OPINION OF ADVOCATE GENERAL MAZÁK delivered on 29 March 2007 [1]

1. The two questions referred for a preliminary ruling concern the interpretation of Article 15(5) 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, [2] as amended by Council Directive 92/111/EEC of 14 December 1992 [3] ('the Sixth Directive').

2. The questions arose in the course of proceedings between the company Navicon ('Navicon') and the competent Spanish tax authority concerning the refusal of the latter to exempt from value added tax ('VAT') operations consisting of the partial chartering of a vessel in order to transport containers. In this connection, it should be noted that the Spanish legislation implementing the Sixth Directive provides only for full chartering to be exempted.

3. The Court is therefore asked to construe the concept of chartering used in Article 15(5) of the Sixth Directive, and in particular to determine whether the concept applies only to the chartering of the whole vessel ('full' chartering) or also to the chartering of a part of it ('partial' chartering).

I — The relevant legislation

A — *Community legislation*

4. Article 15 of the Sixth Directive states:

'Exemption of exports outside the Community, for like transactions and international transport:

Without prejudice to other Community provisions Member States shall exempt the

1 — Original language: English.
2 — OJ 1977 L 145, p. 1.
3 — OJ 1992 L 384, p. 47.

following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

...

(4) the supply of goods for the fuelling and provisioning of vessels:

(a) used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities;

(b) used for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ships' provisions; ...

(5) the supply, modification, repair, maintenance, chartering and hiring of the sea-going vessels referred to in paragraph 4(a) and (b) and the supply, hiring, repair and maintenance of equipment — including fishing equipment — incorporated or used therein. ...'

B — *National legislation*

5. Article 22.1 of Law 37 of 28 December 1992 on Value Added Tax provides:

'Exemptions on transactions equated to exports

The following transactions shall be exempt from the tax under the conditions and in the circumstances to be laid down by regulation:

One. The supply, construction, modification, repair, maintenance, full chartering and hiring of the vessels listed below:

(1) Vessels capable of sailing on the high seas used for international maritime shipping in the exercise of commercial

activities of transport of goods or passengers against payment, including tourist services or industrial or fishing activities. ...'

II — Factual background, procedure and the questions referred

6. Navicon and the company Compañía Transatlántica Española SA entered into a partial chartering agreement in which the former provided the latter, against payment of a sum, with part of the space on its vessels to transport containers between various ports on the Iberian peninsula and a territory outside the scope of application of value added tax (the Canary Islands).

7. Navicon did not apply the amount of value added tax to the respective invoices, as it believed that the transaction was exempt from the payment of VAT. The competent Spanish tax authority made an adjustment to the amounts paid under the chartering agreement for the amount of VAT, as it took the view that the exemption did not apply when there was partial chartering and not full chartering.

8. Navicon challenged this adjustment before the Tribunal Económico Administrativo (Regional and Administrative Court) of Madrid, but was not successful. It appealed against this decision before the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid), which decided to stay the proceedings and make a reference to the Court of Justice of the European Communities for a preliminary ruling on the following questions:

'(1) Is the term "chartering" in the exemption provided for in Article 15(5) of the Sixth Directive to be interpreted as including only chartering of the entire capacity of the vessel (full chartering) or as including chartering relating to a part or percentage of the vessel's capacity (partial chartering)?

(2) Does the Sixth Directive preclude a national law which allows exemption only for full chartering?'

III — Main submissions to the Court

9. The *Greek and Spanish Governments* take the view that the concept of 'chartering' used in Article 15(5) of the Sixth Directive refers

only to the chartering of the full space of the vessel and accordingly draw the conclusion that the national legislation complies with the Directive. The exemptions laid down under the Sixth Directive are to be strictly interpreted, because they constitute an exception to the general principle according to which VAT is to be levied on any service supplied against payment by a taxable person.

10. The *Belgian Government* and the *Commission* contend that the concept of chartering refers both to partial and full chartering.

11. According to the *Belgian Government*, the purpose of the wording of Article 15(5) of the Sixth Directive is to exempt the chartering of certain vessels, in particular seagoing vessels referred to in paragraph 4(a) and (b), and not to exempt particular types of chartering. In any event, according to the case-law of the Court, when a provision of Community law can be construed in different ways, the interpretation which ensures that the provisions retain their effectiveness must be favoured. In the present case, however, an interpretation of the concept of chartering which is limited to full chartering puts the effectiveness of Article 15(5) of the Sixth Directive at risk, because, for the same route and the same type of vessel, a partial chartering would lead to the payment of VAT whereas a full chartering would be exempted.

12. The *Commission* submits in the first place that the Court has consistently held that the first sentence of Article 15 of the Sixth Directive does not give Member States the ability to influence the material scope of the Sixth Directive, as defined by that Directive. Furthermore, goods exported to third countries must be free of any taxes when they leave the territory of the Community, which requires that chartering services should not be taxed, whether they are partial or full. Lastly, if the concept of chartering were to be limited to full chartering only, this would mean that the right to an exemption would depend on the size of the vessel, because a similar volume of freight would, or would not, be exempted, depending on the size of the vessel concerned.

13. However, the Commission also raises an argument which could support the view that the Spanish legislation is compatible with Community law. It could be said, by analogy, that partial chartering should be regarded as the carriage of goods, and thus as falling under Article 15(13) of the Sixth Directive, [4] which lays down inter alia an exemption for

4 — Article 15(13) of the Sixth Directive provides:
'The supply of services, including transport and ancillary operations, but excluding the supply of services exempted in accordance with Article 13, where these are directly connected with the export of goods or imports of goods covered by the provisions of Article 7(3) or Article 16(1), Title A.'

transport services relating to exported goods. However, the Commission takes the view that this argument should not be upheld. First, the wording of the Sixth Directive makes the chartering and carriage of goods subject to different legal regimes and, secondly, the two kinds of contract are very different.

14. The Commission submits that it is for to the national court to determine, on the basis of the wording of the agreement between the parties as well as on the basis of the nature and the content of the service provided, whether the contract in question fulfils the conditions required for a chartering agreement for the purposes of Article 15(5) of the Sixth Directive.

IV — Legal assessment

15. According to Article 15(5) of the Sixth Directive, the chartering of sea-going vessels is exempt from VAT. The provision does not define the concept of chartering more precisely.

16. In practice, chartering can relate to an entire vessel, in which case the operation is called 'full' chartering, or it can relate to a part only of the vessel, when it is referred to as 'partial' chartering.

17. It appears from the submissions of the Member States which have intervened in the present proceedings that the concept of chartering has not been interpreted in a uniform way throughout the Community, as is evidenced by the implementing legislation of some Member States, including Spain, from where the present reference for a preliminary ruling originates, which restrict the concept of chartering to 'full' chartering, whereas other national legislation, such as the Belgian legislation, appear to adopt a broader interpretation, according to which any kind of chartering, whether 'full' or 'partial', is exempted. Thus, the question arises of the scope to be given to the concept of chartering in the context of the VAT exemption under Article 15(5) of the Sixth Directive.

18. The Court of Justice has consistently held that VAT exemptions must be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on each service supplied for consideration by a taxable person. [5] The

5 — See, for example, Case C-382/02 *Cimber Air* [2004] ECR I-8379, paragraph 25.

Court has restated this principle, inter alia when construing the exemptions applicable to sea-going vessels. [6]

19. However this principle of strict interpretation cannot have the effect of giving Article 15 a meaning different from that which is clear from its wording. [7]

20. There is nothing in the provision in question or elsewhere in the wording of the Sixth Directive that would warrant a restriction of the term 'chartering' to 'full' chartering only. It appears that, unlike what is provided in the Sixth Directive with regard to the exemption under Article 15(4) of the directive, [8] Member States may not restrict the exemption laid down under Article 15(5) of the directive until Community fiscal rules specifying the scope of this exemption enter into force. Thus, restricting the meaning of the term 'chartering' in the context of the exemptions from VAT provided for by the Sixth Directive to 'full chartering' appears to go beyond the margin of discretion that Member States have when transposing that Directive into national law. Indeed, the definition of the scope of application of VAT belongs in principle to the Community legislature and for a restriction of the scope of application of VAT, in particular by means of national implementing legislation, to be compatible with the Sixth Directive, it must be possible to infer it from the wording, the purpose and/or the general scheme of the Sixth Directive.

21. In this respect, it must also be questioned whether a restrictive approach, such as that of the Spanish legislature, could be reconciled with the system and the objective of the Sixth Directive. In this respect, it should also be noted that exemptions are independent concepts of Community law which must be placed in the general context of the common system of VAT introduced by the Sixth Directive. [9]

22. As the Belgian Government and the Commission have submitted, to interpret the word 'chartering' used in Article 15(5) of the Sixth Directive as referring exclusively to full chartering would lead to serious inconsistencies in the treatment of chartering operations with respect to VAT. Under such an approach, the right to an exemption in respect of a chartering operation would depend on the size of the vessel, because a chartering operation for the transportation of the same volume of freight would be exempted on a small vessel, since it would

6 — See Case C-185/89 *Velker International Oil Company* [1990] ECR I-2561, paragraph 19, and Joined Cases C-181/04 to C-183/04 *Elmeka* [2006] ECR I-8167, paragraph 15.

7 — See, to this effect, *Cimber Air*, cited in footnote 5, paragraph 29.

8 — The second sentence of Article 15(4) provides as follows: 'The Commission shall submit to the Council as soon as possible proposals to establish Community fiscal rules specifying the scope of and practical arrangements for implementing this exemption and the exemptions provided for in (5) to (9). Until these rules come into force, Member States may limit the extent of the exemption provided for in this paragraph.'

9 — See, in particular, Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 21; Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 25; *Cimber Air*, cited in footnote 5, paragraph 23; and *Elmeka*, cited in footnote 6, paragraph 20.

use the full cargo capacity of the vessel and therefore be regarded as a full chartering, whereas on a larger vessel the same volume of freight would use only part of the full cargo capacity, which would therefore be regarded as partial chartering of the vessel. Such inconsistencies would put the effectiveness of Article 15(5) of the Sixth Directive at risk.

23. Moreover, if an agreement for the 'partial' chartering of seagoing vessels were not to be exempted, this would lead to situations where the transportation costs of some exported goods, namely those goods which are exported by means of a partial chartering, would not be exempted. Such an outcome would clearly be contrary to the principle of the country of destination, according to which goods are to be taxed in the country where they will be consumed by the end consumer. It follows in particular from that principle that goods which are intended to be exported outside the Community must be free of any tax, including any tax on their costs in respect of transportation outside the Community, because such costs will be included in the price of the exported goods.

24. It may be argued that the exclusion of 'partial' chartering from the scope of the exemption under Article 15(5) of the Sixth Directive relating to the 'chartering' of vessels does not necessarily threaten the principle of the country of destination. Indeed, the latter may be safeguarded for goods which are exported by means of a 'partial' chartering by the application of Article 15(13) of the Sixth Directive, which provides inter alia for the transport of exported goods to be exempted, provided those goods fulfil the conditions set out in that provision. As pointed out by the Commission, it is, however, questionable whether such an application of that article would be consistent with the system and the logic of the Sixth Directive.

25. First, it appears that an agreement for charter and an agreement for the transportation of goods are quite different with regard to their object and their legal regime. When a vessel — or part of it, in a case of partial chartering — is subject to an agreement for charter and hire, it is provided for a certain purpose, for example transportation, whereas an agreement for the carriage of goods is a contract by which the carrier undertakes the obligation to deliver goods to a certain destination. Put differently, while contracts for charter or hire concern the means of transportation as such, a contract of carriage concerns the contents which are to be carried by the means of transportation. It follows that while the charterer and the hirer have a right over the use of the vessel which is the subject of the agreement — or

part of it, in a case of partial chartering — the owner of the goods being carried on a vessel under an agreement for the carriage of goods has no such right, but can expect only that the goods are delivered to a given destination. These differences appear to support the argument that the relevant regime under the Sixth Directive should be different.

26. An assimilation of partial chartering to the carriage of goods is also likely to question the need for the separate exemption of full chartering. If partial chartering resembled carriage of goods to such an extent as to assimilate them in spite of substantial differences in the legal nature of the agreement, it may be doubted whether a separate exemption for chartering should exist at all and whether it should not be assimilated altogether to the carriage of goods. The assimilation of partial chartering to the carriage of goods would therefore be difficult to reconcile with the wording of the Sixth Directive.

27. Lastly, since these two types of agreement are plainly quite different in their legal nature, it may reasonably be assumed that the Community legislature would have made it clear in the Sixth Directive if it had intended to restrict the concept of chartering to full chartering alone and to assimilate partial chartering to the carriage of goods.

28. It follows from above that there is no compelling reason to assimilate 'partial' chartering to the carriage of goods for the purpose of the application of the exemptions from VAT under the Sixth Directive, rather than to consider it as falling under the exemption for chartering under Article 15(5) of the Sixth Directive. [10]

29. For all these reasons, the answer to the first question should be that the term 'chartering' in the exemption provided for in Article 15(5) of the Sixth Directive is to be interpreted as including both chartering of the entire capacity of the vessel (full chartering) and chartering relating to a part or percentage of the vessel's capacity (partial chartering).

30. It also follows from the above that the answer to the second question should be that the Sixth Directive precludes a national law which allows exemption only for full chartering.

10 — This being said, in order to ensure the proper application of the Sixth Directive there is nothing to prevent a national court from modifying the characterisation classification of an agreement for 'partial' chartering if it were to come to the conclusion that the latter was, in a given case and based on the contractual clauses of the agreement at issue, nothing else than a contract for the carriage of goods and therefore wrongly designated as an agreement for 'chartering' in order to fall under the conditions for exemption in respect of chartering operations as set out in Article 15(5) of the Sixth Directive.

V — Conclusion

31. In the light of the foregoing, I propose that the Court should answer the questions referred as follows:

(1) The term 'chartering' in the exemption provided for in Article 15(5) 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, as amended by Council Directive 92/111/EEC of 14 December 1992, is to be interpreted as including both chartering of the entire capacity of the vessel (full chartering) and chartering relating to a part or percentage of the vessel's capacity (partial chartering).

(2) The Sixth Directive precludes a national law which allows exemption only for full chartering.