OPINION OF ADVOCATE GENERAL COSMAS
delivered on 8 June 1995 *

1. In the present case the Court is requested to interpret Article 13A(2)(a) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (hereafter the 'Sixth directive') [1]

I — The dispute

2. The applicant in the main proceedings, Mrs W. Bulthuis-Griffioen (hereafter 'the applicant'), has since 1988 been running a children's nursery. In respect of the years 1989 and 1990 she did not account for VAT on her receipts from services supplied by her. In her view the services provided by her are covered by the exemption provided for in Article 11(1)(f) of the Wet op de omzetbelasting 1968 (Law on turnover tax, hereafter the '1968 law'). That provision grants exemption from VAT in respect of supplies of goods and services of a social or cultural nature. A precondition of this exemption is that the provider of the service does not pursue a profit-making aim.

3. Taking the view that the precondition of the non-profit-making aim was not fulfilled in the present case and consequently that the exemption in question was not available to the applicant, the Inspector of Taxes addressed to the applicant a tax recovery notice. Against that decision the applicant brought proceedings before the Gerechtshof, Amsterdam.

As is apparent from the order for reference, the parties are divided on the question whether the applicant is pursuing a profit-making aim from the operation of the children's nursery; in the event that that question is answered in the negative, the parties do not dispute that the recovery notice was erroneously issued.

4. The applicant maintained before the national court that, although she seeks to achieve an operating surplus from the operation of the children's nursery, in view of the

* Original language: Greek.
1 — OJ 1977 L 145, p. 1.

structure of the occupation in question [2] that surplus is lower than the gainful salary, that is to say the remuneration which she would be paid for the same work. She relies on case-law of the Hoge Raad in connection with the application of Article 11(c) of the 1968 Law. That court, as mentioned in the order for reference, had judged that there is no pursuit of profit where the operator does not have the opportunity of achieving as a result of his activities revenue exceeding the hypothetical salary corresponding to those activities. On the other hand the Inspector accepts that the revenue deriving from the operation of the children's nursery is lower than the hypothetical salary corresponding to the applicant's activities. He contends, however, that there is pursuit of profit where it is sought to achieve a positive result. That is so in the present case since the applicant secures her subsistence by means of that revenue.

5. In accordance with the relevant provision of Netherlands' legislation and in particular Article 11(1) and subparagraph (f) of the 1968 Law mentioned above, supplies of goods and services of a social or cultural nature to be defined by general administrative measures are exempt from turnover tax provided that the trader does not seek to make a profit and there is no serious distortion of competitive conditions with respect to traders who do aim to make a profit. Article 7(1) of the Uitvoeringsbesluit omzetbelasting 1968 (the 1968 Turnover Tax Implementing Decree, hereafter 'the Decree') defines the relevant supplies of goods and services as those mentioned in Annex B to the Decree. As stated in the order for reference 'that annex, as it stood until 1 July 1989, referred in subparagraph (b) — as far as is relevant here — to supplies of goods and services which are effected by the following bodies acting as such, where they do not aim to make a profit: 2. Children's holiday camps, crèches, day-nurseries and/or schools. 6. Bodies providing nursery facilities and schools for children suffering from long-term illness.' The national court finds as a fact that the applicant operates an undertaking which falls within the meaning of the above-numbered subparagraphs 2 and 6.

6. As is apparent from the order for reference and also from the observations of the applicant, the Commission and the Netherlands Government in the procedure before the Court, Article 11(1)(f) of the 1968 Law transposes the Sixth directive into Netherlands' law, including the provision conferring

2 — The applicant claimed in that connection, and the national court accepted her claim that the undertaking's likely yield and the competitive conditions do not allow receipts greater than the amounts which would be achieved if the same activity was carried on within the framework of an employment relationship.

exemption, that is to say Article 13A(1)(g) of the directive in conjunction with 13A(2)(a) thereof.

Under those circumstances, taking the view that the legislature wished to confer on the precondition that there should be no profit-making aim as laid down in Article 11(1)(f) of the 1968 Law the same meaning as that attached to the precondition contained in Article 13A(2)(a) of the Sixth Directive, the national court considered it necessary to refer a question to the Court for a preliminary ruling under Article 177 of the EC Treaty.

II — The question submitted

7. The second tax chamber of the Gerechtshof, Amsterdam, seeks a preliminary ruling from the Court on the following question:

'Is a trader to be regarded as systematically aiming to make a profit within the meaning of Article 13A(2)(a) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, where he is a natural person who structurally sets out to achieve a positive result so that his income exceeds his expenditure, but that positive result cannot be higher than what is to be regarded as reasonable remuneration for the work performed by the trader?'

It appears to have been accepted by the national court that the applicant in the exercise of her activities certainly seeks to achieve and does achieve returns but that, given the structure of the occupation, she does not seek to achieve receipts in excess of the remuneration which she could receive for the activities which she herself carries on in operating the children's nursery.

According to the order for reference the issue in the present case centres on the meaning to be given in the applicant's case to the expression 'systematically aiming to make a profit' and in particular whether, in determining profit it is necessary to take into account the salary corresponding to the activities carried on by the applicant in the operation of her undertaking.

III — Legislative and judicial framework

8. Article 13A(1)(g) of the Sixth Directive provides as follows:

'A. *Exemptions for certain activities in the public interest*

1. 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:

g. The supply of services and of goods closely linked to welfare and social security work including those supplied by old people's homes, by bodies governed by public law or by other organizations recognized as charitable by the Member State concerned.'

Article 13A(2)(a) in fact provides:

'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 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.

...'

9. Thus Article 13A confers tax exemption depending on certain preconditions in respect of certain economic activities in the public interest.

The first precondition has to do with the nature of the activity. It concerns supplies of goods or services closely connected to social welfare and security.

The second precondition concerns the person carrying on such activities. In regard to the activities listed in subparagraph (g) of the article in question exemption is available where those activities are carried on by *bodies governed by public law or by other organizations* recognized as charitable by the Member State concerned.

The third precondition concerns the non-profit-making aim. It is that precondition which forms the subject-matter of the question now before the Court. Article 13A(2) gives to the Member States the possibility — availed of in the present case by the Netherlands' legislature — to make exemption dependent on certain conditions including the requirement of a non-profit-making aim. The Community legislature thereby sought to permit the national legislature to exclude from tax exemption activities in the public interest carried on with a systematic profit-making aim as defined by the continuous pursuit of revenue from the operation of the activities in question.

10. It is clear from the Court's case-law that the relevant provisions of the article of the Sixth Directive at issue which introduces exceptions to the general rule of taxation of economic activities must be strictly interpreted so as not to go beyond the clear and express wording of that article. Thus in its judgment of 26 March 1987 [3] the Court emphasized that 'the Sixth directive is characterized by its general scope and by the fact that all exemptions must be expressly provided for and precisely defined'. In its decision of 15 June 1989 [4] it held that 'with regard to the exemption provided for by the Sixth directive, it is evident from the eleventh recital in its preamble that the exemptions constitute independent concepts of Community law which ... should be placed in the general context of the common system of VAT introduced by the Sixth directive'. According to the same decision 'the terms used to specify the exemptions envisaged by Article 13 of the Sixth directive are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for consideration by a taxable person'. [5]

11. Moreover, as was acknowledged by the Court in its judgment of 11 July 1985 [6] 'although it is true that the exemptions' (provided for in Article 13A(1) of the directive) 'are granted in favour of activities pursuing specific objectives, most of the provisions also define the bodies which are authorized to supply the exempted services'.

3 — Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 19.

4 — Case C-348/87 *Stichting Uitvoering Financiele Acties* v *Staatssecretaris van Financien* [1989] ECR 1737, paragraph 11.

5 — See judgment referred to in footnote 4, paragraph 13.

6 — Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraph 13.

Thus, the activities in question do not enjoy exemption unless they are carried on by bodies which in the case of subparagraph (g) must be 'bodies governed by public law or by other organizations recognized as charitable by the Member State'.

Consequently the question arises whether the applicant who operates a children's nursery as mentioned above may be deemed to be 'an organization' within the meaning of the relevant provision of the Sixth Directive.

IV — Reply to the preliminary question

12. In the light of the case-law which I have referred to above I consider that before an answer is given to the preliminary question and in order to provide the national court with all the elements which it requires in order to interpret the relevant decision and resolve the dispute, it must be ascertained, as the Commission pointed out in its observations, whether it follows from the precise meaning of the relevant provision of the Sixth Directive, that a case such as the applicant's, is included amongst the bodies entitled to exemption from tax in respect of its services.

It is apparent from the formulation of Article 13, viewed as a whole, that certain of the exemptions which it provides for expressly refer to the provision of services and goods by 'bodies'.

Thus, for example, in subparagraph (b) of the relevant exemption, mention is made of services supplied '... by bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognized establishments of a similar nature'. Likewise, subparagraph (i) of the exemption mentions 'bodies governed by public law ... or by other organizations defined by the Member State concerned as having similar objects'. The exemptions under subparagraphs (l) and (m) refer to 'non-profit-making organizations', and the exemption under subparagraph (a) concerns services supplied by 'cultural bodies recognized by the Member State concerned'. Moreover, the exemptions under subparagraphs (g) and (h) concern 'bodies governed by public law or ... other organizations recognized as charitable'.

On the other hand, in other cases of exemption, that expression is not used. That applies *inter alia*, to exemptions under subparagraph (c) which concerns services provided in the exercise of the medical and paramedical professions, under subparagraph (e) which concerns services supplied by dental technicians in their professional capacity and under subparagraph (i) which concerns tuition given privately by teachers. In those cases it is

evident that the services and goods are supplied by natural persons.

13. That comparison leads to the conclusion that, whenever the provisions of Article 13 lay down that an exempt activity must be performed by an 'organization' the exemption provided for is not applicable when the economic operator is a natural person.

That interpretation is further reinforced by the provision contained in Article 13A(2)(a) which provides, amongst the preconditions to which exemption of the abovementioned bodies may be made subject that 'any profits nevertheless arising shall not be distributed' and that 'they shall be managed and administered on an essentially voluntary basis'. It would be difficult for these preconditions to be deemed to apply to natural persons.

14. It follows from the foregoing considerations that the applicant cannot be brought within the expression 'organization' and thus does not fall *ratione personae* within the scope of the exemption provided for in Article 13A(1)(g). Consequently, the revenue from the services which she supplies is not exempt from turnover tax.

15. I come, then, to the conclusion that the reply to the preliminary question must make clear that a trader who, like the applicant, carries on tax-exempt activities as a natural person does not fall within the personal scope of the relevant provision contained in Article 13A(1)(g) of the Sixth Directive inasmuch as such a trader cannot be characterized as 'an organization' within the meaning of the provision in question.

16. Without prejudice to the matters set forth above, the question to be examined at this juncture is the interpretation of the expression 'systematically aim to make a profit' with particular regard to the applicant's situation. As elucidated above the question arising in the present case is whether the trader in question can be said to be systematically aiming to make a profit when she does not have the possibility of achieving revenue which exceeds the salary which she could command for similar work to that which she does in the framework of her occupational activity. The reply to that question must be given in the framework of the strict interpretation by the Court of the provisions on tax exemptions contained in the Sixth Directive.

17. As is apparent from the order for reference and from the observations of the applicant herself before the Court, the applicant in carrying on her specific activities certainly

seeks to achieve a revenue even if she does not seek to achieve revenue exceeding a salary as an employed person. The operation of the children's nursery is an undertaking carried on by the applicant in order to provide her with a living. There is, consequently, in the present case a constant effort in order to achieve a positive outcome. Nor can it be doubted that in operating the undertaking in question the applicant achieves that positive result inasmuch as she obtains revenue in excess of her expenses. Thus that undertaking constitutes for the applicant a permanent source of income.

18. I do not consider that that conclusion is altered by the mere fact that the operating result does not and cannot exceed a certain amount which is less and in any event not greater than the salary which she could command for carrying out the same activities within an employment relationship.

In any event a positive result is being sought even if the revenue does not exceed a reasonable remuneration and barely suffices in order to cover the living expenses of the trader.

19. I believe that a trader, like the applicant, who by means of the activities which she carries on on her own account is seeking to achieve revenue in order to cover her living expenses, is systematically aiming to make a profit. That assessment does not alter according to the amount of the revenue. Even if the net revenue is lower than that which could be achieved by another person carrying on the same activities on a salaried basis it would be difficult to maintain that the trader was not systematically aiming to make a profit.

Certainly, the assessment as to whether there is or is not a profit-making aim is in each particular case a matter of fact to be determined by the national court.

V — Conclusion

20. In the light of the foregoing considerations and subject to the reservation that the applicant as a natural person does not come within the personal scope of the provision in question, I propose that the Court should give the following reply to the question submitted by the Gerechtshof, Amsterdam:

Under the terms of Article 13A(2) of the Sixth Council directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes —

Common system of value added tax: uniform basis of assessment, a trader may be said to systematically aim to make a profit when that person seeks to obtain from the exercise of an activity a positive operating result in such a way that receipts drawn exceed expenditure incurred, irrespective of the amount of those receipts and even if from a structural point of view the revenue sought to be obtained cannot be greater than what would be regarded as reasonable remuneration for the employment of the trader on a salaried basis.