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Opinion of Mr Advocate General Jacobs delivered on 17 May 1989. - Skatteministeriet v Morten Henriksen. - Reference for a preliminary ruling: Højesteret - Denmark. - Turnover tax - Exemption. - Case 173/88.

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Opinion of the Advocate-General

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My Lords,

1 . In this reference from the Hoejesteret (Danish Supreme Court) the question arises whether VAT should be charged on the letting of individual, closed garages under the terms of Article 13B(b) of the Sixth VAT Directive (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, Official Journal 1977 L 145 p . 1).

2 . Article 13 of the Sixth VAT Directive is entitled "Exemptions within the territory of the country ". Article 13A is headed "Exemptions for certain activities in the public interest ". Article 13B is headed "Other exemptions" and provides as follows :

"Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse :

(a) ...;

(b)the leasing or letting of immovable property excluding :

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

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

3 . lettings of permanently installed equipment and machinery;

4 . hire of safes .

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

(c) ...".

3 . Article 13C is headed "Options" and reads as follows :

"Member States may allow taxpayers a right of option for taxation in cases of :

(a) letting and leasing of immovable property;

(b) the transactions covered in B(d)(g) and (h) above .

Member States may restrict the scope of this right of option and shall fix the details of its use ."

4 . Article 13B must be read in the light of the seventeenth recital of the preamble to the Directive :

"Whereas Member States should be able, within certain limits and subject to certain conditions, to take or retain special measures derogating from this Directive in order to simplify the levying of tax or to avoid fraud or tax avoidance ."

5 . The Sixth VAT Directive was implemented in Denmark by Law No 204 of 10 May 1978, which incorporated the substance of the provisions of, among others, Article 13B(b) of the Directive .

6 . The point at issue between the parties to the main action, Mr Henriksen and the Ministry of Fiscal Affairs, is whether the letting by Mr Henriksen of garages situated in a garage complex owned by him is the letting of "immovable property" or the "letting of premises and sites for parking vehicles ". If it is the former it will in principle fall within the exemption from VAT (subject to the power of Member States to apply further exclusions under the final words of Article 13B(b) cited above). If it is the latter it will be excluded from the exemption and therefore subject to VAT .

7 . It appears from the documents in the case that the garage complex concerned comprises two buildings each with 12 garages which were erected at the same time as a building development of 37 terraced houses . Some of the garages are let to residents of the housing development whilst others are let to residents in the same neighbourhood . They are lock-up garages which are partitioned and each has its own door . Similar sorts of garages may be seen behind houses or blocks of flats throughout Europe . Mr Henriksen made it clear at the oral hearing that he owned only the garages and not any of the houses .

8 . In the national proceedings, at first instance the OEstre Landsret (Eastern Division of the High Court) held that the letting of such garages was not subject to tax . The Court considered that, in accordance with the natural linguistic meaning of "site for parking" in the Danish law, the exclusion from the exemption concerning the letting of immovable property did not encompass garages such as those in issue; and that it was not sufficiently clear from the wording of Article 13B(b)(2) of the Directive, either in the Danish or in the other versions, that the interpretation adopted by the defendant was correct . When the matter came before the Supreme Court on an appeal by the defendant Ministry, that court referred two questions to this Court by an order lodged at the Registry on 27 June 1988 . The questions referred are as follows :

"1 . Should Article 13B(b) of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (Sixth VAT Directive) be understood as meaning that tax liability on the letting of 'premises and sites for parking vehicles' also encompasses the letting of garages of the type in question in the case?

2 . If the above question is answered in the affirmative, a clarification is requested as to whether the said Article is to be interpreted as meaning that the Member States are under a duty to subject

the letting of garages of the type in question in the case to tax ."

9 . Both the Danish Government and the Commission have submitted written observations to this Court . In respect of the first question, the Danish Government argues that any place for parking vehicles, whether it is open, covered or situated in a building, is covered by the term "premises and sites for parking vehicles ". It relies on the various language versions of Article 13B(b)(2) of the Directive, arguing that the English version (" premises and sites ") is particularly helpful since it shows the all-encompassing nature of the concept intended by the Community legislator . It argues that all exemptions from VAT should be narrowly construed since the purpose of the Directive is to apply a general system of taxation and exemptions should be "correct and straightforward ((in)) application ". To permit this form of garage to be exempted would create an anomaly since it would then be more profitable to let this form of garage rather than any other form of parking .

10 . The Commission suggests in effect that the first question should be answered in the affirmative with the exception that where such a garage is let as part of the letting of immovable property (for example the letting of a house or flat together with a garage) then VAT should not be imposed on that part of the rent which relates to the garage . It argues that in such circumstances the letting of the garage or parking space is ancillary to the purpose of the lease itself . The Commission considers that the legislation of most Member States shows that VAT is imposed on the letting of premises and sites for parking vehicles only when such letting reveals a genuinely commercial character . Since, as it avers, no Member State levies VAT when that letting is part of a contract for the letting of a dwelling the Commission suggests that VAT should only be levied when a separate price is specified for the rental of the garage or parking space .

11 . If this case had fallen to be decided on the basis of the English language version of the Directive taken alone, I would have had little difficulty in reaching the conclusion that garages of the kind in issue in this case fall within the exclusion denoted by the words "premises and sites for parking vehicles" and that the letting of such garages was liable to VAT, possibly subject to an exception of the kind suggested by the Commission where the letting of the garage was merely ancillary to the letting of other property such as a house or flat . I shall consider in due course the issues which might arise on that view .

12 . But it is clear in this case that there are variations in the different language versions of the Directive and it is necessary, therefore, to consider the several language versions, and also to seek to place the provisions in issue in the context of the Directive as a whole, seen in the light of its objectives .

13 . In the English language version, the term "premises", in particular, seems sufficiently broad to cover any kind of structure placed on the land . In other language versions, however, the position is less clear . In the French version, for example, the terms used are : "à l' exception ... des locations d' emplacement pour le stationnement des véhicules ". The term "emplacement" in this context is more apt to cover a car parking space, marked out in a car-park on open land, or provided in a purpose-built car park, such as an underground car-park of the kind found in city centres . Only by extension, perhaps, would the term "emplacement pour le stationnement des véhicules" be apt to cover a building such as a garage .

14 . The other language versions seem closer to the French than to the English on this point . The Danish has "pladser til parkering af koeretoejer", literally "places ((or sites)) for parking vehicles"; the Dutch has "verhuur van parkeerruimte voor voertuigen"; the German has "der Vermietung von Plaetzen fuer das Abstellen von Fahrzeugen" and the Italian has "delle locazioni di aree destinate al parcheggio dei veicoli", all of which seem to have similar connotations to the French . Thus of the six versions of the Directive authentic at the time of its adoption, all except the English one can be taken to indicate that the exclusion is at least primarily confined to the letting of places, or spaces, for parking; a meaning which, in the English text, would have been better expressed by

the term "sites", rather than "premises and sites", for parking vehicles .

15 . Although these linguistic considerations must carry considerable weight, especially in a legislative instrument in the field of taxation, it must be considered whether other factors, particularly the scheme and purpose of the Directive, might lead to a different interpretation, and in particular an extension of the literal meaning such as to include closed garages of the kind at issue : see Case 139/84 Van Dijk' s Boekhuis vStaatssecretaris van Financiën ((1985)) ECR 1405 at 1418 .

16 . The history of the text is unhelpful in this respect, although it may be mentioned that the Commission' s proposal for a Directive (which also went far wider in excluding from the exemption the letting of industrial and commercial property) referred only to "contracts for the supply of parking facilities" in the English or "des contrats de parking" in the French text (Bulletin of the European Communities, Supplement 11/73, p . 43).

17 . The provisions must also be seen in their context . The immediate context provides little assistance, since the other exclusions specified in Article 13B(b)(2) are a motley set, with no guiding principle apparent . On the other hand, the exemption provided for by Article 13B(b) is very broadly expressed, extending as it does to the leasing or letting of all immovable property subject to the specified exclusions . In the context of that broadly worded exemption, it would seem excessive to interpret the exclusion relating to the letting of sites for parking vehicles so widely as to extend it to a transaction which appears to fall outside its terms, and in so doing to give it a meaning which would be contrary to the prevailing sense of the text .

18 . It may be inferred from the scheme of the Directive as a whole and the terms of Article 2 in particular that the basic principle of the Directive is that the supply of all goods and services is subject to VAT, if effected for consideration by a taxable person acting as such, unless expressly exempted . The provisions for exemption must be interpreted restrictively since they constitute an exception to the basic principle of the Directive : see for example Case 51/88 Hamann v Finanzamt Hamburg-Eimsbuettel, judgment of 15 March 1989, at paragraph 19 . It could be argued on that basis that the exemption from the basic rule (for the leasing or letting of immovable property) should be interpreted restrictively and that the exclusion from the exemption (for the letting of premises and sites for parking) should be interpreted broadly, since that would result in the application of the basic rule . However, even on such a broad reading, I do not consider that the terms of the exclusion can be extended to include closed garages without departing substantially from the normal meaning of the words used in most of the language versions . Moreover, in a Directive intended to be applied uniformly throughout the Community by the tax authorities of the Member States, and in which the exemptions are expressly designed to be applied in a "straightforward" manner, it is appropriate that the terms used should be given, where possible, their ordinary meaning . Consequently the aims of the Directive in that respect support the view that the exclusion relating to the letting of sites for parking should not be interpreted as extending to the letting of closed garages .

19 . The Danish Government has suggested that the Directive seeks to achieve a system of VAT which is neutral from the consumer' s point of view, and that it would be contrary to that objective to exempt the letting of closed garages, since it would then become more profitable to let closed garages rather than any other form of parking . The Government also argues that such an exemption would give rise to difficult problems of demarcation between different types of parking place . But similar difficulties would arise if the letting of closed garages were not exempt, since, as the Commission accepts, even if the letting of garages were to be treated as generally subject to VAT, exceptions might have to be made where the letting was ancillary to the letting of other immovable property such as a house . The anomalies that would thus arise are well illustrated by the facts of the present case, where some of the garages are let to residents of the houses which form part of the development in which the garage complex is located, while other garages in the

same complex are not . The Commission proposes as a criterion that VAT should be levied in respect of a garage only when a separate price is specified for the letting of the garage, but that criterion could plainly itself give rise to anomalies or even to abuse . The Commission' s view would lead to results which are no easier to reconcile with "the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse ". The Commission also draws a distinction, based on a survey of the practice of certain Member States, between residential garages and commercial lettings . That distinction does not seem persuasive, when it is recalled that the letting of commercial property generally is exempt from VAT under the Directive . Although under Article 13C Member States may allow taxpayers a right of option for taxation in cases of letting and leasing of immovable property, the provisions of Article 13C also make no distinction between commercial and other property .

20 . Accordingly it seems to me from the terms of the Directive, taken in their context, that the exclusion does not apply to the letting of individual closed garages of the kind in issue in this case, and that the first question referred must be answered in the negative .

21 . On the view I take of the first question, the second question referred does not arise . If however the view were taken that the letting of garages of the kind in issue is excluded from the exemption, then in my view the second question would have to be answered in the affirmative . The effect of the exclusion would be that such a letting was subject to VAT, and the Directive permits of no discretion in that respect . The only possibility of discretion arises under the final words of Article 13B(b), which allow Member States to apply further exclusions to the scope of the exemption, but do not allow Member States to derogate from the exclusions specified . The discretion allows Member States to extend liability to VAT, not to restrict it .

22 . That raises, in my view, a further question, which has not been adverted to but which seems to me to require an answer . As I have just mentioned, the final words of Article 13B(b) allow Member States to apply further exclusions to the scope of the exemption . The discretion conferred by those words is broad, and while that discretion is no doubt subject to certain limits, there does not seem to me to be any limitation which can be read into the Article which would preclude a Member State, if it chose to do so, from extending the exclusion provided for in respect of sites for parking vehicles so as to cover also individual closed garages of the kind in issue in this case . The question whether the exclusion has been extended in that way is a question of interpretation of the national legislation and is a matter for the national courts . However, I think it is plain from the scheme and structure of the Directive that, on the proper interpretation of its provisions, the national legislation cannot have that effect unless it contains its own specific provisions to that effect . Where the national legislation does no more than reproduce the provisions of the Directive, with its specific exemptions and specific exclusions, then the legislation must be interpreted in accordance with those provisions, and it is not open to the national tax authorities to apply any further exclusions unless the Member State has adopted additional legislative measures to extend liability to VAT to such lettings .

23 . Accordingly in my opinion the questions referred should be answered as follows :

Article 13B(b) of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of Member States relating to turnover taxes (the Sixth VAT Directive) must be interpreted as meaning that the letting of individual closed garages is not subject to VAT, unless a Member State has itself adopted specific legislative measures to extend liability to VAT to such lettings .

(*) Original language : English .