OPINION OF ADVOCATE GENERAL JACOBS

delivered on 26/09/02 [1]

1. Under Article 5(8) of the Sixth VAT Directive, [2] Member States may consider that, where "a totality of assets or part thereof' is transferred, no supply of goods has taken place and the recipient is to be treated as the successor to the transferor.

2. In the present reference for a preliminary ruling, the Tribunal d'arrondissement de Luxembourg (District Court, Luxembourg), wishes to know essentially whether such a provision of national law is to apply automatically whenever the recipient or transferee is a taxable person or whether it might also be a condition that he should use the assets in continuation of the same business or type of business as that of the transferor and, if so, whether the Member State in question may or must require that he be in possession of an administrative authorisation to carry on such business.

1 — Original language: English

2 — 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).

Legislation in issue

3. Under Article 2 of the Sixth Directive, a supply of goods or services effected for consideration by a taxable person acting as such is subject to VAT. A taxable person is defined in Article 4(1) as one who carries out an economic activity, whatever its purpose or result. Economic activities include, under Article 4(2), the exploitation of tangible or intangible property for the purpose of obtaining income on a continuing basis.

4. Article 5 defines supplies of goods. Under Article 5(1), a supply of goods means the transfer of the right to dispose of tangible property as owner. However, under Article 5(8):

'In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the successor to the transferor. Where

appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax.'

5. The option to consider such transfers not to be supplies of goods has been implemented in Luxembourg in Article 9(2) of the amended VAT Law of 12 February 1979 under which, by way of derogation, a supply of goods is not treated as such if it is

'the assignment, by whatever means and on whatever basis, of a totality of assets or part thereof to another taxable person. In such cases the transferee is deemed to be the successor to the transferor.' [3]

6. The Court has not been informed of any other national provisions adopted pursuant to the second sentence of Article 5(8) with a view to preventing distortion of competition where the transferee is not wholly liable to tax.

3 — Under Article 6(5) of the Sixth Directive, Article 5(8) applies in like manner to supplies of services, which include assignments of intangible property (Article 6(1)).

The main proceedings

7. The dispute before the national court arises out of the sale, by Zita Modes SARL ('Zita Modes') to Parfumerie Milady ('Milady') of assets of a retail clothing business. The invoice, which was for LUF 1.7 million, described the object of the sale as a business (*fonds de commerce*) and stated: 'In accordance with the statutory provisions in force, this invoice is not subject to VAT.'

8. The identification of the assets sold has not been established before the national court but according to the order for reference Zita Modes asserts that they were fashion accessories matching the articles of clothing in which it traded, comprising perfumery produced by the same firm as manufactured the clothing and subsequently used by Milady in continuation of Zita Modes' activity.

9. The Luxembourg tax authorities objected to the classification of the transaction, essentially on the ground that in order for the derogation to apply the transferee must be a taxable person who continues the transferor's activity and must therefore be legally entitled to carry on that type of business, but that in the present case

Milady had no administrative authorisation to trade in the relevant sector. They therefore reassessed the amount of VAT owed by Zita Modes (which has now been wound up).

10. Zita Modes (or its representatives) have challenged the reassessment before the Tribunal d'arrondissement which, before deciding the case, has sought a preliminary ruling by the Court on the following questions:

'1. Is Article 5(8) of the 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 - to be interpreted as meaning that the transfer of a totality of assets to a taxable person constitutes a sufficient condition for the transaction not to be made subject to value added tax, whatever the taxable person's activity may be or whatever use he makes of the property transferred?

2. If the answer to the first question is in the negative, is Article 5(8) of the Sixth Directive to be interpreted as meaning that the transfer of a totality of assets to a taxable person is to be understood as meaning a transfer of all or part of an undertaking to a taxable person who continues the whole activity of the transferor undertaking or continues the activity of the branch corresponding to the part of the totality of assets transferred, or merely as meaning a transfer of a totality of assets or part thereof to a taxable person who continues the transferor's line of activity in whole or in part, without there being any transfer of an undertaking or branch of an undertaking?

3. If the answer to any part of the second question is in the affirmative, does Article 5(8) of the Sixth Directive require or allow a State to require that the recipient's activity be pursued in accordance with the licence issued by the competent authority for the activity or branch of activity stipulated, assuming that the activity pursued falls within lawful economic channels in the sense contemplated in the case-law of the Court of Justice?'

Observations

11. Written observations have been submitted only by the Administration de l'enregistrement et des domaines de l'état (the Luxembourg tax authorities) and by the Commission. No hearing has been requested.

12. The tax authorities submit that the purpose of Article 9(2) of the Luxembourg VAT Law is to avoid the persistence of any residual tax (*rémanence de taxe*) where the transferee is a taxpayer only partly entitled to deduct input tax, [4] thus helping to ensure the neutrality of VAT.

13. If the transferee is to be deemed the successor of the transferor, he must necessarily carry on the same type of business; otherwise, Article 9(2) of the VAT Law would be extremely difficult to apply and indeed practically deprived of any sense, particularly where adjustments relating to capital goods are concerned. [5] That condition is thus implicit in both Article 5(8) of the Sixth Directive and Article 9(2) of the Luxembourg Law.

14. The Commission takes a somewhat different approach.

15. First, considering the purpose of Article 5(8) of the Sixth Directive, it cites the explanatory memorandum to its Proposal for a Sixth Directive, [6] in which the option was described as being available 'in the interests of simplicity and so as not to overburden the resources of the undertaking'. The point is thus to avoid often large sums of tax being invoiced, paid to the State and then recovered by way of deduction of input tax. It is the purpose of the second sentence, which was not in the original proposal, to allow Member States to make provision for cases where the transferee does not have a full right to deduct. Both parts of the provision are of course optional. Finally, the principle of the neutrality of VAT means that the application of Article 5(8) must lead to exactly the same result as if tax had been charged and deducted in the normal way.

16. Next, the Commission points out that, although the national court has found that there was a transfer of business assets, it must further determine whether that transfer was of 'a totality of assets or part thereof', a phrase which must be given a Community definition. The Commission refers to a number of formulations, taken from case-law and legislation, which might assist in arriving at such a definition and which stress essentially the existence of an

4 — Taxable supplies are commonly referred to, from the suppliers point of view, as outputs and the VAT on them as output tax; if they are used by the recipient to make further supplies, they are, from his point of view inputs and the VAT is input tax (see the discussion in paragraph 20 et seq. below).

5 — See paragraphs 23 and 29 below.

6 — Bulletin of the European Communities, Supplement 11/73, at p. 10; what is now the first sentence of Article 5(8) was Article 5(4) in the original proposal.

identifiable, organised unit capable of functioning as a business. The mere sale of trading stock, however, would not fall within that definition.

17. Turning to the national court's questions, the Commission considers it unnecessary that the transferee's business activity should be identical to that of the transferor. What matters is that application of Article 5(8) should lead to the same result as if tax had been charged, paid and subsequently recovered by way of deduction of input tax; it is therefore necessary only that the transferee should be in a position to make such deductions, that is to say that he should be a taxable person who uses the assets transferred for the purposes of his taxable transactions.

18. As regards the fact that Milady was not licensed to carry on the same business as Zita Modes, the Commission points out that according to case-law an unlawful business activity is not removed from the sphere of VAT as long as it may in some way compete with lawful activities. If however the application of Article 5(8) in such a case were liable to lead to a distortion of competition, a Member State would be entitled to adopt corrective measures pursuant to the second sentence of the provision.

Analysis

Purpose of Article 5(8)

19. As has been correctly pointed out, the scope and effects of Article 5(8) must be determined in the light of its purpose.

20. That purpose must in turn be assessed in the context of the VAT system as a whole, the essence of which is set out in Article 2 of the First VAT Directive: [7]

'The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods and services, shall be chargeable after

7 — First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, OJ, English Special Edition 1967, p. 14.

deduction of the amount of value added tax borne directly by the various cost components.'

21. The deduction system is thus designed to avoid a cumulative effect where VAT has already been levied on goods and/or services used in order to produce those supplied or, in other words, to avoid VAT being levied anew on VAT already charged. A chain of transactions builds up, in which the net amount payable in respect of each link - that is to say the total amount chargeable in respect of the supply in question, minus the amounts already charged on inputs - is a specified proportion of the value added at that stage. When the chain comes to an end with a supply to a final consumer, the total amount levied - and ultimately borne by that consumer, since the various traders in the chain will have been able to deduct all the amounts paid by them - will have been the relevant proportion of the final price.

22. However, such deduction is not appropriate where the input tax has been paid on supplies which are not used to produce taxable outputs. Such situations include cases where a taxable person uses supplies for his own private purposes (and thus acts as a final consumer) or for making onward exempt supplies, on which no VAT is payable. [8]

23. Thus, under Article 17(2)(a) of the Sixth Directive, a taxable person may exercise his right to deduct in so far as his taxed input supplies are used 'for the purposes of his taxable transactions'. Where they are used both for transactions in respect of which VAT is deductible and for transactions in respect of which it is not, Article 17(5) states that 'only such proportion of the value added tax shall be deductible as is attributable to the former transactions' - a proportion to be determined (subject to certain optional variations) in accordance with Article 19, which provides, essentially, for deduction of a fraction equivalent to turnover in VAT-deductible transactions divided by total turnover. Article 20 moreover allows adjustments to be made in particular where a subsequent change occurs in the factors used to determine the amount to be deducted [9] and, in the case of capital goods, over a period of 5 to 20 years. [10]

8 — Certain domestic transactions are exempted from VAT under Article 13 of the Sixth Directive, while Articles 14 to 16 provide for exemptions in international trade. At least in domestic trade, however, the fact that a given transaction is exempted does not mean that preceding transactions in the same chain of supply are also exempted; rather, the tax paid at the earlier stages can no longer be recovered by way of deduction, even though the justification may in that case be more questionable where the exempt supply becomes a cost component of a subsequent taxable supply.

9 — Article 20(1)(b).

10 — Article 20(2).

24. Leaving to one side for the moment the question of what precisely constitutes 'a totality of assets or part thereof' and regarding it more generally as meaning 'a business', I agree essentially with the Commission in its view of the role of Article 5(8) in that context.

25. If A sells his business to B, that is in principle a taxable transaction. In the likely event that B continues to operate the business, whether independently or as part of another enterprise, the tax paid on that transaction will be deductible to the extent that the supplies made by B are themselves taxable, since the purchase of the business will be a component of the cost of making those supplies. In an appreciable proportion of cases the business will be one which makes only taxable supplies and thus the whole amount will be deductible.

26. However, the VAT levied on the sale of a business is likely to amount to a not inconsiderable sum, of which the business or its new owner is deprived at what may well be a commercially delicate juncture, even though it cannot ultimately be retained by the tax authorities. [11]

27. Obviously, in such circumstances it might be advantageous to consider that no taxable transaction has taken place at all, thus avoiding the need for sums to be paid to the tax authorities only to be recovered later by way of deduction. That the first sentence of Article 5(8) of the Sixth Directive was drafted with such an aim in mind is clear from the explanatory memorandum cited by the Commission: the provision was intended 'in the interests of simplicity and so as not to overburden the resources of the undertaking'.

28. The simplification, it may be added, also avoids problems of valuation when different assets are subject to different rates of VAT. And as the United Kingdom Customs and Excise point out at paragraph 1.5 of their Notice 700/9 of March 2002, 'Transfer of a business as a going concern', [12] the arrangement also protects the revenue authorities from the possibility that the transferor, having charged VAT on the transfer, will not in fact pay it. In such cases of what are known as 'phoenix' businesses,

11 — See also my Opinion in Case C-408/98 Abbey National [2001] ECR I-1361, at paragraphs 23 and 24.

12 — See www.hmce.gov.uk/forms/notices/700-9.htm.

which deliberately go into liquidation leaving a substantial tax debt and no resources, the authorities would otherwise still have to allow the transferee to deduct the input tax, with a net loss of tax revenue.

29. However, the aim is justified only where the transferee would in any event have been able to deduct the VAT charged. If the business which he acquires is used wholly or partly to make exempt supplies, that would not (fully) be the case. And if no VAT were payable on the acquisition, he might gain an unjustified competitive advantage over other operators making the same type of exempt supplies. Another such situation would be where (primarily capital) goods, the VAT on which had already been fully deducted by the transferor, were acquired by the transferee at a price free of any of the tax which would have been residual therein if they had been acquired in other circumstances, and where the transferee would not himself have been fully entitled to deduct. [13]

30. It was thus logical for the second sentence of Article 5(8) to be added so that Member States exercising the option could also take steps to prevent any distortion of competition in such cases.

31. In that sentence, the phrase 'not wholly liable to tax' may in my view be taken to include situations where the recipient is not liable to tax at all. The condition in Article 9(2) of the Luxembourg VAT Law that the transferee must be a taxable person can therefore be justified at least on that basis even in the absence of any explicit condition in Article 5(8) of the Sixth Directive itself - although such a condition might also be regarded as already implicit in the scheme of the provision.

32. Thus, viewed in the context of the VAT system as a whole, the aim is not, as the Luxembourg authorities appear to believe, to avoid the charging of non-deductible tax but rather, in the interests of fair competition, to prevent some operators from avoiding such tax in circumstances comparable to those in which others would have to pay it and pass it on to their customers.

13 — Cf. the explanatory memorandum to Council Decision 90/127/EEC of 12 March 1990 authorising the United Kingdom to apply a measure derogating from Articles 5(8) and 21(1)(a) of the Sixth Directive, OJ 1990 L 73, p. 32, quoted in B.J.M. Terra and J. Kajus, A Guide to the Sixth VAT Directive, IBFD 1993, p. 288.

Totality of assets or part thereof

33. In the light of the purpose of Article 5(8) as explained above, we may consider its scope and the type of transaction to which it may apply.

34. Where a totality of assets is concerned, there is little difficulty. The transfer in question is that of a business as a whole which as the Commission has pointed out will comprise a number of different elements. For example, the French term *fonds de commerce*, used on the invoice in the case in the main proceedings, has been defined in legal dictionaries [14] as including elements both corporeal (such as plant, equipment and stock-in-trade) and incorporeal (such as the tenant's interest in a lease, the trade name or sign, patents, trade marks and goodwill). One might add trade secrets, business records, customer lists, the benefit of existing contracts and so forth.

35. The cement which binds such elements together is the fact that they combine to allow the pursuit of a specific economic activity, or group of activities, while each in isolation would be insufficient for that purpose. Separately, they are the building blocks of a business; together, they amount to a business.

36. It follows in my view that the concept of 'part of a totality of assets' relates not to one or more individual elements from that list but to a sufficient combination thereof to allow the pursuit of an economic activity, even if that activity forms only part of a larger business from which it has been detached.

37. That may be contrasted with a case in which a retailer closes one of his outlets and sells its stock to another trader, or a service firm discontinues one type of service and disposes of the relevant equipment to a competitor. Such transactions might be argued to fall within the literal meaning of 'transfer of part of a totality of assets' but so, in that case, could any sale of any asset. In the light however of the purpose of Article 5(8), it seems clear that they do not and that what is meant is the transfer of a self-standing part of a more extensive business.

38. It must also be remembered that Article 5(8) is intended to apply where the amount of VAT would be exceptionally onerous for the business in question. Although the deduction system is meant to relieve the trader entirely of the burden

14 — See, for example, Gérard Cornu (ed.), Vocabulaire juridique (2nd ed., 1990), Presses universitaires de France, and Raymond Guillien and Jean Vincent (ed.), Lexique de termes juridiques (6th ed., 1985), Dalloz.

of VAT payable in the course of all his economic activities [15] - the 'principle of neutrality' - its operation in fact normally requires traders in effect to advance sums (levied on their input supplies) which they later recover by retaining a proportion of the tax (on their output supplies) paid by their customers. Such rolling advances may be viewed as acceptable in the normal course of trade, but it is appreciably more burdensome for the new owner of a business to have to advance tax on its whole value and on a single occasion.

39. Where a taxable person acquires individual assets - a trade mark, say, or part or even all of a business's stock-in-trade or equipment - from another taxable person, that may be regarded as a normal business transaction or investment and the advance of VAT as a normal part of a trader's obligations. Where however the transfer involves a whole business, the event is an exceptional one and special treatment may be justified because the amount of VAT to be advanced on the transfer is likely to be particularly large in relation to the resources of the business in question.

40. The approach summed up in paragraph 36 above is consistent, as the Commission points out, with definitions given in other contexts by both the Court and the legislature. In *Commerz-Credit-Bank*, [16] the Court defined 'part of a business' for the purposes of Council Directive 69/335/EEC [17] as 'an aggregate of assets and persons capable of contributing to the performance of a specified activity'. And Council Directive 2001/23/EC [18] defines a 'transfer of an undertaking, business, or part of an undertaking or business' as 'a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

41. That latter definition, which was already in Council Directive 98/50/EC, [19]

15 — See, for example, Abbey National, cited above in note 11, at paragraph 24 of the judgment, together with the case-law cited there.

16 — Case C-50/91 Commerz-Credit-Bank [1992] ECR I-5225, paragraph 17 and ruling; see also my Opinion in that case and Case C-164/90 Muwi Bouwgroep [1991] ECR I-6049, especially at paragraph 22 of the judgment and paragraph 18 of my Opinion.

17 — Of 17 July 1969 concerning indirect taxes on the raising of capital, OJ, English Special Edition 1969 (II), p. 412; see Article 7(1)(b).

18 — Of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ 2001 L 82, p. 16; see Article 1(1).

19 — Of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of businesses, OJ 1998 L 201, p. 88; see Article 1(1)(b).

reflected the Court's case-law in *Spijkers* [20] and *Redmond Stichting*, [21] to the effect that the decisive criterion for establishing the existence of such a transfer is whether the entity in question retains its identity, as indicated in particular by the fact that its operation is actually continued or resumed, and that it is necessary for that purpose to look at all the characteristics of the transaction, including the type of undertaking or business, whether or not its tangible assets are transferred, the value of its intangible assets, the extent to which staff are taken over by the new employer, whether customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended - all those circumstances being, however, merely individual factors in the overall assessment.

42. Even if such definitions are not binding in the context of the Sixth VAT Directive, it is clearly desirable that such similar concepts should have a uniform content throughout Community law unless there is some specific reason to the contrary.

20 — Case 24/85 Spijkers [1986] ECR 1119, at paragraphs 11 to 13 of the judgment.

21 — Case C-29/91 Redmond Stichting [1992] ECR I-3189, at paragraphs 22 to 27 of the judgment.

43. The above considerations may assist the national court in deciding the essential issue whether the assets transferred by Zita Modes to Milady constituted a totality of assets or part thereof within the meaning of Article 5(8) of the Sixth Directive.

Need to carry on the same type of business as the transferor

44. First, it may be noted that Article 5(8) is couched in general terms and imposes no requirement as to the use to be made of the 'totality of assets or part thereof' following the transfer. In principle, therefore, requirements should not be read into it without some imperative reason to do so.

45. The Luxembourg tax authorities have submitted that the transferee must necessarily continue to operate the same type of business as the transferor because he is to be treated as the latter's successor. The basis for that argument may be clearer from some language versions of Article 5(8) than from others. While several versions use a term equivalent to the English 'successor', others, including the French

referred to in the main proceedings, speak of 'continuing the personality' of the transferor. Thus, in the tax authorities' view, there can be no continuation of the same personality without continuation of the same type of business.

46. There does not in fact appear to be any conflict between the two types of formulation. Read together, they clearly refer to the notion of universal succession, in which one person takes over all of the rights and obligations of another (here, of course, limited to all of the VAT rights and obligations in relation to the business transferred).

47. That being so, I would disagree with the tax authorities' view, at least in the restrictive terms in which it appears to be put to the national court.

48. First, as the Commission points out, it is clear from the wording of Article 5(8) that treating the transferee as the successor to the transferor is the consequence of considering that no supply has taken place, and not a condition for so considering.

49. Second, although the transfer itself will not have attracted VAT, tax will normally have been paid (and not yet deducted) on at least some of the assets transferred and will be passed on in the transfer price. Had he retained the business, the transferor would have been entitled to deduct that tax in accordance with Article 17 and, following the transfer, the transferee will be in the same position - subject to the same requirement that the supplies on which input tax was paid be used for the purposes of taxable output supplies. Conversely, any VAT debt owed by the transferor will become the responsibility of the transferee, who will also be the person concerned by any subsequent adjustments made, in accordance with Article 20 of the Sixth Directive, in respect of tax originally paid by the transferor.

50. For that to be the case, it is not essential that the transferee should carry on exactly the same type of business as the transferor. His position will admittedly be affected if he switches between making taxable and exempt output supplies, but no more than would have been the case for the transferor

if he had made the same switch without transferring the business. To the extent that any distortions of competition may subsist, [22] they may be dealt with by national provisions pursuant to the second sentence of Article 5(8).

51. It may however be asked whether a Member State may avail itself only partially of the option in Article 5(8), by considering a transfer of a totality of assets, or part thereof, not to be a supply of goods only if further conditions are satisfied - such as, for example, that the transferee use the assets for the same type of business as the transferor - even though no such rule appears to have been incorporated in the Luxembourg VAT Law.

52. Article 5(8) allows Member States some latitude in that they may take measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax. However, that latitude appears to be thus circumscribed and not to extend to measures whose aim is other than that of preventing distortion of competition or to cases where the recipient is wholly liable to tax. A general rule requiring the transferee to carry on the same type of business as the transferor would not appear at first sight to fall within those limits.

53. Moreover, the Court has taken a rather strict approach in at least one not dissimilar case. [23] Under Article 13(C) of the Sixth Directive Member States enjoy a broad discretion to allow taxpayers a right of option for taxation in certain normally exempt transactions, including the leasing and letting of immovable property, to restrict the scope of that right of option and to fix the details of its use. Yet even there, the Court held that a Member State may not, having allowed that option, then restrict its scope to, say, land alone to the exclusion of buildings standing on it. *A fortiori*, thus, in the case of Article 5(8) it would not seem permissible for Member States to exercise the option subject to limitations other than those provided for in the second sentence. And it would seem even less acceptable, from the point of view of legal certainty, for such a limitation to be applied by mere administrative practice in the absence of any legislative enactment.

54. That having been said, the purpose of Article 5(8) and the concept, viewed in the light of that purpose, of a 'transfer of a totality of assets or part thereof' in any event presuppose that a business is trans-

22 — For examples, see paragraph 29 above.

23 — See Case C-400/98 Breitsohl [2000] ECR I-4321, at paragraph 43 et seq. of the judgment.

ferred and continues to be run as such following the transfer.

55. It will thus be for the national court to determine whether that is the case. It is difficult to formulate a Community definition for that purpose, since the degree of similarity may depend to some extent on circumstances specific to the Member State. However, criteria such as those indicated by the Court in *Spijkers* and *Redmond Stichting* [24] may be helpful, and the determination may in my view legitimately be based on national rules consistent with the Court's approach. In the present case however the Court has not been informed of any such national rules.

Need to possess administrative authorisation to carry on the type of business in question

56. By its third question, the national court asks in substance whether the fact that the transferee is not authorised to pursue the type of economic activity which he does pursue in relation to the business assets transferred has any effect on the application of the option in Article 5(8) of the Sixth Directive.

24 — See paragraph 41 above.

57. As the Commission points out, the Court has held that, in contrast to transactions in intrinsically illegal goods which may never lawfully be introduced into economic channels, supplies which may compete with lawful supplies remain subject to taxes normally payable under Community rules, even if they are themselves unlawful [25] - for example through want of authorisation. In addition, a Member State may not restrict the scope of a VAT exemption which does not distinguish between lawful and unlawful transactions exclusively to supplies authorised under national law. [26]

58. Thus, whatever other effects may ensue in national law from Milady's alleged lack of authorisation to pursue the economic activity inherent in the business assets it acquired from Zita Modes - which, it seems to be agreed, do not involve any intrinsic illegality - the VAT situation is unaffected, whether in relation to the transfer of assets itself or in any other regard.

25 — See, in particular, Case C-455/98 Salumets [2000] ECR I-4993, at paragraphs 19 to 24 of the judgment, together with the case-law cited at paragraph 19; see also paragraphs 15 to 21 of Advocate General Saggios' Opinion.

26 — Case C-349/96 Card Protection Plan [1999] ECR I-973, at paragraphs 35 and 36 of the judgment.

Conclusion

59. I am accordingly of the opinion that the Court should answer the questions raised by the Tribunal d'arrondissement de Luxembourg, as follows:

(1) Where a Member State has exercised the option in Article 5(8) of the Sixth VAT Directive, it must consider that no supply has taken place whenever there is a transfer of a totality of assets or part thereof within the meaning of that provision, subject only to any limitations contained in national measures designed to prevent distortion of competition in cases where the transferee is not wholly liable to tax.

(2) In order for there to be such a transfer, the assets transferred must form a sufficient whole to allow the pursuit of an economic activity and that activity must be pursued by the transferee. The transaction and its surrounding circumstances must be assessed globally in order to determine whether that is the case, having regard in particular to the nature of the assets transferred and the degree of continuity or similarity between the activities carried on before and after the transfer. In that context, it is not necessary for the transferee's business to be the same as that of the transferor.

(3) It is not relevant for VAT purposes whether the transferee possesses administrative authorisation to carry on that business.