# OPINION OF ADVOCATE GENERAL GULMANN

delivered on 12 May 1992 *

*Mr President,*
*Members of the Court,*

1. The Commission has applied for a declaration under Article 169 of the EEC Treaty that the Kingdom of Spain has failed to fulfil its obligations under Article 6(4) of Council Directive 69/169/EEC on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel. [1]

The Commission claims that it is contrary to Article 6(4) of the directive for Spain to require production of a special invoice made out on a special standard form approved by the authorities as a condition for reimbursement of value added tax [2] on *exportation* of goods carried in travellers' personal luggage.

2. As is clear from the actual title of Directive 69/169/EEC, the key provisions of the directive concern exemption from turnover taxes for goods *imported* into Member States in the personal luggage of travellers arriving from third countries or from other Member States. The Court has already dealt with these rules in a number of cases and is therefore also aware that the tax exemption is subject to a series of conditions, including the provision that tax exemption may be given only in respect of goods the value of which does not exceed a specific fixed amount. [3]

Article 6 contains rules for the remission of tax on the exportation of goods carried in travellers' personal luggage, in the case of travel either to a third country or to another Member State. The primary purpose of the provision is the avoidance of 'double taxation', that is, a traveller being required to pay value added tax in both the country of exportation and the country of importation. In the case of exportation to other Member States, the remission of tax provided for in Article 6 is limited to cases in which the directive does not give entitlement to tax exemption on importation, see the second subparagraph of Article 6(3).

The directive has been amended many times, and Article 6 three times. [4]

* Original language: Danish.

1 — OJ, English Special Edition 1969 (I), p. 232.

2 — The directive concerns both turnover tax and excise but Article 6(2), *in fine*, specifically excludes tax remission on export in the case of excise.

3 — The Court interpreted the directive in, *inter alia*, its judgment in Case C-278/82 REWE II [1984] ECR 721.

4 — I consider some form of consolidation of the text of the directive would be desirable in the interest not only of greater legal certainty for citizens but also of effective implementation of the directive in the Member States.

Article 6 at present provides:

'1. Member States shall take appropriate measures to avoid remission of tax being granted for deliveries to travellers whose domicile, habitual residence or place of work is situated in a Member State and who benefit from the arrangements provided for in this directive.

2. Without prejudice to rules relating to sales made at airport shops under customs control and on board aircraft, Member States shall take the necessary steps with regard to sales at the retail stage to permit in the cases and under the conditions provided for in paragraphs 3 and 4 the remission of turnover tax on deliveries of goods carried in the personal luggage of travellers leaving a Member State. No remission may be granted in respect of excise duty.

3. As regards travellers whose domicile or habitual residence is situated outside the Community, each Member State may set limits and lay down conditions of application in respect of tax remission.

As regards travellers whose domicile, habitual residence or place of work is situated in a Member State, there may be remission of tax only in respect of items the individual value of which, inclusive of tax, exceeds the amount specified in Article 2(1).

Member States may exclude their residents from the benefit of this tax remission.

4. Remission of tax shall be subject:

(a) in the cases referred to in the first subparagraph of paragraph 3, to production of a copy of the invoice or other document in lieu thereof, endorsed by the customs of the exporting Member States to certify exportation of the goods;

(b) in the cases referred to in the second subparagraph of paragraph 3, to production of a copy of the invoice or other document in lieu thereof, endorsed by the customs of the Member State where final importation takes place or by another authority of that Member State competent in matters of turnover tax proving that the turnover tax has been or will be applied.

5. For the purposes of this article

"domicile or habitual residence" means ...

"item" means ...'

The original version of the directive contained only the provision which is now paragraph 1. Paragraphs 2 to 5 were added under the Second Council Directive 72/230/EEC of 12 June 1972. [5] Subsequently certain provisions of paragraphs 2 and 3 were amended by the Third Council Directive 78/1032/EEC of 19 December 1978 [6] *inter*

5 — OJ, English Special Edition 1972 (II), p. 565.
6 — OJ 1985 L 366, p. 28.

*alia* to the effect that Member States were obliged to give remission of turnover tax provided the conditions set out in paragraphs 3 and 4 were fulfilled. Finally, Council Directive 85/348/EEC of 8 July 1985 made a minor addition to paragraph 4(b). [7]

3. It is not in dispute that the Spanish Government has introduced a system whereby tax remission may be obtained only with the use of a special form — described by the Spanish Government as a 'special invoice' — which may be obtained on application to the Spanish tax authorities and on payment of PTA 25 per copy.

4. The Spanish Government contends that the use of the special invoice ensures that the tax authorities have at the time of granting the remission all relevant information on which to base it, and that the compulsory requirement to use the form can therefore only be of benefit to the traveller applying for tax remission inasmuch as its use ensures that the tax may be repaid without any difficulty.

5. The Commission does not dispute that the form concerned does not require any information other than that appropriate to ensure that the remission may be paid. On the other hand, the Commission claims that it is contrary to Article 6(4) for the use of the form to be compulsory under Spanish law and thus for the form to be the sole evidence which may be used by a traveller applying for tax remission. The Commission claims that it follows from Article 6(4) that an ordinary invoice, provided that it complies with the conditions of the Sixth Council Directive 77/388/EEC of 17 May 1977 [8] and the general national value added tax legislation with regard to invoices, must also be acceptable as the basis for repayment of the tax.

6. The issue is therefore a simple one requiring an interpretation of Article 6(4). Under that provision, tax remission in the case of export to a third country requires an endorsement from the customs authorities of the exporting State that the goods have been exported and in the case of exportation to another Member State endorsement by authorities in the State of importation that importation has taken place. In both cases, incidentally, tax remission requires 'production of a copy of the invoice or other document in lieu thereof'.

7. The Spanish Government contends that it follows from the provisions of Article 22(3)(c), taken in conjunction with Article 22(8) of the Sixth Council Directive, that it is possible for Member States to lay down special requirements for invoices to be used in connection with the operation of the value added tax system. The Spanish Government refers in this context to the Court judgment in Joined Cases 123 and 330/87 *Jeunehomme*, [9] where the Court ruled that the abovementioned provisions in the Council's Sixth Value Added Tax Directive gave the Member States power to require that the invoices to be used for the exercise of the right to deduction should contain particulars other

7 — OJ 1985 L 183, p. 24.

8 — On the harmonization 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, hereinafter 'the Sixth Council Directive'.

9 — [1988] ECR 4517.

than those referred to in Article 22(3)(b) of the directive. The Spanish Government takes the view that that power may also be used by the Member States to lay down special requirements for the invoices to be used in connection with tax remission under Directive 69/169. The use of special invoices for tax remission is justified not only because the special invoice makes it easier in practice for the traveller's tax remission to be effected but also because it simplifies the authorities' treatment of such cases and helps to prevent misuse of the remission system.

8. I intend first to assess briefly whether the Commission is correct in stating that the disputed rules have such an effect that they may be said to be obviously at variance with Article 6(4) when interpreted in the light of the purpose of the provision. I shall then investigate whether it is possible to uphold the Spanish Government's contention that the disputed rules are in accordance with the abovementioned provisions of the Sixth Council Directive.

9. To this extent I do not doubt that it may be helpful for the traveller applying for tax remission if the vendor of the taxable goods uses the prescribed special form when making out the invoice. I am by contrast in no doubt at all that the Commission is correct in stating that the compulsory requirement to use exclusively such a special invoice may lead to a traveller's being unable to obtain tax remission in circumstances in which by means of an ordinary invoice they could substantiate that the material conditions for obtaining remission of tax have been satisfied. It seems obvious that in practice there may very well be cases where neither the purchaser nor the vendor is aware of the existence of the requirement to use the special invoice, or where the vendor for one reason or another is not in possession of the special form. I therefore do not doubt that the disputed requirement may constitute a hindrance to effecting the remission of value added tax to which the traveller is entitled under Article 6(2) and (3). The Spanish requirement might therefore lead to the traveller's having to pay tax in both the State of exportation and the State of importation, which is incompatible with the purpose of the system of remission introduced by Directive 69/169/EEC.

10. It is correct that it follows from the case-law of the Court that Article 22(3)(c) of the Sixth Council Directive gives the Member States power to impose requirements additional to those directly referred to in Article 22 in respect of the content of an invoice. I do not, however, consider that those powers, which incidentally the Spanish authorities have used to impose additional obligations

with regard to the content of ordinary invoices, can be extended to entitle Member States to go further and impose special requirements for the invoices to be used as evidence in relation to the reimbursement of value added tax in international travel. In the light of the purpose of the directive, the natural way to read Article 6(4) of Directive 69/169/EEC is that travellers should also be able to prove their entitlement to remission of value added tax by means of the ordinary invoice.

11. I cannot see that there is any need to examine more closely the differences in terms of content between an ordinary invoice and the special invoice. As noted above, it is clear that the form requires more information to be given than that contained in the ordinary invoice and that up to a point that additional information is appropriate when the tax is to be refunded. By contrast, the Spanish Government has not shown either that tax remission cannot in practice be based on an ordinary invoice, or the existence of any special need to use the special form in order to prevent abuse of the remission system. It must be regarded as proven that an ordinary invoice is appropriate and adequate evidence, particularly since, according to the Commission, the other Member States accept an ordinary invoice as sufficient evidence under Article 6(4) of Directive 69/169/EEC. [10]

12. I conclude accordingly that the Kingdom of Spain is obliged to accept an ordinary invoice as evidence for the purposes of tax remission under Article 6 of Directive 69/169/EEC. So far as I can see, there is nothing to prevent the Spanish authorities also making a special form available to traders and travellers so that if they choose to do so they may use this as an alternative basis for exercising the right to remission of tax. The Spanish requirement to produce a special invoice is thus contrary to the directive only to the extent to which it precludes the possibility of the use of an ordinary invoice also as evidence.

## Opinion

13. In the light of the foregoing considerations, I shall propose that the Court uphold the Commission's application and should:

10 — Nothing in the case indicates that this situation is due to the fact that the other Member States impose stricter conditions for ordinary invoices than does Spain.

1. declare that the Kingdom of Spain has failed to fulfil its obligations under Council Directive 69/169/EEC by exclusively requiring presentation of a document known as a 'special invoice' in an official standard form as a necessary conditions for travellers in international travel to obtain reimbursement of value added tax, so that travellers who are in possession of an ordinary invoice which duly complies with Spanish legislation and with the Sixth Council Directive 77/388/EEC cannot obtain reimbursement of tax; and

2. order the Kingdom of Spain to pay the costs.