# OPINION OF ADVOCATE GENERAL TESAURO

delivered on 1 February 1996 *

1. The question referred to the Court for a preliminary ruling by the Gerechtshof, The Hague, concerns the interpretation of Article 17(2) and (3)(a) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [1] (hereinafter 'the Sixth Directive'), and of Article 3(b) and the first paragraph of Article 5 of the Eighth Council Directive (79/1072/EEC) of 6 December 1979 on the harmonization 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 [2] (hereinafter 'the Eighth Directive').

2. In order to determine the reasons which have led the national court to make the referral in question, it may be helpful to recall briefly the wording of the relevant provisions of Community law in force at the material time, as well as the facts of the case.

3. The relevant provisions of Article 17 of the Sixth Directive provide as follows:

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

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

(...)

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

(a) transactions relating to the economic activities as referred to in Article 4(2)

* Original language: Italian.

1 — OJ 1977 L 145, p. 1.

2 — OJ 1979 L 331, p. 11.

carried out in another country, which would be eligible for deduction of tax if they had occurred in the territory of the country;

(...)

(4) The Council shall endeavour to adopt before 31 December 1977, on a proposal from the Commission and acting unanimously, Community rules laying down the arrangements under which refunds are to be made in accordance with paragraph (3) to taxable persons not established in the territory of the country.'

The Council adopted those rules in the Eighth Directive, Article 2 of which provides that 'each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any value added tax charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country (...), in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC (...)'.

With regard to the conditions to which the refund is subject, Article 3 states in particular that:

'To qualify for refund, any taxable person as referred to in Article 2 who supplies no goods or services deemed to be supplied in the territory of the country shall:

(...)

(b) produce evidence, in the form of a certificate issued by the official authority of the State in which he is established, that he is a taxable person for the purposes of value added tax in that State. However, where the competent authority referred to in the first paragraph of Article 9 already has such evidence in its possession, the taxable person shall not be bound to produce new evidence for a period of one year from the date of issue of the first certificate by the official authority of the State in which he is established. Member States shall not issue certificates to any taxable persons who benefit from tax exemption pursuant to Article 24(2) of Directive 77/388/EEC [which establishes a special scheme for small undertakings];

(c) certify by means of a written declaration that he has supplied no goods or services deemed to have been supplied in the territory of the country (...).

(...)'.

The first paragraph of Article 5 provides that, 'for the purposes of this directive, goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 of Directive 77/388/EEC as applicable in the Member State of refund'.

4. I now turn to the facts of the case. Mr Debouche, an advocate established in Belgium and the plaintiff in the main proceedings, hired a car from a leasing company in the Netherlands which he used exclusively for his professional activity in Belgium. In January 1991, Mr Debouche submitted a direct application to the Netherlands administration for the refund of the VAT which he had been charged on the cost of hiring the vehicle for the period from 1 January to 31 October 1990. He annexed to that application, made pursuant to Articles 17 and 33 of the 1968 Wet op de Omzetbelasting (Law on Turnover Tax) which transposed the provisions of the Eighth Directive into Netherlands law, the certificate attesting to the fact that he was a taxable person, issued by the Belgian administration in accordance with the requirements of the Eighth Directive. It was apparent from the certificate that the plaintiff 'is not subject to value added tax in Belgium because he is a provider of services exempted pursuant to Article 28(3)(b) and Annex F to the Sixth VAT Directive of 17 May 1977 (77/388/EEC)'. [3] On the basis of that certificate, the Netherlands tax administration rejected the application for a refund.

5. In the action subsequently brought before the Gerechtshof, The Hague, Mr Debouche challenged that decision, claiming that by virtue of Article 3(b) of the Eighth Directive all those who in accordance with Article 4(1) of the Sixth Directive are taxable persons in the country in which they are established, that is to say, all those who independently carry on any economic activity, are to be deemed to be taxable persons for the purposes of VAT, and thus entitled to claim a refund. According to the plaintiff, the fact that the persons concerned carry out taxable transactions in the country in which they are established and are actually liable to pay the tax is irrelevant.

Mr Debouche also argued that the reference in Article 5 of the Eighth Directive to Article 17 of the Sixth Directive, 'as applicable in the Member State of refund' for the purpose of determining what actually constitutes entitlement to a refund, can only be understood as meaning that the tax must be refunded in all cases where the claimant's activity confers on him the right to deduct tax paid upstream, provided such activity is carried on in the country in which the refund is applied for. Accordingly, any special schemes for exclusion or exemption from tax provided for under the legislation of the State in which the claimant is established should not be taken into account. Therefore, because

3 — In Belgium he relied on the right of the Member States under Article 28(3) of the Sixth Directive to continue during the transitional period to exempt a series of transactions set out in Annex F to the directive, in particular, as far as is relevant here and as expressly laid down by Point 2 of the Annex, with regard to services provided by lawyers.

lawyers' services are subject to VAT in the Netherlands, the Netherlands authorities ought to reimburse the Belgian lawyer the tax applied to services supplied to him in the territory of that country and used for transactions in Belgium, since he would have the right to a deduction if those transactions were carried out in the Netherlands.

6. In those circumstances, the Gerechtshof considered that resolution of the dispute depended on the interpretation of the abovementioned provisions of the Sixth and Eighth Directives in conjunction with one another; accordingly, it decided to stay the proceedings and to ask the Court, in essence, to specify the conditions governing the refund of VAT paid in a Member State other than that in which the person concerned is established. In particular, the national court asks whether, on the basis of the Eighth Directive, a taxable person is entitled to a refund of the VAT paid in a Member State other than that in which he is established even when he is not entitled to any deduction or refund of the tax in the Member State in which he is established, because there he carries out transactions which are exempt by virtue of the national legislation in force.

7. In order to answer the question, the relationship between the Sixth and Eighth Directives must first of all be defined, and so must the objectives which they pursue.

With a view to ensuring the neutrality of VAT in intra-Community trade in goods and services and so contributing to the economic integration of the Member States, Article 17 of the Sixth Directive in particular grants a taxable person the right, on the one hand, to a refund of input tax paid in respect of goods and services used in transactions abroad which would be eligible for deduction of tax if they had taken place in the territory of the country and, on the other, the right to a refund of tax paid in a country other than that in which he is established. As regards the latter case, however, Article 17(4) deferred harmonization at Community level of the arrangements for reimbursement pending adoption of a subsequent measure and authorized the Member States, pending the entry into force of such rules, themselves to determine the conditions and limits of those arrangements.

It is clear from the provision in question that the refund of VAT to taxable persons who are not established in the territory of the country is based on the same rationale and must, therefore, be subject to the same rules as apply to deduction made by a taxable person who is established in the country. As is well known, the VAT machinery permits every taxable person to deduct from the tax which he owes, and which he passes on to his own transferee, the tax passed on to him by his own supplier: thus the application of the tax, which is ultimately borne by the final consumer who cannot claim any further reimbursement, is completely neutral with respect to the taxable persons involved in the production and distribution chain, in that each of them recovers all the tax that he has paid, part to the supplier and part to the tax authorities, when making the transfer to the

next purchaser. The machinery for reimbursement under Article 17(4) which, in the context of the establishment of the internal market, is designed to prevent the taxable person from remaining liable for input tax where he obtains the goods and services necessary to the activity carried on in a country other than that in which he is established, must be based on the same principle, namely that of neutrality in competition as regards the tax burden. [4] It is therefore clear that following the rationale underlying the system, the two mechanisms, for deduction and for a refund of tax, are equivalent to one another.

In view of the objective of the Eighth Directive, therefore, which is to supplement the rules laid down in the Sixth Directive by harmonizing also the arrangements governing refunds of VAT to non-resident taxable persons in order to eliminate the problem of double taxation within the Community, its provisions can only be interpreted, as the Netherlands and Portuguese Governments as well as the Commission have maintained during the proceedings, in the light of the principles of the Community system of VAT as laid down in the Sixth Directive.

8. As I have said, the Eighth Directive lays down provisions implementing Article 17(4), which is in fact its legal basis. It is apparent from the preamble, especially from the second and third recitals therein, that the directive is intended to 'eliminate discrepancies between the arrangements (...) in force in Member States, which give rise in some cases to deflection of trade and distortion of competition' and 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 another Member State (...), thereby avoiding double taxation'.

9. Under Article 17(2), referred to indirectly by Article 17(4) via Article 17(3), a taxable person is entitled to deduct value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person from the tax which he is liable to pay, only and in so far as the goods or services are used for the purposes of his taxable transactions. In other words, the input tax may be deducted only in so far as the goods and services in respect of which it has been charged constitute 'price components' of a taxable transaction.

Neither the letter of the law nor the logical basis of the system leaves any room for doubt as to the fact that a person who must in principle be regarded as taxable, inasmuch as he carries on an economic activity within the meaning of Article 4 of the Sixth Directive, but whose transactions are exempt under Community law, is not entitled to a

4 — See, in this regard, the judgment in Case 126/78 *Nederlandse Spoorwegen* v *Staatssecretaris van Financiën* [1979] ECR 2041, in particular paragraphs 6 and 7; for a more recent restatement of this principle, see Case C-333/91 *Sofitam* v *Ministre du Budget* [1993] ECR I-3513, in particular paragraph 10; Case C-111/92 *Lange* v *Finanzamt Fürstenfeldbruck* [1993] ECR I-4677, in particular paragraphs 16 and 17, and Case C-4/94 *BLP Group* v *Commissioners of Customs and Excise* [1995] ECR I-983, in particular paragraph 26.

deduction. Since *a taxable person so exempted* has no right to pass on VAT to third parties, he is in the position of a final consumer. [5]

10. In order to determine whether a taxable person is entitled to obtain a refund of VAT, it is necessary to go back to the same principles, given that the two situations are equivalent. That, it seems to me, is borne out by the actual wording of the Eighth Directive which, in Article 3(b), subjects the right to a refund to production by the taxable person of a 'certificate issued by the official authority of the State in which he is established, that he is a taxable person for the purposes of value added tax in that State'.

Mr Debouche has however relied on that very provision, in particular in its English version to the effect that the claimant must 'produce evidence (...) that he is a taxable person for the purposes of value added tax in that State', in support of his argument that in order to qualify for a refund, it is enough to show that he is a taxable person within the meaning of Article 4 of the Sixth Directive. It is true that the wording of Article 3(b) is not equally free from ambiguity in all the language versions of the directive: while the use of the past participle in most versions, for example in the French ('tout assujetti ... doit ... justifier ... qu'il est *assujetti* à la taxe sur la valeur ajoutée dans cet État'), Italian ('ogni soggetto passivo ... deve ... comprovare ... che egli è *assoggettato* all'imposta sul valore aggiunto in tale Stato'), Dutch ('een belastingplichtige ... moet ... aantonen dat hij in die Staat *onderworpen* is aan de belasting over de toegevoegde waarde') and Spanish ('todo sujeto pasivo ... estará obligado a ... justificar ... que está *sometido* al impuesto sobre el valor añadido en dicho Estado'), makes it clear that a taxable person's entitlement to a refund is meant to depend on his effecting taxable transactions in the country in which he is established, it may be assumed that some ambiguity exists with regard to the interpretation of other language versions, the English in particular, but also the German version, which provides that the claimant must prove 'daß er Mehrwertsteuerpflichtiger dieses Staates ist'.

The Court has consistently held that, in the case of divergence between the various language versions of a provision of Community law, the necessity for uniform application precludes consideration of one version in isolation and requires it to be interpreted on the basis of the actual intention of the legislature and the objectives pursued by the latter. [6] In the light of the foregoing considerations, an interpretation of Article 3(b) which makes entitlement to a refund subject to a taxable person actually effecting taxable

5 — See, in this regard, the judgments in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, and in Case C-4/94 *BLP Group*, cited in the previous footnote.

6 — See the judgments in Case 29/69 *Stauder* v *Ulm* [1969] ECR 419, in particular paragraphs 3 and 4; Case 100/84 *Commission* v *United Kingdom* [1985] ECR 1169, in particular paragraph 17, and Case C-100/90 *Commission* v *Denmark* [1991] ECR I-5089, in particular paragraphs 7 and 8.

transactions in the country in which he is established may undoubtedly be considered more consistent with the rationale behind the Community VAT system and the specific objectives of the Eighth Directive, especially that of preventing distortions of competition. If such entitlement were granted in a case such as this, that is to say to a taxable person providing services which are exempt from tax, the result in the final analysis would be the application of the so-called zero rate to his activity; in other words, exemption together with the right to deduct input tax, a practice which as a rule is prohibited by the Sixth Directive. [7]

11. I do not believe that any arguments in support of the contrary interpretation can be deduced from the final clause of Article 3(b), according to which 'Member States shall not issue certificates to any taxable persons who benefit from tax exemption pursuant to Article 24(2) of Directive 77/388/EEC', an article which, as we know, provides for special schemes for small undertakings. The plaintiff in the main proceedings claims that it is to be deduced *a contrario* from that provision that the certificate in question must be issued to all taxable persons to whom VAT applies within the meaning of Article 4 of the Sixth Directive but who qualify for an exemption on the basis of provisions other than the one mentioned therein. It is difficult to maintain, regard also being had to the origin of that provision, that that is the aim pursued by the Community legislature.

The clause in question did not appear in the proposal for the Eighth Directive [8] submitted by the Commission which, in the accompanying report, [9] in fact stated that it was in favour of conferring on small undertakings exempted under Article 24(2) of the Sixth Directive the right to a refund of VAT. In the Commission's opinion, such reimbursement would not have resulted in distortions of competition since, in order for the rules to apply, it was in any event necessary for the claimant not to have effected any taxable transactions in the country of reimbursement. The last sentence was added to the final text adopted by the Council precisely in order to remove any doubts regarding the intention to exclude refunds for all taxable persons eligible for an exemption. [10] That argument based on the wording cannot therefore validly be used to substantiate an interpretation which is plainly contrary to the intention expressed by the Community legislature.

12. Nor is it any use referring in support of that argument to the first paragraph of Article 5 of the Eighth Directive, according to which goods and services in respect of which 'tax may be refundable shall satisfy the conditions laid down in Article 17 of Directive 77/388/EEC *as applicable in the Member State of refund*', and concluding therefrom that refund of VAT in the situations envisaged by the provision in question is wholly governed by the legislation of the Member State in which the refund is claimed, thus

7 — See Article 28(2) of the Sixth Directive.

8 — OJ 1978 C 26, p. 5.

9 — COM (77) 721 def. of 3 January 1978. This document was published in *Intertax — European Tax Review*, 1978, p. 47.

10 — See, in this connection, Terra and Kajus: *A Guide to the European VAT Directives; Commentary on the value added tax of the European Community*, Amsterdam, 1993, Chapter XI, p. 97 et seq.

taking account solely of any special exemption schemes provided for by that legislation. On that basis, therefore, a refund would have to be granted wherever the claimant was entitled to deduct input tax if he carried on his activity in the country of reimbursement.

Such a reading of the first paragraph of Article 5 does not seem right to me. The provision at issue, like the rules laid down by the Eighth Directive as a whole, must be interpreted in the light of the principles laid down in the Sixth Directive. The right to a deduction or refund of input tax only in so far as the goods and services to which the tax relates are used for the purposes of a taxable person's taxable transactions forms, as I have already said, one of the cornerstones of the Community VAT system.

In practice, as is borne out by the report accompanying the Commission's proposal, the first paragraph of Article 5 [11] has a different objective. In the absence of complete harmonization of the right to a deduction, it was necessary to establish whether an expense was to be included among those conferring entitlement to a refund of the VAT relating thereto on the basis of the rules on deduction in force in the State in which the claimant is established or, instead, on the basis of the rules in force in the State of reimbursement. The Community legislature chose the second alternative, with the result that a non-resident taxable person may not obtain a refund of VAT relating to expenses which are excluded from entitlement to a deduction in the country of reimbursement, even though deduction would have been permitted in the country in which he is established. Article 5 is therefore intended to specify the amounts in respect of which tax is refundable, but it does not affect in any way the conditions for entitlement laid down in the Sixth Directive.

13. Nor, it seems to me, can the conclusion I have reached be invalidated by the objections raised by the German Government concerning the difficulties which the tax authorities of the Member States would encounter if they were required to check whether a non-resident taxable person was liable to tax in the country in which he was established, before refunding his VAT, having regard in particular to the rapid development of all the national systems in this area and the number of applications for a refund submitted every year. Let me point out in that regard, first, that resolution of legal issues cannot in any event be dependent on practical problems and, secondly, that the certificate provided for in Article 3(b) should to a large extent obviate the difficulties involved in making such checks.

14. Moreover, even the interpretation proposed above of Article 3(b) and the first paragraph of Article 5 of the Eighth Directive is not certain to eliminate the risk of

11 — It is worth noting that the wording used in the first paragraph of Article 5 of the Eighth Directive is identical to that of the Commission's original proposal.

distortion of competition or deflection of intra-Community trade. That may come about, in particular, having regard to the fact that, in the light of the wording of Article 5, first paragraph, and the still incomplete harmonization of the rules governing the right to a deduction, a taxable person may be obliged to obtain the goods and services which he needs for his activity in those States in which the rules on deduction are more favourable.

In fact it is clear that the neutrality of VAT, which was the main reason for introducing the tax, can be absolutely guaranteed only in the absence of any kind of special concessions or arrangements and by means of complete harmonization of the right to a deduction. That result will, therefore, be achieved in full only through the elimination of the transitional schemes still permitted pursuant to Article 28(3) in conjunction with Annex F.

15. On the other hand, it seems to me, it is not possible to claim, as it has been during the proceedings, that the proposed interpretation would ultimately lead in the Netherlands to different and less favourable treatment regarding refunds being reserved to lawyers established in Belgium compared with that accorded to 'national' lawyers. As I have said, a precondition for the application of the Eighth Directive is that a non-resident taxable person should not have effected taxable transactions in the country of reimbursement. Where, however, a Belgian lawyer provides services in the Netherlands, he is granted that right, as the Commission has correctly pointed out, by virtue of Article 21(1)(b) of the Sixth Directive in conjunction with Articles 1(b) and 2 of the Eighth Directive. The first of those provides that the person liable to pay the tax is the person to whom services are provided where they are carried out by a taxable person resident abroad, while the other two equate, for the purposes of reimbursement, the situation of a non-resident taxable person who has provided one of the services mentioned in Article 21(1)(b) with that of a person who has not effected any taxable transaction in the country of reimbursement.

In any event, therefore, the Belgian lawyer would, like his Dutch counterpart, have the right to a deduction or refund only in so far as the taxable person has effected transactions subject to tax — which is plainly in keeping with the principles laid down in the Sixth Directive.

16. Finally, I cannot go along with the objection raised by the plaintiff in the main proceedings and by the German Government, to the effect that the proposed interpretation is contrary to Article 3(2) of Directive 85/560/EEC [12] on the refund of VAT to taxable persons not established in Community territory, according to which 'refunds may not be granted under conditions more favourable than those applied to Community taxable persons'. In this respect, they have pointed out that for the purposes of the refund of VAT, taxable persons who are not established in the Community and who, in the same way as provided for in the Eighth

12 — Thirteenth Council Directive 86/560/EEC on the harmonization 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 Community territory (OJ 1986 L 326, p. 40).

Directive in respect of persons so established, have not effected taxable transactions in the country of reimbursement, are required merely to prove, under Article 3(1) of Directive 86/560/EEC, that they are engaged in an economic activity in accordance with Article 4(1) of the Sixth Directive. Hence such persons are not required to demonstrate that they are subject to a tax comparable to VAT in the country in which they are established. Accordingly, it is claimed, to take into consideration the question whether Community taxable persons are actually subject to the tax concerned in the country in which they are established may lead, as in this case, to the application of conditions for reimbursement which are more restrictive and less favourable than those applicable in similar cases to non-Community nationals.

That argument does not seem to me to be well founded, since the point at issue is not the specific conditions for reimbursement referred to in Article 3(2) but the question of entitlement thereto which, in the light of the fact that taxable persons established in the Community have a different relationship with the Community from that of taxable persons not so established, must of necessity depend on different conditions.

17. In the light of the foregoing observations, I therefore consider that the answer to the question referred to the Court should be as follows:

Article 3(b) and the first paragraph of Article 5 of the Eighth Council Directive (79/1072/EEC) of 6 December 1979 on the harmonization 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, in conjunction with Article 17(2) and (3)(a) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, must be interpreted as meaning that, in order to obtain a refund of VAT in a Member State other than that in which he is established, a taxable person must have a corresponding right to deduct input tax paid in the State in which he is established.