OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 7 September 2006 [1]

I — Introduction

1. In the present case, questions have been referred on the interpretation 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] ('the Sixth Directive') which concern the supply of dental prostheses.

2. Firstly, it is necessary to clarify whether the exemption of such supplies contained in Article 13A(1)(e) of the Sixth Directive applies also where the dental prosthesis concerned is not supplied directly by a dentist or dental technician, but rather by an intermediary who does not himself have the relevant professional qualifications.

3. Secondly, the question arises as to whether a right to deduct turnover tax in respect of intra-Community supplies of dental prostheses exists where the supply is deemed taxable in the Member State of designation under a transitional arrangement in derogation of Article 13A(1)(e) of the Sixth Directive. Similar questions also underlie Case C-240/05 *Eurodental*. [3]

II — Legal framework

A — *Community law*

4. Article 2 of the First VAT Directive [4] provides the following definition of the essential elements of the common system of value added tax:

1 — Original language: German.

2 — OJ 1977 L 145, p. 1.

3 — See, in this respect, the Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 22 June 2006.

4 — 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 (I), p. 14).

'The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the 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.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.'

5. Article 13 of the Sixth Directive is headed 'Exemptions within the territory of the country'. Article 13A(1)(e) provides, in part:

'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 such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(e) services supplied by dental technicians in their professional capacity and dental prostheses supplied by dentists and dental technicians ...'

6. Article 28(3) of the Sixth Directive permits exemptions from Article 13 for a transitional period:

'During the transitional period referred to in paragraph 4 [5] the Member States may

(a) continue to subject to tax the transactions exempt under Article 13 or 15 set out in Annex E to this Directive; ...'

7. The transactions of dentists and dental technicians referred to in Article 13A(1)(e) of the Sixth Directive are listed in point 2 of Annex E, thereto.

5 — According to that provision, the transitional period is to last until the abolition of the rules in Article 28 which has not yet been effected in relation to the present transactions.

8. Council Directive 91/680/EEC of 16 December 1991 [6] inserted a new Title XVIa (Transitional arrangements for the taxation of trade between Member States; Articles 28a to 28m) into the Sixth Directive. These provisions still apply, since so far no definitive rules on the taxation of the movement of goods between undertakings in trade between Member States have been enacted.

9. Article 28a [7] lays down the following provisions regarding liability to tax in respect of intra-Community acquisition.

'1. The following shall also be subject to value added tax:

(a) intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax exemption provided for in Article 24 and who is not covered by the arrangements laid down in the second sentence of Article 8(1)(a) or in Article 28b(B)(1).

By way of derogation from the first subparagraph, intra-Community acquisitions of goods made under the conditions set out in paragraph 1a by a taxable person or non-taxable legal person shall not be subject to value added tax.

Member States shall grant taxable persons and non-taxable legal persons eligible under the second subparagraph the right to opt for the general scheme laid down in the first subparagraph. Member States shall determine the detailed rules for the exercise of that option, which shall in any case apply for two calendar years.

...

1a. The following shall benefit from the derogation set out in the second subparagraph of paragraph 1(a):

(a) ...

6 — OJ 1991 L 376, p. 1.

7 — In the version of Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47), corrigendum OJ 1993 L 197, p. 57.

(b) intra-Community acquisitions of goods other than those at (a), made:

— ... by a taxable person who carries out only supplies of goods or services in respect of which value added tax is not deductible, or by a non-taxable legal person,

— for a total amount not exceeding, during the current calendar year, a threshold which the Member States shall determine but which may not be less than the equivalent in national currency of ECU 10 000

and

— provided that the total amount of intra-Community acquisitions of goods did not, during the previous calendar year, exceed the threshold referred to in the second indent.

The threshold which serves as the reference for the application of the above shall consist of the total amount, exclusive of value added tax due or paid in the Member State from which the goods are dispatched or transported, of intra-Community acquisitions of goods other than new means of transport and other than goods subject to excise duty.'

10. Article 28b(B) defines the place of the intra-Community supply in exceptional cases as follows:

'1. By way of derogation from Article 8(1)(a) and (2), the place of the supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that of arrival of the dispatch or transport shall be deemed to be the place where the goods are when dispatch or transport to the purchaser ends, where the following conditions are fulfilled:

— the supply of goods is effected for a taxable person eligible for the derogation provided for in the second subparagraph of Article 28a(1)(a), for a non-taxable legal person who is eligible for the same derogation or for any other non-taxable person,

...

2. However, where the supply is of goods other than products subject to excise duty, paragraph 1 shall not apply to supplies of goods dispatched or transported to the same Member State of arrival of the dispatch or transport where:

— the total value of such supplies, less value added tax, does not in one calendar year exceed the equivalent in national currency of ECU 100 000, and

— the total value, less value added tax, of the supplies of goods other than products subject to excise duty effected under the conditions laid down in paragraph 1 in the previous calendar year did not exceed the equivalent in national currency of ECU 100 000. [8]

The Member State within the territory of which the goods are when dispatch or transport to the purchaser ends may limit the thresholds referred to above to the equivalent in national currency of ECU 35 000 where that Member State fears that the threshold of ECU 100 000 referred to above would lead to serious distortions of the conditions of competition. Member States which exercise this option shall take the measures necessary to inform the relevant public authorities in the Member State of dispatch or transport of the goods.

...

3. The Member State within the territory of which the goods are at the time of departure of the dispatch or transport shall grant those taxable persons who effect supplies of goods eligible under paragraph 2 the right to choose that the place of such supplies shall be determined in accordance with paragraph 1.

The Member States concerned shall determine the detailed rules for the exercise of that option, which shall in any case apply for two calendar years.'

8 — Greater details in this respect are now set out in Article 22 of Council Regulation (EC) No 1777/2005 of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax (OJ 2005 L 288, p. 1), which does not apply to the present case *ratione temporis*.

11. Under Article 28c(A) of the Sixth Directive, intra-Community supplies between two

Member States are in principle exempt from tax. This provision reads, in part, as follows:

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

(a) supplies of goods, as defined in Articles 5 and 28a(5)(a), dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

This exemption shall not apply to supplies of goods by taxable persons exempt from tax pursuant to Article 24 or to supplies of goods effected for taxable persons or non-taxable legal persons who qualify for the derogation in the second subparagraph of Article 28a(1)(a);

...'

12. Article 17 in the version of Article 28f of the Sixth Directive [9] lays down the right of deduction. Paragraphs 2 and 3 are relevant to this case:

'2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country,

...

9 — In the version of Directive 92/111 (cited in footnote 7).

3. Member States shall also grant every taxable person the right to the deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

(a) transactions relating to the economic activities referred to in Article 4(2), carried out in another country, which would be deductible if they had been performed within the territory of the country;

(b) transactions which are exempt pursuant to Article 14(1)(i), 15, 16(1)(B), (C), (D) or (E) or (2) or 28c(A);

(c) any of the transactions exempt pursuant to Article 13(B)(a) and (d)(1) to (5), when the customer is established outside the Community or when those transactions are directly linked with goods to be exported to a country outside the Community.'

B — *National law*

13. Under Article 11(1)(g) of the Netherlands Law on turnover tax, in the version in force until 1 December 1997, supplies by dental technicians were exempt from tax. According to the interpretation by the Netherlands courts, the exemption did not apply to supplies by intermediaries who are not themselves dental technicians.

14. Since 1 December 1997, the above provision has exempted 'supplies of dental prostheses' from tax without laying down precise provisions regarding the person of the supplier.

III — Facts and questions referred

15. VDP Dental Laboratory NV ('VDP'), a company established in the Netherlands, has dental fittings such as crowns, inlays, frames, bridges, etc. manufactured to order for dentists established in the Netherlands, Belgium, Denmark, Germany, France, Italy and non-member countries. To that end, the dentists who place the orders make one or more plaster casts of a set of teeth which are sent to VDP or collected by it. VDP assesses whether the casts are usable and, where necessary, sends them to a dental laboratory (usually established outside the Community). The laboratory supplies the dental prosthesis to VDP, who pays remuneration for it and, where necessary, has the dental prosthesis

imported into the Community. Finally, VDP supplies the prosthesis — in return for payment of remuneration and free at domicile after clearance through customs — to the dentist who ordered the prosthesis. VDP does not employ any qualified dental technicians or dentists.

16. VDP took the view that the supplies it made in the Netherlands are exempt from turnover tax and that it has no right to deduct turnover tax in respect of supplies to dentists established in the Netherlands. However, it deducted turnover tax in respect of supplies to dentists established outside the Netherlands.

17. In order to avoid double taxation, the tax authority permitted the deduction of input tax in so far as it was charged to VDP in respect of goods and services obtained by it which relate to intra-Community supplies. It did so on the condition that VDP recorded the VAT identification number of the purchaser in its accounts and indicated intra-Community supplies.

18. Since these conditions were not satisfied in respect of supplies to the abovementioned Member States (see point 15 above), the tax authority issued an additional assessment for turnover tax amounting to NLG 117 530 in respect of the period from 1 January 1996 to 31 March 1998.

19. The court of first instance ruled that the appellant's services in the period from 1 January 1996 to 1 December 1997 were not exempt under Article 11(1)(g) of the Law on turnover tax (in the version prior to 1 December 1997). With regard to the period from 1 December 1997 to 31 January 1998, the court ruled that although the services are not covered by the exemption contained in the Sixth Directive because VDP is not a dental technician, Article 11(1)(g) of the Law on turnover tax (in the version from 1 December 1997) was complied with. A right to deduct is ruled out because the service is exempt. VDP cannot rely, on the one hand, on the liability of the supply to tax under the Sixth Directive in order to infer a right to deduct and, on the other, on the exemption from tax under national law. In conclusion, the court reduced the additional tax payable to NLG 9 527. This amount relates to supplies of dental prostheses to dentists established in other Member States in the period from 1 December 1997 to 31 March 1998.

20. In the proceedings in cassation before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), it is a matter of dispute whether a right to deduct input tax exists also in respect of supplies to dentists established in France and Italy since there supplies of dental prostheses are not exempt from tax. In this context, the Hoge Raad referred the following questions to the Court of Justice for a preliminary ruling by a judgment of 11 November 2005:

'(1) Is Article 13A[(1)](e) of the Sixth Directive to be interpreted as meaning that dental prostheses supplied by a taxable person who contracts out the manufacture thereof to a dental technician are covered by the notion of "dental prostheses supplied by dental technicians"?

(2) If the answer to that question is in the affirmative:

Is Article 17(3)(a) of the Sixth Directive to be interpreted as meaning that a Member State which has exempted the abovementioned supplies from VAT must attach the right to deduct to those supplies in so far as (in particular under the first indent of Article 28b(B)(1) of the Sixth Directive) they take place in another Member State which has excluded them from exemption pursuant to Article 28(3)(a) of the Sixth Directive, in conjunction with point 2 of Annex E thereto?'

21. In the proceedings before the Court of Justice, VDP, the Netherlands Government, the Greek Government and the Commission of the European Communities submitted written observations.

IV — Legal appraisal

A — *Applicable regime governing intra-Community trade*

22. Before the questions referred by the Hoge Raad can be examined in detail, it is necessary to consider which provisions on intra-Community trade are relevant to the present situation. Different rules on the deduction of input tax apply depending on the applicable regime.

1. The normal regime

23. Under the normal regime, intra-Community supply from one taxable person to another taxable person in his State of origin is exempt from VAT under Article 28c(A)(a) of the Sixth Directive. Under the first subparagraph of Article 28a(1)(a) of the Sixth Directive, the recipient rather than the supplier must pay the VAT on intra-Community acquisition in the Member State of destination.

24. Under Article 17(3)(b) of the Sixth Directive, Member States are also to grant to every taxable person the right to a deduction or refund of input tax in so far as the goods and services are used for the purposes of his transactions exempt under Article 28c(A) of the Sixth Directive, that is to say the tax on services which a taxable person has received as inputs for an intra-Community supply.

25. At first sight this rule is surprising because the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct. [10]

26. However, Article 17(3)(b) is completely and entirely consistent with the system for the taxation of trade between Member States, as Advocate General Ruiz-Jarabo Colomer also concluded in his Opinion in *Eurodental*. [11] This provision takes account of the transfer of tax law to the Member State of destination and ensures the added value of the inputs is liable to tax in the country in which an economic good is consumed, as is in keeping with the character of VAT as a tax on private consumption. [12]

2. The de minimis regime

27. In the case of certain small-scale intra-Community supplies, special rules apply

10 — Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraph 35, with reference to Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraph 30, Case C-408/98 *Abbey National* [2001] ECR I-1361, paragraph 28, and Case C-16/00 *Cibo Participations* [2001] ECR I-6663, paragraph 31.

11 — Cited in footnote 3, point 34. See also, for greater detail regarding the system of intra-Community supply and intra-Community acquisition, the Opinion which I delivered in Case C-245/04 *EMAG Handel Eder* [2006] ECR I-3227, points 19 to 25.

12 — See, in this respect, the Opinion in *Eurodental* (cited in footnote 3), point 27, and Article 2 of the First Directive which is reproduced at point 4 above.

which I would like to term, in summary, the de minimis regime. The conditions for the application of these special rules are legally complicated and can be affected by the exercise of various options.

28. Put simply, the place to which the goods are dispatched or transported is defined as the place of supply, in derogation of the general provisions on long-distance supplies. Consequently, the tax on the supply must be paid by the *supplier* in the Member State of destination and not, as under the normal regime governing intra-Community trade, by the *acquirer*. Therefore, de minimis supplies to taxable persons in another Member State are largely equated with cross-border supplies from a taxable person to a final consumer. In particular, this special regime is laid down in the following terms.

29. Under the second subparagraph of Article 28a(1)(a) of the Sixth Directive, in conjunction with Article 28a(1a) thereof, intra-Community acquisitions of goods are exempt from tax where the acquirer only carries out supplies in respect of which VAT is not deductible and the total amount of the intra-Community acquisition by that taxable person during a calendar year remains below a threshold which the Member States are to determine. This threshold may not be less than the equivalent in national currency of ECU 10 000 — now EUR 10 000. Furthermore, the taxable person concerned may not, during the current or previous calendar year, have availed himself of the possibility under the third subparagraph of Article 28a(1)(a) to opt for the normal regime (taxation of intra-Community acquisitions).

30. Article 28b(B)(1) of the Sixth Directive shifts the place of intra-Community supplies of goods whose acquisition is exempt under the second subparagraph of Article 28a(1)(a) to the Member State of destination. This legal consequence applies to goods subject to excise duty — such as dental prostheses, for example — only provided that the supplies to a Member State have not exceeded ECU/EUR 100 000 during the current or previous calendar year. The Member State may also reduce this threshold to ECU/EUR 35 000 (Article 28b(B)(2)). However, in this case too the supplier may opt for application of the normal regime.

31. The de minimis regime is supplemented by the second subparagraph of Article 28c(A)(a) of the Sixth Directive. This provision makes it clear that the intra-Community acquisition of goods in derogation of the normal regime is not exempt from VAT where the corresponding acquisition of these goods is not liable to tax under the second subparagraph of Article 28a(1)(a).

32. As regards the deduction of input tax in relation to these supplies made by the supplier in the Member State of destination, Article 17(3)(a) of the Sixth Directive provides that a comparison must be made with the treatment of similar transactions within the territory of the country. If the right to deduct input tax existed where the final transactions were effected within the territory of the country then such right exists also in respect of inputs for foreign transactions.

3. Which regime is applicable in the main proceedings?

33. In response to a question put to it by the Court, the Commission took the view that the de minimis regime is applicable in the main proceedings.

34. However, the order for reference does not provide clear information in this respect. On the one hand, in its second question the Hoge Raad specifically requests an interpretation of Article 17(3)(a) of the Sixth Directive in connection with supplies deemed to have been made in another Member State under the first indent of Article 28b(B)(1) of the Sixth Directive. This points to the de minimis regime.

35. On the other hand, in the grounds for its order the national court refers to *Eurodental* and states that the request for an interpretation of Article 17(3)(b) of the Sixth Directive made in that case is also relevant to this. However, this provision applies only to intra-Community supplies which are subject to the normal regime.

36. The Commission bases its view primarily on its own analysis of the facts provided in the order for reference.

37. In this respect, it should be noted that the dispute originally concerned an additional assessment for turnover tax amounting to NLG 117 530 (the equivalent of around EUR 53 000) in respect of the period from 1 January 1996 to 31 December 1998. Taking an average VAT rate in the Member States of destination of around 19%, the value of the relevant intra-Community supplies amounted to around EUR 279 000.

38. However, the facts of the case provided do not show how the supplies break down over the various tax years and the Member

States of destination. It is also unclear whether and, where appropriate which, countries have availed themselves of the possibility to reduce the threshold for the application of Article 28b(B) of the Sixth Directive to ECU/EUR 35 000. Finally, the scale on which supplies were made during the previous calendar year and whether or not VDP opted for application of the normal regime are unknown.

39. Furthermore, the information provided in the order for reference does not show beyond doubt whether or not VDP's purchasers have only provided services which grant no right to deduct input tax or availed themselves of the option to pay tax on the intra-Community supply. In any event, those dentists supplied by VDP who were established in Member States which avail themselves of the transitional rules contained in Article 28(1)(a) of the Sixth Directive, in conjunction with Annex E thereto, probably have a right to deduct input tax.

40. Consequently, it is for the national courts to determine which of the two regimes applies in the present case. Since there are different rules on the deduction of input tax in each case, below I will examine in respect of both options the effects produced by the coincidence of the provisions on intra-Community trade and the exemption of national supplies of dental prostheses.

B — *The relationship between the provisions on intra-Community trade and the exemption of supplies of dental prostheses within the territory of the country*

1. Hypothesis 1: Application of the normal regime in respect of intra-Community supplies

41. Under Article 28c(A)(a) of the Sixth Directive, intra-Community supplies are exempt from VAT. However, in connection with intra-Community supplies Article 17(3)(b) establishes a right to deduct input tax without making it in any way conditional on the goods supplied.

42. If these rules were applied as a matter of priority, it would not be necessary to answer Question 1 since the classification of the supply in accordance with the criteria laid down by Article 13A(1)(e) of the Sixth Directive would not be relevant. The only relevant factor would be that an intra-Community supply is made which gives rise to a right to deduct input tax under Article 17 (3)(b).

43. However, this solution raises the problem that national supplies may accordingly

be placed at a disadvantage in comparison with intra-Community supplies and that could lead to distortions of competition.

44. If a national supply in the Member State of destination is exempt from tax pursuant to Article 13, an intra-Community acquisition is also exempt under Article 28c(B)(a) of the Sixth Directive. Consequently, a taxable person can supply his purchasers in another Member State without them having to pay VAT in any form. However, the supplier could deduct the input tax because he has carried out an intra-Community supply.

45. A taxable person established in the Member State of destination can also make supplies without paying tax under Article 13. However, he would have no right to deduct input tax under Article 17(2) of the Sixth Directive.

46. In my view, this problem should be tackled by granting the right to deduct input tax in connection with intra-Community supplies only where the output supply is actually taxed in the Member State of destination.

47. However, in his Opinion in *Eurodental* Advocate General Ruiz-Jarabo Colomer proposed a different course of action. He considers that deduction of input tax in connection with an intra-Community supply is not possible where the transaction concerned is 'by nature' not liable to tax under Article 13.[13] In the present case, the intervening governments and the Commission also take the view that the exemption under Article 13 should be given priority over the exemption of intra-Community supplies.

48. There is no clear support for this approach in the wording of the relevant provisions. On the contrary, the express proviso in the introductory sentence of the provision, namely '[w]ithout prejudice to other Community provisions, Member States shall exempt ...' militates against the priority application of the exemption under Article 13A. Moreover, there are doubts as to whether the supply of dental prostheses must be regarded as exempt by nature even though Article 28(3)(a) of the Sixth Directive, in conjunction with Annex E thereto, allows the taxation of such services.

49. Advocate General Ruiz-Jarabo Colomer puts forward two further arguments in favour of his approach. Firstly, he refers — as does the Commission in the present case

13 — Opinion in *Eurodental* (cited in footnote 3), point 35.

— to Article 17(3)(c) of the Sixth Directive. This provision confers the right to deduct input tax in relation to specific services exempt under Article 13B where the transaction goes beyond the frontiers of the Community. The Advocate General and the Commission consider that this provision is superfluous where these exemptions could also be based directly on Article 17(3)(b), as soon as the services covered thereby take on an international dimension.

50. I find this argument unconvincing. The exemptions under Article 13B(a) and (d)(1) to (5) referred to in Article 17(3)(c) of the Sixth Directive relate to insurance and financial services linked with supplies of goods to non-member countries. Article 17(3)(b), on the other hand, covers the supply of goods to other Member States or non-member countries themselves. Consequently, the provisions of Article 17(3)(b) and (c) concern entirely different services and therefore neither of the provisions can render the other superfluous.

51. Secondly, Advocate General Ruiz-Jarabo Colomer takes up a Commission argument and states that the exemption would lead to distortions of competition in an undertaking's home State if it were able to deduct input tax in relation to the intra-Community supplies of dental prostheses whilst other undertakings which carried out similar intra-Community supplies in that State would have no right to deduct input tax.

52. On this point too I am unable to concur with my colleague. In so far as an undertaking carries out cross-border supplies to another Member State, it is not competing with undertakings operating on its home market. Instead, there is a competitive relationship between the intra-Community supply and national supplies in the Member State of destination. Therefore, to avoid distortions of competition it is necessary to ensure that these supplies in the Member State of destination are subject to the same tax treatment.

53. The solution proposed by Advocate General Ruiz-Jarabo Colomer takes no account of this fact. In certain situations, such as that in the case of *Eurodental* and also possibly in the case of VDP, it leads both to breaches of the principle of VAT neutrality and obstacles to intra-Community trade.

54. *Eurodental* relates to whether an undertaking established in Luxembourg has the right to deduct input tax in connection with supplies of dental prostheses to Germany. Whilst Luxembourg exempts supplies of

dental prostheses by dental technicians from VAT under Article 13A(1)(e) of the Sixth Directive, Germany continues to subject them to the tax pursuant to the transitional rules contained in Article 28(3)(a) of the Sixth Directive, in conjunction with Annex E thereto.

55. If the exemption of supplies of dental prostheses in the Member State of origin under Article 13 were taken as a basis as a matter of priority, an undertaking such as Eurodental would be denied the right to deduct input tax even though its supply is actually liable to tax in the Member State of destination. The consequence would be that not only VAT proportionate to the final price but also the remaining VAT on the inputs would be borne by the intra-Community supply.

56. This is contrary to the principle of VAT neutrality which underlies the rules on the deduction of input tax. The right of deduction is an integral part of the VAT scheme and in principle may not be limited. [14] The deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. [15]

57. As set out in Article 2 of the First Directive, the final consumer is to pay tax exactly proportional to the value of the service without the inputs occurring at various stages being repeatedly taxed. However, if the approach taken by Advocate General Ruiz-Jarabo Colomer were followed, there would be double taxation of the inputs and consequently the overall tax burden would no longer be proportional to the price paid by the final consumer. [16]

58. Furthermore, the Court considers that the fact that similar goods and supplies of services, which are thus in competition with

14 — See, in particular, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 18; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 43; and *Kretztechnik* (cited in footnote 10), paragraph 33.

15 — *Kretztechnik* (cited in footnote 10), paragraph 34, with reference to Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19, Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15, *Gabalfrisa and Others* (cited in footnote 14), paragraph 44, *Midland Bank* (cited in footnote 10), paragraph 19, and *Abbey National* (cited in footnote 10), paragraph 24.

16 — See footnote 16 to the Opinion in *Eurodental* (cited in footnote 3).

each other, may not be treated differently for VAT purposes is an application of the principle of neutrality. [17] Strictly speaking, the principle of neutrality thus construed merely constitutes a specific application of the general principle of equal treatment. [18] This principle too would be breached if a dental technician established in the Member State of destination could deduct VAT paid on inputs whilst a dental technician from another Member State who carried out intra-Community supplies from another Member State into that Member State of destination were still denied the right to deduct input tax.

59. In addition, the fact that national supplies and intra-Community supplies in competition with them are treated differently for tax purposes places an obstacle in the way of intra-Community trade safeguarded by Article 28 EC since the double taxation of inputs makes it more expensive to import dental prostheses from other Member States. In this respect, the obstacle emanates from the Member State of origin of the intra-Community supply which grants no right to deduct even though the output service concerned is actually subject to the tax in the Member State of destination.

60. By contrast, Advocate General Ruiz-Jarabo Colomer considers, as does the Commission, that the problem stems solely from the fact that the Member State of destination avails itself of an exemption. The lack of complete harmonisation in that respect should not result in an additional financial burden being placed on the treasury of the Member State of origin — Luxembourg in the case of *Eurodental* — by a unilateral decision of the Member State of destination — Germany.

61. It is certainly desirable for the VAT system to be harmonised as much as possible and for long-established exemptions to be abolished. However, as long as such exemptions lawfully exist, it is necessary to minimise as far as possible the resulting unfavourable effects on the internal market and above all on individual taxable persons, even if this entails a loss of tax revenue for a Member State in a given case.

62. The problems illustrated by way of the *Eurodental* example could also arise in the present case if the supply of a dental prosthesis by an intermediary in principle constituted a service exempt under Article 13A(1)(e) of the Sixth Directive but continued to be taxed in the Member State of destination of the intra-Community supplies specifically made by VDP, under Article 28(3)(a) of the Sixth Directive, in conjunction with Annex E thereto.

17 — Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20; Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 24; and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 33.

18 — Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, paragraph 35. See, in that respect, also point 40 of the Opinion which I delivered in these cases on 15 December 2005.

63. In this situation, the breaches of the principle of neutrality and the restriction on the free movement of goods set out above could be avoided if the Member State of origin of an intra-Community supply actually subject to tax in the Member State of destination allowed the deduction of input tax on the inputs of these supplies or reimbursed the input tax.

64. This is required firstly by the unequivocal wording of Article 17(3)(b) of the Sixth Directive. Secondly, it is consistent with the logic of the system of intra-Community supply and the character of VAT as a tax on consumption that the tax is collected only in the Member State of consumption. The Member State of origin, by contrast, generally has no right to the VAT on services paid by final consumers in another Member State.

65. VDP also highlights the following problem. Since the Netherlands wrongly — in the view of VDP — extended the national exemption also to supplies of dental prostheses by intermediaries and therefore refused to grant the right to deduct input tax in connection with such supplies, VDP is placed at a disadvantage in comparison with intermediaries which make supplies to the Netherlands from other Member States. The home States granted these competitors of VDP the right to deduct input tax because they assumed that supplies by intermediaries were not covered by the exemption.

66. In this regard, it should be observed that the lawfulness of the tax treatment of VDP's competitors in their Member States of establishment does not form the subject-matter of the present case, nor does the exemption of the national supplies by VDP or the denial of the right to deduct input tax in relation to those supplies. What is disputed instead is merely whether VDP has the right to deduct in connection with intra-Community supplies. What is decisive in this respect is whether intra-Community acquisitions corresponding to intra-Community supplies are subject to tax in the Member States of destination.

67. Finally, it should be noted that the solution I have put forward is entirely consistent with the judgment in *Debouche*.[19] That judgment was based on the following facts. Mr Debouche, a lawyer established in Belgium, rented a car in the Netherlands which he used exclusively for his professional activity in Belgium. In Belgium, services provided by lawyers were exempt from VAT pursuant to Article 28(3)(b) of the

19 — Case C-302/93 [1996] ECR I-4495.

Sixth Directive, in conjunction with Annex F, point 2, thereto, whilst they were subject to the tax in the Netherlands.

68. The Court ruled that in such a situation there is no right to reimbursement of the VAT on the car rental as input tax. Since the lawyer's services are not subject to tax in the Member State in which they are provided — in that case Belgium — the tax in relation to inputs received in another Member State cannot be deducted. This applies even where the relevant outputs are subject to tax in the Member State in which the inputs were received.

69. That judgment makes it clear that in principle the important factor as regards the deduction of input tax is how the output is actually treated for tax purposes in the Member State in which it is placed on the market. If it is regarded as exempt there — albeit only as a consequence of a transitional rule — the right to deduct input tax must be denied.

70. On the other hand, if the exemption contained in Article 13A(1)(e) of the Sixth Directive did not apply to supplies of dental prostheses by intermediaries, in the present case, unlike in that of *Eurodental*, there would be no conflict between the exemption under Article 13 with no deduction of input tax and the exemption with deduction of input tax applicable to intra-Community supplies. If these requirements were implemented correctly in the Member States of destination, the right to deduct input tax could, in the Member State of origin, be granted as a matter of course in respect of the inputs for intra-Community supplies under Article 17(3)(b) of the Sixth Directive.

2. Hypothesis 2: Application of the de minimis regime in respect of intra-Community supplies

71. In the case of intra-Community supplies covered by the de minimis regime, the right to deduct under Article 17(3)(a) of the Sixth Directive depends on whether these transactions would be eligible for deduction of tax if they had occurred in the territory of the country.

72. Consequently, Article 17(3)(a) lays down rules which specifically derogate from Article 17(3)(b) — as I understand it — in respect of this category of intra-Community supplies. Instead of taking account of the tax treatment in the Member State of destination, as

would be appropriate in the case of intra-Community supplies for the logical reasons set out above, Article 17(3)(b) takes as a basis the rules applicable in the territory of the country.

73. However, this difference is justified by the de minimis nature of the supplies concerned. In the case of sporadic supplies of low value it would create an unjustified administrative burden if it were necessary to determine whether there is in the Member State of destination a supply which is subject to tax and therefore gives rise to the right to deduct input tax.

74. Here too there is a danger that the principle of tax neutrality will be breached and the free movement of goods will be hindered where dental prostheses are supplied to Member States which continue to subject to tax similar supplies pursuant to Article 28(3)(a) of the Sixth Directive, in conjunction with point 2 of Annex E thereto. However, as is evident from the clear wording of Article 17(3)(a), the legislature accepted this danger so as not to render the tax treatment of de minimis supplies excessively difficult as a whole and thus create obstacles to intra-Community trade in far more cases.

75. However, in relation to the present case the question arises as to how to proceed where Article 17(3)(a) is applied if the supplier's home State has not implemented the Sixth Directive correctly and exempts transactions which are in fact subject to tax under the directive. I will return to this question [20] after I have examined more closely the interpretation of Article 13A(1)(e) of the Sixth Directive.

C — *Question 1*

76. By this question, the national court wishes to determine whether supplies of dental prostheses by a taxable person who is not himself a dentist or dental technician fall within the scope of Article 13A(1)(e) of the Sixth Directive.

77. According to the wording of Article 13A(1)(e), only supplies made by dentists or dental technicians are exempt. As an exception to the principle that VAT is to be levied on all supplies and services, the exemptions provided for in Article 13 are

20 — See point 94 et seq. below.

to be interpreted strictly. [21] For that reason, there are no grounds for extending the scope of the provision beyond its wording.

78. Moreover, a strictly literal interpretation is also consistent with the spirit and purpose of the provision. Unlike other exemptions, in particular those provided in Article 13B, the scope of the exemptions laid down in Article 13A is generally defined not only by particular requirements relating to the subject-matter of the service concerned but also to the person of the provider.

79. As the Court recently ruled in respect of Article 13A(1)(c) of the Sixth Directive in its judgment in *Solleveld and van den Hout-van Eijnsbergen*, [22] the requirements on the person of the provider are to ensure that the exemption applies only to medical care provided by practitioners with the required professional qualifications.

80. The exemption of medical services is aimed at ensuring, in the public interest, that these services remain affordable for everyone and not be made more expensive by VAT. [23] However, a public interest exists only in the tax exemption of medical services provided by qualified personnel. [24] This applies not only in the case of the provision of medical care within the meaning of Article 13A(1)(c) but also in the case of the supply of dental prostheses under Article 13A(1)(e).

81. In the present context, the question may remain open whether or not the last-mentioned exemption applies only where the dental technician making the supply also manufactured the dental prosthesis himself. Even where he supplies a dental prosthesis manufactured by a third party, he can at least assess, on the basis of his qualifications, whether the product is of the required quality. Furthermore, he can advise the dentist when he is ordering the dental prosthesis and — where necessary — carry out additional work on the dental prosthesis and receive and process complaints.

82. This is particularly true where the dental prosthesis in question has been manufactured by dental technicians in non-member

21 — Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 28; Case C-307/01 *d'Ambrumenil and Dispute Resolution Services* [2003] ECR I-13989, paragraph 52; and Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 29.

22 — Cited in footnote 18, paragraph 37, with reference to *Kügler* (cited in footnote 21), paragraph 27.

23 — *d'Ambrumenil and Dispute Resolution Services* (cited in footnote 21), paragraph 58, with reference to Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 23, and *Kügler* (cited in footnote 21), paragraph 29.

24 — See the Opinion in *Solleveld and van den Hout-van Eijnsbergen* (cited in footnote 18), point 39.

countries whose requirements concerning professional qualifications are difficult to ascertain. Furthermore, in this case the carrying-out of repairs could lead to particular difficulties.

83. The possibility cannot be ruled out that in a given case even a person who is not a dental technician himself could, in time, acquire the necessary skills to perform tasks which arise in connection with the supplies. Nor should it be asserted that a dental prosthesis which has been manufactured in a non-member country and is marketed by an intermediary in the Community will not, in principle, meet the quality standard there. However, in order to ensure in general that the exemption applies only in the case of supplies which are of the required quality, it seems reasonable to restrict it to supplies made by trained dental technicians (or dentists).

84. The principle of tax neutrality does not preclude this interpretation of Article 13A(1)(e). According to case-law, this principle precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes. [25]

85. The exemption is based on the legislature's unobjectionable assessment that only dental technicians or dentists have the necessary professional qualifications that generally ensure that the dental prostheses supplied by them are of the required quality. The service provided by an intermediary who does not have the relevant professional qualifications is regarded as not being equal and therefore does not have to be treated equally for reasons of tax neutrality.

86. Accordingly, the answer to Question 1 must be that the exemption under Article 13A(1)(e) of the Sixth Directive covers only supplies carried out by dental technicians or dentists.

25 — See the judgments cited in footnote 17 and Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 20; *Kingscrest Associates and Montecello* (cited in footnote 21), paragraph 54; and *Solleveld and van den Hout-van Eijnsbergen* (cited in footnote 18), paragraph 39.

D — *Question 2*

87. The Hoge Raad submits Question 2 only in the event that the answer to Question 1 is in the affirmative, namely that supplies of dental prostheses by intermediaries also fall within the scope of the exemption.

88. This question is based on the understanding that the important factor in respect of the right to deduct input tax in connection with intra-Community supplies is the treatment of the relevant output transactions in the Member State from which the supply originates. This is suggested by Article 17(3)(a) of the Sixth Directive, an interpretation of which is being sought by the national court as part of this question. However, if the normal regime applied, the interpretation of Article 17(3) — and certainly subparagraph (b) thereof — would in fact be the main question.

89. In view of the above uncertainty as to the regime which actually applies, I would like to propose an answer to both possible hypotheses even though the national court has not requested an interpretation of Article 17(3)(b). In order to provide a satisfactory answer to a national court, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in its question. [26]

1. Hypothesis 1: Application of the normal regime in respect of intra-Community supplies

90. As stated above, [27] there is under Article 17(3)(b) of the Sixth Directive a right to deduct input tax in connection with intra-Community supplies which are exempt from VAT under Article 28c(A). The right to deduct certainly exists if the supply of the dental prosthesis in the Member State of destination is regarded as a taxable supply in keeping with the directive since it is not carried out by a dental technician or dentist.

91. However, input tax can also be deducted in respect of supplies of dental prostheses which per se would be exempt from VAT

26 — See, in particular, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10; Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39; and Joined Cases C-228/01 and C-289/01 *Bourrasse and Perchicot* [2002] ECR I-10213, paragraph 33.

27 — Point 41 et seq.

under Article 13A(1)(e) of the Sixth Directive but which continue to be subject to tax in the Member State of destination pursuant to Article 28(3)(a) of the Sixth Directive, in conjunction with point 2 of Annex E thereto.

2. Hypothesis 2: Application of the de minimis regime in respect of intra-Community supplies

92. Under Article 17(3)(a) of the Sixth Directive, input tax may be deducted in respect of services received within the territory of the country where they are used in respect of transactions relating to the economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if they had occurred in the territory of the country.

93. Consequently, there can be no right to deduct input tax in connection with the supply of a dental prosthesis to another Member State to which Article 28b(B) of the Sixth Directive, in conjunction with the second subparagraph of Article 28a(1)(a) thereof, applies where the supply would be exempt from VAT in the Member State in which the supplier is established under Article 13A(1)(e) of the Sixth Directive.

94. However, there is uncertainty as to what the consequences for the deduction of input tax are if the Member State in which the supplier is established has not correctly implemented Article 13A(1)(e) and extended the exemption to transactions not covered by the directive. This has been so in the case of the Netherlands provisions since it also exempted from tax supplies of dental prostheses made by intermediaries not qualified as dental technicians or dentists.

95. If it is not possible to interpret national law in conformity with Article 13A(1)(e) of the Sixth Directive, an individual may rely directly on the directive to acquire a right to deduct input tax. Both Article 13A(1)(e) and Article 17(1) and (2) of the Sixth Directive are sufficiently precise. [28] However, 'asymmetrical reliance' on the directive is not in principle possible, that is to say a taxable person may not assert the right to deduct input tax without paying tax on the output transactions.

28 — See in general as regards the direct application of the Sixth Directive: Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 31; specifically as regards a tax exemption under Article 13, see Case 8/81 *Becker* [1982] ECR 53, paragraph 49; and as regards Article 17(1) and (2) *BP Supergas* (cited in footnote 14), paragraph 34.

96. A central principle of the VAT systems is that right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct. [29] However, where a taxable person supplies services to another taxable person who uses them for an exempt transaction, the other taxable person is not entitled to deduct the input VAT paid, except in the cases expressly provided for in the relevant directives. [30]

97. In the case of supplies *within the territory of the country* which are exempt from tax as a result of the improper implementation of the directive, it would be contrary to this principle if input tax were nevertheless deductible in respect of these supplies. Consequently, to assert the right to deduct input tax on the basis of the directive, a taxable person must at the same time request to be treated as a taxable person. [31] In this regard, national procedural law must ensure that an individual is able to assert his rights flowing from the directive. On the other hand, it would not be a solution for a taxable person to derive from the interpretation of the directive an advantage which is contrary to the principles of the directive itself.

98. However, in the case of *cross-border supplies* the situation is completely different under the de minimis regime which is involved in the present case. These supplies are not *actually* subject to any taxation at the place where the supplier is established since they are regarded as having occurred in the Member State of destination. Under Article 17(3)(a) of the Sixth Directive, the treatment of similar transactions in the territory of the country is taken as a basis for the deduction of input tax only *notionally* on grounds of administrative simplification.

99. If it is assumed that the Member States have properly implemented Article 13A(1)(e) of the Sixth Directive, the supplies concerned made to the Member States of destination should be treated as subject to tax and therefore the deduction of input tax would be justified in accordance with the principles set out above. There can be no question here of any asymmetrical reliance on the directive.

100. Therefore, where Article 17(3)(a) of the Sixth Directive is applied, notional account

29 — See the references cited in footnote 10.

30 — Case C-4/94 *BLP Group* [1995] ECR I-983, paragraph 28, and *Debouche* (cited in footnote 19), paragraph 16.

31 — In combination with the right to deduct, liability to tax can be advantageous to a taxable person, as Advocate General Darmon explained in his Opinion in Case C-63/92 *Lubbock Fine* [1993] ECR I-6665, point 19.

should not be taken of how similar transactions are treated under national law not in conformity with the directive. Instead, it is necessary to take a notional basis and ask how similar transactions would be classified for tax purposes in the territory of the country if the directive had been *implemented properly*.

101. In the majority of cases, this solution would avoid a breach of tax neutrality. Such a breach would occur if the right to deduct input tax were denied at the place where the supplier is established, even though the supply of dental prostheses by an intermediary is not treated as an exempt supply in the Member State of destination in accordance with the provisions of the directive. In the absence of a right to deduct input tax, there would be double taxation of the inputs which would also hinder cross-border trade.

102. Therefore, supplies in the territory of the country and supplies made to another Member State are treated differently in relation to the deduction of input tax. However, the situation of national and foreign supplies is also different since the supplies are actually taxed in the Member State of destination — assuming that the directive has been implemented correctly — whilst similar supplies in the territory of the country are exempt from tax in breach of the directive.

V — Conclusion

103. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred by the Hoge Raad der Nederlanden:

(1) Article 13A(1)(e) 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 as meaning that dental prostheses supplied by an intermediary who is not himself qualified as a dental technician or dentist are not covered by the notion of supplies exempt under this provision.

(2) Under Article 17(3)(b) of the Sixth Directive, a taxable person has the right to a deduction or refund of input tax in respect of intra-Community supplies of dental prostheses which are exempt from tax under the first subparagraph of Article 28c(A)(a) of the Sixth Directive where the corresponding intra-Community acquisition is subject to tax in the Member State of destination since that Member State continues to subject similar transactions to tax pursuant to Article 28(3)(a) of the directive, in conjunction with point 2 of Annex E thereto.

Under Article 17(3)(a) of the Sixth Directive, a taxable person has the right to a deduction or refund of input tax in respect of supplies made in another Member State under Article 28b(B) of the Sixth Directive, in conjunction with the second subparagraph of Article 28a(1)(a) thereof, in so far as they would be eligible for deduction of tax if they had occurred in the territory of the country. In that case, a right to deduct input tax exists also where the supply would be treated as an exempt transaction in the territory of the country in breach of the Sixth Directive.