

OPINION OF ADVOCATE GENERAL
LA PERGOLA

delivered on 3 February 1998 *

1. In this action, the Commission seeks a declaration that the Kingdom of Spain has failed to fulfil its obligations under 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 ('the directive').¹ More particularly, the Commission argues that the system of exemptions granted by Spanish legislation in respect of sporting activities at private organisations is contrary to Article 13(A)(1)(m) of the directive.

2. Before entering into the merits of the Commission's arguments, it will be useful briefly to recall the Community and national legal context.

Article 13(A) of the directive provides that certain activities in the public interest are exempt from VAT. Particularly relevant for present purposes is Article 13(A)(1)(m), which provides for an exemption in favour of 'certain services closely linked to sport or

physical education supplied by non-profit-making organisations to persons taking part in sport or physical education'.

Article 13(A)(2)(a) goes on to provide that:

'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,

— they shall be managed and administered on an essentially voluntary basis by

* Original language: Italian.

1 — OJ 1977 L 145, p. 1

persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned,

13. Services supplied to individuals taking part in sport or physical education, whoever the person or body in charge of supplying the service may be, provided that such services are directly linked to sport or physical education and are supplied by the following persons or bodies:

— they shall charge prices approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to value added tax,

(a) public law establishments;

— exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax.'

(b) sporting federations;

(c) the Spanish Olympic Committee;

The current Spanish legislation on the matter is Article 20 of Law No 37 of 28 December 1992 on Value Added Tax ('Law No 37/92'), as amended by Article 13 of Law No 42 of 30 December 1994 ('Law No 42/94'). The relevant provision is Article 20(1), point 13, which is worded as follows:

(d) private sports bodies or establishments of a social nature whose entry fees do not exceed the following amounts:

— admission or entry fees: PTA 265 000

'1. The following operations are exempt from the tax:

— periodic fees: PTA 4 000 monthly.'²

...

2 — My translation

Essentially therefore, as regards the supply of services linked to sport or physical education, the Spanish legislature grants unconditional tax exemption to supplies by public law establishments, sporting federations and the Spanish Olympic Committee. In relation to supplies by private sports bodies or establishments of a social nature, however, grant of the exemption is subject to the requirement that such bodies charge entry fees or periodic fees below the amounts specified.

private establishments whose membership fees do not exceed a specified amount, the Kingdom of Spain has infringed Article 13(A)(1)(m) of the Sixth VAT Directive (77/388/EEC);

2. order the Kingdom of Spain to pay the costs'.

3. Taking the view that that latter provision conflicted with Article 13(A)(1)(m) of the directive, the Commission initiated against the Kingdom of Spain the pre-litigation procedure laid down by Article 169 of the Treaty. The Kingdom of Spain replied by disputing the Commission's assessment and arguing that its legislation did not infringe the directive in any way.

The Kingdom of Spain pleads that the application should be dismissed and the Commission ordered to pay the costs. The United Kingdom has intervened in support of the Kingdom of Spain.

The Commission therefore brought the present action, applying for a declaration that the Kingdom of Spain had failed to fulfil its obligations. More precisely, the Commission pleads that the Court should:

4. The Commission maintains that the disputed national legislation introduces a criterion for the grant of exemption to private bodies of a social nature that is not provided for in the directive and is therefore contrary to it. In that respect, the Commission refers to the case-law of the Court to the effect that Article 13(A)(1) lays down a clear, precise and unconditional obligation on Member States to exempt the activities listed in that provision.³ Viewed thus, that obligation

'1. declare that, by providing that VAT exemption for services closely linked to sport or physical education applies only to

³ — Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

cannot, the Commission argues, be hedged about by further conditions not envisaged by the directive. Nor, it submits, can the national provision in question be justified by assuming that the limitation on the amount of subscriptions, which constitutes an obstacle to the grant of exemption, falls within the scope of 'prices approved by the public authorities' within the meaning of the third indent of Article 13(A)(2)(a). In this case, the Spanish legislature has simply introduced a presumption *juris et de jure* concerning the non-profit-making character of the sports bodies; those levying entry fees below the limit laid down by the legislation in question are presumed to be bodies pursuing their activity without a profit motive, whereas the others are regarded as providing services for profit, and are thus excluded from the benefit of the exemption.

provision excluding bodies charging subscriptions higher than a given amount from the benefit of that exemption was intended precisely to verify whether or not the bodies in question had a profit motive. Moreover, the Government submits, Article 13(A)(2) allows Member States to make the exemption subject to compliance with certain conditions, including the condition that the body supplying the services charge 'prices approved by the public authorities'. In this case, the fixing of a ceiling on the level of subscriptions falls precisely within the concept of a price approved by the public authorities and is therefore justified for the purposes of the abovementioned provision. The Kingdom of Spain goes on to challenge the Commission's position concerning the requirement that the exemption be granted on a case-by-case basis rather than — as is the case with the disputed provision — in accordance with a general provision. Although it is true that Article 13(A)(2) provides that the exemption should be granted 'in each individual case', the Commission's position would lead to the need to grant the advantage in question by examining on each occasion the position of every single operator, which would be impossible in practice. Hence the need to lay down a general criterion.

The Spanish Government argues, however, that application of the system of exemptions provided for in the directive necessarily requires national implementing measures, in adopting which the Member States enjoy a wide discretion. In this case, the disputed legislation arose from the lawful exercise of that discretion, which the Spanish legislature used precisely in order to attain the result required by the directive. Article 13(A)(1)(m) provides that tax exemption should be granted for sports-related services supplied by *non-profit-making organisations*, and the

5. Let me say at once that, in my opinion, the Commission's criticisms should be upheld. The Commission has rightly concluded that Member States are *obliged*

to grant the exemptions envisaged in Article 13(A)(1). As the Court has held on a previous occasion,⁴ these are mandatory exemptions and the Member States have no discretion as regards their grant. The discretion, where applicable, concerns the definition of the conditions for ensuring, in accordance with Article 13(A)(1), 'the correct and straightforward application of such exemptions' and 'preventing any possible evasion, avoidance or abuse'. In any event, that power must be exercised in such a way as to ensure the result sought by the provision, namely to guarantee the tax advantage envisaged to any taxpayer entitled thereto. The exemption at issue in this case concerns 'services closely linked to sport or physical education supplied by *non-profit-making* organisations to persons taking part in sport or physical education'

(Article 13(A)(1)(m)).⁵ The services in question must therefore benefit in any event from the exemption provided for. It is precisely in that respect that the Spanish legislation does not comply with the rule in question. The Spanish Government has argued that the national legislation at issue is intended precisely to ensure that services linked to sport supplied by non-profit-making organisations are exempted from the tax. However, it is plain to see that that legislation is manifestly incapable of achieving that result. It provides that the exemption is to be granted only to organisations which levy entry fees or periodic subscriptions (particularly monthly) which are below a certain amount, but without varying that amount by reference to the type of sporting activity, the installations necessary for carrying on that activity, the place where those installations are situated or, finally, the number of members of or subscribers to the organisation in question. In other words, the criterion used by the Spanish legislature takes no account whatever of

4 — See the judgment in *Becker*, cited above, particularly paragraphs 32, 33 and 34, in which the Court held that 'it should first be observed ... that the "conditions" referred to do not in any way affect the definition of the subject-matter of the exemption conferred. The "conditions" referred to are intended to ensure the correct and straightforward application of the exemptions. A Member State may not rely, as against a taxpayer who is able to show that his tax position actually falls within one of the categories of exemption laid down in the directive, upon its failure to adopt the very provisions which are intended to facilitate the application of that exemption. Moreover, the "conditions" refer to measures intended to prevent any possible evasion, avoidance or abuse. A Member State which has failed to take the precautions necessary for that purpose may not plead its own omission in order to refuse to grant to a taxpayer an exemption which he may legitimately claim under the directive, particularly since in the absence of specific provisions on the matter there is nothing to prevent the State from having recourse to any relevant provisions of its general tax legislation which are designed to combat evasion.'

5 — I need scarcely point out that the Spanish Government's argument to the effect that Member States are free to determine the services which may benefit from an exemption since Article 13(A)(1)(m) provides only that 'certain services' are exempted cannot be accepted. I do not believe that the Community legislature intended to confer such a wide discretion on Member States. The term in question ('certain') doubtless constitutes an unfortunate formulation of the provision, but it does not have the scope attributed to it in the Spanish Government's defence; it simply means that not all services are to be exempted but merely those which, as the provision states, are 'supplied by non-profit-making organisations'. Moreover, since the latter constitutes the aim which justifies the grant of the exemption, the rule in question must in any event — in so far as it lays down the services to be exempted — be capable of pursuing that aim. As I shall explain below, that is not the case here.

the whole of the factors which influence the cost of the service and thus indirectly help assess whether or not the organisation supplying it acts with a profit motive. That is to say, the national legislation in question ignores the fact that sporting activity constitutes a complex and diverse reality; the practice of some sports requires costly technical infrastructures and particularly high maintenance burdens, whereas others require relatively simple installations. In the former case the amortisation of sporting infrastructures may require the fixing of high entry fees which are not necessary in the latter. Thus the Spanish legislation does not lay down a certain criterion for assessing whether or not the organisation in question operates with a profit motive. In certain cases, application of that legislation might even lead to results contrary to the provisions of Article 13(A)(1); a private organisation might, for example, charge entry fees above the limit laid down by the Spanish legislation and thus be excluded from the benefit of the exemption even though it does not carry on its activity with a view to profit, whereas other organisations charging fees below the limit may operate with a view to profit and nevertheless be allowed to benefit from the tax exemption. That is contrary to the purpose of Article 13(A)(1); the public interest justifying the grant of the advantage in question exists only where the services linked to sport are supplied by 'non-profit-making organisations'. The national legislature must therefore implement that provision in such a way as to ensure that the aim pursued by the directive is satisfied. For the reasons just stated, I do not consider that the Spanish legislation lays down an appropriate criterion for ensuring that that result is achieved.

should be regarded as 'prices approved by the public authorities', causing them to fall within the conditions to which Member States may make the grant of the exemption subject for the purposes of Article 13(A)(2)(a).

In that respect, I might be able to agree that the limit on entry fees or periodic subscriptions should be regarded as a 'price' in the sense that it is the consideration for the service supplied by the organisation providing sport-related services. However, even if the ceilings established were to be regarded as 'prices approved by the public authorities', it would be necessary in any event for those prices to vary in relation to the type of sporting activity. Only in that way can the 'price' be regarded as indicative of the fact that the organisation in question supplies services linked to sport in the context of a non-profit-making activity, as required by Article 13(A)(1), for the purposes of granting exemption from the tax.

6. Nor, in my view, should one accept the Spanish Government's defence that the ceilings established by the disputed legislation

In short, I consider that, whilst the exemption criterion laid down by the Spanish legislature might theoretically fall within the

conditions set out in Article 13(A)(2)(a), that criterion appears to be totally insufficient to attain the objective pursued by the rule.

Nor do I share the objection of the Spanish Government that what the Commission advocates would be impossible in practice, since it would involve the need to establish different prices to suit the situation of each individual economic operator. In the first place, it seems to me that such an individual approach is required by the very wording of Article 13(A)(2)(a), which provides precisely that Member States 'may make the granting ... of each exemption ... subject *in each individual case*' to the condition that the organisation in question charges prices approved by the public authorities. Moreover, I do not think that the solution put forward by the Commission necessarily leads to the need to examine the prices charged by every sports

centre; it would be sufficient for the national legislation to adopt a more realistic criterion and, instead of fixing a single amount whatever the type of sporting activity, to lay down a series of different prices, possibly according to the category of activity. Finally, as the Commission points out, the alleged impossibility of carrying out individual controls in the granting of the exemption is belied by the Spanish legislation itself; Article 6 of the regulation on VAT governs the 'recognition of the social nature of certain organisations or establishments' and provides that 'private organisations or establishments of a social nature must apply to the tax office for the area in which their place of business for tax purposes is situated (Delegación or Administración de la Agencia Estatal de Administración Tributaria) for recognition of that status'.⁶ That proves that it is perfectly possible to carry out a control on a 'case by case' basis when verifying the conditions required in order to benefit from the exemption, as is, moreover, required by the wording of Article 13(A)(2).

7. In the light of the above considerations, I propose that the Court should allow the Commission's action and order the Kingdom of Spain to pay the costs.

⁶ — My translation.