OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 24 October 1996 *

1. By order of 21 March 1995, the Bundesfinanzhof referred the following questions to the Court for a preliminary ruling:

'1) Does the fourth subparagraph of Article 4(5) of Directive 77/388/EEC allow the Member States to treat tax-exempted activities, in respect of which, however, it is possible to opt to be taxed, of bodies governed by public law as activities which they engage in as public authorities, although they pursue them under the same legal conditions and in the same way as private traders?

2) If the first question is to be answered in the negative: May the scope of the right of option to be taxed be restricted pursuant to the second subparagraph of Article 13(C) of Directive 77/388/EEC in such a way that, where activities coming under the first subparagraph of Article 13(C) of that directive are engaged in by bodies governed by public law, they are treated as business activities only in certain circumstances?

3) If that question is also to be answered in the negative: May a body governed by public law rely directly on Article 4(1) and (2) in conjunction with Article 4(5) of Directive 77/388/EEC in order to oppose the application of a national provision even where the application of those provisions of the directive, albeit having an indirectly favourable effect through the deduction of input tax, also has a burdensome effect?'

2. The case in which the questions arose may be summarized as follows. Marktgemeinde Welden (to which I shall refer as 'the municipality'), a German local authority, erected a building and then let the premises to another person, who carries on a business there.

The municipality, acting under the German legislation, renounced the tax exemption which would otherwise apply to the rent it received. It should be pointed out that it did this in order to deduct from the tax the amount of tax which it itself had paid on the costs of erecting the building. The competent tax office, Finanzamt-Augsburg Stadt, turned down its application. It did so on the ground that the municipality, by letting a building, had not commenced trading and was therefore not a trader within the meaning of the

* Original language: Italian.

national legislation. It followed that the municipality was not subject to the turnover tax system and consequently was not entitled to renounce the tax exemption for letting transactions. The Finanzgericht (Finance Court) upheld an application brought by the municipality, holding that it was a trader on the basis of Directive 77/388/EEC [1] (hereinafter 'the Sixth Directive'). The national court held that a person could be denied the capacity of trader under the Community legislation only where the person in question was a legal person governed by public law acting as a public authority. That was not the case since the municipality had acted in a similar way to any private economic operator. If was therefore a trader and, as such, could rely on the provisions of the directive.

The Finanzamt appealed on a point of law against that decision. The appeal court therefore referred the questions set out above to the Court for a preliminary ruling.

The national court's first question

3. By its first question, the national court asks whether the Member State concerned is entitled to exclude a municipality letting immovable property from the circle of taxable persons for the purposes of the application of the Sixth Directive. In suggesting that that question should be answered in the negative, the Commission refers in the first place to the first subparagraph of Article 4(5) of the Sixth Directive, which reads as follows: 'States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions'. The Commission argues that the Court has consistently held that that provision should be interpreted as meaning that 'activities pursued as public authorities ... are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders'. The provision therefore excludes their not being treated as taxable persons where they carry out 'activities engaged in by them as bodies governed not by public law but by private law'. [2] Since in this case the municipality had let immovable property in no different a manner than any private trader, the national law could not exclude it from being subject to the system of the Sixth Directive.

4. That argument is not convincing. There is no doubt that a public body should be

1 — 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 (OJ 1977 L 145, p. 1).

2 — Joined Cases 231/87 and 129/88 *Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and Others* [1989] ECR 3233, paragraphs 15 and 19, and Case C-4/89 *Comune di Carpaneto Piacentino and Others* [1990] ECR I-1869, paragraph 10.

subject to the system established by the directive in respect of those activities in which it engages *jus privatorum*. In the judgments cited by the Commission the Court has already clarified this point and it is unnecessary to dwell on it. The problem arising here is a different one. The letting of immovable property is among the activities exempted by Article 13 of the Sixth Directive. In addition, the fourth subparagraph of Article 4(5) provides that 'Member States may consider' — for the specific fiscal purposes at issue here, of course — 'activities of these bodies which are exempt under Article 13 or 28 as activities which they engage in as public authorities'. Consequently, on the basis of that provision, a Member State may exclude from the circle of taxable persons a public body engaged in an exempt activity, such as the letting of immovable property.

I therefore consider that the fourth subparagraph of Article 4(5) should be interpreted as meaning that, with reference to exempt activities, it gives Member States the option of excluding public bodies carrying out such activities from being subject to the system of the Sixth Directive.

5. The Commission objects, however, that the fourth subparagraph of Article 4(5) should be interpreted as meaning that the principle of non-treatment as a taxable person laid down by that provision may be applied only to activities which are exempt under Article 13 and strictly connected with the exercise of public authority. I find that argument perplexing. If the activities covered by Article 13 constitute the exercise of public authority, the fact that the public body carrying them out is not subject to the VAT system arises because of the general principle laid down by the first subparagraph of Article 4(5). If this were so, there would be no need to have any recourse to the fourth subparagraph of Article 4(5). If the Commission's proposition were followed, that provision would be otiose. Yet that provision does make sense if it is considered that it was designed to give the Member State concerned the option of excluding from liability to tax legal persons subject to public law carrying out activities exempted under Article 13 or Article 28. That choice, with which the directive does not interfere, is therefore left to the national legislator. What is more, what the provision lays down is clear: it makes no distinction at all between the various activities listed in Article 13. [3]

6. Questions 2 and 3 are put in the alternative in case the first question is answered in the negative. In view of my proposed solution, it is therefore unnecessary to consider them.

3 — To my mind, it is completely irrelevant that in the case of some activities exempted under Article 13 the person concerned can opt to be taxed. That possibility is based on the assumption that the person concerned is a 'taxable person' for the purposes of the Sixth Directive and is therefore entitled to rely on its provisions. If, as in this case, the operator is not a taxable person, however, the possibility of opting to be taxed certainly cannot arise.

Conclusion

In view of the foregoing, I propose that the Court answer the Bundesfinanzhof's questions in the following terms:

The fourth subparagraph of Article 4(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, must be interpreted as permitting the Member State concerned to exclude a body governed by public law engaged in an activity exempted under Article 13 of the directive from being subject to the system laid down by the directive. It is irrelevant in this regard that the activities are performed in a similar manner to those of a private trader.