OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 22 June 2006 [1]

I — Introduction

1. The Sixth Directive on value added tax [2] (hereinafter 'VAT') allows national exemptions under which there is no right to deduct input tax, in addition to exemptions for certain intra-Community transactions in respect of which there is that right of deduction.

2. The Luxembourg Cour d'Appel (Court of Appeal) asks whether an economic activity which, when it is carried out within a Member State, is exempt and does not give rise to a right of deduction, must be treated the same way when it extends across the borders of that State.

3. The question which has been referred for a preliminary ruling focuses attention on the relationship between the exemptions for certain domestic activities, set out in Article 13 of the Sixth Directive, and those laid down for transactions between States by Article 15, as regards the supply of goods and services before 1 January 1993, and by Article 28c, [3] as regards the supply of goods and services after that date.

4. In particular, the Cour d'Appel seeks to ascertain whether, in the case of the manufacture and repair of dental prostheses in Luxembourg, activities which are eligible for that tax privilege, input tax may be deducted when the customers are based in Germany.

1 — Original language: Spanish.

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).

3 — That provision was inserted by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

II — The Sixth Directive

A — *Exemptions within the territory of the country*

5. The Sixth Directive provides that the following are subject to tax: the supply of goods or services [4] effected for consideration within the territory of the country by any person who carries out independently the activities of a producer, trader, or a person supplying services, including the activities of the professions (Articles 2(1) and 4(1) and (2)).

6. Title X governs exemptions and the ones which relate to internal transactions are listed in Article 13, part A of which lists, amongst certain activities in the public interest, 'the services supplied by dental technicians in their professional capacity and dental prostheses supplied by dentists and dental technicians' (paragraph 1(e)).

7. It may be inferred from a converse interpretation of Article 17(1) and (2) that those tax exemptions preclude the deduction of input tax unless the goods or the services are used by a taxable person for the purposes of his taxable transactions.

8. Under Article 28(3)(a), Member States were authorised, during the period stipulated in paragraph 4, to subject to tax the transactions exempt under Article 13 and set out in Annex E, point 2 of which refers to Article 13A(1)(e). In accordance with the fourth sentence of Paragraph 4(14) of the Umsatzsteuergesetz 1991 (German Law on value added tax), [5] the exemption for doctors and dentists does not apply to the supply or repair of dental prostheses or orthodontic equipment where an operator manufactures or repairs those goods in his workshop.

B — *Exemptions in respect of intra-Community transactions*

1. Before 1 January 1993

9. In the original version of the Sixth Directive, intra-Community transactions

4 — The supply of services constitutes a residual category comprising any transaction which does not constitute a supply of goods (Article 6 of the Sixth Directive).

5 — BGBl. 1991, p. 351.

were treated in the same way as transactions with third countries and were governed by Article 15, the first three paragraphs of which exempted the supply of goods dispatched or transported outside a Member State and the supply of services carried out on those goods. [6]

10. Article 17(3)(b) authorised the deduction of the tax due in those cases.

2. After 1 January 1993

11. Directive 91/680 inserted into the Sixth Directive a new Title XVIa with the heading Transitional Arrangements for the Taxation of Trade between Member States, the aim of which is to facilitate the transition to a definitive system for the taxation of trade within the common VAT system after the abolition of fiscal controls at internal borders as from 1 January 1993. [7]

12. Under those transitional arrangements, VAT is charged on intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such (first subparagraph of Article 28a(1)(a)).

13. The supply of goods 'dispatched or transported by or on behalf of the vendor or the person acquiring the goods ... effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods' is exempt (Article 28cA(a)). Intra-Community acquisitions of goods the supply of which by taxable persons would be exempt within the country are also exempt (Article 28cB(a)).

14. Finally, Article 17(3), as amended by Article 28f(1), provides that input VAT may be deducted where a taxable person uses the goods or services for the purposes of (1) transactions relating to the taxable economic activities, carried out in another country, which would have given rise to the right of deduction if they had been performed within a Member State (subparagraph (a)), and (2) transactions which are exempt pursuant to Article 15 and Article 28cA and C (subparagraph (b)).

6 — In the Opinion in Case C-382/02 *Cimber Air* [2004] ECR I-8379, I observed that '[i]nternational goods traffic is governed by the principle of taxation at the place of destination or final consumption. For that reason, if it is wished to avoid the "exportation" of indirect taxes from the country of origin — which would involve double taxation — a system must be agreed for the exemption of foreign transactions' (point 17).

7 — That objective is set out in the third, eighth and ninth recitals in the preamble to Directive 91/680.

III — The main proceedings and the questions referred for a preliminary ruling

15. The Luxembourg company Eurodental SARL makes and repairs dental prostheses for customers based in Germany.

16. In a decision of 26 March 1997, the Luxembourg administration refused to allow the company to deduct the VAT it had paid on goods used for the supply of goods and services in Germany. The authorities argued that Article 44 (which lays down the exemption for dental technicians) of the Law of 12 February 1979 amending and supplementing the Law of 5 August 1969 on VAT, [8] takes precedence over Article 43 (governing the exemption for intra-Community supplies), and that, accordingly, Article 49(2)(a), which authorises the deduction of VAT charged on goods used for the activities referred to in Article 43, was not applicable.

17. In a judgment of 16 December 2002, the Tribunal d'arrondissement (District Court) held that the deduction had been incorrectly refused on the ground that Articles 43 and 44 govern different transactions, since the former relates to foreign transactions while the latter relates to domestic transactions. Article 49 applies to the first kind of transaction, irrespective of its nature, from which it follows that no provision stipulates that Article 44 has primacy over Article 43. The Tribunal d'arrondissement took the view that there is always a right of deduction in an intra-Community supply of goods. [9]

18. The tax administration lodged an appeal, submitting that the interpretation put forward afforded more favourable treatment to the supply of prostheses to Germany than to the supply of prostheses in the Grand Duchy, contrary to the principle of neutrality inherent in the common system of VAT.

19. The Cour d'Appel considered that the wording of the legislative texts at issue does not resolve the dispute and it therefore decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the supply of goods which, when effected within a Member State, is

8 — *Mémorial* A-No 11 of 19 February 1979, p. 186.

9 — The claim put forward by Eurodental was dismissed because the Luxembourg court held that the necessary supporting documents had not been produced.

exempted by reason of Article 13A(1)(e) of [the] Sixth Directive ... and does not give rise to the right to deduct input tax pursuant to Article 17 of the directive, fall within the scope of Article 15(1) and (2) of the directive as worded prior to 1 January 1993 or Article 28cA(a), applicable as of 1 January 1993, and thus within the scope of Article 17(3)(b) of the directive giving rise to the right to deduct input tax, when the goods are supplied by an operator established in a Member State of the Community to an operator established in another Member State and when the conditions relating to the application of Article 15(1) and (2) of the directive as worded prior to 1 January 1993 and of Article 28cA(a), applicable as of 1 January 1993, are met?

(2) Does the supply of services which, when made within a Member State, is exempted by reason of Article 13A(1)(e) of [the] Sixth Directive ... and does not give rise to the right to deduct input tax pursuant to Article 17 of the directive fall within the scope of Article 15(3) as worded prior to 1 January 1993 (no exemptions were laid down for 1993) and thus within the scope of Article 17(3)(b) of the directive giving rise to the right to deduct input tax, when the services are supplied by an operator established in a Member State of the Community to an operator established in another Member State and when the conditions relating to the application of Article 15(3) as worded prior to 1 January 1993 are met?'

IV — The procedure before the Court of Justice

20. Eurodental, the defendant in the main proceedings, the German Government and the Commission submitted written observations within the time-limit prescribed by Article 23 of the Statute of the Court of Justice.

21. None of the parties requested an oral stage and therefore, at the general meeting of 13 December 2005, the Court decided to commence deliberation of the case in accordance with Article 104(4) of the Rules of Procedure, since it took the view that there was no need for an Opinion of the Advocate General.

22. During the deliberation, the Third Chamber, to which the case had been assigned, decided on 6 April 2006 to send the case back to the general meeting which, on 25 April, upheld the assignment of the case to that chamber but took the view that an Opinion and an oral hearing were required. The parties were asked to give their opinions in writing on the choice made by the Federal Republic of Germany under Article 28(3)(a) of the Sixth Directive to subject to tax for a transitional period the supply and repair of dental prostheses and orthodontic equipment by professionals established in its territory.

23. At the public hearing, which was held on 31 May 2006, the representatives of Eurodental and the Commission presented oral argument.

V — Analysis of the questions referred for a preliminary ruling

24. The questions submitted in this case, which may be summarised in the form of a single question, necessitate an examination of the relationship between two kinds of exemptions laid down in the Sixth Directive, that is, the exemptions for certain activities in the public interest, set out in Article 13A(1), and the exemptions in favour of intra-Community transactions. The first question concerns supplies of goods before and after 1 January 1993, while the second refers to supplies of services before that date.

25. The dispute has arisen because the business activity concerned in the main proceedings is capable of being caught by the scope of both types of exemption, on account of either its nature (the activity of dental technicians) or the detailed rules applicable to it (intra-Community). However, the effects of the exemptions are different since if the activity is considered to fall within the first type there is no right to deduct input VAT, a right which would arise in the case of the second type.

26. The resolution of the dispute requires two examinations: the first, of the exemptions having regard to the neutrality of the tax, the keystone of the system, and the second, of the special, transitional status of intra-Community transactions.

A — *Neutrality in exemptions within the territory of the country*

27. VAT is charged on acts of consumption, as an indirect indication of the economic capacity of individuals, an objective which is attained by taxing the activities of traders and professionals who, through the practice of shifting the tax burden, pass on the levy to the final consumer. Thus, a neutral tax is achieved, since it is paid only by the final link in the chain, namely, whoever acquires the goods or uses the service.

28. As a result of that structural requirement, persons who participate in an intermediary stage of the process deduct the input tax, as laid down in Article 17(1) and (2) of the Sixth Directive. Anyone who is a taxable person and uses the goods or services for the purpose of his taxable transactions is entitled to deduct the VAT. Accordingly, if a taxable person uses the goods or services in activities which are not subject to tax or are exempt, there is no taxable event and the right of deduction does not arise because there is no tax liability. [10]

29. In that connection, the Court held in *BLP Group* [11] that, except in the cases expressly provided for, where a taxable person uses, to carry out an exempt transaction, services in respect of which he has paid VAT, he is not entitled to deduct the input tax paid even where the service is used for the purpose of a taxable transaction.

B — *Transitional arrangements for the intra-Community movement of goods*

30. In point 11 of this Opinion, I pointed out that the Sixth Directive was amended by Directive 91/680, which aimed to facilitate the transition, following the abolition of fiscal controls at internal borders, to a

10 — For an analysis of the system of deducting VAT, see Alguacil Marí, P. and Orón Moratal, G., 'La deducción en el IVA español y su adecuación a la Sexta Directiva', *Noticias/C.E.E.*, numbers 67 and 68, August/September 1990, p. 101. Colmenar Valdés, S., 'El derecho a la deducción en el IVA', *Revista de Derecho Financiero y Hacienda Pública*, number 157, 1982, p. 327, argues that, 'since the deduction of input tax arising in the previous period is functionally linked to the input tax to be paid in the subsequent period, in cases where no tax liability arises it is clear that nor can input tax from the previous period be deducted, since the rationale for the right of deduction no longer exists.'

11 — Case C-4/94 [1995] ECR I-983.

definitive system for the taxation of intra-Community trade within the common VAT system involving the taxation of transactions in the Member State of origin. However, since on 31 December 1992 (the day before that abolition of fiscal controls) the conditions required had not been met, the rule that tax must be paid at the place of destination was retained for a period which is still in force. Accordingly, Article 28cA(a) introduced the exemption for the intra-Community supply of goods, providing that acquisitions of that kind are to be taxed in the Member State of destination.

31. In other words, for a temporary period, during the transition to that definitive system, purchases made in the Community by taxable persons or by non-taxable legal persons are taxed on the basis that the taxable event is deemed to have taken place in the Member State to which the goods supplied are dispatched or transported (Articles 28a(1)(a) and 28bA(1) of the Sixth Directive).

32. The reasoning behind those provisions is that, where the tax becomes due in the State of destination, it is only possible to guarantee neutrality by allowing whoever pays the tax to pass it on or deduct it because that person does not fulfil the role of final consumer but rather that of a taxable person who uses the goods for transactions which are subject to tax.

33. That process of placing intra-Community transactions on an equal footing with domestic transactions entails the removal, for tax purposes, of the cross-border stage, with the result that goods supplied in the country of origin are exempted from VAT (Article 28cA(a)) because the acquisition is subject to payment of tax in the country of destination by a person authorised to deduct input VAT (Article 28aA(a)), so the process of shifting the tax burden continues until it reaches the consumer.

34. That explains the reasoning behind Article 17(3)(b), as amended by Article 28f(1), pursuant to which taxable persons may deduct VAT when they use goods or services for the purposes of exempt activities [12] in accordance with Article 28cA, since a person who supplies goods from one Member State to another must be compensated as though he had not existed or participated in the transaction.

12 — In the main proceedings, the dental technician would be authorised to deduct the input tax on the materials used to make the prostheses since they are used for an exempt activity.

C — *No conflict of laws*

35. The logic of the foregoing approach, based on the intra-Community nature of the transaction, would be lost if the exemption under Article 13 of the Sixth Directive related to the type of activity concerned.

36. If, in a cross-border supply of goods which is not subject to tax and which would also not be subject to tax if it was purely internal in scope, a taxable person deducted the VAT, that would create an anti-competitive advantage in favour of suppliers from abroad, thereby upsetting the balance sought, [13] the objective of which is not only that the intermediaries should be able to recover the input tax so that the tax burden falls exclusively on the consumer, but also that there should be equal treatment, [14] irrespective of the chain in which each trader is involved and of the Member State from which they operate. [15]

37. To put it another way, the deduction of VAT which has been passed on from previous stages is permitted in exempt transactions only if they are intra-Community transactions and on no other grounds. Accordingly, it may be concluded that the deduction is not permitted for the exemption referred to in Article 28cB(a), that is, for intra-Community acquisitions of goods the supply of which by taxable persons would be exempted in a Member State unless, pursuant to Article 17(3)(a), those transactions would have given rise to the right to deduct the VAT even though they occurred in the territory of the country.

38. Guidance may also be found in Article 17(3)(c) which explicitly confers the right to deduct input tax in the case of specified exemptions laid down in Article 13B when the transaction crosses the borders of the Community. Subparagraph (c) would be superfluous if, as Eurodental and the German Government submit, such exemptions fell directly within the scope of Article 17(3)(b) on the grounds of their international dimension.

13 — In the case before the Court, a professional who supplies goods outside Luxembourg would be entitled to deduct the VAT charged until his participation, a right which is not granted to a professional operating within his own borders.

14 — Terra, B. and Kajus, J., *A Guide to the European VAT Directives, Volume 1, Introduction to European VAT and other indirect taxes*, 2006, pp. 418 to 422, explain that the neutrality of VAT is a complex notion comprising a legal aspect, aimed at affording non-discriminatory treatment before the law, a financial aspect, aimed at optimising the choice of production means, and a competitive aspect, aimed at avoiding distortions of the market.

15 — In the judgment in Case C-302/93 *Debouche* [1996] ECR I-4495, in particular paragraph 19, the Court ruled that an economic operator who carries out exempt activities may not rely on his intra-Community position to claim a refund of tax where he would not have been able to rely on that right within the territory of the country.

39. The Commission explains that point with great clarity in its written observations in these proceedings, reasoning that, if it were accorded the right of deduction, Eurodental would have a position of advantage vis-à-vis competitors which participate in the national market and do not have that right, thereby promoting fraud and encouraging companies to move to Member States other than the one in which they actually carry on their activities.

40. The German Government rightly argues that, since it opted, under Article 28(3)(a), to make transactions involving dental prostheses subject to tax in Germany, transactions at intra-Community level might be more onerous for consumers in so far as they pay VAT in Germany and there is no right to deduct VAT paid in Luxembourg. [16] However, that effect, resulting from the lack of total harmonisation of that indirect tax, is the result of a legitimate choice made by the German authorities which, for a transitional period, have excluded certain activities from the common system, and they must therefore accept the consequences. [17] It is not acceptable to sanction a general breach of the principle of neutrality and of the coherence of the system by relying on a specific national feature which has been freely chosen [18] and which would transfer to the tax authorities of another Member State, in this case those of Luxembourg, the financial burden arising from that unilateral decision.

41. The considerations relating to supplies of goods, both before and after 1 January 1993, are also applicable to services supplied before that date, which are referred to in the second question submitted, in the light of the original wording of Articles 15(3) and 17(3)(b) of the Sixth Directive.

42. In summary, an exempt intra-Community transaction does not give rise to the right to deduct input tax if, had it been purely domestic in scope, the transaction would also have been exempt on the basis of its nature. [19]

16 — In a situation like the one in the main proceedings, a patient in Germany would pay an invoice from the dentist which includes: (a) the material used to make the prosthesis in Luxembourg plus the VAT due (residual VAT); (b) the fees of the dental technician; and (c) the fees of the German dentist. Thus, the financial consequences would be greater for the final consumer if there were no provision for the deduction of residual VAT, from which it follows, in the opinion of the German Government, that the solution is to allow such deduction.

17 — In the judgment in Case C-169/00 *Commission* v *Finland* [2002] ECR I-2433, the Court noted in paragraph 32 that the exemptions laid down under Article 28(3) are not part of the common system of VAT.

18 — Only two other Member States — Belgium and Hungary — have chosen the same option.

19 — That was the solution proposed by the Advisory Committee on Value Added Tax, set up under Article 29 of the Sixth Directive, at its 60th meeting which was held on 20 and 21 March 2000 (TAXUD/1876/00 — Rév. 1, Comité de la TVA, Orientations de la 60e réunion, 20 et 21 mars 2000).

VI — Conclusion

43. In the light of the foregoing considerations, I propose that the Court reply to the questions referred for a preliminary ruling by the Cour d'Appel, Grand Duchy of Luxembourg, by declaring that:

The supply of goods and services referred to in Article 13A(1)(e) 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 is exempt under that provision, even where it entails intra-Community transactions governed by Article 15(1), (2) and (3) (in the original version and in the one laid down in Directive 91/680/EEC) and Article 28cA(a), but does not thus give rise to the right of deduction laid down in Article 17.