OPINION OF ADVOCATE GENERAL ALBER

delivered on 18 March 1999 *

A — Introduction

1. This case raises the question whether tourism taxes may be characterised as turnover taxes which, under Community law, may neither be introduced nor maintained in force. Consequently, the Verwaltungsgerichtshof Wien (Administrative Court, Vienna) has referred to the Court certain questions relating to the compatibility of taxes levied in the Tyrol, Carinthia and Styria to develop tourism with 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 [1] (hereinafter 'the Sixth Directive'). These taxes are referred to in Styria as 'interested party contributions', in the Tyrol as 'compulsory contributions' and in Carinthia as 'tourism levies'. I shall use the term 'tourism taxes' to refer to all the charges at issue.

2. The plaintiffs in the main proceedings all seek annulment of the relevant tax demands on the ground that the taxes in question are not such as may be introduced or maintained in force under Article 33 of the Sixth Directive.

3. The Sixth Directive, as amended by Council Directive (91/680/EEC) of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers [2] provides:

'1. Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges *which cannot be characterised as turnover taxes*, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.' [3]

* Original language: German.

1 — OJ 1977 L 145, p. 1.

2 — OJ 1991 L 376, p. 1.

3 — Emphasis added.

The applicable national legislation

4. *Styria*: Under Paragraph 27(1) of the *Steiermärkisches Tourismusgesetz* 1992 (Tourism Law 1992 of the *Land* of Styria), 'persons having an interest in the tourist industry' (which, in accordance with the definition set out in Paragraph 1(5) of that Law,[4] means any persons who 'directly or indirectly have a commercial interest in tourism in Styria', who 'independently carry on, in Styria, a commercial or professional activity within the meaning of Paragraph 2 of the *Umsatzsteuergesetz* 1972 (Turnover Taxes Law)' and who 'for that purpose maintain, in a tourist commune in Styria, a registered office, seat or place of business...') must pay 'interested party contributions' to the tourist associations for each calendar year. The amount of those contributions depends on the benefit which each individual trader derives from tourism.

5. The communes are graded (A, B, C or D) or classified as 'chartered towns' according to their importance for the purposes of tourism, which is measured, *inter alia*, by the number of overnight stays spent per head of population and the 'specific tourism turnover'. Communes which do not qualify for classification as communes of importance for the purposes of tourism are graded in category D. Those graded A, B or C or classified as chartered towns are regarded as tourist communes for the purposes of Paragraph 1(2) of the *Steiermärkisches Tourismusgesetz*.

6. Calculation of the tourism tax entails the classification of the taxable person within a specific occupational group, each group being then assigned to one of seven tax brackets. These decisions are made by the regional government by means of regulation and are based on the increased value derived by the taxable person from tourism. Under Paragraph 2 of the relevant regulation, any unlisted occupational groups must be assigned to tax bracket 5 and any occupational group engaged in wholesale trade must be assigned to tax bracket 6.

7. Assessment of the tourism tax is based on the turnover of the individual undertaking. Under Paragraph 31 of the *Steiermärkisches Tourismusgesetz*, the taxable turnover is 'the sum of the taxable transactions, within the meaning of... the *Umsatzsteuergesetz* (Law on Turnover Tax), achieved in the last year but one'. The amount is fixed in accordance with tables which take account of the relevant tax bracket and turnover of the taxable person and the classification of the tourism commune in which he is liable for tax. There is a minimum and a maximum contribution. Provision is made for certain exceptions.

4 — In the version published in *Landesgesetzblatt* No 55/1994.

8. Tyrol: Under the *Tiroler Tourismusgesetz* 1991 [5] (Tourism Law of the *Land* of Tyrol), membership of a tourist association is compulsory for all traders, within the meaning of the *Umsatzsteuergesetz* 1994, who have a 'direct or indirect' interest in tourism in the Tyrol. Thus, the taxes consist of compulsory contributions to one of the local tourist associations and to the tourism development fund.

Here, too, taxable persons are assigned to tax brackets according to their occupation. According to the national court, the tax bracket is determined by the relationship of the business results achieved directly or indirectly from tourism by the particular occupational group in question — in the light of general commercial experience — to the corresponding overall results achieved by all occupational groups considered together. Provision is also made for classifying the communes in specific locality classes according to the number of overnight stays spent in the locality per head of population.

9. The basis of assessment for the tourism tax is, in principle, the annual turnover of the taxable person. However, only income which can properly be attributed, albeit indirectly, to tourism in the Tyrol is taxable.

10. Carinthia: Under Paragraph 3(1) of the *Kärntner Fremdenverkehrsabgabegesetz* 1994 [6] (Law of the *Land* of Carinthia on the charge to promote tourism), independent undertakings 'which derive benefit from tourism' must pay an annual tourism tax. An independent undertaking is deemed to derive benefit from tourism if it is engaged in any activity — or similar activity — listed in the Annex to that Law. That presumption is not, however, irrebuttable.

11. Under Paragraph 5 of the Law, the tax is assessed on the basis of taxable turnover within the meaning of the *Umsatzsteuergesetz*. The tax payable by persons within the various tax brackets is a proportion, expressed in thousandths, of the taxable turnover achieved in Carinthia in the last year but one, subject to a fixed contribution. The amount of tax varies from one bracket to another according to the benefit derived from tourism.

12. In view of its uncertainty as to whether the tourism taxes in these three cases are compatible with the Sixth Directive, the Verwaltungsgerichtshof Wien has in each case referred a question to the Court for a preliminary ruling under Article 177 of the EC Treaty:

Case C-338/97 (Styria):

'Does Article 33(1) of the Sixth Council Directive 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

5 — *Landesgesetzblatt* No 24 in the version of the legislation published in *Landesgesetzblatt* No 71/1992 and 111/1994.

6 — *Landesgesetzblatt für Kärnten* No 59/1994 (in the version published in *Landesgesetzblatt für Kärnten* No 89/1994).

of assessment (77/388/EEC) preclude, on the ground that it is in the nature of a turnover tax, the maintenance in force of a tax which is payable in a *Bundesland* (Regional State) of a Member State of the European Communities

— in respect of each calendar year by all undertakings directly or indirectly involved in tourism which have their registered office or a place of business within certain closely defined areas, where the sum of those areas comprises almost the whole area of the *Bundesland*, and

— the amount of which is essentially proportional to the turnover achieved by the undertaking primarily in that Regional State within a calendar year, but where the rate of contribution varies according to the intensity of tourism in that area and according to the degree of benefit which the legislature deems the commercial sector in question (occupational group) to derive from tourism, and

where no provision is made for the deduction of input tax?'

Case C-344/97 (Tyrol):

'Is Article 33(1) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (77/388/EEC) to be interpreted with regard to the description "characterised as turnover taxes" as precluding the imposition on traders by a Member State of a tourism levy (contribution) which has the following features:

— it is payable by traders with a direct or indirect interest in the tourist industry and therefore by a large number of, but not all, traders;

— it goes to a local tourist association to finance the development of the tourist industry or to a fund to be used for the whole region (*Land*);

— the basis of assessment is the yearly turnover with certain exceptions, in particular turnover related to services to customers whose place of residence (seat) is outside the area covered by the legislation, in so far as the services are not for a business situated within the

area covered by the legislation (a *Bundesland* of a Member State composed of federal States) and not services to final customers, and turnover related to other services in so far as they are not supplied exclusively or primarily within the area covered by the legislation (the *Bundesland* of the Member State);

— the amount of the levy varies according to the benefit deemed by the legislature to be derived from tourism by the sector to which the taxpayer belongs;

— the amount of the levy is higher in tourist areas than in others, and

— no provision is made for deduction of input tax?'

Case C-390/97 (Carinthia):

'Does Article 33(1) of the Sixth Council Directive 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 (77/388/EEC) preclude, on the ground that it is in the nature of a turnover tax, the maintenance in force of a tax which is payable in a *Bundesland* (Regional State) of a Member State of the European Communities in respect of each calendar year by all undertakings directly or indirectly involved in tourism which have their registered office or a place of business within that Regional State, and the amount of which is essentially proportional to the turnover achieved by the undertaking in that Regional State within a calendar year, but where the rate of contribution varies according to the degree of benefit which the legislature deems the commercial sector in question (occupational group) to derive from tourism, and where no provision is made for the deduction of input tax?'

B — Analysis

13. Several preliminary points must be made concerning Article 33 of the Sixth Directive.

14. As the Court has made clear on several occasions (for example, in *Kerrutt*, *Wisselink* and *Giant*), Article 33 precludes systems of taxation which are concurrent with the system of VAT,[7] and whose charging

7 — Case 73/85 *Hans-Dieter and Kerrutt* v *Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219, paragraph 22, Joined Cases 93/88 and 94/88 *Wisselink and Others* v *Staatssecretaris van Financiën* [1989] ECR 2671, paragraph 14, and Case C-109/90 *Giant* v *Gemeente Overijse* [1991] ECR I-1385, paragraph 9.

may result in double taxation of the transaction concerned, only where such taxes or duties can be characterised as turnover tax. [8]

15. The delimitation criteria, and the wording of Article 33, must be considered in the light of the role of that provision in the harmonised system of turnover tax, which takes the form of a common system of VAT. [9] Under Article 2 of the First VAT Directive, [10] the principle of that system involves the application to goods and services — up to and including the retail stage — of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged. However, on each transaction, VAT is chargeable only after deduction of the amount of VAT borne directly by the various cost components.

16. In that context Article 33 of the Sixth Directive seeks to prevent the functioning of the common system of VAT from being compromised by domestic fiscal measures levied on the movement of goods and services and charged on commercial transactions in a way comparable to VAT. [11] It is settled law (see, for example, *Bozzi* and *Dansk Denkavit*), that all taxes, duties and charges which exhibit the essential characteristics of VAT must be regarded as taxing the movement of goods and services in a way comparable to VAT. Thus, Article 33 does not preclude taxes, duties or charges which do not have the essential characteristics of VAT. [12] As regards those essential characteristics, the Court of Justice has repeatedly held that:

— VAT applies generally to transactions relating to goods or services.

— it is proportional to the price of those goods or services.

— it is charged at each stage of the production and distribution process and thus added to the prices of the goods and services and definitively borne by the final customer; [13]

8 — Case 73/85, cited in footnote 7, paragraph 22, and Joined Cases 93/88 and 94/88, cited in footnote 7, paragraph 14.

9 — Case 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759, paragraph 14.

10 — First Council Directive (67/227/EEC) of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition, 1967-I, p. 14).

11 — Case 295/84, cited in footnote 9, paragraph 16.

12 — Case C-347/90 *Bozzi* v *Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e dei Procuratori legali* [1992] ECR I-2947, paragraph 9 et seq., and Case C-200/90 *Dansk Denkavit and Poulsen* v *Skatteministeriet* [1992] ECR I-2217, paragraph 11.

13 — Case 252/86 *Bergandi* v *Directeur Général des Impôts* [1988] ECR 1343, paragraph 8, and Joined Cases C-370/95, C-371/95 and C-372/95 *Careda and Others* [1997] ECR I-3721, paragraph 15.

— finally, it is charged on the added value of goods and services, since the tax payable on a transaction is calculated after deduction of the tax paid on the previous transaction. [14]

17. Some of the defendants in the main proceedings contend that those individual characteristics alone do not conclusively determine compatibility with Article 33. Rather, the tax at issue should be considered in its entirety in the light of Article 33. However, the essential characteristics of VAT which have been laid down by the Court and normally examined to determine compatibility with Article 33 must also be tested for in this case. If necessary, an additional general assessment of the tourism taxes at issue may be made thereafter. Accordingly, it must first be determined whether those taxes exhibit the essential characteristics described above.

18. I suspect that most of those criteria will not satisfied in the present case, with the result that the tourism tax cannot be characterised as a turnover tax within the meaning of Article 33.

14 — Case C-347/90, cited in footnote 12, paragraph 12, and Case 252/86, cited in footnote 13, paragraph 15; Joined Cases 93/88 and 94/88, cited in footnote 7, paragraph 18; Case 109/90, cited in footnote 7, paragraph 11 et seq., and Case C-200/90, cited in footnote 12, paragraph 11.

19. I consider it appropriate to address the parties' submissions separately, rather than collectively, in respect of each of the above-mentioned characteristics.

General applicability

20. The plaintiffs in the main proceedings take the view that the tourism taxes apply generally. That is clear from the information provided by the national court according to which, in the Tyrol, for example, a large number of occupational groups, but not all, have to pay the relevant contributions. The plaintiffs maintain that the accuracy of this information is beyond doubt.

21. The plaintiffs also maintain that any trader subject to turnover tax is also *de facto* liable to pay tourism tax. For example, in the Tyrol, approximately 700 occupational groups have been established, each of which has been assigned to a specific tax bracket. In Styria, there is in certain measure a subsidiary clause under which any unlisted occupational groups must automatically be assigned to certain tax brackets. Consequently, only very few traders are exempt from the liability to pay a contribution. Moreover, those exceptions correspond in part to those set out in the *Umsatzsteuergesetz*. In Carinthia, specific reference to those exceptions is made in the legislation governing tourism tax.

22. Even though the applicable legislation provides for exemptions, it is virtually impossible — according to the plaintiffs — to adduce the necessary evidence, since an indirect interest in the tourist industry is in itself sufficient to make payment of the tax compulsory. Even lawyers and doctors, for example, are deemed to possess a commercial interest in tourism and liable to tax. The criteria of benefit derived from tourism does not restrict the range of taxpayers; it merely determines the amount payable. For that reason no sizeable occupational group in any of the Austrian *Bundesländer* is exempt.

23. Moreover, the plaintiffs maintain that such tourism taxes are levied throughout the federal territory — that is to say in Austria as a whole — and thus they are levied across the board on all traders, whether or not they have any link with tourism. The fact that the individual taxes are laid down by the legislation of the *Bundesländer* is irrelevant in that connection. Unless the Sixth Directive is applied to the legislation of all the various *Bundesländer*, it will very easily be circumvented.

24. The plaintiffs also refer to the basis for assessing the tourism tax. This consists in the sum of the taxable turnover, that is to say, the sum of the transactions subject to turnover tax under the *Umsatzsteuergesetz*. It therefore covers all goods and services, that is to say, turnover in Austria as a whole with the exception of Vienna. The few objective exceptions make no difference since even the legislation on turnover tax provides for certain exceptions. According to the plaintiffs, this case is to be distinguished on its facts from *SPAR* [15] in which the Court ruled that an Austrian levy to support chambers of commerce was compatible with the Sixth Directive. Whereas in that case the tax attached to transactions effected by suppliers, the tourism tax is based on transactions effected by the trader himself.

25. Lastly, the plaintiffs point out that, even in terms of procedural law, there is a close link with the law on turnover tax. For example, the amendments to the *Umsatzsteuergesetz* were reproduced in the Tyrol legislation on tourism tax. Also, a copy of the turnover tax assessment notice is submitted to calculate the tax.

26. Referring to the Court's case-law to the effect that the criterion of general applicability is not satisfied where a tax is imposed only on certain goods and services, the plaintiffs conclude that the tax at issue here is a general one. They claim that the

15 — Case C-318/96 *SPAR Österreichische Warenhandels* v *Finanzlandesdirektion für Salzburg* [1998] ECR I-785.

fact, on which the defendants rely, that the tax is specifically designed to support tourist associations is irrelevant since, if that were so, the criteria laid down in Article 33 could very easily be circumvented.

27. However, the Federal Government of Austria and the *Bundesländer* concerned take the view that the tourism tax does not constitute a general charge on goods and services. In contrast with turnover tax, the taxable product is limited. The tourism tax is levied only on benefit derived from tourism, which may be regarded as value created from tourism and therefore, more or less, as an added value specific to tourism.

28. In fiscal terms the tourism tax should not be regarded as a tax on consumption, that is to say, as an indirect tax. From a commercial point of view, turnover tax is always charged to final customers whereas the tourism tax, albeit calculated on the basis of turnover, is levied solely on the benefit derived by the trader.

29. Since not all traders derive benefit from tourism, they are not all required to pay the tax at issue. In that respect, the defendants emphasise the exceptions provided for. Admittedly, as the national court confirms, in the *Bundesland* of Tyrol the tax is levied on a relatively large number of occupational groups, but not on all of them. For example, whereas the total turnover achieved by undertakings in the Tyrol amounts to ÖS 270 billion, a figure of no more than ÖS 60 billion is taken as the basis of assessment for the tourist tax.

30. The defendants also contend at several junctures that the assigning of an occupational group to a particular tax bracket merely means that the group in question is deemed to derive a certain benefit from tourism. That does not mean, however, that all those belonging to that occupational group — in the Tyrol, for example — are also compulsorily members of the local tourist association. Rather, such membership is based on the actual link between the trader and tourism. Moreover, special rules have been devised for entire commercial sectors since taxable turnover is not an appropriate criterion for determining taxability in those cases. Moreover, in the case of 38% of compulsory members (around 21,000 traders), turnover is not taken as the basis of assessment — they simply pay a flat-rate contribution.

31. Another important exception on which the defendants rely is the fact that, in the Tyrol, for example, export transactions are not included in the basis of assessment, the term 'exports' being taken to cover exports to other *Bundesländer*. In other words, the tourism tax is fixed solely by reference to transactions effected in the Tyrol, since

only those transactions can properly be regarded as at least indirectly related to tourism there. In addition, although certain activities, such as the letting of accommodation to non-tourists, are subject to turnover tax, they are completely exempt from tourism tax.

32. Tourism tax may be further distinguished from turnover tax by the fact that the latter also applies to foreign undertakings, whereas only persons with a registered office within the area covered by a particular tourist association must become members of that association.

33. The *Bundesland* of Styria contends additionally that the tourism tax is a direct tax which may, admittedly, be determined by turnover but is not subject to harmonisation and, accordingly, falls outside the scope of Article 33. Finally, Styria emphasises the localised nature of the tourism tax, which is levied in only 203 of its 543 communes. As regards the basis for assessment, Styria maintains that, according to the case-law of the Court, the fact that this is calculated by reference to turnover does not mean that the tax in question is a general tax for the purposes of Article 33.

34. The Commission argues, first, that a tax must be deemed to apply generally where it is levied on all commercial transactions in the Member State concerned. According to the case-law, a tax cannot be characterised as a general tax if it applies only to certain goods, activities or categories of person. Upon examining the legislation at issue, the Commission maintains that it is not possible to determine with accuracy the number of communes and occupational groups actually taxed. It is possible to say, however — according to the Commission — that the tourism tax is not limited to certain goods, activities or categories of person.

35. As regards the legal evaluation of the arguments put forward, I cannot accept the defendants' contention that the tourism tax is not levied on all transactions as such, but only on the benefit derived by transactions from tourism. That cannot support the inference that the tourism tax is not levied generally on goods and services. As the defendants admit, *indirect benefit* from tourism is sufficient to make a payment or contribution compulsory. If that notion is interpreted in very broad terms, it could mean that the tax is imposed on virtually all traders and applies across the board, that is to say, in the manner of a tax for the purposes of Article 33. Such an interpretation appears entirely reasonable, given the importance of tourism for the economies of the various Austrian *Bundesländer*.

36. It is necessary, therefore, to determine whether or not the tourism tax is levied on all commercial transactions in any given *Bundesland*. I agree with the plaintiffs that such an analysis must be based on the information provided by the national court. It is clear from the orders for reference, at least in respect of Tyrol, that many, but not all, occupational groups have to pay the tax at issue. It cannot be said, however — as the national court goes on to point out — that it is levied only on certain individual transactions. Even on the basis of that information, however, it is still not clear whether the test for general applicability is satisfied. In other words, the question of the general applicability of the tourism tax must also be examined in the case of the Tyrolean legislation. In the case of both Carinthia and Styria, such an exercise is unavoidable, as the information provided by the national court is markedly less clear.

37. The Commission rightly observes that, according to established case-law, a tax cannot be said to apply generally where it relates only to certain goods, activities or categories of person. In fact, the Court has ruled that a special consumption tax on passenger cars did not constitute a general tax since 'it [was] charged only on... categories of specific products'. [16]

38. The Court gave a similar judgment in respect of a tax introduced by a commune under which any person who habitually or occasionally organised public performances or entertainments within the commune and required those attending or participating to pay an entrance fee had to pay a special tax on the gross amount of all receipts. It was not regarded as a general tax since it applied only to a limited category of goods and services. [17]

39. Finally, a supplementary contribution to a lawyers' insurance fund, of which all *avvocati* in continuous practice in Italy are required to be members, was not considered to be a charge of a general nature. Any person whose name appeared on the professional register had to subscribe a percentage of all fees used to calculate annual turnover for VAT purposes. In that case, too, the Court held that the supplementary contribution was not a generally applicable charge, on the ground that only *avvocati* were affected and, moreover, the charge was not levied on all fees, only on those pertaining to court work. [18]

40. The exceptions to which the defendants refer probably do not reverse the ratio between rule and exception to the extent that, in contrast with VAT, tourism tax is

16 — Joined Cases 93/88 and 94/88, cited in footnote 7, paragraph 20.

17 — Case C-109/90, cited in footnote 7, paragraph 14.

18 — Case C-347/90 (cited in footnote 12, at paragraph 14).

payable in only a few (exceptional) cases. Consequently, it cannot be deemed to apply to only certain goods, activities or categories of person. Exceptions do exist, but then they are also to be found in the legislation on VAT.

41. That conclusion is substantiated by the fact that, as the parties observe, the notion of 'indirect benefit' is construed very broadly. Even doctors and lawyers are regarded as indirect beneficiaries of tourism, even when, in the case of the former, they are able to prove that there are no tourists among their patients. In this context, mention must also be made of the subsidiary clause in the Styria legislation, under which all professions are initially assigned to a special tax bracket. Even though the assignation of a profession to a tax bracket reflects nothing more than a presumption and all persons may apply for exemption — if this is not made too difficult — such exemptions can be made only in isolated cases. The same is true of transactions effected outside the Tyrol, which are not taken into account in the calculation of the tourism tax. Essentially, the tax must be assumed to apply to a large number of occupational groups. Likewise, the fact that certain communes can have themselves exempted can constitute no more than an exception. In other words, the tax is levied on vast sectors of the economy. That does not satisfy the test laid down by the case-law, according to which a charge is not general in nature if it is levied only on certain groups.

42. Furthermore, the assessment as to general applicability is not affected by the fact that, as was stated at the hearing, the Carinthia legislation does not levy the tax on traders within the meaning of the *Umsatzsteuergesetz* but only on certain independent businesses which derive benefit from tourism and obtain certain income within the meaning of the *Einkommensteuergesetz* (Income Tax Law). It may be that the range of those liable to pay is somewhat narrower than in the other *Bundesländer*. As demonstrated,[19] however, that does not reverse the ratio between rule and exception. The fact remains that the tax does not apply only to certain categories of person and activity. That conclusion is not invalidated by the fact that exemption may be gained simply by making a case that no benefit is derived from tourism, since such exemptions may be applied only in isolated cases.

43. It is submitted that general applicability cannot be assumed on the basis of annual turnover alone. That argument relies on *Rousseau Wilmot*, in which the Court held that the purpose of Article 33 cannot be to prohibit the Member States from maintaining or introducing duties or charges which are not fiscal but have been introduced specifically in order to finance

19 — See point 40 above.

social funds and which are based on the activity of undertakings and calculated on the basis of the total annual turnover without directly affecting prices. [20] However, that judgment did not establish any direct link between the tax's connection with total annual turnover and its general applicability. Nevertheless, the fact remains that an essential characteristic of VAT is that it applies generally to all transactions relating to goods and services, and thus to turnover.

44. It must therefore be concluded that the tourism tax applies generally. It is uncertain, however, whether it applies generally to goods and services, and therefore taxes consumption. That is probably the case as it is levied on the annual turnover of the undertaking concerned. The contention that turnover is used only to calculate the tax changes nothing in itself. The use of turnover as the basis of calculation cannot be compatible with the Sixth Directive if it results in turnover being taxed in a manner which is inconsistent with Article 33. Similarly, the existence of certain exceptions cannot alter the fact that transactions are taxed generally.

45. However, there could be doubts as regards Carinthia and Styria since in both cases turnover in the last year but one is taken as the basis. It is therefore unclear whether or not the tax is similar to VAT. That is because direct taxation of the turnover concerned is made difficult, to say the least, in Carinthia and well-nigh impossible in Styria. On the other hand, if general taxation of transactions is taken strictly as a basis, it must be acknowledged that that criterion is satisfied.

46. Another special feature of this case must be addressed. The issue here is not whether the legislation of a Member State is compatible with the Sixth Directive, but whether the legislation of certain *Bundesländer* within a Member State is compatible. This, also, must be compatible with the Sixth Directive. In that connection the Commission rightly refers to the judgment in *Giant*. [21] In that case the Court went so far as to examine the compatibility of a district tax with the Sixth Directive. It follows that taxes levied by *Bundesländer* ought certainly to be compatible with the Sixth Directive and the localised nature of the Styria tourism tax — a point relied upon by the defendants — alters nothing. Accordingly, I shall now examine whether or not the legislation enacted by the various Austrian *Bundesländer* to govern tourism tax is compatible with the Sixth Directive.

20 — Case 295/84, cited in footnote 9, paragraph 16.

21 — Case C-109/90, cited in footnote 7.

Proportionality

47. Another essential characteristic of a tax within the meaning of Article 33 is that it must be proportional to the price of the goods and services concerned. Under Article 2 of the First Directive, [22] it must even be an exactly proportional tax on consumption.

48. The plaintiffs maintain that the tax at issue is proportional. They claim that the base figure to be established for the purpose of calculation is a percentage of the taxable turnover. The fact that the amount payable depends on the tax bracket and locality rating does not alter the relationship of strict proportion between turnover and the amount of tourist tax payable. They argue that the plethora of base figures, tax brackets and locality ratings merely gives rise to a large number of tax rates. They also point out that fixed rates are applied in only very limited sectors.

49. With regard to the Tyrol, for example, the defendants contend that the tax is not proportional because certain transactions have to be deducted from the total taxable turnover. Furthermore, the base figures used to calculate the latter represent a percentage of turnover, which varies with each tax bracket. As a result, the tax — that is to say, the charge levied on each transaction — cannot then be identified or demonstrated, or even determined in retrospect. There is a fixed minimum amount and the rates in thousandths laid down by the various tourist associations vary considerably. Accordingly, the tax at issue cannot be termed a proportional charge since the contribution rates charged by the various tourist associations vary considerably and fewer than 10% of the associations levy the same rates.

50. As regards the Styrian legislation, the defendants state that the starting-point in each tax bracket is a fixed rate expressed in thousandths. However, since the benefit derived from tourism is the point of reference, that rate will be higher, the greater the perceived benefit. The tax is not proportional, therefore, but progressive. Lastly, in the case of certain tax brackets and locality ratings in Styria, a fixed amount may be payable, which means that the charge is not proportional.

51. By contrast, the plaintiffs reiterate that, although the rates may vary depending on the locality, the rate applied to each individual trader remains constant and may therefore be regarded as strictly proportional. The fact that it is rounded off to a flat rate at the lower contribution levels

22 — See footnote 10 above.

makes no difference since only a small number of traders are affected. The range of tax or contribution rates is not material since even the law on turnover tax provides for varying tax rates.

52. The Commission takes the view that the tax is not proportional. The fact that it is based on total turnover precludes this. Moreover, the amount is not determined solely by turnover but also by other factors such as the relevant locality rating.

53. Before making a legal assessment of the arguments put forward by the parties, it must first be noted that a tax based on the benefit derived from tourism can nevertheless be proportional within the meaning of the *Umsatzsteuergesetz*. In order to evaluate that benefit, the tourism tax is based on turnover related to tourism. This, too, can be taxed proportionately, like VAT. I shall now examine whether that is the case here.

54. I cannot agree with the defendants' contention that, because the total taxable turnover does not include certain transactions, such as those relating to exports, the tax is not proportional. The question at issue is whether the tax is exactly proportional to the taxable transactions. The fact that certain transactions are not taxable simply means that calculation of the contribution is limited to particular transactions. I do not see why, merely because a percentage of turnover is determined, the tax should not be proportional.

55. As regards determination of the base figures, these, too, represent a percentage of the turnover, which in turn is proportional to the transactions made. The assertion that the purpose of determining those figures is to base the tax only on the share of proceeds attributable to tourism demonstrates an intention to apply a certain degree of weighting. Thus, the individual goods and services — or, rather, the corresponding prices — are to be taxed at different rates. However, those base figures are fixed according to the tax bracket and the benefit which that group is deemed to derive from tourism. If, however, it is assumed that certain services are always provided by the same occupational group, the tax levied on those services ought to remain constant. However, the fact that — in the Tyrol, for example — the classification of the locality must also be taken into account means that a particular transaction or service may be taxed differently in certain circumstances. As the plaintiffs rightly observe, the tax nevertheless remains the same for each individual trader and is always proportional to the price of the goods concerned.

56. Nevertheless, it is uncertain whether the proportionality of the charge is the same as that provided for under the common system of VAT. For each individual trader, the tax may indeed always be the same and proportional to the price of the goods concerned, but if it is assumed that the tax is levied at each stage down to the final customer — and that question remains to be examined — then the final customer will admittedly be taxed in proportion to the price, but at varying rates for identical services and goods. It seems unlikely that this is the same as the exactly proportional charge provided for under the common system of VAT. However, the question of the identifiable and demonstrable nature of the charge levied on a particular transaction appears more appropriate to the discussion of the passing on of the tax to the final consumer.

57. It is also argued that the tourism tax cannot be an exactly proportional charge since the sole point of reference is the taxpayer's total turnover. However, that is not completely true. Although VAT is charged proportionately on each transaction at the retail stage, that is to say, when passed to the final consumer, the VAT payable by the trader as a person subject to VAT is also calculated on the basis of the total turnover, as the plaintiffs correctly submitted at the hearing. Thus, the difference between the calculation of the tourism tax and calculation of VAT does not appear to be so great that the tourism tax cannot be regarded as proportional.

58. Admittedly, the legislation in force in the Tyrol and Carinthia provides in part for flat-rate payments or for fixed minimum amounts. This means that, at least in such cases — approximately 38% of the total for the Tyrol — there is no exact proportionality.

59. As for Styria, some of the parties argue that fixed amounts, rather than percentages, are applied in the case of certain occupational and locality groups. Others refer to the rates expressed in thousandths and to minimum and maximum amounts. It may be assumed, therefore, that the tourism tax in Styria, too, is not always strictly proportional.

60. Thus, the exact proportionality required under the common system of VAT is not a feature of the tourism tax. In the Tyrol, for example, where a fixed minimum amount is paid in over one-third of cases, the number of traders concerned is not insignificant. No exact figures are available for Carinthia and Styria. However, it is clear from the parties' submissions that proportional calculations are made in all but very few cases. It is ultimately for the referring court to examine that question. However, in principle it is sufficient that the individual rules provide for minimum and maximum contributions and rounding off to flat rate amounts to note

that what we have here is not an exactly proportional charge as provided for in the system of VAT. If account is also taken of the fact that it is uncertain whether the customer is taxed in a way comparable with the system of VAT, it must be noted that the contributions in this case are not proportional.

Charging the tax at each stage

61. It must now be determined whether or not the tourist tax at issue is charged at each stage of the production and distribution process. Since that is also the final stage under the common system of VAT, that is to say, it includes the passing on of the tax to the final customer, that criterion must now be examined.

The passing on of the charge to the final consumer

62. In that connection the plaintiffs referred at the hearing to *Careda*. [23] In that case the Court made it clear that it is sufficient for the tax at issue to be capable of being passed on to the final consumer and there is no need for this to be expressly laid down by the national legislation. Furthermore, it is not necessary for an invoice to be issued. The plaintiffs conclude from this that the passing on of the charge in the same way as VAT is not a necessary condition for classifying it as turnover tax within the meaning of Article 33 of the Sixth Directive.

63. However, in *Careda* the Court expressly stated that: 'It follows from the above that, in order to be characterised as a turnover tax, within the meaning of Article 33 of the Sixth Directive, the tax in question must be capable of being passed on to the customer.' [24] Thus, the Court considers simply that there is no need for express legislative provision to that effect. It adds: 'In this respect, it should be noted that, in view of the purpose of Article 33... the classification of a tax and, consequently, the appraisal of its compatibility with Community law must be based not only on the wording... but also on the essential characteristics of the tax.' [25] In other words, it is it at least necessary for the tax to be capable of being passed on to the final consumer in a manner comparable with VAT for it to be regarded as incompatible with Article 33. However, that also means that the charge on the final customer must be exactly proportional to the price of the relevant goods or services.

23 — Joined Cases C-370/95, C-371/95 and C-372/95, cited in footnote 13.

24 — Joined Cases C-370/95, C-371/95 and C-372/95, cited in footnote 13, paragraph 15.

25 — Joined Cases C-370/95, C-371/95 and C-372/95, cited in footnote 13, paragraph 17.

64. The Commission makes that point and adds that, in contrast to VAT the tourism tax is paid not by the final consumer but by the trader. Tourism taxes do not apply to deliveries to final customers. I concur with Commission where it adds that, even if the tax were charged to the consumer (as part of the cost) that would not constitute passing-on within the meaning of the Directive. It does not involve direct passing on, but at most the incorporation of costs in the price. Only the proportional charging of a tax or levy on the transaction concerned — as in the case of VAT — can constitute direct taxation of the final consumer within the meaning of the Sixth Directive. None of the parties has suggested that the tourism tax is passed on to the consumer in such a manner. The fact that the costs may be incorporated in the calculation of the price is not sufficient.

65. Carinthia's representative pointed out at the hearing that it is completely impossible to pass on the tax at issue. Since this must be calculated not in respect of each individual transaction but partially on the basis of the total turnover of the *last year (or last year but one)*, the trader is unable to determine in respect of each individual service which he provides the extent to which prices must be raised in the current tax year in order actually to pass on the tax burden. Thus, in reality the tax is levied on profit and is generally only passed on, in the economic sense, where the price of the service is below an attainable market price. The fact that the tax is incorporated as a factor in the calculation of the price does not mean that it can be characterised as a turnover tax. Attempts are even made to pass on income tax in a similar manner.

66. The assertion that the trader is unable to determine the charge levied on his transactions may be rejected in cases where the tax constitutes a proportional charge which does not vary from year to year. However, as we have already seen, the tourism tax is not always calculated proportionately.

67. The plaintiffs also submit that in *Dansk Denkavit* [26] the Court held that a tax was incompatible with Article 33 of the Sixth Directive even though it was not indicated separately on invoices but regarded as part of the price for goods and services. Arguably, the tourism tax, too, is included as a cost factor in the price and thus passed on to the customer.

68. In *Dansk Denkavit*, although the tax was not indicated in the invoice, the charge was proportional to the price and as such included in the price. [27] However, as has already been noted, there is no such direct passing on to the final consumer where the

26 — Case C-200/90, cited in footnote 12.

27 — Case C-200/90, cited in footnote 12, paragraph 15.

charge is merely incorporated as a cost component — such as income tax and other charges — in the calculation of the price. It may be concluded, therefore, that the tourism tax is not passed on to the final customer in a way comparable to VAT.

Charging the tax at each stage of the production and distribution process

69. Since the tourism tax is not passed on the final consumer, it must be concluded that it is not charged at each stage — down to the final customer. The plaintiffs' argument that the tax is imposed on an extremely broad range of traders and is therefore charged at each stage of the production process does not alter this. Admittedly, a particular trader on whose activities the tax is levied receives, for his part, goods and services on which tourism tax has already been paid. That does not mean, however, that the final stage, that is to say, delivery to the final consumer, is included in that.

70. The Commission also refers to *Giant*,[28] in which the Court ruled that a tax, which is not a levy of general nature, which is imposed annually on the aggregate receipts of taxable undertakings may be regarded as a tax which is not charged at each stage of the production process. Even if it is uncertain whether that also applies to a tax which is a levy of general nature, the fact remains that the criterion of charging at each stage of the production and distribution process is not satisfied, since the final stage — the final consumer — is not included.

Possibility of deduction of input tax

71. If the last of the essential criteria laid down by the Court is to be satisfied, it must be possible to deduct the tax already paid on goods and services from the turnover tax so that it is levied only on the added value provided by the trader.

72. In that respect reference must first be made to the information provided by the national court. This shows that none of the tourism taxes at issue provide for deduction of input tax. However, since all the parties concerned have commented on this point — with different conclusions — each submission must be examined here.

28 — Case C-109/90, cited in footnote 7.

73. Some of the plaintiffs in the main proceedings maintain that it is possible to deduct input tax in the context of tourism tax. The tourism tax is fixed as a proportion expressed in thousandths of the base figure, constituted by the taxable annual turnover. Clearly, therefore, added value is included.

74. The same plaintiffs claim that, in the case of particular occupational groups in the Tyrol, turnover tax is not included in the taxable turnover for tourism tax purposes. That means that the possibility of deducting input tax exists.

75. The defendants contend, on the other hand, that the *Tiroler Tourismusgesetz* in no way concerns the added value of goods and services, since it takes the overall taxable transactions within the meaning of the *Umsatzsteuergesetz* only as a criterion for determining the basis of assessment.

76. In its observations, the Commission refers again to the judgment in *Giant* where the Court states, with regard to the compatibility of a district tax with the Sixth Directive: 'Thirdly, it is not levied on the value added at each transaction but on the gross amount of all receipts'. [29] The Commission adds that the tourism tax in both Styria and the Tyrol is levied on the gross amount of all receipts (and on factors not relating to turnover such as inclusion in a occupational group or locality class), not on the value added at each transaction. To corroborate that contention it refers finally to the questions referred for a preliminary ruling which show that the Verwaltungsgerichtshof also considers that no provision is made for the deduction of input tax.

77. I cannot accept the plaintiffs' arguments. Turnover within the meaning of the *Umsatzsteuergesetz* is taken as the basis of assessment for the tourism tax. The possibility of deducting input tax can be assumed only where the taxes already paid on goods and services have been deducted from that turnover. However, deduction of input tax does not involve deducting a particular transaction, but rather the VAT already paid on previous transactions. In other words, the taxable turnover is determined first and the tax payable is fixed thereafter on the basis of that turnover. The tax paid on previous transactions is then deducted. Thus, the added value is not determined until that final stage, not at the time of assessing the taxable turnover. It is difficult to see, therefore, how the method of calculating the tourism tax incorporates a mechanism for the deduction of input tax.

29 — Case C-109/90, cited in footnote 7, paragraph 14.

78. The fact that, in the case of certain occupational groups, turnover tax is not included in the taxable turnover cannot be equated with the possibility of deducting input tax. It would be possible to deduct input tax if the trader were able to deduct, from the tourism tax which he is required to pay, the tourism tax which he himself has paid as a customer when receiving services. However, that is not the position. On the contrary, the trader's turnover forms the basis for calculating both his turnover tax (after deduction of input tax) and his tourism tax. In that respect it is certainly possible to use turnover in a slightly modified form as the basis of assessment. The fact that the turnover tax is deducted does not mean that the tourism tax is calculated only in respect of the added value provided by the trader. On the contrary, it has to be paid in full and without any possible deduction at each stage of the production and distribution process. Finally, it must be noted that even if it were possible to deduct input tax, that possibility would be available only to certain occupational groups and could not be considered inherent in the tourism tax system.

79. Even though the grounds given in the judgment in *Giant*, to which the Commission refers, are not very comprehensive, it is evident from the foregoing that the deduction of input tax is not possible in respect of the tourism taxes.

80. However, some of the plaintiffs argue that the possibility of deducting input tax is not absolutely essential in order to classify a tax as one which may not be maintained in force in accordance with Article 33 of the Sixth Directive. The aim of the First, Second and Sixth Directives was to abolish the all-stage tax on gross turnover and to introduce a tax on the value added. If Article 33 were construed as permitting turnover taxes which did not provide for the deduction of input tax that would constitute the introduction of a new all-stage tax on gross turnover and thus an infringement of the First, Second and Sixth Directives. The effect of such a second turnover tax would also be cumulative. Such a tax would necessarily be contrary to Community law.

81. That also follows from the wording of Article 33. It prohibits taxes similar to *turnover tax*, not *value added tax*. That reference to turnover taxes is completely in keeping with the general structure of the Directive. Moreover, a tax which possesses all the essential characteristics of VAT would no longer be a tax similar to VAT, it would be VAT.

82. If the only taxes prohibited were those which provide for the possibility of deducting input tax, the legislature could easily circumvent the prohibition on other taxes similar to turnover tax contained in

Article 33 by refusing to allow the deduction of input tax.

83. In that respect the plaintiffs refer to the judgment, and in particular the Opinion, in Case C-130/96.[30] They argue that Advocate General maintained that the deduction of input tax is not an essential criterion for assessing a tax in the light of Article 33. They also argue that the Court concurred with that assertion and therefore the other conditions were not considered in the judgment. However, I cannot agree. True, the Court does not examine that question, but begins by considering the essential characteristics among which it includes the possibility of deducting input tax. It concludes that examination after consideration of the first characteristic — general applicability — because it considers that that criterion is not satisfied.

84. Some of the defendants also rely on the Court's ruling in *Giant*[31] that a tax does not have to be similar in all respects to VAT to be characterised as a turnover tax. They claim that it is sufficient for it to exhibit the essential characteristics thereof. That argument, too, must be rejected since the Court specifically defined the essential characteristics of a value added tax as including the possibility of deducting input tax. As is clear from the Commission's observations referred to above,[32] in *Giant* the Court also examined whether the district tax at issue made possible the deduction of input tax. It cannot be assumed, therefore, that the Court intended to exclude the possibility of deducting input tax from the essential characteristics of VAT.

85. Although certain elements — such as the purpose and wording of Article 33, which refers only to characterisation as *turnover taxes* — initially appear to support the plaintiffs' argument that the possibility of deducting input tax is not an essential characteristic of VAT, it is not entirely clear why Article 33 should permit a tax which does not provide for the deduction of input tax, and thus leads to a cumulation of taxes at the various transaction stages. That view finds support in the Court's frequent observation that it must be assumed 'in any event' that a tax which possesses the essential characteristics of VAT is not compatible with Article 33. It could be concluded that other cases are conceivable in which a tax infringes Article 33 even though it does not possess the essential characteristics of VAT.

However, as the Court has always referred to the possibility of deducting input tax as one of the essential characteristics of a VAT and as one of the points to be addressed

30 — Case 130/96 *Fazenda Pública* v *Solisnor-Estaleiros Navais* [1997] ECR I-5053.

31 — Case C-109/90, cited in footnote 7.

32 — See point 76 above.

when appraising a tax in the light of Article 33,[33] the possibility of deducting input tax must be regarded as an essential characteristic of VAT.

86. Nevertheless, since, as we have seen, the tourism tax does not satisfy all the other essential criteria laid down by the Court, there is no need to examine this point further.

Additional overall examination

87. Lastly, it would appear appropriate to re-examine the tourism taxes in their entirety. Both the plaintiffs and the defendants maintain that the resolution of the dispute must also be based on an overall examination of the tax independently of the examination of the particular characteristics of VAT. Thus, the plaintiffs maintain that the tourism tax constitutes a second tax burden in addition to turnover tax, which places Austrian traders at a considerable competitive disadvantage as compared with traders from other Member States. In that connection it must again be noted that the Court has consistently held that Member States may apply taxes alongside VAT to the same transaction, provided that such taxes cannot be characterised as turnover taxes. Thus, the aim of Article 33 is not to prevent Member States from subjecting transactions to other charges in addition to VAT.

88. As regards the competitive disadvantages suffered by Austrian traders in relation to those in other Member States, it should be noted that the taxes are used principally to improve tourism, thus certainly making the latter more attractive and justifying the 'extra cost'. Moreover, a greater financial burden on residents does not infringe the prohibition on discrimination contained in the Treaty, or competition law. The question whether the amount of the tax is warranted at national level is a separate issue and need not be examined here.

89. Furthermore, the defendants rightly state that tourism tax is intended to 'tax the benefit' derived from tourism. That is also demonstrated by the fact that in Styria and Carinthia the total turnover of the current year is not taxed directly but on the basis of the turnover of the last year but one. The question whether the range of persons who derive benefit from tourism is too broad falls to be addressed by the Court only in so far as a general tax similar to

33 — See also Case C-347/95 *Fazenda Pública* v *UCAL* [1997] ECR I-4911, paragraph 36, and Case C-28/96 *Fazenda Pública* v *Fricarnes* [1997] ECR I-4939, paragraph 40.

VAT might be introduced as a result. Since that is not the case, no further comment is necessary. Furthermore, the functioning of the common system of VAT as a whole and the resulting protection of the Community's own resources are not compromised. Consequently, it must be stated in conclusion that although the tourism taxes at issue probably apply generally, in contrast with VAT they are not levied exactly proportionally, or at each stage of the production and distribution process, and no provision is made for the deduction of input tax. These taxes may therefore be maintained in force in accordance with Article 33 of the Sixth Directive.

C — Conclusion

90. For the above reasons, I propose that the Court reply as follows to the questions referred to it:

Case C-338/97:

Article 33(1) 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 does not preclude the maintenance in force of a tax which is payable in a *Bundesland* (Regional State) of a Member State of the European Communities

— in respect of each calendar year by all undertakings with as direct or indirect interest in tourism which have their registered office or a place of business within certain closely defined areas, where those areas together comprise almost the entire *Bundesland*, and

— the amount of which is essentially proportional to the turnover achieved by the undertaking primarily in that Regional State within a calendar year, but where the rate of contribution varies according to the intensity of tourism in that area and according to the degree of benefit which the legislature deems the commercial sector in question (occupational group) to derive from tourism, and

— where no provision is made for the deduction of input tax.

Case C-344/97:

On a proper construction of Article 33(1) 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 the expression 'characterised as turnover taxes' does not preclude Member States from imposing on traders a tourism tax (contribution) which has the following features:

— it is payable by traders with a direct or indirect interest in the tourist industry and therefore by a large number of traders, but not all;

— it is paid to a local tourist association to finance the development of the tourist industry or to a fund to be used for the whole region (*Land*);

— the basis of assessment is the annual turnover with certain exceptions, in particular turnover related to services to customers whose place of residence (seat) is outside the area covered by the legislation — in so far as those services are not for a business situated within the area covered by the legislation (a *Bundesland* of a Member State composed of federal States) and are not services to final customers — and turnover related to other services in so far as these are not supplied exclusively or primarily within the area covered by the legislation (the *Bundesland* of the Member State);

— the amount of the levy varies according to the benefit deemed by the legislature to be derived from tourism by the sector to which the taxpayer belongs;

— the amount of the levy is higher in tourist areas than in others, and

— no provision is made for deduction of input tax.

Case C-390/97:

Article 33(1) 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 does not preclude the maintenance in force of a tax which is payable in a *Bundesland* (Regional State) of a Member State of the European Communities in respect of each calendar year by all undertakings directly or indirectly involved in tourism which have their registered office or a place of business within that Regional State, and the amount of which is essentially proportional to the turnover achieved by the undertaking in that Regional State within the reference calendar

year, but where the rate of contribution varies according to the degree of benefit which the legislature deems the commercial sector in question (occupational group) to derive from tourism, and where no provision is made for the deduction of input tax.