OPINION OF ADVOCATE GENERAL ALBER

delivered on 10 October 2002 [1]

I — Introduction

1. The House of Lords has referred a question to the Court on the interpretation of 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 [2] (hereinafter 'the Sixth Directive'). The referring court seeks guidance as to whether an agreement for the installation of a cigarette vending machine in a public house is a contract for the 'letting of immovable property', which would be exempt from value added tax under Article 13B(b) of the Sixth Directive.

1 — Original language: German.

2 — OJ 1977 L 145, p. 1.

II — Legal context

A — *Community law*

2. Article 2 of the Sixth Directive provides 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;

...'

3. Article 13B of the Sixth Directive provides 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 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;

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;

...'

B — *National law*

4. The Sixth Directive was implemented in the United Kingdom by Section 31 of the Value Added Tax Act 1994, which provides that a supply of services is an exempt supply if it is of a description for the time being specified in Schedule 9 to the Act. Item 1 in Group 1 of Part II of that Schedule includes:

'The grant of any interest in or right over land or of any licence to occupy land'.

III — Facts and procedure

5. Sinclair Collis Ltd. (hereinafter 'Sinclair Collis'), the appellant in the main proceedings, installs vending machines for the sale of cigarettes in public houses, clubs and hotels. To that end it enters into agreements with the owners of such establishments.

6. The agreements contain the following provisions:

— The siteholders agree to install the machines in their premises. The siteholders determine where the machines are to be positioned; if they are not mounted on a wall, they may be moved around. Sinclair Collis none the less has a right to require that a machine be installed in a different position if, in its view, this is likely to generate increased sales.

— Sinclair Collis retains ownership of the machines, the cigarettes and the money in the machines. It retains exclusive control over the machines, keeps them stocked with cigarettes and removes the cash.

— The siteholders agree to provide electricity and to ensure that no other cigarette vending machines are installed on the premises.

— Sinclair Collis is given the exclusive rights to supply cigarettes and other tobacco products at the relevant premises.

— The siteholders receive a certain percentage of the gross takings of the machines by way of consideration.

— The licence period is two years.

7. In January 1996 the Commissioners of Customs and Excise decided that the services supplied entailed licences to occupy land and were therefore exempt from VAT under Article 13B(b) of the Sixth Directive.

8. Sinclair Collis, which had an interest in the services supplied being found to be

taxable so as to be able to set off input tax, appealed against that decision to the Manchester VAT and Duties Tribunal. The Tribunal found for the appellant. It stated that the services supplied were taxable because the real subject of the agreement was the installation of the machines and not the use or enjoyment of the land on which they stood.

9. The Commissioners appealed against the decision of the Tribunal to the High Court, which overturned the Tribunal's decision. Lightman J. stressed that the critical question was what, upon the true construction of the agreement, the siteholder was agreeing to supply. The answer to that question was that the agreement amounted to a licence to keep a machine on a site. It was a licence to occupy land combined with certain ancillary or incidental rights. He accordingly held the supply to be exempt from VAT.

10. Sinclair Collis appealed against that decision to the Court of Appeal. The Court of Appeal upheld the decision of the High Court. Sinclair Collis then appealed further to the House of Lords.

IV — Reference for a preliminary ruling

11. The House of Lords is uncertain whether the supply in question should be classified as a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive, and so deemed exempt from VAT.

12. It has therefore referred the following question to the Court of Justice for a preliminary ruling:

'Is the grant, by the owner of premises ("the Siteholder") to an owner of a cigarette vending machine, of the right to install, operate and maintain the machine in the premises for a period of two years, in a place nominated by the Siteholder, in return for a percentage of the gross profits of the sales of cigarettes and other tobacco goods in the premises, but with no other significant rights of possession or control than those set out in the written agreement between the parties, capable of amounting to the letting of immovable property within the meaning of Article 13B(b) of Council Directive 77/388/EEC of the 17th day of May 1977 on the harmonisation of the laws of the Member States relating to

turnover taxes; and what are the principles applicable in deciding whether an agreement amounts to the letting of immovable property within such meaning?'

13. Lord Slynn of Hadley, Lord Steyn, Lord Nicholls of Birkenhead, Lord Millet and Lord Scott of Foscote have set out their opinions on the reference for the preliminary ruling in writing. These will be addressed in the context of the legal appraisal.

V — Arguments of the parties

14. The *appellant* is of the view that agreements for the installation of machines of the kind in point here do not meet the conditions for a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive. The agreement does not specify any particular location for the machines. Rather, it is generally for the siteholder to select an appropriate position for the installation of the machines. The siteholder is simply bound not unreasonably to withhold his consent to the selection of a position for installing the machine which the appellant considers to be more likely to generate maximum sales. The fact that most of the machines can be moved around by the siteholder is another factor suggesting that there is no occupation of a defined part of the land.

15. More importantly, although the appellant has a right of access to the machines to maintain them, remove the money and keep them stocked with cigarettes, it has no further control over access to the machine nor does it have a right to exclude others. Only the siteholder enjoys that right.

16. It follows from the above that the characteristics necessary for there to be a 'letting of immovable property' are not present or at any rate do not predominate in the contract as a whole. The agreement is first and foremost a contract for the installation of the machines, not for the use or occupation of the land on which they stand.

17. The *United Kingdom Government*, on the other hand, takes the view that, by installing the machine, a person is occupying the land by the machine to the exclusion of all others. This is quite different from sitting at a table to drink a cup of coffee or wander around a park or across a golf course.

18. Nor does the fact that the machine may be moved invalidate the conclusion that there is occupation. It merely means that the land occupied has been varied consensually by the parties.

19. Moreover, the appellant does have control over access to the machines, albeit limited. It has its own rights of access to the machines to maintain them, remove the cash and keep them stocked with cigarettes. Those rights of access are sufficient for the purposes for which occupation is obtained. In any event, unlimited rights of access are not a necessary condition for a right to occupy land. The essential point is that the rights of access are consistent with the purpose for which occupation is sought.

20. The services supplied therefore amount to a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive and must therefore be regarded as exempt from VAT.

21. The *Commission* does not make any detailed submissions on the classification of the agreement at issue. It simply points out that the mere right to install a machine does not normally entail any right of occupation of a piece of land or control over access to that land. Only if there is occupation and control can there be a 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive.

VI — Legal appraisal

22. The installation of the machine amounts to the supply of a service effected for consideration, within the meaning of Article 6(1) of the Sixth Directive, which is subject to VAT pursuant to Article 2(1) of the Directive. The taxable person under Article 4(1) of the Sixth Directive is the siteholder as the supplier of the service.

23. The only question is whether an agreement of the kind described in this case is to be regarded as amounting to 'the letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive and thus exempt from VAT.

A — *'Letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive*

24. The concept of 'letting of immovable property' is not defined in the Sixth Directive itself. [3]

25. However, it is settled case-law that the exemptions from VAT provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition. [4]

26. The purpose of establishing a common list of exemptions in the Sixth Directive was to create a uniform basis for charging value added tax in the Member States. That is only possible if the tax exemptions provided for in the Sixth Directive are based on uniform concepts of Community law. [5]

27. The tax exemptions listed in Article 13 of the Sixth Directive are, moreover, according to the settled case-law of the Court, to be construed strictly, since they are exceptions to the general principle that all supplies made by a taxable person for consideration are subject to value added tax. [6]

28. The Court of Justice has not yet been called upon to give a comprehensive interpretation of the concept of 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive. Where is has considered the matter before the present request for a preliminary ruling, it has been concerned *inter alia* with the status of a transaction surrendering a lease, [7] a licence to use a golf course [8] and a licence to use a road on payment of a toll. [9]

29. Certain principles for interpreting the concept of the 'letting of property' may none the less be derived from those decisions and from the corresponding Opinions of the Advocates General. In its judgment in Case C-359/97 *Commission* v *United Kingdom*, [10] for instance, the Court

3 — See Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 65, and Case C-326/99 *Stichting Goed Wonen* [2001] ECR I-6831, paragraph 44.

4 — See Case 348/87 *Stichting Uitvoering Financiele Acties* [1989] ECR 1737, paragraph 11; Case C-453/93 *Bulthuis-Griffioen* [1995] ECR I-2341, paragraph 18; Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 21; and Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 51.

5 — See the 11th recital to the Sixth Directive. See also the *Stichting Goed Wonen* case, cited in footnote 3, paragraph 47.

6 — See, on tax exemptions in respect of leasing of land in particular, Case C-358/97 *Commission* v *Ireland*, cited in footnote 4, paragraph 55; Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25; and *Stichting Goed Wonen*, cited in footnote 3, paragraph 46.

7 — Case C-63/92 *Lubbock Fine* [1993] ECR I-6665; Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7275 and Case C-409/98 *Mirror Group* [2001] ECR I-7157.

8 — Case C-150/99 *Stockholm Lindöpark*, cited in footnote 6.

9 — Case C-358/97 *Commission* v *Ireland*, cited in footnote 4, and Case C-359/97 *Commission* v *United Kingdom*, cited in footnote 3.

10 — Case C-359/97 *Commission* v *United Kingdom*, cited in footnote 3, paragraph 68. See on this point also *Stockholm Lindöpark*, cited in footnote 6, paragraph 27.

of Justice held that it is an essential element of a contract to let property that a specific period be agreed for use of the property:

'[The term letting of immovable property] cannot be considered to cover contracts where... the parties have not agreed on any duration for the right of enjoyment of the immovable property, which is an essential element of a contract to let'.

30. Advocate General Jacobs took the view in his Opinion in the *Stockholm Lindöpark* case [11] that it is a salient and typical characteristic of a lease or let that 'it necessarily involves the grant of some right to occupy the property as one's own and to exclude or admit others'. The right must also be linked to a defined piece of property.

31. These criteria are sufficient to provide a reply to the question posed by the referring court; there is no need for a more comprehensive definition of the term 'letting of immovable property' at this stage. The fact that the consideration for installing the machines is not a fixed sum but a percentage of the profits made from the sale of the cigarettes is irrelevant to the question how to classify the main supply under the contract. It is precisely in circumstances involving the letting of sales areas that rents are in practice conditional on turnover.

B — *Classification of the agreement for installation of the machine in this case*

32. It is for the national court to determine the exact nature of the agreement at issue here. In the light of the criteria set out under section A above, however, an agreement of the kind described in this case appears not to constitute a 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive.

33. The agreement for the installation of the machine was entered into for a limited period, namely two years. The situation in this case is therefore different from that in, for instance, Cases C-358/97 *Commission* v *Ireland* [12] and C-359/97 *Commission* v *United Kingdom*, [13] which related to the use of a road on payment of a toll.

11 — Opinion in *Stockholm Lindöpark*, cited in footnote 6, point 38. See also on this the Opinion of Advocate General Tizzano in Case C-409/98 *Mirror Group*, cited in footnote 7, point 25.

12 — Cited in footnote 4.

13 — Cited in footnote 3.

34. In those cases the Court held that one reason why there could be no 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive was that there was no agreement between the parties as to the duration of the right to enjoy the land:

'Where access to roads is provided, what interests the user is the possibility offered to him of making a particular journey rapidly and more safely. The duration of the use of the road is not a factor taken into account by the parties, in particular in determining the price.' [14]

35. What is uncertain with regard to the contract at issue in this case, however, is whether the agreement includes the right to occupy a particular piece of property and to refuse others access to that property.

36. As stated at points 14 to 16 above, the appellant takes the view that it does not because the agreement does not specify a site for installing the machine and because it only has limited rights of access which do not extend to excluding third parties from the site where the machine is installed. That is also the view taken by Lord Nicholls and Lord Millet.

37. The United Kingdom and Lord Slynn, on the other hand, are of the opinion that installing the machine is a way of taking possession of the site on which it is placed and excluding all third parties (occupying the land by the machine). The fact that the machine may be moved does not affect the fact of occupation. Moving the machine merely alters the piece of land occupied by agreement between the parties.

38. The United Kingdom also takes the view that the appellant does enjoy the right to control access to the machines. The appellant has a right of access to the machines to maintain them, remove the money and keep them stocked with cigarettes. That right is sufficient for the purposes of occupying the land. It is not necessary to have unlimited rights of access.

39. I concur with the appellant's view. The agreement in this case does not give the appellant the right to occupy a particular piece or parcel of land.

14 — Case C-358/97 *Commission* v *Ireland*, cited in footnote 4, paragraphs 56 and 57, and Case C-359/97 *Commission* v *United Kingdom*, cited in footnote 3, paragraphs 68 and 69.

40. That is clear from the fact that the agreement does not identify any particular area, by size or location, in the public house where the machine to be installed. It is, rather, left to the siteholder to determine where the machine is to stand. The appellant only has the right to require that it be moved if it considers a different location to be more suitable for the purposes of maximising profits. The appellant cannot therefore be said to occupy a particular, precisely defined site.

41. Moreover, under the agreement in this case, unlike in a classic lease of property, the actual site is immaterial. It is only relevant in so far as it is intended to generate maximum sales. In this case the occupation of a particular site is therefore not an end of the contract in itself, but a means to that end.

42. The fact that machines that are not intended to be mounted on the wall may be moved around the room by the siteholder at will lends further support to the view that there is no occupation of a specific piece of land.

43. The argument advanced by the United Kingdom and by Lord Slynn in this connection that moving the machine merely varies the land occupied by agreement between the parties is not entirely convincing.

44. It assumes that the contract does not permit the siteholder to alter the machine's position unilaterally but that he must agree any potential alteration with the appellant in advance. It is for the national court to decide whether this is what the agreement provides. If it does not, and the siteholder is entitled to move the machine unilaterally, then the parties cannot be said to have agreed to vary the land occupied.

45. The United Kingdom and Lord Slynn are right to say that the machine occupies the space where it stands. But that is not sufficient for it to be deemed to occupy a particular piece of land, since it is a feature of every physical object that it occupies space. This is persuasively argued by Lord Nicholls in his speech.

46. It is clear from all of the foregoing that the principal element of the agreement in

this case is not the occupation of a specific piece of land but the supply of a service, namely installation of the machine, for which the land itself is an incidental, albeit essential, prerequisite.

47. The facts in this case may therefore be compared with the provision of a meal in a hotel restaurant, as contrasted with the provision of a hotel room. Whereas in the latter case the dominant feature is the occupation of the room itself, in the former the essential element is the meal, combined with certain ancillary services. In order to receive the service the diner must sit down at a table in the restaurant, and must therefore use a particular area of land for a time. But the use of that area of land is not the main feature of the contract viewed in the light of its scheme and purpose. It cannot therefore be said to amount to occupation of the part of the land on which the table is placed. [15]

48. Advocate General Jacobs took a similar approach in his Opinion in Case C-150/99 *Stockholm Lindöpark*, which related to a licence to use a golf course, stating as follows:

'Whilst it is obviously difficult to play golf without a course to play it on, the service provided in that case is the opportunity to play the game and not the opportunity to occupy the course. Indeed, a golfer may be thought of not as occupying the course in any sense but as traversing it'. [16]

49. I too made that point in my Opinion in Case C-358/97 *Commission* v *Ireland* (road tolls):

'The chief purpose of the "contract" between the parties is not so much the use of the property as the one-time provision of a service using that property. For car drivers a brief use of the property is in fact of secondary importance, as their priority is to reach their destination quickly and safely.' [17]

50. In addition, in the situation in this case, the appellant has no right to control access to the site where the machine stands, or to exclude others' access to that site.

15 — See on this also Advocate General Jacob's Opinion in *Stockholm Lindöpark*, cited in footnote 11, point 32.

16 — Opinion in *Stockholm Lindöpark*, cited in footnote 11, point 35.

17 — My Opinion in Case C-358/97 *Commission* v *Ireland*, point 67.

51. Admittedly, the appellant has a right of access to the machine under the agreement in order to maintain it, to remove the money and stock it with cigarettes, albeit limited to the pub's opening hours. But the agreement does not confer any wider right to control or limit access to third parties. Those rights are enjoyed by the siteholder alone.

52. The siteholder is entitled, on the basis of his domiciliary rights, and his contractual duty to protect the machine, to control access to the place where the machine stands and to deny access to certain patrons, for example, those causing a nuisance.

53. Contrary to the view taken by the United Kingdom it is difficult to see how the appellant can be said to enjoy a right, albeit a limited one, to control access, derived from its own right of access.

54. At most it might be said that the appellant controls access to the actual machine or its interior. But that is immaterial in this case since the question whether there is a 'letting of immovable property' turns precisely not on whether there is access to the machine itself, but on whether there is access to the site on which it stands.

55. In that respect the facts in this case may also be compared to a licence to use a golf course or road for consideration. These too are situations in which an individual golfer or driver is entitled to use the golf course or road himself, but not to exclude others. [18]

56. In view of the foregoing considerations, the facts of this case do not entail occupation of a particular piece of land or the ancillary right to exclude others from access to that piece of land.

57. Subject, therefore, to the findings of the national court under point 44 above, an agreement such as that in this case does not involve a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive.

18 — See Opinion in Case C-358/97 *Commission* v *Ireland*, cited in footnote 17, point 66.

VII — Conclusion

58. I therefore propose that the Court should answer the question referred as follows:

The grant, by the owner of premises ('the Siteholder') to an owner of a cigarette vending machine, of the right to install, operate and maintain the machine in those premises for a period of two years, in a place nominated by the Siteholder, in return for a percentage of the gross profits of the sales of cigarettes and other tobacco goods in the premises, but with no other significant rights of possession or control than those set out in the written agreement between the parties, does not amount to the letting of immovable property within the meaning of Article 13B(b) of the Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes.