OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 4 June 1991 *

Mr President,
Members of the Court,

1. The questions referred to the Court for a preliminary ruling by the Tribunal Superior de Justicia de Andalucía concern the interpretation of Article 4(1), (4) and (5) 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 [1] (which I shall hereinafter refer to as 'the Sixth Directive'). The national court asks, in particular, whether under the provisions of the Sixth Directive the activities of a tax collector must be regarded as dependent or independent, and if independent, whether they must in any event be exempted from value added tax since they are activities engaged in as a 'public authority'.

I shall summarize the basic facts of the case below and refer to the Report for the Hearing for the details.

2. A recent reform of the Spanish tax system, [2] in essence, gave responsibility for the collection of taxes — both State taxes and those of autonomous bodies — to the State finance authorities. As a consequence, the tax-collection activities entrusted to third parties were abolished. [3] However, local authorities, including communes, may assume responsibility for the collection of certain taxes and appoint collectors and enforcement agents for that purpose. [4]

The rules applicable to tax collectors are contained in the abovementioned provisions on the tax system, and in the Statute on the Organization of Tax Collection and Tax Collectors, [5] provisions which give quite a clear picture of the nature of the activities in question. On the one hand, tax collectors are appointed by local authorities following competitions held for that purpose; they carry out their activities under the control of the treasuries of the local authorities which appointed them and they enjoy some rights and prerogatives peculiar to civil servants. On the other hand, however, tax collectors are required to provide a security of an amount fixed by the local authority on behalf of which they carry out their tax-collection activities; they appoint independently the auxiliary staff for their respective zones and, more generally, they organize their own undertakings and receive by way of remuneration a collection premium consisting of a proportion of the sums collected and a part of the supplements applied in the event of late payment.

* Original language: Italian.

1 — OJ L 145, p. 1.

2 — Royal Decree No 1327 of 13 June 1986 (BOE of 2 July 1986).

3 — Royal Decree No 1451 of 27 November 1987 (BOE of 28 November 1987).

4 — Article 193 of the amended law on the rules governing local authorities, Royal Decree No 781 of 18 April 1986 (BOE of 22 and 23 April 1986).

5 — Decree No 3286 of 19 December 1969 (BO del Mº Hac. of 30 December 1969).

3. When the tax collectors of the first and second zones of the Commune of Seville calculated the amount of the collection premium, they added on VAT. The Commune contested the passing on of VAT before the Tribunal Economico-Administrativo Provincial, Seville, which, having regard to the administrative instructions laid down by the Directorate-General of Taxes, dismissed the action on the ground that tax collectors were to be regarded as independent professionals since they engaged in their activities regularly and independently, and for valuable consideration; they were therefore taxable persons for the purposes of VAT.

The Commune of Seville appealed against that decision to the Tribunal Superior de Justicia, Andalucía, which decided to refer the case to this Court for a preliminary ruling.

4. With its first question, the national court seeks an interpretation of Article 4(1) and (4) of the Sixth Directive on VAT in order to determine whether the activities of tax collectors are carried out independently and are therefore chargeable to tax.

Let me remind the Court first of all that Article 4(1) defines a taxable person as anyone who 'independently' carries out any economic activity, whatever the purpose or results of that activity. I would add that the concept of an economic activity covers all activities of producers, traders and persons supplying services. Article 4(4) goes on to give a negative definition of the term 'independently' in that it excludes from the tax 'employed and other persons . . . in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability'.

5. In my view, tax collectors are certainly not employed persons or bound to the tax authorities by a contract of employment in the narrow sense. Therefore, in order to establish whether an activity of the kind described above can be considered to be exempt from VAT, it is necessary to determine whether the relationship between the tax collector and the tax authorities takes the form of a legal tie creating the relationship of employer and employee as regards working conditions, remuneration and liability.

It is for the national court to make such a finding, on the basis of the interpretation given by the Court of Justice of the provisions applicable in the present case, and consequently on the basis of the criteria to be applied in order to determine whether or not a given activity is carried out independently.

6. With regard to working conditions, the first thing to be determined is whether the worker in question forms a part of the employer's organization — in the present case the communal administration — or whether he is free to organize his activity independently, and to what extent. The freedom to organize one's own work independently (to choose colleagues, the structures necessary for the performance of one's tasks and one's working hours), in

conjunction with the fact of not forming part of the organization of an undertaking or an administrative authority, are characteristic features of an activity which is carried out independently.

On the other hand, while it is part of the relationship between employer and employee for an employer to be able to give a worker instructions and to have a certain control and disciplinary power over him, those circumstances are not incompatible with an activity which is carried out independently. In fact, a requirement to take instructions from another person can be clearly seen in relationships whose object is an activity which is indisputably independent, such as contracts for work; and as this Court has already had occasion to hold in connection with the professions of notaries and bailiffs, the fact of being subject 'to disciplinary control under the supervision of the public authorities (a situation to be found in other regulated professions) ... is not a sufficient ground for regarding notaries and bailiffs as persons who are bound by legal ties to an employer within the meaning of Article 4(4)'.[6]

With regard to the method of remuneration, the fact that pay (albeit fixed by law[7]) is according to the individual services and is therefore uncertain is clear evidence of the existence of an independent employment relationship. It is obvious that in a relationship of employer and employee, the economic risk can fall only on the employer.

In the present case the tax collector bears the entire economic risk in so far as any taxes he fails to collect translates into a loss of earnings, which would not be the case if he were bound to the commune by a contract of employment since in that case he would still be paid whether or not he collected the taxes.

I now come, finally, to the issue of liability. In the present case a distinction must be made between liability arising as a result of the tax collector's own conduct and liability arising from the taxation, that is to say relating to the appropriateness of the tax. It is clear that the tax collector can be held liable only for the former and that, therefore, it must be determined, on the basis of the applicable national legislation, whether the worker in question is liable vis-à-vis third parties for his own acts and conduct.

From the foregoing considerations, it is clear that the term 'independently' in Article 4(4) of the Sixth Directive on VAT must be interpreted as meaning that an independent worker is one who does not form part of the organization of an undertaking, who has sufficient freedom to organize the human and material resources necessary for the activity in question to be carried out and who bears the economic risk of that activity.

7. By its second question, the national court asks whether the activities carried out by a tax collector are to be regarded as exempt

6 — Judgment in Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 14.

7 — See in this regard the judgment in Case 235/85, op cit., paragraph 14.

from VAT pursuant to the first subparagraph of Article 4(5) of the Sixth Directive since they are activities engaged in 'as a public authority'. Under that provision, bodies governed by public law are excluded from tax in respect of the activities in which they engage as public authorities.

First of all, as the Court itself has pointed out on a number of occasions, 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 particular, it is clear from the provision in question that two conditions must be fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. [8]

However, as the Court held in Case 235/85, cited above, the foregoing means that 'an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling within the prerogatives of the public authority'. [9] That pronouncement is surely applicable to the present case. Moreover, the delegation of tax collection to a third party, who provides such a service, for valuable consideration and on an independent basis, for the tax authority, produces a supply of services which, as such, is chargeable to tax pursuant to Article 4(1) of the Sixth Directive on VAT.

In short, even when, as in the present case, it is not disputed that a given activity is, in principle, part of the prerogatives of the public authority, the activity cannot be exempted under the first subparagraph of Article 4(5) of the Sixth Directive when it is not carried out directly by a body governed by public law, but is entrusted to a supplier of services who is a third party vis-à-vis the body itself.

8. In the light of the foregoing considerations, I therefore propose that the Court should give the following reply to the questions referred by the Tribunal Superior de Justicia de Andalucía:

(1) The term 'independently' used in Article 4(4) of the Sixth Directive is to be interpreted as meaning that an independent activity is an activity carried out by a taxable person who is not organically part of an undertaking or an administrative authority, who has sufficient organizational freedom with regard to the

8 — See the judgments in Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraph 11; Case 235/85, cited above, paragraph 21; and Joined Cases 231/87 and 129/88 *Comune de Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 12.

9 — Judgment in Case 235/85, cited above, paragraph 21.

human and material resources used in carrying out the activity in question and who bears the economic risk entailed in that activity.

(2) The first subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that an economic activity which consists in carrying out acts falling within the prerogatives of the public authority are not excluded from the scope of VAT when they are not exercised directly by a body governed by public law but are entrusted to a supplier of services who constitutes a third party vis-à-vis the body itself.