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Opinion of Mr Advocate General Léger delivered on 27 February 1997. - Careda SA (C-370/95), Federación nacional de operadores de máquinas recreativas y de azar (Femara) (C-371/95) and Asociación española de empresarios de máquinas recreativas (Facomare) (C-372/95) v Administración General del Estado. - Reference for a preliminary ruling: Audiencia Nacional - Spain. - Tax on the use of gaming machines - Turnover tax - Passing on to consumers. - Joined cases C-370/95, C-371/95 and C-372/95.

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Opinion of the Advocate-General

1 The questions referred to the Court by the Audiencia Nacional (National High Court) in these three joined cases seek clarification of certain aspects of the concept of turnover tax referred to in Article 33 of the Sixth VAT Directive (1) (hereinafter the `Sixth Directive') in order to characterize, with regard to that article, the supplementary charge to the fiscal levy on games of chance, betting and gambling, introduced by the Spanish authorities for 1990 (hereinafter `the supplementary levy'). To that end, the national court is seeking a better understanding of the condition that the tax is to be passed on to the consumer and of the role played by invoices in establishing that the tax is passed on.

I - The relevant national legislation

2 It is apparent from the order for reference in Case C-370/95 (hereinafter `the order for reference') and the submissions of the applicants (2) that the questions referred by the national court arose, firstly, in the context of an action challenging a tax assessment drawn up by the Spanish Ministry of the Economy and Finance in respect of the supplementary levy, applicable to gaming machines with winnings (so-called type `B' machines) (3) and, secondly, of two actions brought before the Audiencia Nacional for annulment of the Ministerial Decree of 6 September 1990 (4) which forms part of the legal basis of the tax at issue. The action against the assessment resulted in a judgment of the Tribunal Económico-Administrativo Central (Central Economic Administrative Court) dated 13 November 1992, against which an appeal was lodged before the Audiencia Nacional.

3 Although the national proceedings from which these cases arise relate to the supplementary levy, the national court refers to the rules governing both the fiscal levy on games of chance, betting and gambling (hereinafter the `fiscal levy on gambling') as well as to the supplementary levy. (5)

4 The characteristics of the two taxes are largely the same, as is apparent from the following provisions of Law No 5/1990 (6) introducing the supplementary levy:

`1. The supplementary levy applies to automatic type "B" or "C" (7) gaming machines and devices ... in respect of which the fiscal levy for 1990 fell due before this law entered into force.

2. The persons accountable for the supplementary levy are those accountable for the fiscal levy on games of chance, betting or gambling.' (8)

5 It appears from the order for reference (9) and the relevant legislation (10) that the main characteristics of the rules governing the fiscal levy on gambling are as follows.

6 The fiscal levy on gambling applies throughout the territory of Spain when the gambling is authorized or, failing that, organized. Organizers and undertakings, whose activities include the organization of gambling, are accountable for the tax. The taxable base is the gross revenue which casinos derive from gambling or the sums which players spend on gambling in the various buildings, places of business or premises where games of chance, betting or gambling are organized.

7 The differences between the two taxes essentially relate to the period in respect of which they are due and the rate at which they are charged.

8 The fiscal levy on gambling is payable by calendar year and is due on 1 January of each year in respect of machines authorized during previous years. The supplementary levy is due only in respect of 1990.

9 As regards the rate of the fiscal levy on gambling, the national court states that `there is a general reference rate, which was originally applied, of 20% on the income obtained ... which at a later stage was deferred by the application of charges supposedly fixed in proportion to the turnover from the machine.' (11) The rate of the supplementary levy is obtained by calculating the difference between two types of fixed rate. (12) In practice, it seems that the supplementary levy made it possible to increase the level of the gambling tax applicable to type `B' machines for 1990.

II - The questions submitted by the national court

10 The differences between the two taxes are not relevant in the context of the questions raised, which relate essentially to the passing on of the tax to the consumer; I will thus refer without distinction to the rules governing the two taxes, since, as the Government of the Kingdom of Spain observes, (13) they are of the same type.

11 In the proceedings before both the national court and this Court, the applicants claim that there was an infringement of Article 33 of the Sixth Directive, (14) which 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 characterized as turnover taxes.'

12 They claim that the tax charged in respect of type `B' machines in Spain is a tax `which [has] the same qualities and essential characteristics as value added tax, and by its very nature infringes the prohibition set out in Article 33 of the Sixth Directive'. (15) In contrast, the Government of the Kingdom of Spain and the Commission consider that the taxes at issue do not exhibit the characteristics of a turnover tax which would render it incompatible with Article 33. (16)

13 The Court has consistently held that Article 33 `does not preclude the maintenance or introduction of stamp duties or other kinds of taxes, duties or charges which do not have the essential characteristics of VAT'. (17) Member States are even permitted to apply taxes, duties or charges other than turnover taxes concurrently with VAT. (18)

14 The national court considers there to be no doubt that, in establishing the fixed charges applicable to the various types of gaming machines, the turnover generated by those machines must have been taken into account and that, `although the rules regulating the gambling tax and the supplementary levy do not expressly provide that it is to be passed on to the consumer, it is clear, as the Tribunal Supremo (Supreme Court) has consistently held, that the final user is the consumer, to whom the fiscal burden is ultimately transferred'. It concludes that in the case of the Spanish gambling tax `the requirements which would render it incompatible with Article 33 of the Sixth Directive appear to be fulfilled'. (19)

15 However, in order to be certain the Audiencia Nacional is seeking clarification of the concept of `passing on' taxes to the consumer, (20) in particular where passing on is not expressly provided for by law. It also raises the question whether the fact that no document is issued to record the passing on affects the character of the Spanish taxes.

16 The Spanish court has accordingly referred the following questions to the Court under Article 177 of the Treaty:

`(1) Does the concept of passing on the tax to the consumer, within the meaning of the Sixth Directive 77/388/EEC of 17 May 1977 and of the rest of the Community legal order, and for determining the concept of turnover tax, require always and in every case the law concerning the tax in question to lay down expressly that the said tax may be passed on to the consumer or is it sufficient, on the other hand, if the tax can be deemed, on a reasonable interpretation of such law, to be actually included in the price paid by the consumer?

(2) May a tax which is levied as a fixed charge of a large amount on the total turnover or revenue generated and which takes account of such turnover, if it is ultimately paid by the consumer, be regarded as a turnover tax although there is no express record (invoice) of passing on the tax to the consumer, the transactions in question being automatic, by the use of coins, and there being a price for use. As so framed, does it infringe Article 33 of the Sixth Directive 77/388/EEC on value added tax and is it therefore incompatible with that directive?'

17 Contrary to the approach taken by the interveners, which involves an overall analysis of the legal character of the taxes at issue, the wording of the questions indicates that the Audiencia Nacional is not asking the Court to rule on the interpretation of Article 33 of the Sixth Directive in order to evaluate every characteristic of a tax such as the one introduced by the Spanish law.

18 It is true that the last sentence of the second question, which is drafted in general terms, relates to the compatibility with Article 33 of the Sixth Directive of a tax exhibiting the characteristics of the fiscal charge on gambling and the supplementary levy. The wording of that sentence does not make clear whether the national court's question is limited to that part of the Court's interpretation of Article 33 which makes the passing on of the tax to the consumer part of the definition of turnover tax, or whether it also relates to the criteria applied by the courts when considering national taxes with regard to Article 33 which were not mentioned in the order for reference, or whether it simply concerns the interpretation of Article 33 as a whole.

19 That uncertainty is dispelled on reading the order for reference, which, as indicated above, (21) makes it clear that the Audiencia Nacional considers itself to be sufficiently informed as to the existence and scope of some of the criteria laid down by the Court to be able to interpret Article 33 of the Sixth Directive.

20 It therefore seems that, in order to rule on this case, the Spanish court only requires an interpretation of that part of Article 33 which makes the passing on of a tax to the consumer an essential characteristic of turnover tax. It seems to me that, by undertaking an overall analysis of the taxes at issue with regard to Article 33 of the Sixth Directive and the criteria set out in the case-law of the Court, the interveners are going beyond the scope of the questions referred.

21 The Court has consistently held, as regards the extent of its jurisdiction in proceedings for a preliminary ruling, that `the considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the Court of Justice'. (22) Therefore, I do not consider it appropriate for the Court to rule, as the interveners suggest, on the relevance of the reasoning of the national court which led it to consider certain elements of the definition of turnover tax to have been established, even though it might seem that those conditions are not in fact fulfilled. I need only call to mind the criteria elicited from the case-law of the Court, which make it possible to determine the nature of a national tax with regard to Article 33 and which were not considered by the national court.

22 The Court has identified the distinguishing features of compulsory deductions which fall within the definition of taxes, duties and charges having the character of a turnover tax. If we recall those principles, we can situate the concept of `passing on' in that definition.

III - Concept of turnover tax

23 The prohibition on applying other charges or taxes characterized as turnover tax concurrently with VAT can be explained by the fact that there exists a harmonized system in the form of a common system of VAT.

24 The first VAT directive (23) (hereinafter the `First Directive') lays down the basic principles of that system. It states that the aim of the system is `to achieve such harmonization of legislation concerning turnover taxes as will eliminate, as far as possible, factors which may distort conditions of competition ...'. (24) According to the rationale of the First Directive, harmonization requires `the abolition of cumulative multi-stage taxes' (25) applied in certain countries of the Community, the principal characteristic of which is the levying of a tax, on every transaction, on the whole price, without the possibility of deducting tax paid at the previous stage. Such a system of taxation is not neutral since, by virtue of its mechanical effect, it favours integrated economic circuits and increases the price of goods and services more where the value added in the initial stages of production was high.

25 The second VAT directive (26) (hereinafter the `Second Directive') establishes the system which is based on a Community definition of VAT, and replaces national systems. Member States retain competence in respect of tax matters, except in the specific field of VAT.

26 Article 33 of the Sixth Directive is intended to ensure the coherence and continuity of the common system by only authorizing taxes other than those which meet the definition of turnover tax to be laid down by Community law. The goal of harmonization would not be achieved if Member States were permitted to charge both VAT and other taxes and charges having the same characteristics.

27 That is the interpretation given by the Court in Rousseau Wilmot, in which it stated that:

`In leaving the Member States free to maintain or introduce certain indirect taxes such as excise duties on the condition that they are not taxes which can be "characterized as turnover tax", Article 33 of the Sixth Directive seeks to prevent the functioning of the common system of value added tax from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to value added tax.' (27)

28 Article 33 of the Sixth Directive does not specify what is to be understood by a tax which can `be characterized as a turnover tax'. The Court has held that `taxes, duties and charges must ... be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT'. (28)

29 The case-law of the Court has identified those essential characteristics, stating that `VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services; it is charged at each stage of the production and distribution process; and finally, it is imposed on the added value of goods and services since the tax payable on a transaction is calculated after deducting the tax paid on the previous transaction'. (29)

30 Furthermore, VAT is `a general tax on consumption' (30) which is not paid by undertakings but is ultimately borne by the final consumer. (31) It is therefore clear that a tax levied in such a way that it may not be passed on to the consumer is entirely different from turnover tax within the meaning of the VAT directives. Such a tax is charged directly on the production process and therefore cannot fulfil the same functions as VAT.

31 Therefore, a turnover tax, within the meaning of Article 33 of the Sixth Directive, is one which may be passed on to the consumer. That being so, is it necessary for the law to state this expressly?

IV - Express reference in the law to the concept of `passing on the tax to the consumer'

32 I do not accept the argument that a tax may not be passed on, or that this should be considered to be the case, simply because a piece of legislation, such as the Spanish law at issue, does not expressly provide for it.

33 As the Commission recalls by reference to the case-law of the Court, (32) Article 33 of the Sixth Directive is to be given a purposive interpretation. It is intended to prevent Member States from adopting or maintaining taxes which, irrespective of the wording of the legislation applicable thereto, would, in practice, operate in the same way as turnover tax. The effect of a measure is more important than the actual wording used which, in the event of a conflict with the manner in which the tax operates in practice, should be considered secondary.

34 That is apparent, moreover, from an analysis of the VAT system. The concept of `passing on to the consumer' is one of the characteristics of that tax, even though it is not expressly mentioned in the definition set out in the First Directive. That directive only refers to VAT as a tax `on consumption' in order to express the idea that it is payable in respect of the transfer of goods or the provision of services, not to indicate that liability for the tax transfers to the person receiving the goods or services. From the above, it follows that, what matters, more than the wording of the law itself, is the fact that the mechanism established enables a trader, in his dealings with consumers, to incorporate in the price charged, or to add to it, the amount of tax paid by him in respect of that transaction, in such a way that the fiscal burden is not borne by him.

35 Besides, none of the interveners supports the view that the law should expressly provide for the tax to be passed on. The applicants in the main proceedings, in particular, submit that, in order for a tax to constitute a turnover tax, `it is not necessary for the relevant legislation expressly to provide that that tax may be passed on to the consumer' but `on the contrary, it is sufficient that the legislation permits or, at least does not prevent, the tax being directly or indirectly passed on and that the tax may be deemed to be included in the price paid by the consumer for goods or services'. (33) Similarly, the Commission considers that `the fact that the national law does not expressly refer to the criteria defining turnover tax is not relevant in determining whether a particular tax is compatible with Article 33 of the Sixth Directive'. (34)

V - Absence of documents recording the passing on of the tax to the consumer

36 Although satisfied that the taxes are passed on to the consumer and that they are proportional to turnover, the national court none the less raises the question whether those criteria are sufficient for the taxes to be characterized as turnover taxes, since there is no express record of their being passed on to the consumer.

37 It is not possible in practice for an invoice or other document serving as invoice to be issued to users of gaming machines because of the automatic and repetitive nature, over a short period of time, of the activity in respect of which tax is charged.

38 In fiscal matters, invoices play an essential role in the monitoring of financial transactions, intended to ensure that the tax is collected efficiently. In the specific field of VAT, an invoice is evidence of the right to deduction. It enables a taxable person to set against the tax payable in respect of goods produced or services rendered by him, the tax paid on each element of the cost price. In respect of the provision of most services, Article 18(1)(a) of the Sixth Directive makes the right to deduction subject to the taxable person holding an invoice drawn up in accordance with Article 22(3).

39 Article 22(3)(a) requires an invoice to be issued in two circumstances: first, in respect of goods and services supplied by a taxable person to another taxable person and second, in respect of payments on account made to a taxable person by another taxable person, before the supply of goods or services is effected or completed.

40 In the field of VAT, therefore, the requirement that an invoice should be issued does not concern dealings between a person providing services and the final consumer. Final consumers are not considered to be `taxable persons' within the meaning of the Sixth Directive (35) and may not therefore claim the right to deduction, so that the issue of an invoice would serve little purpose in that respect. The issue of an invoice cannot therefore constitute an obligation characterizing turnover tax applicable to dealings between organizers of gambling and users of gaming machines.

41 As worded, the question also expresses the idea that, in the absence of proof, the tax might be deemed not to be passed on to the consumer, notwithstanding that it actually is passed on. I do not accept that the condition that the tax is to be passed on to the consumer is not fulfilled merely because no provision is made for any document to record the fact, since the court could determine for itself whether that condition is fulfilled by analysing the way in which the tax at issue operates, which would reveal that the taxable person is able to pass it on.

42 For the sake of completeness, I should point out that if, for the reasons set out above, a tax which is levied as a fixed charge of a large amount on the total turnover or revenue generated and which takes account of such turnover may be regarded as a turnover tax, even though there is no express record of the tax being passed on to the consumer, it is on condition that the other criteria enabling the tax to be classified as a turnover tax are also met. In addition to the matters raised in

its decision, therefore, the national court must establish:

- that the tax has a general character, which implies that it applies to every transaction concerning the transfer of goods or the provision of services;

- that it is collected at each stage of the production and distribution process;

- that it relates to the added value alone.

Conclusion

43 In the light of the above, I propose that the questions be answered as follows:

The Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States concerning turnover tax - Common system of value added tax: uniform basis of assessment and, in particular, Article 33 thereof, is to be interpreted as meaning that it is not necessary for a national law introducing a tax expressly to mention the possibility of `passing the tax on to the consumer' in order for the passing on to be recognized as one of the essential characteristics of turnover tax. It is sufficient for that law to permit the tax to be passed on to the consumer, or at least not to prevent it.

The Sixth Directive (77/388) and, in particular, Article 33 thereof, is to be interpreted as meaning that the classification as a turnover tax of a tax which is passed on to the consumer, is levied as a fixed charge of a large amount on the total turnover, and takes account of such turnover, is not subject to the requirement that the person providing services should draw up an invoice, or other document serving as invoice, which expressly records the passing on of the tax to the consumer.

The Sixth Directive (77/388) and, in particular, Article 33 thereof, is to be interpreted as meaning that it only prevents the introduction or maintaining of a national tax exhibiting the features set out above if that tax has a general character, is charged at each stage of the production and distribution process and is imposed on the added value of services.

(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) - Page 2, paragraph 1, of the French translation of their written submissions. Although the questions referred by the national court arise in three separate national proceedings, only Careda SA and Femara have intervened in this case.

(3) - Case C-370/95.

(4) - Cases C-370/95 and C-372/95.

(5) - See, in particular, page 6, point 6, and page 7, point 7, of the English translation of the order for reference (Case C-370/95).

(6) - Law of 29 June 1990 (BOE of 30 June 1990, p. 3587).

(7) - Law No 5/1990 distinguishes amusement machines with winnings (type `B') and gaming machines (type `C'). According to the explanations given at the hearing by the applicants, type `B' machines make it possible to win sums of money corresponding to a legally established minimum of 60% of the sum played. The level of winnings of type `C' machines is higher and they may only be used in casinos.

(8) - Article 38(2), point 2, of Law No 5/1990, which amends Article 3(4) of Royal Decree Law No 16/1977 of 25 February 1977 (BOE of 7 March 1977, p. 780).

(9) - Pages 6 and 7 of the English translation.

(10) - Article 3 of Decree Law No 16/1977.

(11) - Page 7, point 6, of the English translation of the order for reference. Article 38(2), point 1, of Law No 5/1990 amended Article 3 of Decree Law No 16/1977 by substituting a fixed annual rate of PTA 375 000 for the rate of 20% in respect of type `B' machines.

(12) - Article 38(2), point 2(3), of Law No 5/1990 provides that `the amount of the tax is equal to the difference between the fixed rates set out in point 1 above and those specified by Decree Law No 7/1989 of 29 December'. In respect of type `B' machines, this amount is therefore the difference between the fixed rate of PTA 375 000 and that of PTA 141 750 (Article 39 of Decree No 7/1989, BOE of 30 December 1989, p. 8325).

(13) - Page 12 of the French translation of its written submissions.

(14) - Page 3, paragraph IV, of the English translation of the order for reference.

(15) - Page 7 of the French translation of the written submissions.

(16) - See, in particular, page 15 of the French translation of the written submissions of the Spanish Government, and page 12 of the French translation of the written submissions of the Commission.

(17) - See, recently, Case C-208/91 Beaulande [1992] ECR I-6709, paragraph 13.

(18) - Case 73/85 Kerrutt [1986] ECR 2219, paragraph 22, and Joined Cases 93/88 and 94/88 Wisselink and Others [1989] ECR 2671, paragraph 14.

(19) - Page 9, point 10, of the English translation of the order for reference. It should be noted that the applicants in the main proceedings also refer to the case-law of the Tribunal Supremo. As it held in its judgment of 19 December 1990, as cited on page 6, point 2, of the French translation of their written submissions, `there is no doubt that the person ultimately accountable for the tax is the player, on to whom the fiscal burden is passed'. According to the judgments of that court of 23 February and 5 May 1990, which are also cited by the applicants in the main proceedings, `the so-called "fiscal levy" on type "B" gaming machines is a fixed annual rate calculated on the basis of the presumed yield of the machine'.

(20) - Page 10 of the English translation of the order for reference. The Audiencia Nacional states that `this concept of passing on gives rise to the doubts which have been set out below'.

(21) - See point 14 of this Opinion.

(22) - Case 26/62 Van Gend en Loos [1963] ECR 1, 11. See also Case 83/78 Pigs Marketing Board [1978] ECR 2347, paragraph 25.

(23) - First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

(24) - Third recital in the preamble to the directive.

(25) - Fourth recital in the preamble to the directive.

(26) - Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16).

(27) - Case 295/84 [1985] ECR 3759, paragraph 16, and, more recently, Case C-347/90 Bozzi [1992] ECR I-2947, paragraph 9.

(28) - Beaulande, paragraph 12, emphasis added.

(29) - Case C-200/90 Dansk Denkavit and Poulsen Trading [1992] ECR I-2217, paragraph 11. See also Case 252/86 Bergandi [1988] ECR 1343, paragraph 15; Wisselink and Others, cited above, paragraph 18; Case C-109/90 Giant [1991] ECR I-1385, paragraph 12; Bozzi, cited above, paragraph 12; and Beaulande, cited above, paragraph 14.

(30) - Article 2 of the First Directive.

(31) - Bergandi, cited above, paragraphs 8 and 17.

(32) - Point 8 of the written submissions referring to the Bergandi case, cited above, paragraph 14, according to which `[in] order to decide whether a tax can be characterized as a turnover tax it is necessary, in particular, to determine ... whether it has the effect of compromising the functioning of the common system of VAT by levying a charge on the movement of goods and services and on commercial transactions in a way comparable to VAT'.

(33) - Page 16, point 1, of the French translation of the written submissions.

(34) - Point 9 of the written submissions.

(35) - Article 4(1) defines a taxable person as `any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'. Paragraph 2 refers to `all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions' and operations involving `the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis'.