OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 25 October 2007 [1]

I — Introduction

1. By order of 2 March 2006, the Bundesfinanzhof (Federal Finance Court) (Germany) referred to the Court a question 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] as amended by Council Directive 95/7/EC [3] ('the Sixth Directive'), in particular Article 15 thereof.

2. The referring court essentially wishes to ascertain whether the provisions on exemption from tax for exports to a third country as laid down in Article 15(2) of the Sixth Directive must be interpreted as precluding a Member State from granting, on grounds of fairness, a tax exemption in a case where the conditions for exemption were in fact not satisfied but the taxable person was, due to fraudulent conduct by the supposed purchasers, unable, even by exercising due commercial care, to recognise that those conditions were not met.

3. This question was raised against the background that, over several years, Polish nationals fraudulently claimed and obtained from the German supermarket 'Netto' ('Netto Supermarkt') reimbursement of the turnover tax on goods, allegedly exported from the Community, by collecting till receipts dropped in the car parks, shopping baskets and waste bins of the supermarket and by counterfeiting proofs of export by means of forged forms and forged customs stamps.

1 — Original language: English.

2 — OJ 1977 L 145, p. 1.

3 — Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18).

II — Legal framework

A — *The Sixth Directive*

4. Article 15 of the Sixth Directive, entitled 'Exemption of exports from the Community and like transactions and international transport', provides, so far as relevant to this case, as follows:

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

...

2. the supply of goods dispatched or transported to a destination outside the Commuity by or on behalf of a purchaser not established within the territory of the country, with the exception of goods transported by the purchaser himself for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use;

In the case of the supply of goods to be carried in the personal luggage of travellers, this exemption shall apply on condition that:

— the traveller is not established within the Community,

— the goods are transported to a destination outside the Community before the end of the third month following that in which the supply is effected,

— the total value of the supply, including value added tax, is more than the equivalent in national currency of ECU 175, fixed in

accordance with Article 7(2) of Directive 69/169/EEC; however, Member States may exempt a supply with a total value of less than that amount.

Each Member State shall transmit to the Commission specimens of the stamps it uses for the endorsement referred to in the second indent of the third subparagraph. The Commission shall transmit this information to the tax authorities in the other Member States.'

For the purposes of applying the second subparagraph:

B — *Relevant national law*

— a traveller not established within the Community shall be taken to mean a traveller whose domicile or habitual residence is not situated within the Community. For the purposes of this provision, "domicile or habitual residence" shall mean the place entered as such in a passport, identity card or other identity documents which the Member State within whose territory the supply takes place recognises as valid,

5. The Sixth Directive was implemented in Germany by the Umsatzsteuergesetz 1993 (Law on Turnover Tax) ('the UStG 1993').

6. The provisions concerning the exemption of exports and like transactions from turnover tax are contained in Paragraph 4(1)(a) and Paragraph 6 of the UStG 1993.

— proof of exportation shall be furnished by means of the invoice or other document in lieu thereof, endorsed by the customs office where the goods left the Community.

7. Under Paragraph 4(1)(a) of the UStG 1993, of the transactions falling under Para-

graph 1(1)(1) of the UStG 1993, inter alia export supplies (Paragraph 6 of the UStG 1993) are exempt from tax.

8. There is an export supply, according to Paragraph 6(1)(2) of the UStG 1993, where on a supply the purchaser has transported or dispatched the object of the supply to a third-country territory, excluding territories under Paragraph 1(3) of the UStG 1993, and is a foreign purchaser.

9. Under Paragraph 6(4) of the UStG 1993, the conditions inter alia of subparagraph 1 must be proved by the operator. The Federal Ministry of Finance can, with the assent of the Bundesrat, determine by regulation how the operator is to provide the proof.

10. The Ministry has made use of the authority conferred by Paragraph 6(4) of the UStG 1993, in Paragraph 8(1) of the Umsatzsteuer-Durchführungsverordnung (Turnover Tax Implementation Regulation, 'the UstDV'). Under that provision, in the case of export supplies, an operator within the scope of that regulation must demonstrate by documentary evidence that he or the purchaser has transported or dispatched the object of the supply into the third-country territory (proof of export). The documentation must show in a way that is clear and easy to check that the conditions are met.

11. For *supplies within the Community*, Paragraph 6a(4) of the UStG 1993 lays down a provision on the protection of legitimate expectations, reading as follows:

'If the operator treats a supply as exempt from tax even though the conditions under paragraph 1 are not met, the supply is nevertheless to be regarded as tax-exempt if the claiming of the tax exemption is based on incorrect statements by the purchaser and the operator was not able to recognise the incorrectness of those statements, even by exercising due commercial care. In that case the purchaser owes the unpaid tax.'

12. National law does not lay down an equivalent provision on the protection of legitimate expectations for *export supplies* to third countries.

13. The German Abgabenordung (General Tax Code) ('the AO'), however, contains in Paragraph 227 the following general provisions on fairness:

'The tax authorities may waive, in whole or in part, claims arising from a liability to tax where it would be unfair to pursue them in the circumstances of the particular case; on the same conditions, amounts which have already been paid may be reimbursed or set off.'

III — Factual background, procedure and questions referred

14. In the main proceedings, Netto Supermarkt (as the applicant and appellant) and the Finanzamt Malchin ('the Tax Office') (as the defendant and respondent) are in dispute on the remission of turnover tax which the Tax Office assessed to Netto Supermarkt on the ground that the conditions for tax-exempt export supplies were not fulfilled.

15. Netto Supermarkt operates several discount supermarkets in the German state Mecklenburg-Vorpommern. As regards the reimbursement of turnover tax, it had decided internally that it would reimburse turnover tax to non-commercial travellers only if the impression of the stamp was half on the voucher and the customs form and the foreign national presented his passport. It introduced those rules before the circular of the Bundesministerium der Finanzen (Federal Ministry of Finance) of 18 March 1999 on exemption from turnover tax for export supplies to non-commercial travellers, containing recommendations for proof of export in non-commercial travel, appeared.

16. From 1992 to 1998, Netto Supermarkt refunded considerable amounts of value added tax to some of its customers on the erroneous assumption that the legal conditions for a tax exemption for export supplies were met. As the investigations conducted by the Tax Office confirmed later on, Polish nationals had provided Netto Supermarkt with forged forms of the customs authority and used receipts of other customers which they found in the car park of the Netto stores. They had gone on to furnish the forged forms and the used receipts with a stamp which was a counterfeit of the customs authority's original stamp.

17. The fraudulent conduct was discovered in 1998, when Netto Supermarkt contacted

the Hauptzollamt Neubrandenburg (Principal Customs Office, Neubrandenburg) to find out whether the frequently used stamp and the corresponding papers were counterfeit. After an employee of the Principal Customs Office had initially considered the forms and stamp to be genuine, that office, after further examination, found the documents produced to be falsified.

18. Thereupon, the Tax Office requested from Netto Supermarkt payment of the turnover tax for the years 1993 to 1997 and for the month of December 1998.

19. Netto Supermarkt's claim for remission of the turnover tax retrospectively demanded for the years 1993 to 1998 was rejected by decision of the Tax Office of 14 February 2000.

20. An objection against that decision succeeded only in part. The remainder was rejected by decision of 3 May 2000, in which the Tax Office held, in particular, that collecting the tax was not materially unfair and that enforcing the claim arising from the liability to tax in the particular circumstances of the individual case was not contrary to the statutory principles. It found that Netto Supermarkt had to accept liability for being partly responsible for the unjustified paying out of turnover taxes, even if further damage was prevented by deliberate action on its part.

21. Netto Supermarkt challenged that decision by appeal to the Finanzgericht (Finance Court), which was unsuccessful.

22. In the main proceedings, the Bundesfinanzhof has to decide on the appeal brought by Netto Supermarkt against the judgment of the Finance Court. In support of the appeal, Netto Supermarkt essentially submits that the Finance Court should have treated the supplies to Polish purchasers as exempt from tax by applying Paragraph 6a(4) of the UStG 1993 by analogy and that, moreover, the conditions are met for the tax assessment to be fixed by reference to the exception on grounds of fairness set out in the AO.

23. Referring, inter alia, to case-law of the Court of Justice on the principle of the

protection of legitimate expectations and good faith in the area of value added tax law, the Bundesfinanzhof considers it doubtful whether the exemption from tax of an export supply may as a rule be refused where the supplying operator has been unable, even by exercising due commercial care, to recognise that the proof of export produced to him by the purchaser was falsified.

24. Against that background, the Bundesfinanzhof referred the following question to the Court for a preliminary ruling:

'Do the provisions of Community law on exemption from tax for exports to a third country preclude the granting of exemption from tax by the Member State on the grounds of fairness where the conditions for exemption are not satisfied but the taxable person was unable, even by exercising due commercial care, to recognise that they were not met?'

IV — Legal analysis

1. *Main submissions of the parties*

25. In the present proceedings, written observations have been submitted by the Governments of Germany and Poland as well as by the Commission and Netto Supermarkt.

26. The German and the Polish Governments take the view that the question referred should be answered in the affirmative.

27. The German Government emphasises that, according to the wording of Article 15(2) of the Sixth Directive, any evasion, avoidance or abuse must be prevented. Since it provides for an exemption, that provision must be applied restrictively. The Member States may grant the tax exemption only in cases where the conditions of that article are actually met, which has to be proved by the supplier.

28. According to the German Government, the common interest in equal taxation outweighs in principle the interest of the individual operator to be treated in a particular way.

29. Furthermore, the exemption provided for in Article 15(2) of the Sixth Directive

serves the creation of a uniform internal market. A rule on the protection of legitimate expectations such as that laid down in Paragraph 6a(4) of the UStG 1993 for supplies within the Community may thus not be applied by analogy to export supplies.

30. The German Government argues, moreover, that the case-law of the Court of Justice on the principle of the protection of legitimate expectations (good faith) in the context of value added tax rules [4] is not relevant to the present case, since in those cases the Court intended to prevent double taxation of the same transaction, whereas the present case is about ensuring that the transactions at issue are taxed at all. Rather, the case-law of the Court, cited by the referring court, on the conditions for the remission of import and export duties [5] supports the view that a situation such as that at issue in the present case does not warrant an exemption in favour of the supplier. Such a risk is to be borne by the operator, not by the public.

31. In the event that the Court were not to follow its approach, the German Government submits in the alternative that a tax exemption on the grounds of the protection of legitimate expectations and good faith could be granted only under very restrictive conditions, which are not fulfilled in the present case where, had Netto Supermarkt exercised proper care, it could have prevented the fraud which had lasted for six years.

32. On the basis of essentially similar arguments to those put forward by the German Government, the Polish Government maintains that there can be no tax exemption in a case such as that at issue where the conditions for the application of the exemption, in particular that there be an export supply, are not fulfilled. It points out that Article 15(2) of the Sixth Directive does not allow for a derogation on the grounds of equity or according to the concept of due commercial care. Account must also be taken of the need to protect the national budgets and the European Communities' own resources accruing from VAT.

33. The Commission and Netto Supermarkt, by contrast, take the view that the provisions of Community law on exemption from tax for export supplies do not preclude the granting of an exemption on

4 — Case C-342/87 *Genius Holding* [1989] ECR 4227, and Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973.

5 — Case C-446/93 *SEIM* [1996] ECR I-73; Joined Cases 98/83 and 230/83 *Van Gend & Loos* v *Commission* [1984] ECR 3763; see also Case T-205/99 *Hyper* v *Commission* [2002] ECR II-3141.

the grounds of fairness in circumstances like those at issue in the present case. They agree that the Statement for the Council Minutes of the meeting of 16 December 1991 on Article 28c(A) of Directive 77/388/EEC as amended by the 'internal market' Directive 91/680/EEC of 16 December 1991, [6] cited by the referring court, although it was primarily concerned with the creation of a uniform internal market, reflects general principles of Community law and supports rather than contradicts that view.

34. Both the Commission and Netto Supermarkt maintain [7] that where the supplier has done everything to avoid tax fraud which can reasonably be expected from an operator exercising due commercial care, he can rely on the lawfulness of his actions and should not be held responsible for fraudulent acts of third parties. In view of the circumstances and the contribution of Netto Supermarkt to the discovery of the fraudulent actions at issue, the conditions for an exemption of Netto Supermarkt on the grounds of the protection of legitimate expectations and — as the Commission adds — of the principle of proportionality are fulfilled.

35. Finally, Netto Supermarkt submits that the Community rules on import and export duties are in various respects not comparable with those establishing the VAT system and that the case-law on the repayment or remission of import or export duties is therefore not, without more, applicable to the present case.

2. *Appraisal*

36. In answering the question referred, it should be noted, first of all, that it is undisputed that the conditions for the exemption from tax for the supply of goods which are dispatched or transported to a non-Member State as provided for in Article 15 of the Sixth Directive have not been met as regards the circumstances of the main proceedings.

6 — Council Directive supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1); the passage referred to reads as follows: 'The Council and the Commission state that application of the transitional arrangements may not in any event result in the exemption referred to in Article 28c(A) being refused where it subsequently emerges that the purchaser has provided incorrect data in this respect, whereas the taxable person has taken the necessary measures to preclude incorrect application of the rules on VAT with respect to supplies in connection with his undertaking.'

7 — Referring, inter alia, to Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483; Joined Cases C-439/04 and C-440/04 *Kittel* [2006] ECR I-6161; and Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-4191.

37. It is also true that, as the German and Polish Governments have emphasised in their submissions, a tax exemption like that in issue may in principle only be granted if it is proven that the conditions for exemption are satisfied.

38. The peculiarity of the present case lies, however, in its criminal background and the fact that fraudulent acts of third parties, the (alleged) purchasers and exporters, made it falsely appear to the supplier that the conditions for exemption from tax for export supplies were met.

39. As is clear from the order for reference as well as from the wording of the question referred, the referring court starts in that regard from the assumption that Netto Supermarkt, the taxable person, acted in good faith, that is to say, it was unable, even by exercising due commercial care, to recognise that the conditions for exemption were not met. That finding of the referring court is not to be questioned in the framework of the present proceedings.

40. The point of the question referred is therefore to know whether in these circumstances, although the conditions for exemption were in reality not met, a Member State may, on grounds of fairness, nevertheless release a taxable person from his liabily to pay tax.

41. For the following reasons, I share the view of Netto Supermarkt and the Commission that that question, which concerns the allocation of risk in the case of fraudulent conduct by a third party and the protection of a taxable person acting in good faith, should be answered in the affirmative.

42. As there is no provision in the Sixth Directive relating to a situation like that at issue in the present case, it should be recalled, first, that according to settled case-law, when they exercise the powers conferred on them by Community directives, Member States must take account of the general principles of law which form part of the Community legal order such as the principles of proportionality, legal certainty and of the protection of legitimate expectations. [8]

43. As regards, more particularly, the principle of proportionality, the Court has already

8 — See to that effect, inter alia, *Federation of Technological Industries and Others*, cited in footnote 7, paragraph 29, and Joined Cases C-181/04 to C-183/04 *Elmeka* [2006] ECR I-8167, paragraph 31.

pointed out that, whilst it is legitimate for the Member State to seek to preserve the rights of the Treasury as effectively as possible, such measures must not go further than is necessary for that purpose.[9]

44. In that regard it should be noted that although the supplier is, as a taxable person under the common system of VAT, liable to payment of VAT, as a tax on consumption, VAT is finally to be borne by the ultimate consumer.[10] Without, obviously, having themselves a natural benefit from or interest in the payment of VAT and without being supposed to bear the tax economically, taxable persons act thus as tax collectors for the State[11] and in the interest of the public purse.

45. Viewed against that background, it would to my mind clearly be disproportionate to hold, in circumstances such as those in the main proceedings, a taxable person liable for the shortfall in tax revenues caused by fraudulent acts of third parties. A taxable person can certainly be expected to assume the task attributed to him under the common system of VAT with all due diligence and care and be held responsible for any shortcomings in that regard. But it falls, as regards shortcomings outside the sphere of influence of the taxable person, to the Member State to ensure — in the interest of the public purse — the overall functioning of the system and to prevent any evasion, avoidance or abuse. The corresponding risks should therefore also be borne by the Member State.

46. That view is supported by a number of decisions of the Court, from which — in spite of certain differences regarding the factual circumstances — it appears clearly that a taxable person acting in good faith, that is, more particularly, on condition that he had no part in the irregularities and took every precaution reasonably required, should not have to assume liability for the fraudulent conduct of others.[12]

9 — See to that effect, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281, paragraph 47, and *Federation of Technological Industries and Others*, cited in footnote 7, paragraph 30.

10 — See to that effect, inter alia, Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, paragraphs 22 and 28.

11 — See Case C-10/92 *Balocchi* [1993] ECR I-5105, paragraph 25.

12 — See, to that effect, also Advocate General Kokott in her Opinion in Case C-409/04 *Teleos and Others* [2007] ECR I-7797, at I-7801, point 77 and footnote 27.

47. Thus, in *Optigen and Others*, the Court found that the right to deduct input VAT of a taxable person who carries out transactions which are not themselves vitiated by VAT fraud cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing that fraud had taken place. [13]

48. In the same vein, the Court subsequently held in *Kittel* that 'traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT'. [14]

49. A supplier such as the one at issue in the main proceedings, who is, as the referring court established, unable even by exercising due commercial care, to recognise that the conditions for exemption were in reality not met, certainly meets the standards of acting in good faith and of diligence as envisaged by the abovementioned case-law. It may be added in that regard that it appears from the order for reference that even the customs authorities contacted by Netto Supermarkt were unable, without more, to see at first sight that the documents produced were falsified.

50. As regards, moreover, the Statement for the Council Minutes of the meeting of 16 December 1991, it is true that it concerns the protection of legitimate expectations and good faith of the taxable person in the context of intra-Community supplies. From this it cannot, however, as the Commission and Netto Supermarkt have rightly observed, be inferred that the taxable person should not enjoy an equivalent protection with regard to export supplies. As the reasons for granting an exemption in a case like that at issue are rooted, as transpires from the considerations above, in the protection of the individual supplier acting in good faith, I cannot see in what way the aim of the harmonisation of legislation concerning turnover taxes of establishing a common market should mean

13 — See, to that effect, *Optigen and Others*, cited in footnote 7, paragraphs 51 and 52.

14 — *Kittel*, cited in footnote 7, paragraph 51 with a reference to *Federation of Technological Industry and Others*, cited in footnote 7. The Court has, by contrast, found in *Genius Holding* (cited in footnote 4), particularly paragraph 18, and *Schmeink & Cofreth and Strobel* (cited in footnote 4), paragraph 61, that, in a case where VAT has been improperly invoiced, the issuer of the invoice may be held responsible for the shortfall in tax revenues if he has not acted in good faith.

that the granting of such a protection with regard to export-supplies should not be possible.

51. Rather, such a distinction in Community law may put traders who have, on the grounds of the kind of goods they deliver, their geographic position or for some other reason, a high proportion of export supplies at a considerable disadvantage compared with traders with mainly intra-Community supplies.

52. In my view, it may therefore even run counter to the principle of equality to hold taxable persons acting in good faith in circumstances such as those at issue in the present case liable to pay tax with regard to export supplies, if they would be granted, in the same circumstances involving fraud by third persons, an exemption with regard to intra-Community supplies.

53. As regards, finally, the reference made by the German Government to the case-law of the Court in the field of customs law, I agree with the Commission and Netto Supermarkt that, due to the differences in structure, object and purpose of the Commmunity system on the levying of customs duties as compared with the common system of VAT under the Sixth Directive, it is not possible to transpose the findings of the Court in the former context to the specific situation of a taxable person under the VAT system such as to call into question the previous conclusions. [15]

54. In the light of the foregoing it follows that the provisions of Community law on exemption from tax for exports to a third country do not preclude the granting of exemption from tax by the Member State on the grounds of fairness in circumstances like those at issue where the conditions for exemption are not satisfied but the taxable person was unable, even by exercising due commercial care, to recognise that they were not met.

15 — See also, to that effect, Opinion of Advocate General Kokott in *Telios and Others*, cited in footnote 12, in particular point 80.

V — Conclusion

55. I therefore propose that the reply to the question referred to the Court should be as follows:

In a situation such as that at issue in the main proceedings, Article 15(2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC, must be interpreted as not precluding the granting of exemption from tax by the Member State on the grounds of fairness where the conditions for exemption are not satisfied but the taxable person was unable, even by exercising due commercial care, to recognise that they were not met.