

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 14 October 2004<sup>1</sup>

**I — Introduction**

1. This reference for a preliminary ruling made by the Vestre Landsret (Denmark) concerns the treatment for VAT purposes of the letting of mooring berths for boats in a pleasure boat port complex and of storage sites for housing pleasure boats during the winter. Under Article 13B(b) of the Sixth Council Directive 77/388/EEC of 17 March 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 (hereinafter ‘the Sixth Directive’)<sup>2</sup> these services could be exempt from value added tax inasmuch as they relate to the leasing of immovable property. However, the tax exemption would not apply if the mooring berths for boats and the storage sites were to be categorised as ‘premises and sites for parking vehicles’).

**II — Legal background**

*A — Community law*

2. Under Article 2(1) of the Sixth Directive the supply of goods or services effected for consideration within the territory of a country is subject, in principle, to value added tax. The second sentence of Article 4 (2) of the Sixth Directive provides that ‘the exploitation of tangible ... property for the purpose of obtaining income therefrom on a continuing basis’ is also to be considered an economic activity that is subject to value added tax.

3. Under Article 13B(b) of the Sixth Directive the following are exempt from value added tax under certain conditions:

‘the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member

<sup>1</sup> — Original language: German.

<sup>2</sup> — OJ 1977 L 145, p. 1.

States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

gas, water, electricity and heating as part of the letting or leasing. The exemption does not, however, cover the letting of rooms in hotels and similar establishments, the letting of rooms in businesses that let for periods of less than one month, the letting of camp sites, parking areas and advertising spaces, or the hire of safes.’

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

5. Further guidance is given in Point D.11.8 of the 2001 VAT Guide as regards administrative practice in Denmark:

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption’.

‘The letting by sailing clubs of mooring berths, land storage sites and port and slipway sites is subject to VAT, even though such letting is made to club members only.’

#### B — *Danish law*

4. Paragraph 13(1)(8) of the Danish law on VAT provides exemption for the following goods and services:

VAT is accordingly payable on site rent, including any fees or deposits charged to fixed lessees, together with port dues charged when visiting mariners use the port.’

‘the administration, letting and leasing of immovable property, including the supply of

6. Under Paragraph 39(5) of the VAT Law tax on the installation, repair and mainte-

nance of port complexes other than buildings can be deducted as input tax.

**III — The facts, questions referred for a preliminary ruling and the main proceedings**

7. Fonden Marselisborg Lystbådehavn (the Marselisborg Pleasure Boat Port Trust, hereinafter the 'FML') is a foundation that operates and maintains a pleasure boat port. FML lets out mooring berths for boats within the port and storage sites on port land for the winter storage of boats. These services are offered either jointly or separately. Mooring berths can be rented on a long-term basis or for shorter periods, in other words on a monthly or daily basis.

8. If a mooring berth and storage site are let together on a long-term basis the lessee has to pay a deposit in addition to the hire charge. The amount of both payments is determined inter alia according to the size of the site required for the particular boat concerned.

9. In consideration of such payment the boat owner acquires the right to use a specific fixed mooring berth alongside a jetty or

landing-stage, adjusted to fit the size of the boat, for a period of one year. If a berth holder does not wish to use his mooring berth for a period exceeding 24 hours the berth may be made available to visitors without reimbursement. The lessee also receives a storage site, which consists of a numbered stand situated within a special area of port property on which he can store his vessel outside the sailing season and to which he has free access. Finally, the lessee is entitled to use the communal facilities at the port, such as toilets and washing facilities.

10. Boat owners who just rent a mooring berth, whether in the long term or on a monthly basis, do not need to pay a deposit. A greater hire charge is payable instead. They are also allocated a fixed berth for the period of the letting agreement. Visiting mariners who are only at the port for one day or for several days at a time are allocated vacant berths.

11. The aforementioned land storage sites can also be rented separately from water-based mooring berths.

12. The tax authority informed FML that its activities were subject to VAT in their entirety. On FML's appeal against that decision the Landsskatteret (court of first

instance) upheld the tax authority's view with regard to the mooring berths. The letting of those berths did not come within the exemption for the leasing of immovable property. However, the court did consider that the letting of land storage sites was tax-exempt. Both the FML and the Skatteministeriet (Ministry of Fiscal Affairs) appealed against that decision to the Vestre Landsret, which made an order of 22 November 2002 referring the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:

parties are of the opinion that the letting of mooring berths and storage sites is subject to VAT. Whilst the Member States take the view that the water-based mooring berths, in any event, do not constitute immovable property within the meaning of the Directive, the Commission takes a different view on that point. The Commission and the Governments agree that the exclusion from VAT exemption for premises and sites for parking vehicles should apply. In the opinion of FML the provision governing premises and sites for parking vehicles should not apply to premises and sites for boats.

(1) Must Article 13B(b) of the Sixth VAT Directive (Council Directive 77/388) be construed as meaning that the term "leasing and letting of immovable property" includes the letting of a boat site consisting of a section of a land-based port area and of a defined and identifiable water-based area?

#### IV — Legal appraisal

(2) Must Article 13B(b)(2) of the Sixth VAT Directive (Council Directive 77/388) be construed as meaning that the term "køretøjer" (vehicles) includes boats?

14. The questions referred for a preliminary ruling seek an interpretation of the provision allowing exemption from VAT for the leasing of immovable property in Article 13B(b). The aim of the first question is therefore to determine whether a mooring berth for boats within a port and a land storage site for boats should be considered immovable property. In order to answer the second question it is necessary to establish whether the exclusion from exemption for the letting of premises and sites for parking vehicles should also apply to such sites for boats.

13. FML, the Danish and the Greek Governments and the Commission have submitted observations in the proceedings before the Court. With the exception of FML all of the

## A — Preliminary observations

15. Before looking in more detail at the questions referred for a preliminary ruling it should be borne in mind that the exemptions provided for by Article 13 of the Sixth Directive have their own independent meaning in Community law and that they must therefore be given a Community definition.<sup>3</sup>

16. The following principles of interpretation of the provisions at issue in the present case are to be derived from the structure of the Sixth Directive: since the tax exemptions constitute exceptions to the general rule that VAT is to be levied on all services supplied for consideration by a taxable person, the concept of rent on immovable property is to be interpreted strictly.<sup>4</sup> As a result of the exclusion from tax exemption provided in Article 13B(b)(2) of the Sixth Directive in relation to premises and sites for parking vehicles the turnover in question again becomes subject to the general rule laid down in this directive; that provision cannot therefore be interpreted strictly.<sup>5</sup>

17. An interpretation of the directive might not have been required, moreover, if Denmark had made use of the opportunity afforded to it of applying further exclusions to the scope of that exemption in addition to those instances stated in Article 13B(b)(1) to (4) of the Sixth Directive. The Sixth Directive affords the Member States wide discretion in that respect, as the Commission quite rightly argued, citing the judgment in *Far*.<sup>6</sup> Denmark could therefore expressly provide for the letting of mooring berths for boats, in particular, to be subject to VAT like the letting of premises and sites for parking.

18. However, if a Member State wishes to exercise that right it must do so by enacting the necessary legislation on VAT. It is not sufficient for the national provisions which are largely in line with the Sixth Directive to be supplemented by administrative practice or by administrative rules which are binding only at national level, with the result that further sets of circumstances give rise to VAT liability.<sup>7</sup>

3 — Case C-358/97 *Commission v Ireland* [2000] ECR I-6301, paragraph 51, Case C-315/00 *Materhofer* [2003] ECR I-563, paragraph 25, and Case C-275/01 *Sinclair Collis* [2003] ECR I-5965, paragraph 22.

4 — *Commission v Ireland* (cited in footnote 3, paragraph 52), Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25, and *Sinclair Collis* (cited in footnote 3, paragraph 23).

5 — Case C-346/95 *Blasi* [1998] ECR I-481, paragraph 19.

6 — Case C-12/98 *Far* [2000] ECR I-527. See also Case C-326/99 *Goed Wonen* [2001] ECR I-6831, paragraph 45.

7 — See the Opinion delivered by Advocate General Jacobs in *Materhofer*, cited in footnote 3, paragraphs 27 and 28, and in Case 173/88 *Heuriksen* [1989] ECR I-2763, I-2770, paragraph 22.

19. The administrative practice set out in the 2001 VAT guide,<sup>8</sup> according to which mooring berths for boats are to be deemed subject to VAT, cannot therefore be considered a wider national exclusion from the scope of the exemption afforded to the leasing and letting of immovable property.

B — *The leasing of immovable property (first question)*

22. Article 13B(b) of the Sixth Directive does not define the term ‘leasing of immovable property’, nor does it refer to relevant definitions adopted in the legal orders of the Member States.<sup>9</sup>

20. Under the national legislation taxable persons are entitled to deduct input tax on charges relating to the installation, repair and operation of port facilities provided that those charges do not relate to buildings. This indicates that the Danish legislature attributes such charges to a taxable activity. However, even an indirect reference such as this does not constitute an unequivocal further exclusion from tax exemption for the leasing of immovable property.

23. However, it is settled case-law, firstly, that the fundamental characteristic of a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such right.<sup>10</sup>

21. In the absence of a specific rule for the tax treatment of the leasing of mooring berths for boats under Danish VAT law it is necessary to establish whether such an activity should be considered to be the leasing of immovable property and, if so, whether it should also be considered to be the letting of premises and sites for parking vehicles within the meaning of the Sixth Directive.

24. Secondly, in order to determine the nature of a taxable transaction, regard must be had to all the circumstances in which the transaction in question takes place.<sup>11</sup>

<sup>9</sup> — See ‘*Goed Wonen*’ (cited in footnote 6, paragraph 44) and *Sinclair Collis* (cited in footnote 3, paragraph 24).

<sup>10</sup> — See ‘*Goed Wonen*’ (cited in footnote 6, paragraph 55), *Sinclair Collis* (cited in footnote 3, paragraph 25) and Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 21.

<sup>11</sup> — Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraph 12, *Stockholm Lindöpark* (cited in footnote 4, paragraph 26) and *Sinclair Collis* (cited in footnote 3, paragraph 26).

<sup>8</sup> — See above, paragraph 5.

25. The services offered by FML comprise both the letting of mooring berths within the port and of land storage sites for housing boats during the winter. Although these services can also be offered together, the question of whether this constitutes the leasing of immovable property must be examined separately in relation to berths and sites.

26. The fact that a single price is charged for the combined renting of mooring berths and storage sites is not decisive.<sup>12</sup>

27. What is crucial, however, is the fact that a mooring berth for boats and a land storage site can each be leased separately from each other, so that these are indeed two distinct and independent principal services and not a single integrated service from an economic point of view.<sup>13</sup> Nor does one form of letting of a boat site constitute the principal service and the other the ancillary service which shares the tax treatment of the principal service.<sup>14</sup>

28. As regards the land storage sites it is clear from the details contained in the request for a preliminary ruling that the areas concerned are clearly defined and identified. The lessee has an exclusive right to use the storage site for a specific period. He has unrestricted access to the site. During the term of the agreement no other boat owner can occupy the site without the lessee's consent. This therefore constitutes the leasing of immovable property within the meaning of Article 13B(b) of the Sixth Directive.

29. The categorisation of mooring berths within the port basin is rather more difficult however. Here too, it is clear that the mooring berths are clearly distinguished from the rest of the port basin by jetties and posts. However, the Danish and Greek Governments doubt whether mooring berths can be deemed immovable property at all.

30. Immovable property can be defined as a specific part of the earth's surface, including the buildings firmly constructed thereon, over which title and possession can be created. Unlike the high seas, inland waterways can be held in the ownership and possession of a person. FML is therefore the owner of the port area, as can be seen from the request for a preliminary ruling. The fact that an area is completely or partially under water does not prevent it from being categorised as immovable property that can

<sup>12</sup> — Case C-349/96 *CPP* [1999] ECR I-973, paragraph 31.

<sup>13</sup> — *CPP* (cited in footnote 12, paragraph 29).

<sup>14</sup> — *CPP* (cited in footnote 12, paragraph 30) and Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 24; see, in particular, the judgment in Case 173/88 *Henriksen* [1989] ECR I-2763, paragraphs 14 to 16, in which the Court considered the leasing of a garage to be a service ancillary to the leasing of a dwelling which also came within the tax exemption for the leasing of immovable property.

be leased or let. Just as FML was able to acquire title to the port land, including the port basin, it could equally well have rented the site. Whatever applies to the land as a whole must also, however, apply to its distinctive parts.

31. Immovable property must also be distinguished from movable items. Admittedly, the water in which the boats lie does constitute a movable item. On that basis even the Danish Government seems to consider that only the posts and landing-stages which are attached to the earth and to which the boats are made fast should be considered immovable items, the provision of which it considers just an ancillary service. The subject-matter of the lease is not any movable quantity of water, however, but a specific part of the port basin. That water-covered area is clearly delimited and cannot be moved.

32. Even on a narrow interpretation of Article 13B(b) of the Sixth Directive, therefore, a mooring berth in a port basin fulfils the definition of immovable property within the meaning of this provision.

33. Nor is the existence of a lease precluded by the fact that FML is entitled to allocate a mooring berth to visitors during the temporary absence of the owner of the mooring berth.

34. Admittedly, it is a fundamental characteristic of the leasing of immovable property that the lessee takes possession of the property and is entitled to exclude any other person from it at any time. However, it is also possible for leasing arrangements to exist where several lessees are entitled to use the same property with one of the lessees having a preferential right of use.

35. This is the case here. The long-term lessee is free to decide whether or not he will move his boat from the mooring berth. Neither FML nor any other boat owner can require the lessee to vacate his mooring berth during the term of the agreement. The port authority may only temporarily allocate a berth to another boat owner only once the lessee has decided not to use his berth for a period of more than 24 hours.

36. The answer to the first question must therefore be that the term 'leasing or letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive encompasses both the letting of a clearly delimited area of a port basin as a mooring berth for boats and a defined storage site for a boat on land.

*C — The letting of premises and sites for parking vehicles (second question)*

37. In its second question referred for a preliminary ruling the referring court wishes to know whether Article 13B(b)(2) of the Sixth Directive excludes parking places for boats from the tax exemption for the leasing of immovable property. The referring court has doubts chiefly because in the Danish version of the provision the term 'køretøjer' is used, which means just vehicles on wheels. It would therefore not be consistent with the wording of the Danish version for boats to be considered vehicles within the meaning of this provision.

38. However, as the referring court, the Commission and the governments concerned quite rightly point out, this problem does not arise in the same way in the other language versions of the directive because they use more neutral terms that can also cover boats.<sup>15</sup>

39. It is settled case-law that, where there is a difference between the various language versions, the provision at issue must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.<sup>16</sup>

40. Even in the language versions other than the Danish version, however, it is not quite clear whether the concept of 'premises and sites for parking vehicles' also includes mooring berths and storage sites for boats. If the meaning of a phrase cannot be determined on the basis of interpretation which is exclusively textual then, in order to clarify its meaning, reference must be made to the context in which the phrase occurs and consideration given to the structure of the Sixth Directive.<sup>17</sup>

41. FML argues that the term 'means of transport' is used in the Sixth Directive as an overall term for vehicles travelling on land, on water and in the air; whilst the word 'vehicle' means just land-based vehicles.

42. Examination of the German version of the Sixth Directive does, however, give rise to

15 — The English version uses the term 'vehicles', the French version the term 'véhicules', the Spanish version the term 'vehículos', the Portuguese version the term 'veículos', the Italian version the term 'veicoli', the Dutch version the term 'voertuigen' and the Swedish version the term 'fordon'.

16 — Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraph 19, and Case C-384/98 *D.* [2000] ECR I-6795, paragraph 16.

17 — Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 22, and the judgment in *Henriksen* (cited in footnote 14, paragraphs 10 and 11).

doubts as to whether the directive does have any such terminological structure. In the first paragraph of Article 15, subparagraph 2, cited by FML, therefore, the term 'means of transport' is indeed used. In other provisions quoted by FML, however, (Article 28a(2)(a), Article 28n(4)(b) and (c), Article 28o(1)(g) and Article 28p(7)(b) and (c) of the Sixth Directive) the word 'Fahrzeug' (vehicle) is used rather than the more general term 'Transportmittel' (means of transport). *[Translator's note: in all these Articles the English version uses the term 'means of transport' and not 'vehicle'.]*

43. As an example to the contrary the Commission also quite rightly refers to Article 13A(1)(p) of the Sixth Directive, which relates to tax exemption for the supply of transport services for sick or injured persons in specially designed vehicles (véhicules spécialement aménagés). Here too, the term 'vehicle' covers boats and aircraft.

44. Since examination of the terms 'vehicle' and 'means of transport' used in various parts of the directive does not therefore provide any further assistance it is necessary to examine, having regard to the meaning and purpose of the tax exemption for the leasing of immovable property and the exclusions from that exemption, whether boats come within the definition of 'vehicles' in Article 13B(b)(2) of the Sixth Directive.

45. There are two principal reasons for exempting the leasing of immovable prop-

erty from value added tax. Firstly, land that has already been used is not the result of a production process, as Advocate General Jacobs has stated in his Opinion in the *Blasi* case.<sup>18</sup> Once immovable property has been developed for the first time and a building has been constructed, that property is generally used in a passive manner not entailing added value.<sup>19</sup> It is therefore only the first supply of developed building land and the supply of a building before first occupation that are subject to value added tax,<sup>20</sup> whilst the later transfer of a previously occupied building and the leasing thereof are exempt from value added tax.

46. Secondly, in any event in most of the Member States, prior to harmonisation under the Sixth Directive the letting of residential property was not subject to value added tax for social reasons.<sup>21</sup> It was intended that this position should be maintained in the Sixth Directive in order to avoid a rise in rents for residential premises.

47. Neither of these two reasons justifying tax exemption apply to the cases in Article 13B(b)(1) to (4) of the Sixth Directive, so that

18 — Opinion in Case C-346/95 *Blasi* [1998] ECR I-483, paragraphs 15 and 16.

19 — This might not be the case where an undertaking's production works is constructed on the property so that the property becomes part of the production process.

20 — See Article 4(3)(a) and (b) of the Sixth Directive.

21 — See the Commission Proposal for the Sixth Directive (*Bulletin of the European Communities*, issue 11-1973, p.17).

those special cases of letting immovable property were excluded from the exemption and again made subject to value added tax.

48. One distinguishing feature of these services is, firstly, a generally more active use of the immovable property. The provision of hotel accommodation and accommodation on camping sites under subparagraph 1, for example, encompasses numerous other services going beyond the mere provision of accommodation or sites.

49. Although this argument has less weight in connection with the letting of premises and sites for parking vehicles under the second subparagraph, certain additional services — such as security on the parking sites — might also be included. However, the second aspect is of particular significance in this context, that is to say the absence of any socio-political reason for tax exemption.

50. The letting of mooring berths for boats also entails a more intensive use of the

property, such as is generally characteristic of the activities excluded under Article 13B (b)(1) to (4) of the Sixth Directive. For instance, as on a campsite, other facilities, such as sanitary installations, are provided over and above the basic berth or storage site. It is also necessary for the berths to be equipped with landing-stages and special devices for making boats fast, and these have to be regularly checked and maintained because of the effect that water can have.

51. Nor do the social reasons that originally justified allowing an exemption in respect of the leasing of immovable property appear to apply to the leasing of mooring berths for pleasure boats.

52. It would therefore appear, having regard to the aims of Article 13B(b) of the Sixth Directive, that subparagraph 2 of that provision should be construed as meaning that it also applies to the letting of mooring berths and storage sites for pleasure boats. Such an interpretation also respects the principle that the provision should not be afforded a strict interpretation.

## V — Conclusion

53. It is recommended that the questions referred to the Court by the Vestre Landsret should be answered as follows:

- (1) The term ‘leasing or letting of immovable property’ within the meaning of Article 13B(b) 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 encompasses both the letting of a clearly delimited area of a port basin as a mooring berth for boats and a defined storage site for a boat on land.
  
- (2) Article 13B(b)(2) of the Sixth Directive also applies to the leasing of mooring berths and storage sites for boats.