OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 13 April 2000 *

1. In this preliminary reference the Court is asked to consider the circumstances in which the Sixth VAT Directive obliges or permits Member States to provide for the remission of liability incurred in respect of VAT wrongly mentioned on invoices regarding transactions that have never taken place. [1] Essentially, this involves consideration of the scope of the principle enunciated in *Genius Holding* v *Staatssecretaris van Financiën* and, in particular, of whether an incorrect invoice must have been issued in good faith for the issuer later to seek its rectification. [2]

I — The legal and factual background

A — *The legal context*

2. Under Article 2(1) of the Sixth Directive 'the supply of goods and services effected for consideration ... by a taxable person acting as such' is subject to VAT. Under Article 17(2)(a) a right to make a deduction will arise in respect of VAT 'due or paid' by a taxable person 'in respect of goods or services supplied or to be supplied to him by another taxable person'. Article 20 permits Member States to adjust '[t]he initial deduction' allowed to a taxable person in certain circumstances. Article 21 is concerned with the '[p]ersons liable for payment of VAT'. Article 21(1) provides, in relevant part, that:

'The following shall be liable to pay value added tax:

1. under the internal system:

...

(c) any person who mentions the value added tax on an invoice or other document serving as invoice.'

* Original language: English.

1 — 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 (hereinafter 'the Sixth Directive'); OJ 1977 L 145, p. 1.

2 — Case C-342/87 [1989] ECR 4227 (hereinafter '*Genius Holding*').

3. In German law, the Umsatzsteuergesetz (Turnover Tax Law) 1991 (hereinafter the 'UStG') distinguishes between VAT that is incorrectly mentioned on invoices (see subparagraph 2 of Paragraph 14 of the UStG) and that which is improperly mentioned (see subparagraph 3 of Paragraph 14 of the UStG), the latter being relevant in the present case. Those provisions are worded, respectively, as follows:

'If in an invoice in respect of a supply or other service an entrepreneur mentions separately a higher amount than he owes for the transaction under this Law, then he shall also be liable for the higher amount. If he rectifies the amount of tax *vis-à-vis* the recipient of the service, subparagraph 1 of Paragraph 17 shall apply correspondingly';

'Where a person mentions an amount of tax separately in an invoice, and he is not entitled to mention the tax separately, he shall be liable to pay the amount mentioned. The same shall apply where a person mentions an amount of tax separately in any other document which he uses to make out a bill, in the manner of an entrepreneur making a supply or providing a service, even though he is not an entrepreneur or is not making a supply or providing any other service.'

4. Paragraph 190, subparagraph 3 of the German Umsatzsteuer-Richtlinien (Turnover-Tax Instructions) provides that, if the imposition of liability of even an improperly mentioned tax results in material hardship, the tax authorities — in derogation from the statutory rules — may, on grounds of equity, allow the issuer to rectify the invoice by analogous application of the more generous provision of subparagraph 2 of Paragraph 14 of the UStG. In this respect, under Paragraph 227 of the Abgabenordnung (Tax Code, hereinafter 'AO'), it is provided that:

'The tax authorities may waive, in whole or in part, claims arising from a liability to tax where it would be inequitable to pursue them in the circumstances of the particular case ... .'

B — *The facts and main proceedings*

5. The main proceedings concern two cases joined by the referring court.

6. Schmeink & Cofreth, the plaintiff and appellant in the first action (hereinafter 'Schmeink'), issued, on 31 December 1991, to a company whose shares it was acquiring a pro forma invoice mentioning the sum of DEM 529 370.80 in respect of VAT on the charges made for advice which was never actually provided. The invoice was apparently used a year later by the latter company to assist it in an application for an investment grant. Following a special investigation by the defendant, the Finanzamt (Tax Office), Borken, Germany (hereinafter 'the first defendant'), into Schmeink's VAT position, the first defendant, on 14 April 1993, assessed Schmeink for VAT as shown on the relevant invoice, in accordance with subparagraph 3 of Paragraph 14 of the UStG.

7. In a subsequent application pursuant to Paragraph 227 of the AO, Schmeink sought unsuccessfully to have the relevant VAT remitted by the defendant on grounds of equity. Its appeal against that refusal to the Finanzgericht (Finance Court), Münster was also rejected. It appealed to the Bundesfinanzhof (Federal Finance Court), relying upon an earlier judgment of 21 February 1980 of that court (hereinafter 'the 1980 judgment') to the effect that it would suffice for the grant of equitable relief under Paragraph 227 of the AO if the issuer of the invoice wholly and in good time eliminated the exposure to risk of tax revenues.

8. Mr Strobel, the plaintiff and appellant in the second action, ran a data-technology, office-appliances business during the relevant years, 1992 and 1993. He issued fictitious invoices to various leasing undertakings relating to supplies which were never made in order to disguise losses and boost the profitability of one of his subsidiaries. The leasing undertakings paid the invoices and deducted the turnover tax mentioned therein as input tax. Mr Strobel made the consideration in each case subject to VAT, but agreed to repay the purchase price to the leasing undertakings by instalments. In 1994 Mr Strobel voluntarily informed the local Public Prosecutor's Office and the Finanzamt Esslingen, Germany (hereinafter 'the second defendant') of the incorrect declarations. Mr Strobel was assessed, in accordance with the second alternative of the second sentence of subparagraph 3 of Paragraph 14 of the UStG, for the VAT mentioned in the relevant invoices, namely DEM 519 346.36 for 1992 and DEM 653 156.51 for 1993.

9. On 24 August 1995 Mr Strobel applied for remission of those (and of other) amounts of VAT on grounds of equity under Paragraph 227 of the AO. This was rejected by the second defendant. Mr Strobel then appealed unsuccessfully to the

Finanzgericht, Baden-Würtemberg. He further appealed to the Bundesfinanzhof alleging that Paragraph 227 of the AO was applicable because, although he did not demand the return of the fictitious invoices, he had acted in sufficient time to prevent risk to tax revenues.

10. In their appeals, both plaintiffs have essentially contended that, to benefit from the possibility of remission on equitable grounds, it should suffice that the issuer of the relevant invoices eliminates the risk of loss to the tax authorities, whether by retrieving the invoices issued from the addressee(s) before they are used for tax-deduction purposes, or by discharging the tax declared thereon and then ensuring that the addressees repay the authorities any inputs improperly deducted on the basis of the fictitious invoices.

11. In the order for reference, the Bundesfinanzhof points out that, according to the 1980 judgment, equitable relief under Paragraph 227 of the AO is available if the issuer of the false invoice either retrieves it before it is used or otherwise takes steps to remove the risk to tax revenues, for example by informing the relevant fiscal authorities. However, in a judgment of 23 November 1995, the Bundesgerichtshof (Federal Court of Justice), relying upon Article 20(1)(a) of the Sixth Directive and *Genius Holding*, held that, for remission of tax liability occurring under Paragraph 14(3) of the UStG to be permissible under Paragraph 227 of the AO, it was necessary, in addition to the removal of risk of loss to the tax authorities, for there to have been 'an excusable error' on the part of the issuer of the invoice. [3] The Bundesfinanzhof, in its present order for reference, appears inclined, on the basis of its own case-law, to reject the imposition of such a condition. As the errors of both plaintiffs in the present proceedings were not unintentional, it questions, *inter alia*, whether the VAT principle of fiscal neutrality requires that the issuer of an invoice establish its 'good faith' in order to be allowed remission of liability arising on foot of an invoice in circumstances where all risk of loss of revenue has been eliminated. It suggests that such an interpretation could give rise to constitutional difficulties in Germany, because the national provision implementing Article 21(1)(c) of the Sixth Directive would approximate to a penal provision under which the burden of tax mentioned on invoices would be imposed on issuers, even where their conduct did not threaten the principle of tax neutrality.

3 — IX ZR 225/95, *Neue Juristische Wochenschrift* 1996, 842. The case concerned an action for damages against a tax lawyer who had allegedly negligently failed to bring an action against the determination by the tax administration that his client was liable to pay certain VAT mentioned incorrectly by the latter on an invoice. In a judgment of 8 March 1994, the Finanzgericht Münster, referring to *Genius Holding*, had held that rectification could occur where good faith was established; see 15 K 6635/91 U, *Entscheidungen der Finanzgerichte* 1994, p. 813.

12. The following questions have been referred to the Court by the Bundesfinanzhof for a preliminary ruling:

'1. Does Community law require that provision be made to allow rectification of an improperly invoiced tax as part of the procedure for determining the tax or is it sufficient for the Member States to permit rectification only in a later procedure for determining whether payment of the tax is equitable (on "objective" grounds)?

2. Is it an imperative prerequisite for rectifying an improperly invoiced tax that the issuer of the invoice should demonstrate good faith or are there other circumstances in which an invoice may be rectified (and, if so, what are those circumstances)?

3. What conditions must be satisfied for the issuer of an invoice to be acting in good faith?'

III — Observations

13. Written observations only were submitted by Schmeink, Germany and the Commission.[4] It is clear from the observations that the questions referred raise two distinct issues; namely what type of rectification procedure should be available and whether bona fides must be proved by a taxable person seeking a remission. Only if an affirmative answer is given on the latter point does the Court need to consider the nature of the requisite good faith.

IV — Analysis

A — *Required rectification procedures*

14. Schmeink, supported on this point by the Commission, suggests that it is not sufficient for Member States merely to allow rectification of VAT unjustifiably mentioned on invoices pursuant to an 'equitable procedure' subsequent to the fixing of the taxpayer's initial tax liability. It claims that the principle of neutrality, as interpreted, *inter alia*, in *Gibbs* v *Commissioners of Customs and Excise*[5] and *Molenheide and Others* v *Belgian State*,[6] requires that all unduly levied VAT must be

4 — The Court dispensed with the necessity for an oral hearing in accordance with Article 104(4) of its Rules of Procedure.

5 — Case C-317/94 [1996] ECR I-5339, paragraph 28.

6 — Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 [1997] ECR I-7281, paragraph 42 (hereinafter '*Molenheide*').

rectifiable. To permit to national administrations discretion in this regard would render impossible or excessively difficult the exercise of Community-law rights, contrary to the *Fantask* line of case-law. [7]

15. Germany proposes that it is unnecessary to answer the first question since the main proceedings concern appeals against lower-court decisions rejecting applications brought under Paragraph 227 of the AO in circumstances where the tax liability of the plaintiffs has been established. In the alternative, it submits that the principle of neutrality only requires Member States to ensure that VAT levied in error be rectifiable. As the Sixth Directive does not establish any specific provisions regarding rectification, Member States are free to determine the applicable procedures.

16. I do not agree that it is unnecessary to answer the first question. It is true that the plaintiffs' appeals in the main proceedings concern the equitable procedure available under Paragraph 227 of the AO where the tax has been paid. However, it is clear from the order for reference that this occurred because there is no autonomous possibility of rectification under Paragraph 14(3) of the UStG in cases where the VAT in question is improperly mentioned on the relevant invoice. Thus, it is clear that if a wider possibility of rectification is required by Community law it will benefit the plaintiffs, particularly as the Bundesfinanzhof seems quite willing to interpret Paragraph 227 of the AO more broadly. In any event, it is for that court alone to assess the relevance, for the proceedings before it, of the questions which it submits to the Court. The Court is, in principle, bound to answer such questions unless it is quite obvious that the interpretation of Community law sought is entirely irrelevant for the resolution of the dispute before the national court. [8]

17. It is therefore necessary to consider whether the limited possibility of rectification now apparently available in German law is compatible with Community law. It is important to recall that the Sixth Directive does not exhaustively harmonise the VAT systems of the Member States. On the contrary:

'... it is intended to establish a uniform basis so as to guarantee the neutrality of the system and, as indicated in the 12th recital in its preamble, to harmonise the rules

7 — Case C-188/95 *Fantask and Others* v *Industriministeriet* [1997] ECR I-6783.

8 — See, *inter alia*, Case C-415/93 *Union Royale des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraphs 59 and 61, confirmed recently in Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb* v *TK-Heimdienst Sass* [2000] ECR I-151, paragraph 13.

governing deductions "to the extent that they affect the actual amounts collected" and to ensure that the deductible proportion [is] calculated in a similar manner in all the Member States.' [9]

18. This is particularly true in respect of invoices. In *Jeunehomme and Others* v *Belgian State*, the Court confirmed that Member States are entitled, in addition to the minimum information required by Article 22(3)(b) of the Sixth Directive, to specify the information to be contained in invoices grounding the exercise of the right to deduct. [10] Thus, I would reiterate the view that I expressed in *Molenheide* that Member States enjoy both 'a wide discretion in implementing the provisions of the VAT system' and, '[m]ore generally, the responsibility for managing the entire VAT system ...'. [11] It is in this light that the adequacy of the rectification possibilities available in German law must be assessed.

19. The Sixth Directive is silent regarding the possibility of rectification. It must, consequently, be for the Member States, as the Court acknowledged explicitly in *Genius Holding*, to provide, in their respective national laws, for the possibility of rectifying tax liabilities arising on the face of issued invoices.

20. It would, however, be incompatible with the principle of fiscal neutrality if national law were to make no provision for rectification. Although the Court confirmed in *Molenheide* that, in exercising powers in respect of matters falling outside the scope of the Sixth Directive, Member States must ensure that rights derived by taxable persons under the Directive are not infringed or rendered excessively difficult to invoke, I am not satisfied that the fact that a Member State, in cases of improperly mentioned VAT, provides for the possibility of rectification only subsequent to the determination of the relevant tax liability infringes the principle of proportionality. [12] Indeed, it follows in my opinion from the express requirement of Article 21(1)(c) of the Sixth Directive to the effect that persons who mention VAT on invoices are liable to pay it that a Member State may legitimately take the view that an *ex post facto* reimbursement system provides adequate protection against the risk of loss of revenue posed by incorrect or fictitious invoices, especially where a deduction has been made in respect of the VAT in question. A system of retroactive rectification may also act as a deterrent to the misuse of invoices.

9 — *Molenheide*, op cit., paragraph 42.

10 — Joined Cases 123/87 and 330/87 [1988] ECR 4517 (hereinafter '*Jeunehomme*').

11 — Op. cit., paragraph 41.

12 — See, in particular, paragraph 48.

B — *The conditions for rectification*

21. The question whether good faith on the part of the issuer of the invoice constitutes in Community law a prerequisite for rectification is, in reality, the principal issue raised by this reference.

22. Where the invoice issued has not given rise to a deduction and has been returned to its issuer, Schmeink contends that the principle of fiscal neutrality requires that a claim for rectification be accorded without the necessity of proving good faith. It also asserts that to require bona fides in the absence of any possibility of abusive claims for deduction being made would infringe the principle of proportionality.

23. Germany submits that the principle of fiscal neutrality requires that rectification be permitted only under the precise conditions laid down in *Genius Holding*, i.e. where good faith has been demonstrated. In the alternative, it contends that good faith may exist only where the issuer of the invoice has committed an excusable error, such as a clerical oversight or an error of law or any other similar mistake.

24. The Commission submits that denial of rectification to taxable persons who have not acted in good faith, even where there is no danger of any loss of VAT revenues, would infringe the principle of neutrality. It would disadvantage them by comparison with other taxable persons who are only liable to pay VAT in respect of concrete transactions. In its view, *Genius Holding*, which is based on Article 21(1)(c) of the Sixth Directive, concerns only those cases where invoices are issued in error. More generally, it follows, both from the fact that, under Article 2, VAT liability is predicated on the occurrence of a taxable transaction and from the principle of neutrality, that no VAT liability arises where no such transaction occurs.

25. It is common case in the observations submitted to the Court that the possibility of rectification presupposes that all appropriate steps have been taken by the taxable person to ensure that no deduction of the VAT mentioned therein occurs. Thus, in the main proceedings, Schmeink was able to recover the relevant invoice before a deduction was made while Mr Strobel discharged the VAT due and later sought its remission through rectification. In my opinion, the elimination of all risk to the VAT yield of the relevant Member State is the essential precondition for any rectification claim. [13] In order to assess whether a Member State may require the issuer also to demonstrate

13 — As one German author has aptly pointed out, given the *ex ante* risk, at the time when an incorrect invoice is issued, of such loss occurring, the good faith of the issuer should discharge its liability only where *ex poste* no actual loss occurs; see Reiss, *Umsatzsteuer-Rundschau* 1999, 170, p. 174.

bona fides, it is necessary to analyse the case-law concerning invoices.

26. *Jeunehomme*, decided 17 months before *Genius Holding*, concerned a claim made by a taxable person who objected to the disallowance of a deduction which had been based on invoices received from certain suppliers. The tax administration took the view that the relevant invoices contained insufficient information. The case thus concerned the right of deduction, which is expressly recognised by Articles 17 and 18 of the Sixth Directive and which, pursuant to Article 20(1)(a), is subject to adjustment whenever the deduction made is 'higher or lower than that to which the taxable person was entitled'. The Court held that the Member States' competence to regulate the information which may be required to appear on invoices was 'limited to what is necessary to ensure the correct levying of value-added tax and permit supervision by the tax authorities'. [14] It is clear that the Court was concerned to ensure that Member States have sufficient but not unlimited latitude to apply rules designed to verify, as Advocate General Sir Gordon Slynn put it in his Opinion in *Jeunehomme*, 'the genuineness of the transaction' in respect of which the input was claimed; i.e. to check that the supplier in question has actually 'accounted for the VAT'. [15]

27. In *Genius Holding* the question of rectification arose but only indirectly, as the case was essentially concerned with an adjustment made to a deduction that had initially been allowed. The need for adjustment arose because Genius Holding had deducted tax invoiced to it by certain subcontractors although the relevant Netherlands VAT rules at the time precluded such subcontractors from charging VAT. [16] Genius Holding maintained, with the support of the Commission, that, if a taxable person who has paid invoices were unable to deduct VAT therein charged to it by its suppliers, this would result, contrary to the principle of neutrality, in double taxation. The Member States who submitted observations called for a strict interpretation whereby only VAT actually due could be deducted, although the Netherlands' position was 'less radical' in that the relevant Dutch administrative practice was first to look to the issuer of the invoice for payment of such VAT and '[i]t [wa]s only if that step appear[ed] to have no chance of producing a result that, *under certain conditions, for example, in the absence of good faith on the part of the person who received the invoice*, the tax deducted [wa]s later charged to the latter'. [17] It is not, however, stated in the report of the case whether the suppliers — the subcontractors in that case — had actually paid the VAT

14 — Paragraph 17.

15 — See [1988] ECR 4517, p. 4534.

16 — They were required under so-called 'transfer rules' to pass on the liability for paying the VAT due on services performed by them for the benefit of the recipient (principal) contractor to the latter, who would then include it in its own VAT declaration while simultaneously being entitled to claim a deduction in respect of it. The Netherlands had been authorised by the Council, pursuant to Article 27 of the Sixth Directive, to adopt those rules.

17 — See paragraph 15 of the Opinion of Advocate General Mischo (emphasis in original).

mentioned on the invoices sent to Genius Holding, nor, indeed, whether Genius Holding had actually paid the invoices including the relevant VAT. It is, thus, not possible definitively to consider either that the former acted merely in error in invoicing the VAT in question to the latter or whether the latter was in collusion with the former. [18]

28. In *Genius Holding* the Court interpreted Article 17(2)(a) of the Sixth Directive, under which a taxable person may deduct VAT 'due or paid to in respect of goods or services supplied or to be supplied to him by another person', to mean that 'the right to deduct may be exercised only in respect of taxes actually due, that is to say, the taxes corresponding to a transaction subject to VAT or paid in so far as they were due'. [19] Consequently, it held that national tax authorities are entitled, under Article 20(1)(a), to adjust a deduction 'even if it corresponds to the amount of the tax mentioned on the invoice or other document serving as invoice'. [20] It justified this construction by observing that it was 'best adapted to prevent tax evasion, which would be made easier if any tax invoiced could be deducted'. [21]

29. This is the context in which the Court then proceeded, effectively by way of an *obiter dictum*, to address the argument based on the principle of neutrality. Genius Holding, the recipient of the invoices in question, supported by the Commission, contended that to limit its right to deduct would infringe that principle. In response, the Court declared that it was for the Member States 'to provide in their internal legal systems for the possibility of correcting any tax improperly invoiced where the *person who issued the invoice* shows that he acted in good faith'. [22] However, it seems clear that the issue of good faith did not arise on the facts of the case. First, the case concerned a recipient of invoices and, secondly, the Dutch practice, by reference to which it was presumably inspired (see paragraph 27 above), mentioned the absence of good faith on the part of invoice recipients as being only one possible basis upon which the tax deducted could be charged to the latter. Nevertheless, it is clear that the Court posited, in the interest of preventing tax evasion, good faith as a requirement for rectification of tax liability, though it left open the issue of the precise relationship between that requirement and the principle of fiscal neutrality where there is no risk of evasion.

30. Before considering that relationship, it is helpful to refer to the more recent case-law in which the Court has considered the role of invoices or documents serving as invoices. To my mind, that case-law supports the view that I have expressed above

18 — Advocate General Mischo was clearly of the view that both hypotheses were possible; see paragraph 17 of his Opinion. The assumption made by the Commission in its observations in the present case that *Genius Holding* involved a mere error, although probably correct, is therefore not supported by the case-report.

19 — Paragraph 13.

20 — Paragraph 16.

21 — Paragraph 17.

22 — *Genius Holding*, paragraph 18 (emphasis added).

(paragraph 25) that the concern to prevent tax evasion constitutes the foremost Community-law concern in respect of the exercise by Member States of their competence to administer their national VAT systems.

31. In *Reisdorf* v *Finanzamt Köln-West* the Court was asked whether a taxable person may be absolved from the normal requirement of producing the original of an invoice where the right of deduction has been exercised in respect of the VAT therein mentioned. [23] It held that 'the Sixth Directive gives Member States the power to determine the rules relating to the supervision of the exercise of the right to deduct input tax, in particular the manner in which taxable persons are to establish that right' and that this includes 'the power to require production of the original invoice when tax inspections are carried out and also, where a taxable person no longer holds it, to allow him to produce other cogent evidence that the transaction in respect of which the deduction is claimed actually took place'. [24] The Court was clearly concerned, as it was in *Jeunehomme*, to ensure that the Member States may counter tax evasion by permitting deductions to be made only where the taxable person is able to demonstrate the genuineness of the claimed VAT input.

32. The central importance of the fight against fraud also emerges from *Langhorst*. [25] That case concerned certain credit notes issued by a livestock dealer to Mr Langhorst, a farmer, which were deemed to serve as invoices. They incorrectly mentioned a higher rate of VAT than that which Mr Langhorst was actually liable to pay. Referring to Article 21(1)(c) of the Sixth Directive and the objective of preventing fraud, the Court held that because Mr Langhorst, having agreed to the self-billing system operated by the dealer, could be regarded as the author of the notes, he was liable for the VAT therein mentioned. [26]

33. The Court's concern with fraud prevention is also evident in its decision in *Grandes Sources d'Eaux Minérales Françaises* v *Bundesamt für Finanzen*, [27] where the plaintiff could only produce, as evidence of its entitlement to a reimbursement of VAT, a duplicate invoice, the original having been lost for reasons beyond its control. [28] While satisfied that the requirement for originals 'reflect[ed] the general purpose of the Eighth Directive, which is stated in the sixth recital in the preamble as being that of preventing "certain forms of

23 — Case C-85/95 [1996] ECR I-6257.

24 — Ibid., paragraph 29, where reference is made to paragraphs 26 and 27 of my Opinion in that case.

25 — Case C-141/96 *Finanzamt Osnabrück-Land* v *Langhorst* [1997] ECR I-5073 (hereinafter '*Langhorst*').

26 — See, in particular, paragraph 28.

27 — Case C-361/96 [1998] ECR I-3495.

28 — The claim in that case was made by a French-registered taxable person in respect of German VAT paid in respect of the termination of an agreement with a German supplier. It was brought pursuant to the Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover tax — Arrangements for the refund of value added tax to persons not established in the territory of the country (OJ 1979 L 331, p. 11, hereinafter 'the Eighth Directive'), Article 3(a) of which requires explicitly the attachment to refund applications of the 'originals of invoices ...'.

tax evasion or avoidance"' and, in particular, the re-use of invoices 'to make further applications for a refund', the Court, none the less, held that Article 3(a) of that Directive '[could] not be interpreted as precluding Member States from accepting such an application for a refund in exceptional circumstances where there is no doubt that the transaction which led to the application for a refund occurred ... and where it is established that, in view of the circumstances, there is no risk of further applications for a refund'. [29] Referring to the principle of proportionality, it then observed that 'exclusion of the possibility mentioned [was] not necessary in this case to prevent fraud or tax evasion'. [30]

34. The precise scope which the Court wished to attribute to the requirement of good faith by its dictum in *Genius Holding* is uncertain, given that, from the information on the case-file, it appears that the issuer acted merely in error in invoicing Genius Holding for the VAT in question. Having regard to the later case-law, where the concern with preventing straightforward tax evasion or the dishonest creation of VAT-deductible claims predominates, it seems likely, in my opinion, that the Court intended by its reference in *Genius Holding* to good faith to do no more than refer to a principle to be applied when relevant to the rules of Community law and, in particular, the Community VAT system. Accordingly, if it is established that the invoice was issued in good faith, it would manifestly infringe the principle of neutrality to prevent the taxable person from availing of a right of rectification where there has been no loss or risk of loss of tax revenue. I consider that, in such circumstances, Community law would require Member States to permit the rectification of VAT declarations affected by erroneous invoices, in accordance with national rules. To my mind, this interpretation effectively underlies the dictum in *Genius Holding*. However, I agree with the Commission that the same principle should logically also require that rectification be possible where, despite the occurrence of an inexcusable initial error or the presence of bad faith when an invoice was drawn up, appropriate and effective steps have been taken by the issuer to ensure that no loss of tax revenues occurred. [31]

35. This interpretation is not precluded by Article 21(1)(c) of the Sixth Directive, which refers to the issuer's liability for the VAT mentioned on the invoice. As the Commission points out, Community law would not preclude Member States from prescribing whatever measures they deem appropriate, such as fines or penalty payments, whether of a penal or administrative nature, to act as a deterrent to the issuance

29 — Paragraphs 28 and 29.

30 — Paragraph 30.

31 — The fact that seemingly only some Member State laws at present permit rectification even where there was bad faith cannot affect the interpretation of the obligations flowing from the Sixth Directive, which is to be construed autonomously.

or attempted issuance of false or fictitious invoices. Community law would also, in my opinion, not preclude Member States from prescribing that the burden of proving the absence of any threat to VAT revenues rests upon the responsible taxable person. This would *a fortiori* be the case where good faith was initially lacking.

36. If the Court accepted this interpretation, it would not need to consider what, for Community VAT law purposes, should be the substantive content of the notion of 'good faith'. In the light of the widely differing current practices in national law as to the meaning of that notion, and in the absence of any explicit provisions dealing with this issue in the Sixth Directive, it should, in my opinion, be left to the Community legislature, if it considers it appropriate, to develop a Community-law definition of 'good faith'. [32] However, if the Court were to disagree with this recommendation, neither *Genius Holding* nor the later case-law concerning invoices, to my mind, provides support for the view that there is a Community-law obligation on Member States not to permit rectification save in those cases where good faith is demonstrated. In the relevant part of its judgment in *Genius Holding*, the Court held that 'it is for the *Member States to provide* in their internal legal systems' for rectification 'where the person who issued the invoice shows that he acted in good faith'. [33] An ordinary interpretation of this passage does not suggest that the Court intended to impose stringent requirements on Member States. In particular, I do not think it supports the view that Member States would *be precluded* from permitting, within the framework of their own national VAT systems, the rectification of VAT liability arising from declarations based on erroneous or fictitious invoices. Moreover, I see no good policy reason for imposing such an obligation on Member States.

37. I am conscious that Advocate General Léger, in his Opinion in *Langhorst*, has construed the principle underlying particularly *Genius Holding* as requiring that 'the person who issues the invoice mentioning excess tax must pay it, unless he is able to prove that there was no fraudulent intent behind the amount stated'. [34] However, that case, unlike the present, did not raise the issue of rectification. I do not construe

32 — It would appear that only in Austrian, Belgian, German, Portuguese and United Kingdom law has there been any consideration of what 'good faith' should mean for VAT purposes. Thus, in German law, for example, the case-law to which allusion is made in paragraph 11 and the accompanying footnote 3 above would require the error to be excusable, which would not be the case where the issuer acted with gross negligence or naïvety. This view would appear to be implicit in United Kingdom law, where the right at least to issue a credit note in order to correct an earlier erroneous invoice is predicated on the existence of 'a genuine mistake or overcharge'; see *British Machinery Co Ltd* v *Customs and Excise Commissioners* [1977] VATTR 187. However, the Portuguese VAT system proceeds on the basis that the good faith of the issuer is presumed, while the proof of bad faith would appear to require an intention on the part of the issuer to defraud the State; see Article 19(3) of the CIVA (Value Added Tax Code). This latter view would also appear to be relevant in Austria, where an academic VAT commentator would permit rectification once the bad faith was not directed at evading VAT liability; see Ruppe, *Umsatzsteuergesetz 1994 — Kommentar*, 1999, p. 918.

33 — Loc. cit., paragraph 18 (emphasis added).

34 — Paragraph 60.

that passage as referring to fraud unrelated to the VAT system. To my mind, the principle mentioned in that passage should not deprive the Member States of the autonomy, in applying their national VAT systems, to grant rectification even where bona fides on the part of the taxpayer was wanting, provided there is no danger to VAT receipts.

38. On this interpretation of the Sixth Directive, it is unnecessary to consider the third question posed by the Bundesfinanzhof. Accordingly, I am of the view that rectification of incorrect or false invoices should not be discretionary but, rather, should always effectively be possible provided the taxable person who is responsible for issuing them demonstrates that no loss of VAT revenue will occur.

IV — Conclusion

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

(1) Community law does not require that national law allow rectification of an improperly invoiced tax as part of the procedure during which the initial tax liability of a taxable person who has issued erroneous or fictitious invoices is determined, provided that it is effectively possible for that person later to seek rectification of the sum thereby levied and that the availability of such relief, where the appropriate conditions are satisfied, is not discretionary;

(2) The only condition imposed by Community law in respect of claims for the rectification of VAT mentioned erroneously or fictitiously on invoices is that the issuer of the invoice in question must be able to establish, to the satisfaction of the relevant national-tax authorities, that no loss of VAT revenue will occur. Community law precludes national VAT laws from rendering such claims subject to an additional requirement of good faith on the part of the issuer at the moment when the invoice was issued.