OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 13 January 2000 [1]

1. This infringement action concerns the treatment of cross-border transactions under the Community VAT system. France is refusing to make refunds pursuant to the Eighth VAT Directive [2] of French VAT paid by German waste-disposal contractors in respect of upstream services provided to them by French-based subcontractors. The Eighth Directive provides, where it applies, for a refund of VAT paid by a taxable person in another Member State instead of for the deduction of that amount as an input. The solution to the problem depends on the interpretation of the tax-localising rules governing supplies of services contained in Article 9 of the Sixth VAT Directive. [3]

I — The legal and factual background

2. The purpose of the Eighth Directive is stated in the second recital in its preamble as being to '... ensure that a taxable person established in the territory of one member country can claim for tax which has been invoiced to him in respect of supplies of goods or services in another Member State or which has been paid in respect of imports into that other Member State, thereby avoiding double taxation'. Articles 1 and 2 of the Eighth Directive lay down two conditions to be fulfilled to establish the right to a refund. First, the claimant must be established in the territory of another Member State and not have the seat of his economic activity, or a fixed establishment whence his business activities are effected, in the Member State from which the refund is requested, and, secondly, he must not, in the relevant period, have 'supplied ... services deemed to have been supplied in that country'. The right to a refund extends to VAT 'charged in respect of services ... supplied to him by other taxable persons in the territory of the country [from which the refund is sought], in so far as such ... services are used [for the purposes of his economic activities in his Member State of establishment]'. In order

1 — Original language: English.

2 — Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country, OJ 1979 L 331, p. 11 ('the Eighth Directive').

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

to determine whether such a claimant may be *deemed* to have supplied services in the Member State in question, it is necessary to consider the place-of-supply rules set out in the Sixth Directive.

3. Article 9 of the Sixth Directive is concerned with the place of supply of services. Article 9(1) lays down a general rule that:

'The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides'.

However, Article 9(2) contains a number of specific rules for certain categories of services. Article 9(2)(c) enumerates a number of broad categories of services whose place of supply is deemed to be 'the place where those services are physically carried out'. The relevant category in the present case is that covered by the fourth indent of Article 9(2)(c), which concerns 'work on movable tangible property'.

4. This provision has been implemented in French law by Article 259-A-4° of the Code Général des Impôts (General Tax Code, hereinafter 'the CGI'), under which the place of supply of services physically carried out in France, including 'work and valuations on/of movable tangible property', is deemed to be in France. It is not contested that this provision properly transposes Article 9(2)(c), fourth indent, into French law. However, the present dispute arises from an administrative circular (hereinafter 'the circular') adopted in 1992 by the tax-legislation department of the French fiscal administration and addressed to all departments of the national administration responsible for applying VAT. In respect of waste-treatment contracts, the circular instructs the authorities concerned that, pursuant to Article 9(2)(c) of the Sixth Directive and Article 259-A-4[e] of the CGI, not only must waste-elimination operations effected in France be subject to French VAT but so subject must also be the service provided by the main contractor to its clients, provided the contractor invoices its clients for the entire cost of performing the service required by the contract of which the essential element is represented by the price paid by it to a site operator in France who physically carried out work for it there. The fact that the main contractor performs none of the waste elimination operations is immaterial once they are assigned to the subcontractor. The effect of this instruction is to deny the right of refund to main contractors in another Member State.

5. The factual background to this case centres on the French authorities' refusal to reimburse French VAT to a certain

number of German taxable persons. These German undertakings entered into contracts for the collection, sorting, stocking and elimination of waste with local authorities, industrial undertakings and public as well as private undertakings. They subcontracted part of this work to undertakings specialising in the elimination of waste. Since the latter were established in France, they charged French VAT on their services. The German undertakings invoiced their clients with German VAT on the totality of the price. Not being able to make deductions in Germany in respect of French VAT, they sought its reimbursement from the French authorities and this was refused.

6. The main contractors in question complained to the Commission about the refusal of reimbursement. The Commission, by letter of 23 October 1992, informed France of the complaint and sought an explanation of the basis for the relevant refusals. The French authorities, at a meeting on 17 November 1992 and in a note to the Commission of 7 January 1993, contended that the tax-allocation rule of Article 259-A-4[e] of the CGI and Article 9(2)(c) of the Sixth Directive applied. In their view, the essential feature of a waste-treatment contract of the type at issue, irrespective of whether part of the work involved is subcontracted, comprises the elimination or treatment of the waste in question. The mere fact that such work is executed in France by taxable persons established there is irrelevant, because the entire contract should be treated as a single whole and the work carried out in France be deemed to have been carried out there by the main contractors. The latter were, thus, properly subject to VAT in France and were not entitled to claim its refund pursuant to the Eighth Directive.

II — The pre-litigation procedure

7. The Commission, on 8 June 1993, sent France a letter of formal notice, rejecting the French authorities' argument and stating that the main waste-treatment contract must be treated as autonomous from the subcontract.

8. France, by a letter of 6 August 1993, maintained its position. The contractors in question might, however, register for VAT in France and thus claim a right of deduction, in accordance with Article 17 of the Sixth Directive, in respect of the French VAT included in the invoices received from their subcontractors.

9. The Commission, on 10 April 1996, adopted a reasoned opinion which particularly contested the French authorities' view that the main and subcontracts could be assimilated for the purpose of deeming the main contractor responsible for the treat-

ment works carried out by the subcontractors in France.

10. France did not comply with the reasoned opinion, but, on 12 June 1996, sent the Commission a further memorandum, in which it insisted, in particular, on the need to adopt a global interpretation of waste-treatment contracts, especially since the local authorities and other clients who award such contracts pay one price for what they would regard as the single service of having their waste treated.

11. On 16 September 1997, the Commission brought the present action pursuant to Article 169 of the EC Treaty (now Article 226 EC), in which it claims that the Court should:

(a) Declare that, by refusing to refund VAT to taxable persons not established in France, in cases where those persons had subcontracted part of their work to a taxable person established in France, the French Republic has failed to fulfil its obligations under the Eighth Directive, especially Article 2 thereof;

(b) Order the French Republic to pay the costs.

III — Analysis

A — *Admissibility*

(i) The plea of partial inadmissibility

12. France claims that the action is partly inadmissible to the extent that it seeks a general declaration going beyond the case of waste-treatment contracts and applying to all services provided by French-based subcontractors in respect of work on movable tangible property. It contends that the Commission has not specified, either in its application to the Court or during the pre-litigation procedure, the factual or legal basis upon which such a general declaration is sought. [4]

13. The Commission, in its reply, claims that the question of the proper VAT treatment of waste-treatment contracts cannot be separated from the general question of the proper interpretation of the fourth indent of Article 9(2)(c) of the Sixth Directive. This is evidenced by the fact that France's defence turns on the interpretation

4 — France relies, *inter alia*, on Case 52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17.

of that provision, which, France accepts, would not necessarily be limited to such contracts. The Commission recalls the criticism expressed by the Court of the narrowness of its application in an earlier *Commission* v *France* case, which raised a comparable question of general principle, but in which the Commission had sought a declaration in its application to the Court that was limited to one sector.[5] Furthermore, it submits that the rights of defence of France were not affected, since the scope of its complaint remained constant throughout the pre-litigation procedure and in its application to the Court.

14. In its rejoinder, France contends that the fact that the Court limited its declaration in the *Shareholders' tax credit* case to the particular sector cited in the Commission's application demonstrates that the Commission may not seek a general declaration from the Court pursuant to Article 169 of the Treaty unless it has formulated a correspondingly broad complaint during the pre-litigation procedure. At the hearing, the Commission's agent stated that the French interpretation of the fourth indent of Article 9(2)(c) is capable of being applied more broadly than just to the field of waste-treatment contracts.

5 — Case 270/83 *Commission* v *France* [1986] ECR 273 ('*Shareholders' tax credit*').

(ii) Opinion on alleged partial inadmissibility

15. The Court has consistently held that 'the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission', that '[t]he subject-matter of an action brought under Article 169 of the Treaty is therefore delimited by the pre-litigation procedure provided for by that article' and that, consequently, it 'cannot be founded on any complaints other than those formulated in the reasoned opinion'.[6] In essence, 'the safeguarding of the rights of the defence depends solely on the complaints contained in the application being identical to those in the reasoned Opinion ...'.[7] In my opinion, the application in the present case satisfies those criteria and France may not reasonably claim that it was unaware of the general nature of the complaint made by the Commission in this case.

16. The complaint relating to the interpretation of Article 9(2)(c) of the Sixth Directive applies particularly, but not exclusively, to the treatment of complex waste-treatment contracts. The reasoned opinion

6 — See, for example, Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 22, Case C-206/96 *Commission* v *Luxembourg* [1998] ECR I-3401, paragraph 13 and Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraph 34.

7 — See *Commission* v *Austria*, ibid., paragraph 40.

raises in a general form the correct interpretation of Article 9(2)(c). Its formal conclusion is worded in identical general terms to that of the formal declaration which the Commission now seeks from the Court. Accordingly, the present infringement action cannot be declared inadmissible because of any lack of correspondence between the application to the Court and that outlined by the Commission during the pre-litigation procedure. [8]

17. It does not follow, however, that the claim, though admissible, is well founded in its broad form.

18. It is useful to consider the reason for the regret expressed by the Court in the *Shareholders' tax credit* case regarding the Commission's decision to limit its complaint to the application of the impugned tax rule in the insurance sector because, notwithstanding that the rule was unequivocally of general application, it had received complaints 'only in regard to that sector'. [9] The Court observed that it was to be 'regretted that, by reason of the fact that it is restricted to insurance companies, this action raises the problems in terms which cover only part of the scope of the French legislative provisions in question'. [10] This case, however, is different. It is not Article 259-A-4[e] of the CGI but its application by a circular that is claimed to be incompatible with the Community law. The wider complaint made in the application to the Court may well be justified but, in my opinion, whether this is so is inextricably linked with the interpretation of Article 9 of the Sixth Directive and should be assessed by the Court when considering the substance of the case.

B — *Substance*

19. Cross-border transactions give rise inevitably, as acknowledged by the seventh recital in the preamble to the Sixth Directive, to 'conflicts concerning jurisdiction as between Member States'. This danger arises in particular where a service provider established in one Member State provides services in another.

20. Article 9 of the Sixth Directive contains a number of rather general rules designed, as the Court said in *Dudda*, 'to avoid, first, conflicts of jurisdiction, which may result from double taxation, and, secondly, non-taxation, as Article 9(3) indicates, albeit

8 — The situation in this case may thus be contrasted with that in Case C-237/90 *Commission* v *Germany* [1992] ECR I-5973, where the Commission's attempt to broaden a complaint that a directive had not been transposed into one concerning an alleged failure to ensure compliance with it in practice was rejected as inadmissible by the Court; paragraphs 18 to 22.

9 — Op. cit., footnote 5 above, paragraph 7.

10 — Ibid., paragraph 9.

only as regards specific situations'. [11] It allocates tax liability by means of two types of rule. Article 9(1) comprises a 'general rule' in so far as 'the place where the supplier has established his business is a primary point of reference ...'. [12] Article 9(2) displaces that rule in a number of specific cases. However, the Court has also said that: 'when Article 9 is interpreted, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1)'. [13]

21. The task in each case is to see if the case falls within one of the 'specific instances of places where certain services are deemed to be supplied, whereas Article 9(1) of the Sixth Directive lays down the general rule in the matter'. [14] Even if the latter does not take precedence, the Court considers the former as having in some sense the character of derogations. [15] It is sufficient to say that, as not all services are covered by Article 9(2), the application of one of the specific cases should be clearly demonstrated, otherwise the general place-of-establishment rule of Article 9(1) applies.

22. The Commission and France have disagreed sharply about the contents and character, for the purposes of Article 9 of the Sixth Directive, of the waste-treatment contracts at issue. The former considers that they involve the performance of a complex series of operations only some of which involve 'work on movable tangible property' for the purpose of the fourth indent of Article 9(2)(c). France does not dispute that the contracts are complex. It claims, however, that they derive their essential character from the act of elimination and recycling of waste which is the purpose of all other elements and that these characteristic parts of the work are performed in France. The contracts for waste treatment should be treated as a single operation and not be broken down into their separate components of elimination. The characteristic operations constitute 'work on movable tangible property'. They are both performed in France and give the contract its essential character. Hence Article 9(2)(c) applies to the entire of the work provided for under the main contract.

23. This claim to apply one of the specific instances listed in Article 9(2) of the Sixth Directive requires, in accordance with *Dudda*, that consideration be given, in the first instance, to the French argument.

24. It is important not to lose sight of two simple points of reference. It is common

11 — Case C-327/94 *Dudda* v *Finanzamt Bergisch Gladbach* [1996] ECR I-4595, paragraph 20 (hereinafter '*Dudda*').

12 — Case C-190/95 *ARO Lease* v *Inspecteur der Belastingdienst* [1997] ECR I-4383, paragraph 15 (hereinafter '*ARO Lease*').

13 — *Dudda*, paragraph 21.

14 — *Dudda*, paragraph 20.

15 — See its most recent statement in *ARO Lease*, paragraphs 13 and 16.

case that the services provided by the French subcontractors fall to be taxed in France, the dispute relating solely to the claim for reimbursement made by the main contractors pursuant to the Eighth Directive. Furthermore, it is the characterisation of the main contract as a whole that is at issue. According to France the services provided under that contract, as a whole, must be considered as 'work on movable tangible property' which must be deemed to be performed in France by the main contractor just as surely as if it had performed that work directly there itself. The subcontracting of the work changes nothing since a global approach must be adopted.

25. Before considering the issue in the light of the scheme, purpose and working of Article 9 of the Sixth Directive, I must dispose of two particular legal arguments advanced by France.

26. Firstly, France supports its case for a global approach with the definition of 'waste management' given in the waste directives: 'the collection, transport, recovery and disposal of waste, including the supervision of such operations and aftercare of disposal sites'. [16] These operations correspond, no doubt, in whole or in part to the services provided under the main contracts, but they do not, in my view, assist in the resolution of the application of Article 9(2)(c) of the Sixth Directive where some elements are and some are not 'work on movable tangible property'. Nor does the definition concern itself at all with the latter notion. The Court has occasionally referred to a definition in one provision of Community law to shed light on its meaning in another. [17] This is not such a case. The definition of waste treatment cannot cast light on the meaning of 'work on movable tangible property'. Collection and transport do not appear to be such work, though included in the definition. Sorting and stocking are not in the definition, though they form part of the subject-matter of the main contracts. Indeed, the definition tends, if anything, to confirm the variety of operations covered by the definition. I will return later to this question in paragraph 32.

27. Secondly, France relies on two infringement actions about 'advertising services' for the purposes of the second indent of Article 9(2)(e) of the Sixth Directive. [18] In these cases, the Court held France and Luxembourg to be in breach of their obligations under the Sixth Directive because of the exclusion (in the first case, by means of an administrative circular, in the second case by practice) of certain types

16 — Article 1(d) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste (OJ 1991 L 78, p. 32).

17 — Case C-349/96 *Card Protection Plan* v *Commissions of Customs and Excise* [1999] ECR I-973 regarding 'insurance transactions' in Article 13(B)(a) of the Sixth Directive, interpreted in the light of directives concerning insurance.

18 — Case C-68/92 *Commission* v *France* [1993] ECR I-5881 and Case C-69/92 *Commission* v *Luxembourg* [1993] ECR I-5907 (the '*Advertising services*' cases).

of promotional services (which included certain supplies of goods) from the definition of 'advertising services' for that purpose. The judgments do not, however, touch in any way on the issue to be resolved in this case, namely how to classify, by reference to Article 9(1) or 9(2), a contract for the supply of services containing some elements within and some without one of the specific headings of Article 9(2).

28. Neither the definition of 'waste management' nor the decisions in the *Advertising services* cases are of assistance in determining that central issue.

29. The essence of the French position is that the main contract has to be treated as indivisible and as classified by reference to its claimed essential character. Thus, although a substantial number of the operations which that contract encompasses do not relate to 'work on movable tangible property', and are not physically performed in France, the entire of the services which are to be provided thereunder should be deemed to be provided in France.

30. Consequently, in France's view, as explained at the hearing, the German main contractor should make a declaration and nominate a fiscal representative in France, as envisaged by Article 21 of the Sixth Directive. No issue of reimbursement pursuant to the Eighth Directive would then arise. The VAT paid on supplies of services by the French subcontractors would simply be deducted in accordance with the normal operation of Article 17 of the Sixth Directive.

31. At first sight, it seems strange that a taxable person established in Germany would have to charge French VAT to its German clients for services supplied to them in Germany. The general rule of Article 9(1) of the Sixth Directive would be entirely displaced. As the Commission has said, this would expose the German final clients of such a taxable person to uncertainty about the rate of VAT to be paid, since the non-applicability of Article 9(1) would depend on whether the contract as a whole may be characterised by reference to those of its component elements that constitute 'work on movable tangible property'.

32. The Court had occasion to consider the applicability of the fourth indent of Article 9(2)(c) of the Sixth Directive in *Linthorst*.[19] There the Court ruled that veterinary surgeons' care for animals did not constitute 'work on movable tangible prop-

19 — Case C-167/95 *Linthorst, Pouwels and Scheres* v *Inspecteur der Belastingdienst* [1997] ECR I-1195 (hereinafter '*Linthorst*').

erty'. That phrase, in its view, 'calls to mind, in common parlance, purely physical action on movable tangible property which is, by nature, neither scientific nor intellectual'.[20] Emphasising that 'the principal duties of a veterinary surgeon basically consist ... in the provision of therapeutic treatment administered to animals in accordance with scientific rules', the Court held that the occasional 'physical action on the animal' which might be necessary was 'not sufficient for it to be described as "work"'.[21] While France cites this decision as authority for its proposition that the collection, grouping, stocking, sorting, storage, treatment, incineration and most recycling operations constitute work on 'movable tangible property', I believe the decision demonstrates, on the contrary, the very limited scope of the latter term. 'Purely physical action' would not include, in my view, any of the items listed by France, with the possible exception of incineration and recycling. Waste-treatment work is not, as the Commission aptly points out, the subject of any specific Article 9(2) heading. *Linthorst*, moreover, gives no support for a global approach to the allocation of contracts between Article 9(1) and (2). In the result, some only of the operations involved in waste treatment come within the scope of Article 9(2)(c). Presumably they are part of the work performed by the subcontractors involved in the contracts underlying the present case. These operations are taxed in France, but not necessarily because of the operation of Article 9(2)(c), since no conflict has arisen between the application of Article 9(1) and (2) in that respect.

33. The contention of France involves, in any event, for the reasons given at paragraph 31 above, an artificial interpretation of the main contract. By deeming the main contractor to provide services which it subcontracts to others to be performed independently, that interpretation deems it to be supplying services to itself. Self-supply may, of course, arise by express provision, in particular via Article 6(2) of the Sixth Directive. However, where there are, in fact, two taxable persons involved, there is no basis for it. It ignores that autonomy of the supplies of services in the distribution chain which is central to the VAT system.

34. Moreover, the Commission points out that the logical outcome of the system proposed by France is that French VAT would be paid on the entire value of the main contract, though only part of the work involved is done in France. Although France claimed at the hearing that only the part of the work that is actually done in France would, at least systematically, be taxed there, it has not explained how this

20 — *Linthorst*, paragraph 16.

21 — *Linthorst*, paragraph 17. By rejecting 'such a broad interpretation of the term "work" [as] would make the third indent of Article 9(2)(c) redundant...', the Court would appear to have endorsed my view (see paragraph 16 of my Opinion in *Linthorst*) that the notion of 'work on movable tangible property' should not be broadly interpreted.

would be achieved in a way consistent with the supposition, underlying its approach, of a 'global' interpretation of the main contract based on its essential characteristic. I believe that the Commission's fears of the dangers of double taxation are thus well founded. The main contractor provides a comprehensive waste-treatment service to its German clients and, being established in that Member State, is ordinarily bound to pay VAT there. France's reliance on *Genius Holdings* [22] for the proposition that 'Member States [should] provide ... for the possibility of correcting any tax improperly invoiced where the person who issued the invoice acted in good faith' is misplaced. That dictum concerns only the special circumstance there described, namely the effects of incorrect invoices. It is not a substitute for the correct application of Article 9 of the Sixth Directive.

35. In my view Article 9, when combined with the Eighth Directive, provides a coherent scheme for resolution of conflicts of jurisdiction. Where one of the particular cases listed in Article 9(2), but not otherwise, applies, the service is effectively allocated to the Member State where the service is supplied. The Eighth Directive permits recovery of tax paid by a taxable person in another Member State to that service supplier. This is intended to replace the deduction system which operates within a single Member State. The adoption of a different approach where two Member States are concerned would complicate rather than simplify the system. The principal service provider (the main contractor in this case) would, as the Commission has said, be required to establish an artificial or fictitious establishment in a second Member State.

36. In the result, I believe that France is clearly incorrect in refusing to make refunds in accordance with the Eighth Directive. Its refusal is based on a mistaken interpretation of the fourth indent of Article 9(2)(c).

37. On the other hand, it has not been established by the Commission that France has misapplied the rules in question other than in respect of waste-treatment contracts. Indeed, the circular at issue is, on its face, limited to waste-treatment contracts. Although a wider application of the same principle would also constitute a failure by France to respect its obligations under the Eighth Directive, the Commission has not proved any wider application. I propose, therefore, that the Court grant the declaration sought by the Commission but limited to the manner in which France treats the contracts in question.

22 — Case C-342/87 *Genius Holdings* v *Staatssecretaris van Financien* [1989] ECR 4227, paragraph 18.

IV — Conclusion

38. I am of the opinion that the Court should:

(1) Declare that, by refusing to refund VAT to taxable persons not established in France, in cases where those persons have subcontracted to a taxable person established in France part of the work involved in a complex waste-treatment contract, the French Republic has failed to fulfil its obligations under the Eighth Directive, especially Article 2 thereof;

(2) Order the French Republic to pay the costs of the present action.