JUDGMENT OF THE COURT (Third Chamber)

15 June 2006 *

In Case C-494/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 26 November 2004, received at the Court on the same day, in the proceedings

Heintz van Landewijck SARL

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet (Rapporteur), S. von Bahr, U. Lõhmus and A. Ó Caoimh, Judges,

* Language of the case: Dutch.

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Heintz van Landewijck SARL, by A.E. van der Voort Maarschalk and R. Meijer, advocaten,

— the Netherlands Government, by H.G. Sevenster and C.M. Wissels, acting as Agents,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

— the Commission of the European Communities, by K. Gross and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products

subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1; 'the Excise Directive') and 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'), in particular Article 27(1) and (5).

2 The reference was made in the course of proceedings between Heintz van Landewijck SARL ('Landewijck') and the Staatssecretaris van Financiën (Secretary of State for Finance). Landewijck claimed reimbursement from the latter of sums paid for excise stamps which went missing before they were affixed to the tobacco products for which they were intended.

Legal background

Community law

3 Under Article 6 of the Excise Directive which applies, in accordance with Article 3(1), to manufactured tobacco:

'1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

(a) any departure, including irregular departure, from a suspension arrangement;

(b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;

(c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States.'

4 Article 14(1) of the Excise Directive states:

'Authorised warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or force majeure and established by the authorities of the Member State concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. These exemptions shall apply equally to the

traders referred to in Article 16 during the transport of products under excise duty suspension arrangements.'

5 Article 21(1) of the Excise Directive provides that:

'Without prejudice to Article 6(1), Member States may require that products released for consumption in their territory shall carry tax markings or national identification marks used for fiscal purposes.'

6 Article 22(2)(d) of the Excise Directive states that:

'[P]roducts subject to excise duty and released for consumption in a Member State and thus bearing a tax marking or an identification mark of that Member State may be eligible for reimbursement of the excise duty due from the tax authorities of the Member States which issued the tax markings or identification marks, provided that the tax authorities of the Member State which issued them has established that such markings or marks have been destroyed.'

7 Under Article 10 of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40; 'the Manufactured Tobacco Directive'):

'1. At the final stage at the latest the rules for collecting the excise duty shall be harmonised. During the preceding stages the excise duty shall, in principle, be

collected by means of tax stamps. If they collect the excise duty by means of tax stamps, Member States shall be obliged to make these stamps available to manufacturers and dealers in other Member States. If they collect the excise duty by other means, Member States shall ensure that no obstacle, either administrative or technical, affects trade between Member States on that account.

2. Importers and national manufacturers of manufactured tobacco shall be subject to the system set out in paragraph 1 as regards the detailed rules for levying and paying the excise duty.'

8 Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

9 Article 5(1) of the Sixth Directive states:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

10 Under Article 10 of the Sixth Directive:

'1. (a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes "chargeable" when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed.

...'

11 According to Article 11A(1)(a) of the Sixth Directive, the taxable amount, in respect of the supply of goods, constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party. Article 11C(1) provides:

'In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

...'

12 Article 27 of the Sixth Directive, entitled 'Simplification procedures', provides:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

...

5. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.'

13 Pursuant to Article 1 of Ninth Council Directive 78/583/EEC of 26 June 1978 on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 1978 L 194, p. 16; 'the Ninth Directive') the Member States were authorised to implement the Sixth Directive by 1 January 1979 at the latest.

Netherlands law

14 Article 1 of the Law on excise duty (Wet op de accijns, Stb. 1991, No 561; 'Law on excise duty') provides:

'1. A tax, referred to as excise duty, shall be charged on:

...

(f) tobacco products.

2. Excise duty shall become due on the release for consumption and importation of the goods referred to in paragraph 1.'

15 Article 71(1) of the Law on excise duty provides:

'1. Under the conditions and within the limits laid down by general administrative measures, the amount of excise duty shall be reimbursed, on request, in respect of goods which are subject to it [where those goods]:

(a) are lost;

(b) have been destroyed under the supervision of the authorities;

(c) are exported to a non-member State or placed under the Community customs procedure destined for a non-member country;

(d) are placed in a warehouse authorised for that type of goods which are subject to excise duty;

...'

16 Under Article 73(1) of the Law on excise duty:

'When they are released for consumption and imported, tobacco products must have affixed to them the excise stamps required for the tobacco product concerned.'

17 Under Article 75(1) of the Law on excise duty, authorised warehousekeepers for the tobacco products and traders which affix the excise stamps to the tobacco products outside the Netherlands may, in particular, request excise stamps from the Tax Inspector ('the Inspector').

18 Article 76 of the Law on excise duty provides:

'1. The amount by way of excise duty represented by the face value of the excise stamps must be paid when the request for the stamps is made.

2. In derogation from paragraph 1, payment may be deferred to a date no later than the last day of the second month following that in which the excise stamps were requested if those stamps are to be affixed to packets of cigarettes or smoking tobacco, or to a date no later than the last day of the third month following that in which the excise stamps were requested if those stamps are to be affixed to packets of cigars or individual cigars, provided that security is lodged to that end.

...'

19 Article 77(1) of the Law on excise duty states:

'The amount of excise duty which is to be paid for a specified period shall be deducted from the amount paid or due when the request is made for the excise stamps which are to be affixed to the tobacco products in respect of which a declaration of departure from the warehouse for that period.'

20 Under Article 79(3) of the Law on excise duty:

'The minister shall establish, upon the conditions and restrictions laid down by him, rules on the offsetting or reimbursement of the amount paid or due in respect of requests for excise stamps which:

(a) have been returned by the traders which requested them;

(b) have been lost as a result of an accident or force majeure without having been affixed to tobacco products which have been sold or imported;

(c) have been destroyed under the supervision of the authorities.'

21 The latter provision was implemented by Article 52 of the Decree implementing the Law on excise duty (Uitvoeringsregeling accijns).

22 Under Article 52, a trader which has requested excise stamps may obtain reimbursement of the amount of duty represented by the stamps which have been lost as a result of an accident or force majeure, provided, in particular, that its request for reimbursement is submitted within one month of the date of the loss and that the time, place and cause of the loss are notified without delay to the Inspector. Article 52(6) provides that reimbursement in respect of the lost stamps is possible 'only if the exact amount of the excise duty concerned can be determined'.

23 Finally, the Law on turnover tax of 28 June 1968 (Wet op de omzetbelasting, Stb. 1968, No 329; 'Law on VAT') provides, in Article 28, for a procedure for charging VAT on tobacco products similar to that which applies to excise duty. Article 28 states that the rate of VAT applicable to those products is 19/119 of the retail price taken into consideration for calculating the excise duty, and that the VAT is not deductible.

24 According to the Netherlands Government, the special scheme provided for in Article 28 derogates from the Community VAT system. The objectives of that scheme are, on the one hand, to simplify the procedure for charging VAT, which is levied at only one stage in the supply chain for tobacco products, on departure from the warehouse or on importation, in accordance with the scheme applicable for excise duty and, on the other hand, to combat fraud, since retail trade is excluded from the procedure for tax collection.

25 That scheme was in existence on 1 January 1977. In accordance with Article 27(5) of the Sixth Directive, the Netherlands Government notified that scheme to the Commission on 12 June 1979.

The main proceedings and the questions referred for a preliminary ruling

26 Landewijck operates a manufactured tobacco wholesale business in Luxembourg in which is an authorised warehousekeeper.

27 On 6 October 1998, it submitted to the Belastingdienst/Douane te Amsterdam (Amsterdam tax and customs authorities), pursuant to Article 75 of the Law on excise duty, two requests for excise stamps for manufactured tobacco. It entrusted Securicor Omega with the delivery those stamps to it.

28 On 9 October 1998, the Inspector charged the amounts due by Landewijck in respect of those two transactions, that is NLG 177 809.10 (NLG 140 575 by way of excise duty and NLG 37 234.10 by way of VAT) and NLG 2 711 474.60 (NLG 2 202 857.50 by way of excise duty and NLG 508 617.10 by way of VAT).

29 On 12 October 1998, the requested stamps were withdrawn from the PTT Post Filatelie, now Geldnet Services BV, by the courier company Smit Koerier acting on behalf of Securicor Omega.

30 It appears from the report drawn up on 17 December 1998 by an expert acting for the Luxembourg insurance company Le Foyer that, on 13 October 1998 at 19.40, Smit Koerier delivered three packages of stamps to Securicor Omega in Utrecht (Netherlands) and that, on 14 October 1998 at 10.00, Securicor Omega found that those packages had gone missing.

31 By letter of 23 November 1998, Landewijck informed the Inspector that the stamps handed over to Smit Koerier had still not been delivered to it, they could not, therefore, be used and that Securicor Omega did not accept responsibility for their disappearance. In that letter Landewijck asked the Inspector 'to consider the particular circumstances of this case before the deadline for payment on 31 January 1999'.

32 The Inspector treated that letter of 23 November 1998 as a request for the offsetting or reimbursement of the amount due or paid by Landewijck for the stamps concerned, submitted in accordance with the combined provisions of Article 79(3) of the Law on excise duty and Article 52 of the Decree implementing that law. The Inspector refused the request by decision of 30 January 2001.

33 The complaint lodged by Landewijck against that decision was also dismissed by the Inspector.

34 The appeal against the dismissal of Landewijck's complaint, brought before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam), was also declared unfounded. The Gerechtshof te Amsterdam held, first, that the applicant had failed to establish with sufficient certainty that the stamps no longer existed or that the risk of their still being used was negligible and that, therefore, the stamps could not be regarded as lost within the meaning of Article 79(3)(b) of the Law on excise duty. Second, it held, pursuant to Article 28 of the Law on VAT, in accordance with which VAT on manufactured tobacco is collected according to the rules governing excise duty, that the request for reimbursement of the VAT should be dismissed on the same grounds as those justifying the refusal of reimbursement of excise duty.

35 Landewijck brought an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The Hoge Raad der Nederlanden observed that the Gerechtshof had correctly applied Article 79(3)(b) of the Law on excise duty. It was uncertain, however, whether the refusal to allow reimbursement or offsetting raised in respect of Landewijck in the dispute in the main proceedings was compatible with certain provisions of the Excise Directive, particularly Articles 6(1), 14 and 22.

36 Furthermore, the Hoge Raad der Nederlanden was uncertain as to whether Article 28 of the Law on VAT was applicable. Landewijck maintained essentially that the special scheme for collecting VAT established by that article had not been notified to the Commission within the period prescribed in Article 27(5) of the Sixth Directive, and that it is therefore incompatible with that provision.

37 The Hoge Raad der Nederlanden wishes to know in that regard, particularly in the light of the judgment in Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, whether the late notification of that scheme to the Commission, effected on 12 June

1979, led to the same consequences as a failure to notify, that is that the scheme is not applicable to individuals relying on such a defect. The Hoge Raad der Nederlanden added that, even assuming that the lateness of the notification does not render the scheme inapplicable, it is still appropriate to ascertain whether it is compatible with the requirements of Article 27(1) of the Sixth Directive.

38 In those circumstances, the Hoge Raad der Nederlanden decided to stay its proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Must the Excise Directive be interpreted as requiring Member States to enact a statutory provision on the basis of which, in cases such as the present, they must reimburse or offset amounts by way of excise duty that have been paid or become chargeable at the time excise stamps are requested in a case in which the requesting party (an authorised warehousekeeper) has not used, nor will be able to use, stamps which disappeared before they were affixed to products subject to excise duty, and third parties cannot have made and will not be able to make lawful use of the stamps, even though it cannot be ruled out that they have used, or will use, the stamps by affixing them to tobacco products which have been put on the market unlawfully?

2. (a) Must the Sixth Directive, and in particular Article 27(1) and (5) thereof, be interpreted as meaning that the fact that the Netherlands Government failed to notify the Commission that it wished to maintain the special procedure for charging tax on tobacco products until after the expiry of the time-limit prescribed by Article 27(5) of the Sixth Directive, as amended by the Ninth Directive, means that, if an individual invokes the failure to observe the time-limit after the date when notification was in fact made, that special procedure for charging tax must be disapplied even after the notification is made?

(b) If the answer to Question 2(a) is in the negative, must the Sixth Directive, and in particular Article 27(1) and (5) thereof, be interpreted as meaning that the special procedure for charging tax on tobacco products laid down in Article 28 of [the Law on VAT] must be disapplied on the grounds that it is incompatible with the conditions laid down by the abovementioned provisions of the directive?

(c) If the answer to Question 2(b) is in the negative, must the Sixth Directive, and in particular Article 27(1) and (5) thereof, be interpreted as meaning that failure to reimburse VAT in circumstances such as those referred to in Question 1 is contrary to that directive?'

The questions

The first question

39 Article 21(1) of the Excise Directive gives Member States the option to supply tax stamps for products released for consumption on their territory. In the same way, Article 10(1) of the Manufactured Tobacco Directive provides that, during the stages preceding harmonisation of the rules for collecting excise duty, that duty is, in principle, to be collected by means of tax stamps.

40 Article 22(2)(d) of the Excise Directive also provides for the possibility to obtain reimbursement of excise duty from the tax authorities of the Member State which issued the tax stamps, where the tax authorities of the Member State which issued them have established that such stamps have been destroyed.

41 However, the Excise Directive does not contain any provisions relating to the disappearance of such stamps. That directive must, therefore, be regarded as leaving it to the Member States to determine the consequences of such a disappearance. That directive cannot, therefore, be interpreted as meaning that it precludes the Member States from laying down national rules which, in a case where tax stamps go missing, place the financial responsibility for the loss of those stamps on the purchaser.

42 Neither can such national rules be regarded as contrary to the principle of proportionality.

43 A national law which allowed the purchaser of excise stamps to obtain reimbursement simply by claiming that they had gone missing would be likely to encourage abuse and evasion. The prevention of abuse and evasion is precisely one of the objectives pursued by Community law.

44 Accordingly, national rules such as those at issue in the main proceedings, which place the financial responsibility for the loss of those stamps on the purchaser where tax stamps go missing, contribute to the achievement of the aim of preventing the fraudulent use of those stamps. Furthermore, those national rules do not exceed what is necessary to pursue that objective, since they do not exclude any possibility of reimbursement or offsetting in other situations, such as the loss of the stamps due to accident or force majeure.

45 In that connection, the argument that the risk that the missing stamps will be misused is minimal in the particular circumstances of the case has no effect on the answer to be given to the national court, since there is nevertheless a risk of abuse.

46 Accordingly, the answer to the first question must be that neither the Excise Directive nor the principle of proportionality preclude Member States from adopting legislation which does not provide for reimbursement of the amount of excise duty paid, in circumstances such as those in the main proceedings, which thereby places the financial responsibility for the loss of the tax stamps on their purchaser.

Question 2(a)

47 By Question 2(a), the national court asks essentially whether the fact that a Member State has notified the Commission of its wish to maintain the special procedure for collecting tax on manufactured tobacco after the expiry of the period prescribed in Article 27(5) of the Sixth Directive, as extended by the Ninth Directive, means that the procedure for charging tax may not be applied even after the date of its notification.

48 It is true that the Court has already held that a derogation from the Sixth Directive adopted without compliance with the duty of notification imposed on the Member States by Article 27(2) cannot be relied upon as against a taxable person (see, in particular, Case 5/84 *Direct Cosmetics* [1985] ECR 617, paragraph 37, and Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 33). In the absence of notification, that measure cannot be authorised by the Council in accordance with Article 27(1) of the Sixth Directive.

49 However, in the present case, it is not a question of a new derogating measure which must be authorised by the Council, but a special measure in existence on 1 January 1977 and which the Member State wished to maintain, in accordance with Article 27 (5) of the Sixth Directive, in spite of the implementation of that directive. The Netherlands Government therefore notified the Commission of its wish to maintain the scheme in Article 28 of the Law on VAT on 12 June 1979. Furthermore, in its

first report to the Council of 14 September 1983 on the functioning of the common system of VAT, submitted in accordance with Article 34 of the Sixth Directive (COM (83) 426 final), the Commission did not consider that that scheme was contrary to the criterion set out in Article 27(1) of the Sixth Directive, namely that the measures do not affect, except to a negligible extent, the amount of tax due at the final consumption stage.

50 Late notification of the derogating measure cannot entail the same consequences as a failure to notify. Article 27(5) of the Sixth Directive does not in fact impose any sanction in respect of the failure to comply with the time-limit for notification. Furthermore, the purpose of that notification is not to obtain the Commission's authorisation, but simply to enable it to become acquainted with the measure concerned and to evaluate it. In those circumstances, failure to comply with the time-limit for notification cannot be regarded as a material procedural defect capable of rendering inapplicable a derogating measure which was notified late.

51 Accordingly, the answer to Question 2(a) must be that Article 27(5) of the Sixth Directive must be interpreted as meaning that failure to observe the period for notification does not constitute a material procedural defect capable of rendering inapplicable a derogating measure which was notified late.

Question 2(b)

52 By Question 2(b), the national court wishes to know whether the special procedure for collecting VAT by way of tax stamps, such as that provided for in the Dutch law applicable in the main proceedings, is compatible with the requirements of Article 27(1) and (5) of the Sixth Directive and does not exceed what is necessary in order to simplify the procedure for charging tax and to prevent tax evasion and avoidance.

53 As the Court has already held, the national derogating measures referred to in Article 27(5) of the Sixth Directive, which are allowed 'in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance', must be interpreted strictly (see, to that effect, Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 29). They may not derogate from the basis for charging VAT laid down in Article 11 of the Sixth Directive except within the limits strictly necessary for achieving that aim (Case C-63/96 *Skripalle* [1997] ECR I-2847, paragraph 24). They must also be necessary and appropriate to the realisation of the specific objective which they pursue and have the least possible effect on the objectives and principles of the Sixth Directive (Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, paragraph 60).

54 In the present case, the derogating scheme permitting VAT to be collected by means of tax stamps has the purpose and effect of simplifying the procedure for charging tax, which is effected, thanks to this derogating scheme, at a single stage in the supply chain for the products.

55 Furthermore, that scheme applies the amount of the VAT due to the price of the products at the final consumption stage, in accordance with the requirements of Article 27(1) of the Sixth Directive.

56 It is true that, in certain circumstances, such as the loss of products, their sale at a loss or unlawful sale at a price different from the retail price indicated on the tax stamps, the manufacturer may be obliged to pay an amount of VAT which is higher than that which would have resulted from the application of the ordinary Community system for levying VAT.

57 The mere possibility that such events may take place is not sufficient, however, to justify the conclusion that the derogating rules for collecting VAT by means of tax stamps do not comply with the criteria set out in Article 27(1) of the Sixth Directive.

That article precludes only measures which might affect, to a non-negligible extent, the amount of tax due at the final consumption stage.

58 The nature of the arguments that the scheme for collecting tax by means of tax stamps may lead to a variation in the tax due at the final consumption stage is not such as to support the conclusion that that scheme might affect, to a non-negligible extent, the amount of tax due at the final consumption stage. Such a scheme does not therefore disregard the criteria set out in Article 27(1) of the Sixth Directive.

59 For the same reasons, it does not exceed what is necessary in order to simplify the procedure for charging VAT.

60 Therefore, the answer to the national court must be that Article 27(1) and (5) of the Sixth Directive must be interpreted as meaning that a derogating scheme for collecting VAT by means of tax stamps, such as that established by Article 28 of the Law on VAT, is compatible with the requirements laid down by the provisions of the directive and does not exceed what is necessary for the simplification of the procedure for charging the tax.

Question 2(c)

61 By its final question, the national court asks the Court whether the Sixth Directive, in particular Article 27(1) and (5), must be interpreted as meaning that the failure to reimburse VAT in circumstances such as those in the main proceedings is incompatible with that directive.

62 As stated above in paragraph 44, national rules which place the financial responsibility for the loss of those stamps on the purchaser where tax stamps go missing contribute to achieving the aim of preventing the fraudulent use of those stamps. Moreover, those national rules do not exceed what is necessary to pursue that objective, since they do not exclude any possibility of reimbursement or offsetting in other cases, such as the loss of the stamps by accident or force majeure.

63 Furthermore, the tax stamps do not constitute, strictly speaking, the purchaser's tax debt, but have an intrinsic value. It is therefore reasonable that the purchaser of those tax stamps should take precautions against the risk of their disappearance and, should the case arise, assume the financial consequences of that disappearance, even though that might lead, in certain cases, to double taxation of VAT in respect of the same goods.

64 Finally, and contrary to the Commission's and Landewijck's submissions, the answer to this question cannot be inferred from the approach adopted by the Court in Case C-435/03 *British American Tobacco and Newman Shipping* [2005] ECR I-7077. By that judgment the Court held, first, that the theft of goods does not constitute a supply of goods for consideration within the meaning of Article 2 of the Sixth Directive, and therefore cannot as such be subject to VAT and, second, that the fact that goods are subject to excise duty does not affect that conclusion.

65 The disappearance of tax stamps, unlike the theft of goods, has no effect on the taxable amount itself. The manufactured tobacco in respect of which the stamps were purchased may still be sold and the VAT debt, like the excise duty debt, may still arise. Furthermore, it is reasonable, as it has been observed, to encourage the purchaser of tax stamps to take precautions against the risk that they might go missing, although it is probably unnecessary to encourage the owner of goods to supervise them and take precautions against the risk of theft.

66 The Commission and Landewijck are not therefore justified in claiming that it is clear a fortiori from the judgment in *British American Tobacco and Newman Shipping* that a right to reimbursement or offsetting of amounts paid by way of VAT exists in the case of the loss of tax stamps.

67 The answer to the final question must be, therefore, that the absence of an obligation to reimburse amounts paid for the purchase of excise stamps which correspond to VAT, in circumstances such as those in the main proceedings, is not incompatible with the Sixth Directive and, in particular, with Article 27(1) and (5) thereof.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Neither Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products nor the principle of proportionality preclude Member States from adopting legislation which does not provide for reimbursement of the amount of excise duty paid, where the excise stamps disappeared before having been affixed to the tobacco products, if that disappearance is not attributable to force majeure or to an accident and if it is not established that the stamps have been destroyed or rendered permanently unusable, which thereby places the financial responsibility for the loss of tax stamps on the purchaser.**

2. **Article 27(5) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment must be interpreted as meaning that failure to observe the period for notification**

does not constitute a material procedural defect capable of rendering inapplicable a derogating measure which was notified late.

3. **Article 27(1) and (5) of Sixth Directive 77/388 must be interpreted as meaning that a derogating scheme for collecting VAT by means of tax stamps, such as that established by Article 28 of the Law on turnover tax of 28 June 1968 (Wet op de omzetbelasting), is compatible with the requirements laid down by the provisions of the directive and does not exceed what is necessary for the simplification of the procedure for charging the tax.**

4. **The absence of an obligation to reimburse amounts paid for the purchase of excise stamps which correspond to VAT, where those stamps disappeared before having been affixed to the tobacco products, if that disappearance is not attributable to force majeure or to an accident and if it is not established that the stamps have been destroyed or rendered permanently unusable, is not incompatible with Sixth Directive 77/388 and, in particular, with Article 27(1) and (5) thereof.**

[Signatures]