Chamber)
21 March 2002 *

In Case C-267/00,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), for a preliminary ruling in the proceedings pending before that court between

Commissioners of Customs and Excise

and

Zoological Society of London,

on the interpretation of the second indent of Article 13A(2)(a) 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 (OJ 1977 L 145, p. 1),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, S. von Bahr and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Zoological Society of London, by P. Hopkins, Barrister, and R. Cordara QC, instructed by Messrs Ernst & Young, Tax Advisers,

— the United Kingdom Government, by G. Amodeo, acting as Agent, assisted by N. Paines QC,

— the Commission of the European Communities, by R. Lyal, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Zoological Society of London, represented by R. Cordara and M. Smith, Barrister, of the United Kingdom Government, represented by R. Magrill, acting as Agent, assisted by N. Paines, and of the Commission, represented by R. Lyal, at the hearing on 26 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

Judgment

1 By order of 21 June 2000, received at the Court on 3 July 2000, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of the second indent of Article 13A(2)(a) 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 (OJ 1977 L 145, p. 1; 'the Sixth Directive').

2 The question has been raised in proceedings between the Commissioners of Customs and Excise ('the Commissioners'), who are responsible for the collection of value added tax ('VAT') in the United Kingdom, and the Zoological Society of

London ('the Zoological Society') concerning the charging of VAT on certain services carried out by the society in the administration of the two zoological gardens which it runs in London.

Legal background

Community legislation

3 Article 2 of the Sixth Directive provides:

'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.'

4 Article 13A(1) of the Sixth Directive is worded as follows:

'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 such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(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 Article 13A(2) provides:

'(a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (n) of this Article subject in each individual case to one or more of the following conditions:

...

— they 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,

...'

National legislation

6 For the purposes of transposing the provisions of the Sixth Directive referred to in the previous paragraph, the Value Added Tax (Cultural Services) Order 1996, which came into force on 1 June 1996, amended the Value Added Tax Act 1994 by introducing a further category of exempt supplies as follows:

'Item 2

The supply by an eligible body of the right of admission to

(a) ... zoo...

...

Notes

...

(2) ... "eligible body" means any body (other than a public body) which

(a) is precluded from distributing, and does not distribute, any profit it makes;

(b) applies any profits made from supplies of a description falling within item 2 to the continuance or improvement of the facilities made available by means of the supplies; and

(c) is managed and administered on a voluntary basis by persons who have no direct or indirect interest in its activities.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 The Zoological Society is a non-profit-making body set up under the domestic law of the United Kingdom. It carries out a number of activities, including the ownership and operation of two zoological gardens.

8 According to its charter, the Zoological Society comprises a governing body, called the council, members and honorary members. The council is composed of three officers, namely a president, a secretary and a treasurer, and 18 other members. It has the power to appoint management boards or committees with responsibility for specific activities. Members of the council and of those boards and committees, like other members and honorary members of the Zoological Society, receive no remuneration from it.

9 According to the information provided by the referring court, the Zoological Society employs about 350 to 400 persons, part-time or full-time, who are paid. They include a director general, a director of finance and a director of personnel. Those paid directors are not members of the council or of the management boards or committees, although they frequently attend meetings of the latter and are involved with the functions of the Zoological Society in all areas.

10 The Zoological Society lodged a claim with the Commissioners of Customs and Excise for the refund of VAT paid by the society on admission charges to zoos for the period from 1 January 1990 to 31 May 1996, which the Commissioners rejected on the ground that the supplies carried out in that respect could not be regarded as services benefiting from exemption under the Value Added Tax (Cultural Services) Order 1996. The Commissioners contended in particular that the Zoological Society did not satisfy the criterion that, in order to benefit from the VAT exemption, the body requesting that advantage must be managed and administered on an essentially voluntary basis, since some of the society's paid employees were involved in its management and administration.

11 On an action brought by the Zoological Society, the VAT and Duties Tribunal, London (United Kingdom), held at first instance that the society was managed and administered by its three officers and the 18 other members of the council. It

also held that, provided that those officers and general members did in fact exercise their powers and fulfil their responsibilities under the charter, the conditions for exemption were satisfied. Thus, taking into account the information at its disposal and having regard in particular to the frequent and extensive control exercised by the council, the VAT and Duties Tribunal allowed the action before it.

12 On appeal by the Commissioners, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), took the view that resolution of the dispute depended on the interpretation of the national VAT provisions in the light of the corresponding provisions of the Sixth Directive. It therefore decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'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 13A(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

— only to the members of the senior controlling organs of the body, or

— 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

— 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

— 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

— to some other test or criterion, and if so, what is that test or criterion?'

Part (a) of the question

13 By part (a) of its question, the referring court is asking essentially whether, on a proper construction of the second indent of Article 13A(2)(a) of the Sixth

Directive, the condition that a body must be managed and administered on an essentially voluntary basis refers only to the members of the highest controlling organs of that body, or whether it concerns any person entrusted with any managerial or administrative function within it.

14 The Zoological Society and the Commission submit that that condition refers only to the highest controlling organs and not to all persons carrying out managerial functions in the broad sense. In their view, the presence of paid staff in a body such as the Zoological Society is not decisive, so long as the persons concerned do not have a decisive influence over the adoption of essential decisions, namely those concerning the determination of its policy, particularly financial policy, and the orientation of its activities.

15 The United Kingdom Government argues, on the other hand, that regard should be had to all persons entrusted with the managerial and administrative activities of the body concerned. The exemptions referred to in Article 13 of the Sixth Directive should be strictly interpreted. Therefore, besides obtaining information from the constitution of the body in question enquiry must be made, as to who is in fact managing and administering the body. The dual reference to management and administration is an indication that the persons in question cannot be only the members of the highest controlling organs.

16 It should be noted at the outset that the second indent of Article 13A(2)(a) of the Sixth Directive is an optional condition which Member States are at liberty to impose additionally for the grant of certain exemptions mentioned in Article 13A(1) of the Sixth Directive.

17 As for the interpretation of that additional condition, namely that a body availing itself of one of the exemptions in Article 13A(1) of the Sixth Directive must be managed and administered on an essentially voluntary basis, it follows from the legal context in which that condition occurs that the Community legislature wanted to make a distinction between the activities of commercial undertakings and those of bodies not aiming to achieve profits for their members (see in relation to the exemption under Article 13A(1)(m) of the Sixth Directive, Case C-174/00 *Kennemer Golf and Country Club* [2002] ECR I-3293, paragraph 34).

18 The aim of that condition is therefore to reserve the VAT exemption for bodies which do not have a commercial purpose, by requiring that the persons who participate in the management and administration of such bodies have no financial interest of their own in their results, by means of remuneration, distribution of profits or any other financial interest, even indirect.

19 The condition that such persons should have no financial interest of their own thus refers only to persons directly associated with the management and administration of a body and not to all persons working for reward in one way or another in its administration. As the Zoological Society points out, there is nothing in the Sixth Directive to prohibit the bodies referred to in Article 13A from taking on paid staff, the current practice of many bodies falling within the scope of those provisions, such as hospitals and educational establishments, being on the contrary to have recourse to such staff in order to fulfil their tasks.

20 In order to determine which persons are directly associated with the management and administration of a body for the purposes of the second indent of

Article 13A(2)(a) of the Sixth Directive, reference must be made, first, to the constitution of the body in question in order to identify the members of the directing organs and their specific tasks.

21 Next, it must be determined which persons actually carry out the management and administration of the body, in the sense that, like the directing members of a commercial undertaking, they take the decisions of last resort concerning the policy of the body, particularly in the financial area, and carry out the higher supervisory tasks. As the Advocate General points out in paragraph 32 of his Opinion, such activities are characterised by the taking, rather than the implementation, of policy decisions and accordingly are carried out at the highest level. Therefore, persons carrying out purely executory tasks are not affected by the requirement that management and administration be on an essentially voluntary basis.

22 Finally, in the light of those considerations, it is for the competent national authorities to determine, in respect of each body concerned, which are the persons who fall within the scope of the additional condition laid down in the second indent of Article 13A(2)(a) of the Sixth Directive and who must therefore fulfil the requirement of not having a financial interest in the body's results.

23 The answer to part (a) of the question must therefore be that, on a proper construction of the second indent of Article 13A(2)(a) of the Sixth Directive, the condition requiring a body to be managed and administered on an essentially voluntary basis refers only to members of that body who are designated in accordance with its constitution to direct it at the highest level, as well as other

persons who, without being designated by the constitution, do in fact direct it in that they take the decisions of last resort concerning the policy of that body, especially in the financial area, and carry out the higher supervisory tasks.

Part (b) of the question

24 By part (b) of its question, the referring court is asking essentially whether, on a proper interpretation of the second indent of Article 13A(2)(a) of the Sixth Directive, the words 'on an essentially voluntary basis' refer to the composition of the organs entrusted with the tasks of managing and administering a body, in the sense that it would be permissible for some of those who have a financial interest in the body to be involved in those tasks exceptionally and in an incidental way, or whether those words refer to the reward which those persons receive, in the sense that it would be permissible to grant them certain exceptional and symbolic financial advantages.

25 The Zoological Society, the United Kingdom Government and the Commission are agreed that, on a proper construction of the words 'on an essentially voluntary basis', even if all the management of the body must be carried out by unpaid persons, the fact that paid staff take part occasionally or incidentally in the adoption of essential decisions, or that small or token payments are made to those staff, is not sufficient to deprive their activity of its essentially voluntary character and to justify the conclusion that the body pursues a disguised commercial purpose.

26 In that respect, it is apparent from the purpose of the second indent of Article 13A(2)(a) of the Sixth Directive, as explained in paragraph 17 of this

judgment, that the condition laid down by that provision is intended to make a distinction between the activities of commercial undertakings and those of non-profit-making bodies, that is to say those that do not aim to generate profits for their members. The words 'on an essentially voluntary basis' thus refer to the members who compose the directing organs and those persons who, without being designated by the constitution, do in fact direct the body concerned, and refer also to the reward which the latter may receive, habitually or exceptionally, from that body.

27 It is for the competent national authorities to determine, for each body in question and by means of an overall assessment, whether, by reason of any contribution to the management of the body, as defined in the context of the answer to part (a) of the question, by persons having a financial interest in it, and by reason of any reward given to them, the essentially voluntary character of the management or administration of a body can be accepted or not.

28 The answer to part (b) of the question must therefore be that, on a proper interpretation of the second indent of Article 13A(2)(a) of the Sixth Directive, the words 'on an essentially voluntary basis' refer to the members who compose the organs entrusted with the management and administration of a body of the kind referred to in that provision and those persons who, without being designated by the constitution, do in fact direct it, and refer also to the reward which the latter may receive, habitually or exceptionally, from that body.

Costs

29 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), by order of 21 June 2000, hereby rules:

1. On a proper construction of the second indent of Article 13A(2)(a) 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, the condition requiring a body to be managed and administered on an essentially voluntary basis refers only to members of that body who are designated in accordance

with its constitution to direct it at the highest level, as well as other persons who, without being designated by the constitution, do in fact direct it in that they take the decisions of last resort concerning the policy of that body, especially in the financial area, and carry out the higher supervisory tasks.

2. On a proper construction of the second indent of Article 13A(2)(a) of the Sixth Directive 77/388, the words 'on an essentially voluntary basis' refer to the members who compose the organs entrusted with the management and administration of a body of the kind referred to in that provision and those persons who, without being designated by the constitution, do in fact direct it, and refer also to the reward which the latter may receive, habitually or exceptionally, from that body.

Jann von Bahr Timmermans

Delivered in open court in Luxembourg on 21 March 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber