61995C0283

Opinion of Mr Advocate General Jacobs delivered on 20 March 1997. - Karlheinz Fischer v Finanzamt Donaueschingen. - Reference for a preliminary ruling: Finanzgericht Baden-Württemberg - Germany. - Tax provisions - Sixth VAT Directive - Application to the organisation of unlawful games of chance - Determination of the taxable amount. - Case C-283/95.

European Court reports 1998 Page I-03369

Opinion of the Advocate-General

1 The issues raised by the present case, referred to the Court by the Finanzgericht (Finance Court) Baden-Württemberg, are as follows: whether transactions consisting in the unlawful provision of roulette games fall within the scope of VAT; if so, whether a Member State must exempt them from VAT when it exempts the provision of such games by licensed public casinos; if not, what constitutes the taxable amount for VAT purposes.

Relevant Community and national provisions

2 Article 2 of the Sixth Directive (1) provides:

`The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

...'.

3 Article 11A(1)(a) of the Directive provides that the taxable amount for domestic transactions is:

`... everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies'.

4 Article 13B(f) exempts from tax:

`betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State'.

5 Article 33 of the Directive provides:

`Without prejudice to other Community provisions, the provisions of 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.'

6 Paragraph 1(1)(1) of the German Turnover Tax Law implements Article 2(1) of the Directive by subjecting to VAT domestic transactions effected for consideration by a trader within the course of his business. Pursuant to Article 13B(f) of the Directive, Paragraph 4(9)(b) of the Law exempts inter alia the turnover of licensed public casinos arising from the operation of such casinos.

The facts and the national court's questions

7 Under German law the game of roulette may be organised commercially only by licensed public casinos. From 1987 to 1989 Mr Fischer operated games of roulette at a number of locations in the Federal Republic of Germany. Mr Fischer was not licensed to run a casino and therefore to operate games of roulette but had a permit to operate a game of skill using a machine called a `Roulette Opta II'. However, he departed from the terms of the permit in such a way that the game amounted to a game of roulette.

8 The equipment used by Mr Fischer consisted of a wheel bearing the numbers 1 to 24 and also the `numbers' O and X. Numbers 1 to 12 were black and numbers 13 to 24 red. The object of the game was to predict, by placing chips on the appropriate squares of the gaming table, where the ball thrown by a croupier would come to rest. The players purchased the chips for DM 5 each. In each game they could place one or more chips on the squares for one of the numbers 1 to 24, O and X (en plein), on the line between the two numbers (cheval) and/or on the red and/or black numbers square. A player received 24 times the value of his stake where he placed his stake on the square for the number on which the ball came to rest, 12 times his stake where the ball came to rest on one of the two numbers between whose squares he had placed his stake and 2 times his stake where he correctly predicted that the ball would come to rest on red or black. Winnings were paid in chips after each game, and the chips collected by croupiers were available for payment of winnings and for purchase. Players who wished to discontinue the game could exchange their remaining chips for cash.

9 Mr Fischer recorded as taxable turnover his net takings, i.e. the surplus amounts which he had taken at the end of each day. The Finanzamt, however, took the view that the taxable amount was the sums of money (in the form of chips) staked by players in each game or series of games as reduced by their winnings (also in the form of chips). Although it is not entirely clear, it appears that the Finanzamt sought to take account only of sessions in which the house made a net gain, ignoring its net losses in other games. Since Mr Fischer had not recorded that figure (which would have involved recording the stakes and winnings for each player), the Finanzamt estimated it by multiplying his net takings by a factor of 6, based on the probability of each player winning or losing.

10 The Finanzgericht raises first of all the question whether the provision of the roulette games is taxable. Mr Fischer did not operate a licensed public casino within the meaning of Paragraph 4(9)(b) of the Turnover Tax Law and indeed was convicted under Paragraph 284 of the German Criminal Code for operating a prohibited game of chance. Since Mr Fischer's turnover therefore does not qualify for exemption under Paragraph 4(9)(b), the Finanzgericht concludes that it is taxable under German law by virtue of the general charging provision in Paragraph 1(1)(1), first sentence, of the Law. However, referring to the Court's judgments in Happy Family (2) and Mol, (3) where it was held that unlawful supplies of narcotic drugs fell outside the scope of VAT, the Finanzgericht wonders whether as a matter of Community law the fact that Mr Fischer's transactions were unlawful under German law precluded them from being taxed.

11 Secondly, on the assumption that Mr Fischer's transactions are taxable, the Finanzgericht seeks guidance on the taxable amount. The Finanzgericht is inclined to accept the view of the Finanzamt but considers that it is precluded from giving judgment in its favour by the Court's judgment in Glawe, (4) where it was held that the taxable amount for services consisting in the

operation of slot machines was the net takings emptied from the machine after payment of the winnings rather than the total stakes inserted into the machine by players. The Finanzgericht notes the similarities between the two forms of gambling. It adds that, although in its judgment the Court noted that the slot machines were by law set in such a way as to pay out winnings of at least 60% of the stakes inserted, that point cannot be considered crucial to the Court's ruling.

12 The Finanzgericht has therefore put the following questions to the Court:

`1. Is Article 2(1) of the Sixth Directive to be interpreted as meaning that services which the organiser of unlawful and punishable games of chance provides to the players are not taxable?

2. If Question 1 is to be answered in the negative:

Is Article 11A(1)(a) of the Sixth Directive to be interpreted as meaning that, in the case of unlawful gaming in the form of roulette, the basis of assessment for the operator's services to the players is the amount retained by the operator during a tax period?

3. If Question 2 is to be answered in the negative:

How is the basis of assessment to be determined in cases described under Questions 1 and 2?'

Question 1

13 The Court's case-law concerning VAT on illegal transactions has its origins in the case-law on customs duties. In its judgments in Horvath, (5) Wolf (6) and `Einberger I' (7) the Court held that no customs debt arose upon the importation of drugs otherwise than through economic channels strictly controlled by the competent authorities for use for medical and scientific purposes. The Court reasoned that the importation and marketing of narcotic drugs otherwise than through such channels were prohibited in the Member States by virtue of an international agreement to which all the Member States were signatories, namely the Single Convention on Narcotic Drugs. A customs debt could not arise upon the importation of drugs which could not be marketed and integrated into the economy of the Community. It added that unlawful imports of drugs fell wholly outside the scope of the objectives assigned to the Community in Article 2 of the Treaty and the guidelines laid down in Article 29 for the operation of the customs union.

14 In `Einberger II' (8) the Court extended its case-law on customs duties to VAT on unlawful imports of narcotic drugs. Subsequently in Happy Family (9) and Mol (10) the Court held that unlawful supplies of narcotic drugs made within the territory of the country also fell outside the scope of VAT. It reasoned that unlawful transactions in drugs were alien to the objectives of the Sixth Directive, namely to assist effective liberalization of the movement of persons, goods, services and capital, the integration of national economies and the achievement of a common market permitting fair competition and resembling a real internal market. (11)

15 In two further cases the Court was asked to consider the same issue in relation to two further categories of goods. In Witzemann (12) it extended the case-law on customs duties and VAT to imports of counterfeit currency, taking the view that its reasoning in that case-law applied with even greater force to counterfeit currency which, unlike narcotic drugs, was subject to a total prohibition on importation and marketing. In Lange, (13) on the other hand, the Court held that exports of goods to Eastern Europe made in contravention of an export ban adopted within the framework of the Co-ordinating Committee for Multilateral Export Controls (COCOM) fell within the scope of the tax. In contrast to previous cases, the goods were not such that all transactions were prohibited by reason of their nature or particular characteristics; all that was prohibited was their export to certain destinations owing to possible use for strategic purposes.

16 In the present case the Court has received observations from the German and United Kingdom Governments and the Commission. All three take the view that, in contrast to unlawful transactions in narcotic drugs and counterfeit currency, the unlawful provision of roulette games falls within the scope of the Directive. I share that view.

17 It is clear that the Court's case-law on narcotic drugs and counterfeit currency constitutes an exception to the normal rule that lawful and unlawful transactions should be accorded the same tax treatment. In Mol and Happy Family the Court held:

`It must be acknowledged that the principle of fiscal neutrality does in fact preclude, as far as the levying of value-added tax is concerned, a generalised differentiation between lawful and unlawful transactions. However, that is not true in the case of the supply of products, such as narcotic drugs, which have special characteristics inasmuch as, because of their very nature, they are subject to a total prohibition on their being put into circulation in all the Member States, with the exception of strictly controlled economic channels for use for medical and scientific purposes. In a specific situation of that kind where all competition between a lawful economic sector and an unlawful sector is precluded, the fact that no liability to value-added tax arises cannot affect the principle of fiscal neutrality.' (14)

18 Thus the Court, responding to the concern expressed by the French, German and Netherlands Governments in those cases that more favourable tax treatment of unlawful trade would undermine the principle of fiscal neutrality, (15) made it clear that, where there existed the possibility of competition between lawful and unlawful trade, the fiscal treatment should be the same.

19 That is the case here. The transactions in issue in the present case are plainly distinguishable from transactions in narcotic drugs or counterfeit currency. The provision of gambling services such as roulette forms the subject of a substantial lawful trade which is an integral part of the economy of the Community. It is not, to use the Court's words in Happy Family and Mol, `alien to the objectives of the Sixth Directive'. The transactions in issue in the present case are unlawful solely because a lawful game for which a permit was held was converted into a game which may lawfully be provided only in licensed public casinos. The case is more akin to the situation in Lange, (16) in which the goods were not prohibited by their nature and were the subject of an export ban solely because they were destined for certain countries for use for strategic purposes. In the present case there exists the possibility of competition between lawful and unlawful trade, and the principle of fiscal neutrality demands that the VAT system should not favour unlawful gambling by placing it at an advantage over lawful gambling.

20 I conclude therefore that unlawful roulette transactions such as those in issue fall within the scope of VAT. They are therefore taxable under Article 2(1) of the Directive unless specifically exempted pursuant to Article 13B(f).

21 In that connection there is a further issue, not raised by the national court, which is relevant to the outcome of the dispute, namely whether Germany is entitled under Article 13B(f) to limit exemption from tax to roulette games provided by licensed public casinos. Article 13B(f) permits Member States to impose `conditions and limitations' on the exemption provided for in that provision. However, the question remains whether the Member State's discretion in limiting the scope of the exemption is curtailed by the principle of fiscal neutrality.

22 As the United Kingdom pointed out in its written observations, the ruling in Lange shows that the application of the principle of fiscal neutrality is not confined to circumstances in which, but for its application, lawful trade would be placed at a disadvantage in relation to unlawful trade. In that case the principle of fiscal neutrality was applied in circumstances in which unlawful trade would otherwise have been placed at a disadvantage. The Court held that an exporting Member State

was not entitled to withhold the export exemption provided for by Article 15 of the Directive on the ground that the exports in question were unlawful. The Court observed that, in accordance with the principle of fiscal neutrality on which the Sixth Directive was based, Article 15 made no distinction for the purpose of exemptions between lawful and unlawful exports. Moreover, noting that Member States were required under Article 17(3) of the Directive to grant deduction or refund of input tax on goods qualifying for an export exemption under Article 15, the Court added that the purpose of such exemptions was to ensure that consumers in non-member countries were not subject to Community VAT. Consequently, the refusal by a Member State to apply an exemption provided for by the Directive to an export transaction in order to punish an infringement of a national provision requiring authorisation would pursue an objective alien to the Sixth Directive. (17)

23 In its written observations the United Kingdom took the view that, in the light of that ruling, the principle of fiscal neutrality precluded Germany from restricting the exemption from tax in Article 13B(f) to lawful transactions. At the hearing, however, it withdrew that contention, stating that it was based on a misunderstanding of the German rules. The United Kingdom observed that, while a Member State was not entitled to make a general distinction for the purpose of granting exemptions between lawful and unlawful transactions, it was permitted to lay down conditions and limitations to the exemption, including a condition that the transaction in question be carried out in licensed public casinos. Thus Germany was entitled to exclude from the scope of the exemption transactions not performed in licensed public casinos but could not, for example, refuse exemption for unlawful transactions performed by such a casino or transactions rendered unlawful because the casino was late in renewing its licence.

24 At the hearing the German Government sought to justify the limitation on different grounds. It contended that the principle of fiscal neutrality did not require the exemption to be extended to unlawful transactions because the two categories of transaction were subject to different conditions of competition. Under German law the counterpart to the VAT exemption for lawful roulette games is that they are subject to a special gaming or casino tax; transactions which are not exempt from VAT are not subject to that tax.

25 It appears from the order for reference that the games in issue in the main proceedings are substantially identical to the roulette games provided by licensed casinos. It is therefore difficult to see how it would be consistent with the aim of fiscal neutrality underlying the Directive for a Member State to refuse exemption to the former on the ground that they are provided unlawfully.

26 As the United Kingdom correctly pointed out in its written observations, the ruling in Lange shows that the principle of fiscal neutrality precludes the use of the VAT system to penalise unlawful transactions. The incidence of VAT should not be made dependent upon the particularities of a Member State's criminal legislation. To recognise an exception in the present case would undermine the consistency which should characterise the application of fiscal legislation.

27 I do not think it possible in this case to contend, as the United Kingdom sought to do at the hearing, that Germany is merely laying down the conditions under which the exemption applies rather than making a general distinction - which the United Kingdom accepts is not permissible - between lawful and unlawful trade. The national court presents the German rules as drawing a distinction between lawful and unlawful roulette; its first question is put on that basis. There is nothing in the documents before the Court to cast doubt on that analysis. On the contrary, it appears that only lawful roulette is exempt from tax because roulette games can be provided commercially only by licensed casinos. That the distinction between lawful and unlawful roulette results from a condition under which the exemption is expressed to apply is of little consequence in that respect.

28 It is therefore unnecessary in the present proceedings to consider the more general issue of the extent to which, leaving aside distinctions between lawful and unlawful trade, the principle of fiscal

neutrality may curtail the discretion, accorded to Member States by the introductory words of Article 13B or by individual exemptions, to lay down conditions, limitations or exclusions in respect of certain exemptions. Given that the transactions covered by Article 13B of the Directive take place on competitive markets, the principle of fiscal neutrality, if taken too far, would virtually remove any discretion accorded by the Directive to Member States to define the terms of the relevant exemptions. It nevertheless seems to me that the Directive may impose limits on the power of Member States, in defining the scope of exemptions, to distinguish between competing taxable persons performing substantially identical transactions.

29 The German Government's argument that the principle of fiscal neutrality does not preclude the German rules because different conditions apply to lawful and unlawful trade is in my view also untenable. It seems to me that, for the purpose of applying the principle of fiscal neutrality in cases such as the present, VAT must be considered in isolation. It would be unworkable to allow Member States to take account of the imposition on lawful transactions of other unharmonised taxes, whether direct or indirect, the amount of which may or may not correspond to the VAT which is sought to be levied on unlawful transactions.

30 It is clear from Article 33 of the Directive that excise duties and other special taxes may be imposed in addition to VAT where applicable; indeed Article 11A(2)(a) provides that such duties and taxes are to be included in the taxable amount for VAT purposes. A Member State is therefore free to impose special taxes on gambling or gambling establishments and to determine the scope of such taxes. It may, if it wishes, define the scope of any national taxes in such a way that a transaction is not subject both to VAT and to the national tax; but it is not obliged to do so. What a Member State is not entitled to do is to define the contours of the harmonised Community VAT system by reference to unharmonised national taxes.

31 I conclude therefore that a Member State is not entitled to limit the scope of the exemption provided for in Article 13B(f) of the Directive to the lawful provision of roulette games.

Question 2

32 By its second question the national court asks whether, in the case of the transactions in issue in the main proceedings, the taxable amount is the amount retained by the operator during a tax period. This question arises only if the view is taken that Germany is entitled to tax the transactions although it exempts equivalent transactions effected by licensed public casinos.

33 The purpose of the national court's question is to determine whether the Court's ruling in Glawe (18) concerning slot machine transactions applies to the roulette transactions in issue here. The slot machines in question in that case were located in bars and restaurants. Players activated a machine by inserting coins which either entered its winnings reserve in order to be subsequently paid out as winnings or, if the reserve was full, entered the machine's cash box, which was periodically emptied by the operator. The machines were required by law to pay out at least 60% of the stakes inserted into the machines as winnings. The German Government argued that the taxable amount consisted of the total stakes inserted into the machines by players, including those stakes which were subsequently paid out as winnings.

34 The Court, following my Opinion, held that the taxable amount for the purposes of Article 11A(1)(a) of the Directive did not include the statutorily prescribed proportion of the total stakes inserted corresponding to the winnings paid out. Referring to its judgments in Boots (19) and Naturally Yours Cosmetics, (20) the Court reasoned that the taxable amount for VAT purposes was the consideration actually received by a taxable person. The consideration actually received by an operator of slot machines was limited to the proportion of the stakes which he could actually take for himself, i.e. the coins which entered the machine's cash box.

35 In the present proceedings the German Government asks the Court to reconsider its ruling in Glawe. In order to explain its criticisms of the ruling it may be helpful to set out a short passage from my Opinion in the case:

`In my view the consideration which the operator obtains for his services for the purposes of Article 11A(1)(a) is limited to the amounts which he empties from the machine. That is apparent from an analysis of the transactions in issue and of other forms of gambling.

Whilst gambling for money entails expenditure by gamblers, it does not in its simplest form give rise to consumption of goods or services. Suppose, for example, that A enters into a private bet with B, both placing their respective bets on the table. A wins the bet and collects the money on the table. In such a case it would be absurd to suggest that A and B provide services to each other for a consideration equal to the amount of their respective bets. The placing of the bets and collection of the winnings is simply part of the gambling transaction. The placing of the bets, although it involves the outlay of money, does not constitute the consumption of goods or services which is the taxable event under the VAT system.

Commercial gambling is different in so far as the person organising the gambling arranges matters in such a way that on average his winnings are sufficient to meet his costs in organising the gambling and to provide him with a reasonable profit. For example, a bookmaker will set the odds for bets on horse races at a level intended to ensure that he makes an overall profit on bets placed. To that extent the person organising the gambling may perhaps be regarded as not only taking part in the gambling himself but also providing a service to the other gamblers consisting in organising the gambling. On that view his reward for that service would not, however, be the total amount of the bets placed by gamblers. As already stated, the placing of bets and payment of winnings form the nucleus of the gambling activity. The service provided by the organiser consists in providing the framework within which that activity can take place, his reward for that service being the surplus of winnings which he arranges for himself, together with any specific commission which he may charge.' (21)

36 In the present proceedings the German Government rejects the premiss that the nucleus of the gambling activity does not involve consumption of goods or services. It considers that the gambling activity itself involves an exchange of services. An organiser of commercial gambling does not merely provide the framework for the gambling activity but also participates in the game himself. The player does not, according to the German Government, furnish consideration to the organiser with the mere aim of participating in the game; otherwise it would suffice for the organiser to charge an entrance fee. What is important to the player is the provision of the chance of winning.

37 The German Government points out that the fact that Article 13B(f) provides for the possibility of exemption necessarily implies that games of chance may be subject to the tax. According to the ruling in Glawe, the taxable amount is nil, effectively removing gambling from the scope of the tax, unless the organiser makes a net gain.

38 The German Government adds that its analysis is consistent with the principle underlying the Sixth Directive that VAT is imposed on individual transactions. Under the ruling in Glawe, according to which the taxable amount consists of the total of net receipts less winnings paid out over a period, the reference to specific transactions is lost. Moreover, under the ruling in Glawe the consideration for the provision of the framework for a game is the operator's gross margin, which is inconsistent with the principle that VAT is payable on a taxable person's turnover.

39 In the alternative the German Government contends that the transactions in Glawe are distinguishable from those in the present case. It points out that, in contrast to the situation in Glawe, players' winnings do not correspond to a fixed percentage laid down by law. Nor do the

stakes to be retained by the organiser enter a separate cash box. The chips placed on the table cannot therefore be divided into two separate categories, namely winnings and the organiser's turnover.

40 While not asking the Court to reconsider its ruling in Glawe, the Commission does not think the same analysis can be applied to roulette. It contends that the taxable amount consists of the chips purchased by players. By purchasing chips a player gains access to the casino, its infrastructure, its particular atmosphere and the tables. The range of possibilities offered by a casino is infinitely greater and more varied than that offered by a gaming machine fixed on the wall of a restaurant.

41 The United Kingdom, on the other hand, takes the view that the Court's ruling in Glawe was correct and should be extended to roulette. It emphasises however that gambling is a special case and that the ruling is not applicable to other categories of transaction.

42 In considering this issue it is important above all to have regard to the basic principles underlying the common VAT system, as set out in particular in Article 2 of the First VAT Directive. (22) That provision states that the principle of the common VAT system `involves the application to goods and services of a general tax on consumption exactly proportional to the price of 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' (emphasis added).

43 The normal functioning of the VAT system in conformity with that provision may be illustrated by the following example. Suppose that during a particular period a manufacturer sells goods for DM 3 000 000, plus DM 420 000 VAT (calculated at the rate of 14% applicable in Germany at the material time). The manufacturer's VAT-inclusive takings are therefore DM 3 420 000, of which he is obliged to pay DM 420 000 (less any VAT already paid on his purchases) to the tax authorities. The remaining DM 3 000 000 is available to cover his profit margin, the cost components of his supplies and any other taxes for which he may be liable (e.g. profits tax). The proportion of the price of his goods, i.e. of his total takings, represented by VAT corresponds to the 14% VAT rate applicable in Germany (DM 420 000/DM 3 000 000). The tax is therefore `exactly proportional to the price of [his] goods' as required by Article 2 of the First Directive. (23)

44 The application of VAT to gambling transactions is admittedly less straightforward. Indeed the reason for the exemption in Article 13B(f) is that such transactions are better suited to other forms of taxation. Nevertheless, despite the inherent difficulties, the ruling in Glawe provides in my view the basis for applying VAT to such transactions in a manner which is consistent with the basic principles of the VAT system as set out and illustrated above. It seems to me that the ruling is equally applicable to roulette transactions.

45 If the ruling in Glawe is applied to the present case, the effect will be that VAT is payable on the organiser's net takings (after payment of all winnings) over a given period. That analysis produces results most closely resembling those applicable in the case of more typical transactions as in the example given above. It is ultimately only the amount retained by the organiser after payment of winnings which is available to cover his profit margin, the costs of running the gambling establishment, the VAT and other taxes which may be payable on his activities. It is that amount which may therefore be equated with the manufacturer's (VAT-inclusive) turnover from the sale of his goods. By calculating the tax by reference to that amount the tax remains exactly proportional to the organiser's turnover.

46 The German Government's argument that such an analysis removes gambling from the scope of the tax ignores the fact that organisers of commercial gambling of the type in issue arrange the odds in such a way as to ensure that they make a profit in the long run. Nor do I share the German Government's view that the ruling in Glawe conflicts with the principle that VAT is imposed on individual transactions. In my Opinion in Glawe I noted:

`... each stake must be regarded as consisting of two components. One component is the price paid for the services provided by the operator (including the VAT payable on that amount). The remainder of the stake may be regarded as an amount contributed to the common pool available to be paid out as winnings. Over a given period those components will correspond to the amounts collected respectively by the cash box and the reserve of the machine.' (24)

47 The same applies to the present case. As a matter of legal analysis each chip placed on the table comprises two components: (a) the wager and (b) the consideration for the organiser's service, i.e. the price paid by players for the right to participate in the game and obtain the chance of winning. That price, consisting in the advantage which the house reserves to itself by virtue of the odds being in its favour, can be calculated precisely and is a standard percentage varying according to the version of roulette played. It is paid by each player each time he places a chip on the table. It would be perfectly possible for an organiser to separate the two components by eliminating the advantage for the house and replacing it with a separate charge to cover his costs and provide him with a profit.

48 For similar reasons the German Government's argument that the ruling in Glawe entails taxation of a taxable person's gross margin rather than his turnover contrary to the basic principles of the Sixth Directive is also misconceived. The organiser's turnover is limited to that proportion of each chip representing the price of the organiser's service.

49 In practice individual calculations based on each chip placed on the table are unnecessary. The total of the amounts received by way of consideration for individual transactions corresponds to the organiser's net takings (after payment of winnings) during a given period. Over a period the organiser's net takings necessarily correspond to the advantage which he reserves to himself. The fact that there is in practice an easier method of determining the taxable amount does not however mean that tax is not levied on individual transactions. I therefore do not accept the Commission's view that such an analysis is theoretically unsound. On the contrary it seems to me that it is an illustration of how a theoretically sound solution is often easier to apply in practice.$

50 It is, I think, instructive to examine by way of contrast the consequences of the other interpretations which have been suggested in these proceedings. It appears from the order for reference that the Finanzamt's analysis is based on the judgment of the Finanzgericht Düsseldorf of 29 January 1986. (25) The Finanzgericht reasoned that, if a player lost DM 50 during a session, the price which he paid for the chance of winning was DM 50. If, on the other hand, he won DM 100 during a session, he paid nothing for the chance of winning. Since the operator had no record of players' net winnings or losses at each session, it was necessary for the Finanzgericht to lay down a method for estimating his taxable turnover. After undertaking a calculation of probabilities the Finanzgericht concluded that the estimate was to be arrived at by multiplying the operator's net takings by 6.

51 At the hearing the German Government explained that it did not share the Finanzamt's analysis of the transaction. In keeping with its analysis in Glawe, the German Government considers that the taxable amount consists of the total chips placed on the table by a player in each game, no account being taken of his winnings.

52 The Commission on the other hand takes the view that the taxable amount consists of the chips purchased, again no account being taken of winnings.

53 The basic flaw in all those analyses is that they produce a tax burden which is not proportional to the organiser's real turnover. The essential reason for that is that a large part of the amount staked is repaid to players as winnings yet is treated as the organiser's turnover for VAT purposes. The result is an artificial inflation of his turnover. Such analyses ignore the fact that the nucleus of a gambling activity, although involving the use of money, does not involve the consumption of goods or services.

54 The effect of the Finanzamt's method may be seen from the figures given in the order for reference: for example, on the basis of Mr Fischer's actual takings of DM 344 880.00 for 1987 the Finanzamt calculated a taxable amount of DM 2 069 280.00, on which it assessed VAT of DM 289 699.20 at the rate of 14%. The result of that method, however, is to impose an effective rate of tax on Mr Fischer's actual takings of no less than 84% (DM 289 699.20/DM 344 880.00).

55 The German Government's analysis would undoubtedly lead to an even higher tax burden. Suppose that a player purchases ten chips for DM 5 each. He stakes two chips in each of the first five games. In the first four games he loses. In the fifth game he wins, restoring his total chips to ten. He then plays another five games, again staking two chips in each game. He loses the sixth to ninth games but then wins the tenth game, restoring the number of his chips to eight. On the German Government's view tax would be payable on the total chips staked, i.e. DM 100 (twenty chips of DM 5 each). Yet the organiser's actual takings from the series of games would be only DM 10 (two chips of DM 5 each). That amount alone is the (VAT-inclusive) turnover available to cover his costs, his profit margin, the VAT and any other taxes which may be payable. Yet on the German Government's analysis his VAT liability alone would amount to DM 12.28 (DM 100 x 14/114). His actual takings would therefore be insufficient even to meet his VAT liability.

56 Moreover, on both the German Government's and the Finanzamt's view the taxable amount can only be estimated since it would plainly be impracticable for operators to keep a record of every chip staked or the results of each session at the table. The correct multiplication factor to be applied has evidently been the subject of some debate in Germany. From the taxable person's viewpoint the factor of 6 adopted by the Finanzgericht Düsseldorf compares very favourably with the factor of 25 which had been suggested by the tax authorities in the proceedings before that court. At the hearing in the present proceedings the German Government was unable to state the method which it would use to arrive at an estimate of Mr Fischer's turnover.

57 The Commission's analysis would probably result in a taxable amount somewhat lower than that resulting from the German Government's analysis since the taxable amount would not include chips won by players and placed as stakes in further games. Moreover, taxable persons could perhaps reasonably be required to keep a record of chips sold, making the use of estimates unnecessary. However, there is no reason to suppose that the method proposed by the Commission, which takes no account of winnings paid to players, would result in the imposition of a tax burden which was proportional to the organiser's actual takings from his activities.

58 I consider therefore that, on the assumption that the national court's second question calls for a reply, the Court should uphold its ruling in Glawe and rule that it also applies to roulette transactions such as those in issue in the main proceedings. I do not think the particular workings of the slot machines in question in Glawe or the fact that the minimum winnings paid out were fixed by law were critical to the Court's ruling. The Court's essential concern was to provide an interpretation which would ensure that a taxable person's VAT liability was proportional to his actual turnover.

59 I should however finally emphasise that, for reasons already mentioned, gambling transactions of the kind in issue which involve betting with money are something of a special case, and it must not be thought that the foregoing analysis can necessarily be extended to other transactions.

60 In view of the answer which I propose to the second question, the national court's third question does not arise.

Conclusion

61 Accordingly, I am of the opinion that the Court should reply as follows to the questions put by the Finanzgericht Baden-Württemberg:

Article 2(1) of the Sixth VAT Directive is to be interpreted as subjecting to VAT the unlawful provision of roulette games. A Member State is not entitled to limit the scope of the exemption provided for in Article 13B(f) of the Directive to the lawful provision of such games.

(1) - 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, OJ 1977 L 145, p. 1.

(2) - Case 289/86 Happy Family v Inspecteur der Omzetbelasting [1988] ECR 3655.

(3) - Case 269/86 Mol v Inspecteur der Invoerrechten en Accijnzen [1988] ECR 3627.

(4) - Case C-38/93 [1994] ECR I-1679.

(5) - Case 50/80 Horvath v Hauptzollamt Hamburg-Jonas [1981] ECR 385.

(6) - Case 221/81 Wolf v Hauptzollamt Düsseldorf [1982] ECR 3681.

(7) - Case 240/81 Einberger v Hauptzollamt Freiburg [1982] ECR 3699.

(8) - Case 294/82 Einberger v Haupzollamt Freiburg [1984] ECR 1177.

(9) - Cited in note 2.

(10) - Cited in note 3.

(11) - Mol, paragraphs 14 and 16 of the judgment; Happy Family, paragraphs 16 and 18.

(12) - Case C-343/89 [1990] ECR I-4477.

(13) - Case C-111/92 [1993] ECR I-4677.

(14) - Mol, paragraph 18 of the judgment; Happy Family, paragraph 20.

(15) - Mol, paragraph 17 of the judgment; Happy Family, paragraph 19.

(16) - Cited in note 13.

(17) - Paragraphs 19 to 22.

(18) - Cited in note 4.

(19) - Case C-126/88 Boots Company [1990] ECR I-1235.

(20) - Case 230/87 Naturally Yours Cosmetics v Commissioners of Customs and Excise [1988] ECR 6365.

(21) - Paragraphs 19 to 21 of the Opinion.

(22) - 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, p. 14.

(23) - For the purpose of this example I shall ignore the small amounts of hidden VAT which may have been passed on to him in exempt purchases of goods or services (e.g. insurances).

(24) - Paragraph 29 of my Opinion.

(25) - EFG 1986, p. 421.