OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 9 July 2009 (1)

Case C?267/08

SPÖ Landesorganisation Kärnten

v

Finanzamt Klagenfurt

(Reference for a preliminary ruling from the Unabhängiger Finanzsenat (Austria))

1. The present case concerns the interpretation of Article 4(1) and (2) of the Sixth VAT Directive. (2) The referring court wishes to know whether certain financial transactions carried out by a political party constitute economic activities for the purposes of that directive.

I – Facts and the questions referred for a preliminary ruling

2. The appellant in the main proceedings is the Carinthia provincial organisation of the Sozialdemokratische Partei Österreichs (Social Democratic Party of Austria; 'the SPÖ'). That provincial organisation is divided into individual district and local groups. The provincial organisation has individual legal personality, as do the district groups, but the local groups do not.

3. Between 1998 and 2004 the appellant organised for its subordinate groups a variety of publicity and advertising activities in connection with various elections in Austria. In essence, it acted as a central purchasing agency acquiring advertising material which was subsequently passed on to the district and local groups in return for a fee. It also organised the annual party ball. Those activities were described as 'external advertising', by contrast with the training of party officials which was referred to as 'internal advertising'. The present case concerns only the 'external advertising'.

4. In its tax returns, the SPÖ declared various amounts in respect of taxable turnover in connection with ‘external advertising’ and claimed a deduction of the corresponding input tax. A dispute arose between the SPÖ and the tax authorities as to whether, in performing external advertising activities for its subordinate groups, the appellant falls to be regarded, under the Sixth VAT Directive, as a taxable person which is entitled to deduct input tax incurred in that context. The Finanzamt Klagenfurt (Klagenfurt Tax Office) took the view that the SPÖ could not be regarded as a taxable person for the purposes of the directive. The SPÖ appealed to the Unabhängiger Finanzsenat (Independent Finance Tribunal), Klagenfurt, which referred the following eight questions to the Court of Justice:

‘(1) Is Article 4(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (the Sixth Directive) to be interpreted in such a way that “external advertising” by the legally independent provincial organisation of a political party, taking the form of publicity, information provision, the staging of party events, the supply of advertising material to district organisations and the organisation and holding of an annual ball (the SPÖ Ball), is to be regarded as an economic activity if revenue is obtained from (partially) passing the expense of the “external advertising” on to the likewise legally independent party structures (district organisations etc.) and from entrance fees from the holding of the ball?

(2) In the assessment of whether there is “economic activity” within the meaning of Article 4(1) and (2) of the Sixth Directive, is it prejudicial that the activities mentioned in Question 1 are also “reflected” back to the provincial organisation and hence are beneficial to it too? It is in the nature of things that as a result of those activities the party as such and its political objectives and views are always also being publicised, if not in the forefront, nevertheless as an inevitable side effect.

(3) Can there still be “economic activity” in the above sense where the expenditure on “external advertising” persistently exceeds many times over the revenue obtained from that activity by passing on the expense and the revenue obtained from holding the ball?

(4) Is there an “economic activity” even where the passing on of the expense does not take place according to readily ascertainable economic criteria (e.g. allocation of charges according to cause or benefit) and it is essentially left to the subordinate organisations to determine whether and to what extent they wish to contribute to the expenditure of the provincial organisations?

(5) Is there an “economic activity” even where advertising services are invoiced to the subordinate organisations in the form of a charge the amount of which is determined firstly by the number of members in the relevant local organisation and secondly by the number of members it sends to representative assemblies?

(6) In determining whether there is economic activity, should subsidies from public funds which do not form part of the taxable consideration (such as, for example, the financing of parties under the Carinthian Parteienförderungsgesetz (Law on the financing of parties) be taken into consideration as it were as economic advantages?

(7) If the “external advertising”, viewed in isolation, constitutes an economic activity within the meaning of Article 4(1) and (2) of the Sixth Directive, does the fact that publicity and election advertising is a central feature of the activity of political parties and a condition *sine qua non* for the implementing of political objectives and programmes preclude such activity from being classified as an “economic activity”?

(8) Are the activities performed by the appellant and described by it “external advertising” of

such a nature as to be comparable with, or correspond in content to, activities carried out by commercial advertising agencies for the purposes of Annex D (number 10) of the Sixth Directive? If that question is answered affirmatively, can the extent of the activities be described as “not insignificant” in the context of the revenue/expenditure structure prevailing at the material time for the purposes of the appeal?’

II – **Analysis**

5. Article 2 of the Sixth VAT Directive provides:

‘The following shall be subject to [VAT]:

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

2. the importation of goods.’

6. Article 4(1), (2) and (5) of the Sixth VAT Directive provides:

‘1. Taxable person shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services, mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

…

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition …’

7. The issue to be determined by the Court is whether the external advertising carried out by the Carinthian provincial organisation of the SPÖ constitutes an ‘economic activity’ within the meaning of Article 4 of the Sixth VAT Directive, making that organisation a ‘taxable person’ under that directive. If it does, then the Carinthian provincial organisation can claim the right to deduct input tax under Article 17 of the directive; if not, no such claim can be made.

8. The very wording of the relevant provisions makes it clear that the term ‘economic activities’ must be given a broad interpretation. As the Court explained in *T?Mobile Austria*, ‘the scope of the term “economic activities” is very wide and … the term is objective in character in the sense that the activity is considered per se and without regard to its purpose or results’. (3) Therefore, ‘all stages of production, distribution and the provision of services’ (4) fall within the ambit of Article 4.

9. However, the activities listed in Article 4(2) can be properly regarded as ‘economic activities’, making the person engaging in them a ‘taxable person’, only if they aim at the procurement of income on a continuing basis. (5) It follows that, if an activity produces income only occasionally, or produces no income at all, the person undertaking that activity does not qualify as

a ‘taxable person’ with the right to deduct input tax.

10. Further, Article 2 of the Sixth VAT Directive provides that ‘the supply of goods or services effected for consideration’ is to be subject to VAT. Here, the existence of consideration is made a prerequisite for the application of VAT to a specific transaction. That provision is part of Title II, which defines the scope of the directive as a whole. Therefore, the interpretation of every other provision of the directive must take place against the background of Article 2. I agree with the Finanzamt Klagenfurt, the Greek Government and the Commission that the supply of services without consideration does not constitute an ‘economic activity’ for the purposes of Article 4 of the directive.

11. The first thing to note is that, according to well-established case-law of the Court of Justice, a supply of services is taxable for the purposes of VAT ‘only if there is a direct link between the service provided and the consideration received’. (6) Further, the Court has already examined the effect of the requirement of consideration on the supply of information and advertising services. *Hong Kong Trade Development Council* (7) concerned the refusal of the Dutch Revenue Service to recognise the office of the Hong Kong Trade Development Council in the Netherlands as a taxable person. The office provided traders free of charge with information about Hong Kong and opportunities for trade with Hong Kong businesses. The Court held that the office could not be regarded as a taxable person since it did not generate income from the provision of information. It stated that ‘where a person’s activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the free services in question are therefore not subject to value added tax. In such circumstances the person providing services must be assimilated to a final consumer … In fact, the link between him and the recipient of the goods or service does not fall within any category of contract likely to be the subject of tax harmonisation …; in those circumstances, services provided free of charge are different in character from taxable transactions which, within the framework of the value added tax system, presuppose the stipulation of a price or consideration’. (8)

12. The issue of the provision of centrally commissioned advertising services came before the Court of Justice in *Apple and Pear Development Council*. (9) The Council was a public law body whose functions related to advertising and the promotion of the quality of apples and pears grown in England and Wales. It was funded by a mandatory annual charge imposed on growers of apples and pears at a rate not exceeding a specified amount in respect of each hectare of land planted with apple or pear trees, or a specified amount in respect of every 50 trees planted on a grower’s land. The Court noted that the Council’s functions related to the common interest of the growers and any benefits deriving from its advertising activity accrued to the whole industry; individual farmers enjoyed such benefits only indirectly. Further, there was no relationship between the level of the benefits enjoyed by individual farmers and the amount of the mandatory charge they had to pay to the Council. The charge resulted not from a contractual but from a statutory obligation and it was recoverable whether or not the individual farmer had actually benefited from the Council’s advertising activity. The Court concluded that the Council’s activity did ‘not constitute “the supply of … services effected for consideration”’. (10)

13. The combined effect of the preceding cases was explained by the Court in *Tolsma*. (11) The claimant in the main proceedings, Mr Tolsma, was a street musician who collected donations from passers-by. The Dutch tax authorities levied VAT on this activity. He claimed that the donations were not subject to VAT as there was no obligation on passers-by to pay him any money, and when they decided to do so they determined the amount themselves. The tax authorities took the view that there was a direct link between the service provided and the payments obtained, with the result that his activity constituted a supply of services for consideration. The Court ruled that ‘a supply of services is effected “for consideration” within the

meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. (12)

14. In the present case, the national court states in the order for reference that between 1998 and 2003 the provincial organisation of the SPÖ passed on charges for advertising and publicity services to the district and local groups only to a limited extent. No clear criteria existed for the calculation of the charges, and it appears that the subordinate groups were at liberty to decide for themselves – according to their financial resources – whether to contribute to the expenditure of the provincial organisation. Clearly, the SPÖ had no internal party rules regulating the mode of charging for such services. The situation changed slightly in 2004. As from that year, certain publicity services were invoiced to the district groups in the form of a 'publicity charge', the amount of which was determined by the number of the relevant district's party members and the number of members of parliament returned by that district. This money covered only a limited part of the expenditure incurred by the provincial organisation of the SPÖ which had persistent losses arising from its advertising and publicity activities.

15. I think it is clear that the present case is analogous to *Hong Kong Trade Development Council*, *Apple and Pear Development Council* and *Tolsma*. For the period between 1998 and 2003 there was no system in place for the regular passing on of publicity expenses to the district and local groups; those groups were under no obligation, contractual or other, to contribute; and if they did decide to do so, it was up to them to determine, according to their financial situation, the amount of the contribution. Such an arrangement constitutes the supply of services for no direct consideration.

16. The essence of the system introduced in 2004 is not different in any significant respect. Again, there was no reciprocal performance: the subordinate groups did not really pay for the services they were receiving, as the value of the contributions they paid to the provincial organisation did not correspond to the actual value of its publicity and advertising services; and the contributions were calculated at a flat rate based on the number of party members in a given district and the number of MPs returned by the district. This is why the provincial organisation incurred significant and persistent losses. Further, the publicity generated by the activities of the provincial organisation benefited the party as a whole; any benefit received by the district and local groups was not individual and direct, but ancillary and indirect.

17. Finally, there is a broader point to be made about the character of the publicity and advertising in the present case. As the Finanzamt Klagenfurt and the Greek Government correctly submitted, this is a typical case of political speech. Political parties do not engage in publicity and advertising campaigns in order to generate income but in order to make their ideas known to the public. They play a central role in the system of representative democracy and the outreach activities they organise are part of the functions they perform as players within that system. Any financial element entailed by party publicity is subordinate to the political character of such publicity. When the provincial organisation of the SPÖ performed 'external advertising' activities for its subordinate groups in relation to a number of different elections in Austria (municipal council, provincial assembly, national assembly, federal presidency), it did not act as an economic actor guided by financial considerations but as a political organisation aiming at electoral victory.

18. That conclusion is not undermined by the fact that the SPÖ received funding from the State under the relevant Austrian legislation on the financing of political parties. Such proceeds do not constitute income generated by an economic activity; in a democratic system parties are publicly funded so as to be able to perform their political functions for the benefit of the citizens. Indeed,

the existence of public funding reinforces the position that the appellant's publicity activities are not economic activities involving consideration. The Austrian State funded the SPÖ precisely because it is not an ordinary economic actor but a political group whose priorities are different from those of a commercial undertaking. Accordingly, there are no grounds for comparing the appellant to a commercial advertising agency, which, by its very nature, is in the advertising business for making money. By contrast – if I may be forgiven the irony – it would be generally inappropriate for a political party to engage in political activities with the aim of obtaining monetary profit: normally, that would be considered corruption.

19. Having said that, I would like to point out that there may be circumstances where a political party engages in economic activities which are commercial in nature, providing goods or services for consideration. At the oral hearing, the Greek Government gave the examples of a party that had opened and operated a shop selling organic products and another one which sold to businesses advertising space in its publications. I think that both activities are 'economic activities' for the purposes of the directive and render the party a 'taxable person' subject to VAT. But the 'external advertising' activities of the provincial organisation of the SPÖ are not such activities.

III – **Conclusion**

20. I therefore propose that the Court state in reply to the questions referred that Article 4(1) of 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 is to be interpreted in such a way that 'external advertising' by the legally independent provincial organisation of a political party taking the form of publicity, information provision, the staging of party events, the supply of advertising material to district organisations and the organisation and holding of an annual ball is not to be regarded as an economic activity if revenue is obtained from (partially) passing the expense of the 'external advertising' on to the likewise legally independent party structures (district groups and so on) and from entrance fees from the holding of the ball. Such a provincial organisation is not in a position comparable to that of a commercial advertising agency.

Furthermore, subsidies from public funds paid to the political party under the national law on the financing of parties are not economic advantages making the relevant activity an 'economic activity' for the purposes of the Sixth VAT Directive.

1 – Original language: English.

2 – 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).

3 – Case C?284/04 *T?Mobile Austria and Others* [2007] ECR I?5189, paragraph 35. See also Case C?223/03 *University of Huddersfield* [2006] ECR I?1751, paragraph 47.

4 – Case C?305/01 *MGK-Kraftfahrzeuge-Factoring* [2003] ECR I?6729, paragraph 42.

5 – Case C?186/89 *van Tiem* [1990] ECR I?4363, paragraph 18; Case C?77/01 *EDM* [2004] ECR I?4295, paragraph 48; *T?Mobile Austria*, cited in footnote 3, paragraph 38.

6 – Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12; Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11.

7 – Case 89/81 [1982] ECR 1277.

8 – Ibid., paragraph 10.

9 – Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443.

10 – Ibid., paragraph 17.

11 – Case C?16/93 [1994] ECR I?743.

12 – Ibid., paragraph 14.