OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 8 October 1987 *

Mr President,
Members of the Court,

1. I — The Third Chamber of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has referred a question to the Court for a preliminary ruling on the interpretation of Article 11 (1) (a) and (4) of the Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax, [1] and Article 17 (2) (d) and (6) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 [2] on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment.

2. The question submitted arose in a dispute between Leesportefeuille 'Intiem' CV and the Netherlands tax authorities.

3. Leesportefeuille 'Intiem' CV (hereinafter referred to as 'Intiem') operates a business involving the distribution by its employees of a catalogue of reading material to customers at their homes. Intiem's employees use their own cars to make the deliveries and they receive an allowance from Intiem in respect of travel expenses so incurred.

4. That allowance is wholly unconnected with the petrol used by the employees in connection with the distribution of the material. The system of distribution is as follows: before they begin work, Intiem's employees refuel their cars at their own expense. At the end of each working day, Intiem allows its employees to refuel their cars at its expense at a filling station situated opposite its premises. The company which runs the filling station invoices Intiem for the petrol supplied to Intiem's delivery staff for its account.

5. The dispute arose when Intiem received an adjusted assessment to turnover tax (value-added tax) since the Netherlands tax authorities refused to allow Intiem to deduct the whole of the tax charged to it for the petrol supplied to its employees.

6. According to the relevant Netherlands legislation — Article 23 of the Uitvoeringsbesluit Omzetbelasting 1968 and Article 16 of the Uitvoeringsbeschikking Omzetbelasting 1968 — an undertaking may deduct from the tax due a percentage — fixed by the competent minister — of the allowance which it pays to its employees for using their own cars in the course of its business.

7. Upon objection by Intiem, the Tax Inspector considered that those provisions

* Translated from the Portuguese.

1 — Official Journal, English Special Edition 1967, p. 16.

2 — Official Journal 1977, L 145, p. 1.

should be applied both to the allowances paid to Intiem's employees and to the amount paid for the petrol used by them.

8. Intiem appealed to the Gerechtshof (Regional Court of Appeal), Amsterdam, which upheld the Inspector's decision on the ground that the petrol was supplied not to Intiem but to its employees, with the result that Intiem could not deduct the value-added tax charged on those supplies.

9. Taking the view that the petrol used by its employees was supplied to the company itself in the course of its business and that Articles 3 (1) (a) and 15 (1) of the 1968 Law, which entitled it to deduct the full amount of value-added tax charged on that basis, were therefore applicable, Intiem appealed in cassation to the Hoge Raad. The Hoge Raad considered it necessary, in order to resolve the dispute, to seek a ruling from the Court of Justice on the interpretation of the provisions of Commmunity law referred to at the outset.

10. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, the Commission, the Netherlands Government and the Government of the Federal Republic of Germany submitted written observations which are summarized in the Report for the Hearing.

11. II — As is clear from the preceding account of the facts, the problem raised by the national court is centred on the analysis of the deduction mechanism provided for under the system of value-added tax.

12. The principle of deducting input tax is a fundamental component of the common system of value-added tax. At each stage in the production and marketing circuit (including each time the goods cross the frontier of the country of consumption), the taxable person pays the tax authorities the amount of tax due on his sales, after deducting the amount of tax paid at the previous stage by his suppliers.

13. It is that mechanism which makes it possible to put into practice the concept of value-added tax, which is defined in Article 2 of the First Council Directive (67/227/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes[3] as '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'.

14. The deduction of the amount of tax borne directly by the various cost components is meant, as the Court recently pointed out in its judgment in *Rompelman*,[4] 'to relieve the trader entirely of the burden of the value-added tax payable or paid in the course of all his economic activities'. The Court went on to state that 'the common system of value-added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to value-added tax, are taxed in a wholly neutral way'.

15. The structure of the deduction mechanism is identical in the Second and Sixth Directives, referred to in the judgment of the Hoge Raad, and Article 17 of the

3 — Official Journal, English Special Edition 1967, p. 14.

4 — Judgment of 14 February 1985 in Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655, at p. 664, paragraph 19 of the decision.

Sixth Directive merely explains and amplifies the principles already set out in Article 11 of the Second Directive.

16. To all intents and purposes, therefore, my analysis will focus essentially on the relevant provisions of the Sixth Directive which has, moreover, since it came into force, replaced the Second Directive.

17. Article 17 (2) (a) to (c) of the Sixth Directive provides as follows:

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

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

(b) value-added tax due or paid in respect of imported goods;

(c) value-added tax due under Articles 5 (7) (a) and 6 (3).'

Article 17 (6) provides that:

'Before a period of four years at the latest has elapsed from the date of entry into force of this directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value-added tax. Value-added tax shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this directive comes into force'.

18. That provision permits the deduction mechanism to be broken down as follows: a taxable person may deduct from the value-added tax which he is liable to pay the tax due or paid: (a) in respect of goods or services supplied by another taxable person, (b) in respect of imported goods (which Article 2 (2) of the Sixth Directive subjects to value-added tax) and (c) in respect of goods and services supplied to oneself.

19. The general principle that tax is deductible only 'in so far as the goods and services are used for the purposes of his taxable transactions', that is to say in the course of the trader's business, entails:

(a) the deduction of the whole of the tax borne by the goods or services which meet that general condition in every respect;

(b) the application of a system of proportional deduction in respect of goods and services used both for transactions in respect of which value-added tax is deductible and for transactions in which value-added tax is not deductible (Article 17 (5)), in accordance with the system established by each Member State within the framework laid down by the various subparagraphs of Article 17 (5);

(c) the exclusion of the right to deduct expenditure which, although incurred in the normal course of the undertaking's business, must be regarded as intended to meet private needs.

Owing to lack of agreement within the Council, the Sixth Directive did not establish a Community list of exclusions, and Article 17 (6) merely refers in general terms to expenditure on luxuries, amusements or entertainment and provides for the compilation of that list before the end of a four-year transitional period.

Until then, Article 17 (6) allows the Member States to retain the exclusions provided for under their national laws (standstill clause) but not to introduce any new ones.

20. III — I believe that the question submitted to the Court by the Hoge Raad der Nederlanden seeks to ascertain whether, for the purposes of the deduction of the full amount of value-added tax in accordance with Article 17 (2) (a) of the Sixth Directive, petrol supplied directly to Intiem's employees for them to use in their own cars in the course of the undertaking's business, the corresponding invoices being paid by Intiem directly to the supplier, is to be regarded as a supply to the taxable person.

21. In my view, that question must decidedly be answered in the affirmative.

22. If the petrol is used exclusively for the purposes of the undertaking's business ('for the purposes of [its] taxable transactions') and paid for by the undertaking to the supplier on receipt of the invoices issued in accordance with Article 22 (3), the deduction must be authorized in order to prevent the same basis of assessment from bearing the same tax twice, to the extent of the residual amount of value-added tax payable in respect of one of the undertaking's cost components (the petrol used).

23. The fact that the petrol is pumped directly into the tank of the employee's car and is used on account of the undertaking in no way affects the legal and economic reality of the transaction.

24. To begin with, the petrol is supplied in performance of a contract which was concluded between two taxable persons — the purchaser and the seller — and which produces legal effects in relations between them. That contract transferred to the purchasing undertaking 'the right to dispose of tangible property as owner', which is treated in Article 5 (1) of the Sixth Directive as the factor that defines the 'supply of goods' for the purpose of delimiting the field of application of value-added tax (Article 2 (1)). It is that transfer of the *legal right* to dispose of property (and not the supply *transaction itself*) which lies at the root of the concept of 'taxable transaction' and constitutes the essential element on which my analysis is based.

25. The manner in which the goods are used in the course of the undertaking's business is, in its turn, governed either by the trader's right to organize its own activities or by another contract (a contract of employment) concluded between the trader and his employees. In any event, since the petrol constitutes an input by the undertaking, its delivery to the undertaking's employees for them to use in their cars for the purposes of the undertaking's business does not constitute a 'supply of goods' within the meaning of Articles 2 (1) and 5 (1) of the Sixth Directive; it makes no

sense, therefore, to consider the re-imposition of value-added tax with the possible deduction of the corresponding amount either in whole or in part, particularly since there is no transfer 'between taxable persons'.

26. In economic terms, the petrol with which Intiem is invoiced and for which it has to pay constitutes one of its production cost components which bears the value-added tax charged on it at the previous stage.

27. The legal and economic position is essentially the same whether the trader receives the goods (the petrol) himself, whether he sends an employee to fetch it in a truck loaded with oil drums or in a tanker, whether he avails himself of the services of a carrier or whether (by agreement with the supplier) he arranges for the petrol to be pumped directly into his employees' car tanks to be used by them.

28. It is difficult to see why it should be necessary to accept a distortion in the system of value-added tax as a result, for instance, of the fact that certain book distributors have their own tankers or stocks of petrol, whilst others do not.

29. It is of course necessary to ensure that the petrol is used by the employees exclusively for business purposes and not for private purposes of their own as well, in which case the provisions concerning a proportional deduction not exceeding a maximum percentage would be applicable.

30. In that regard, the appellant in the proceedings before the Hoge Raad maintains that the system which it applies on the basis of the contracts concluded with its employees and with the petrol supplier (and which is described above) is capable of ensuring that only the petrol used in travel for distribution purposes gives rise to the deduction of the total amount of the tax incorporated in the corresponding price.

31. That allegation is plausible in view of the system of supervision that is used.

32. In any event, that is a mere question of fact which must be assessed by the competent courts in accordance with the evidence admitted by the legislation of each Member State in the context of the Sixth Directive. Moreover, the possibility of abuse also exists where delivery staff use company cars which have been refuelled with petrol supplied at the company's expense and which — in the absence of effective supervision — could be used by them for private purposes of their own, without the trader's knowledge.

33. The allowances paid by Intiem to its employees for using their own cars in the course of its business are another matter. Since the cars can be used for business as well as for private purposes, the Netherlands legislation provides — as is laid down in the directive — for a limited flat-rate deduction.

34. That system should also apply to the petrol supplied to its employees and paid for by Intiem if it were established that the petrol was used on a regular basis for non-business purposes as well.

35. IV — I therefore suggest, on the basis of the information at my disposal, that the Court answer the question submitted by the Hoge Raad der Nederlanden as follows:

'The supply of goods by one taxable person directly to the employees of another taxable person, in performance of a contract concluded between those two taxable persons, confers on the employer a right to the deduction of the full amount of value-added tax, in accordance with Article 17 (2) (a) of the Sixth Directive, even though the goods are intended for use in cars belonging to those employees, provided that the purchaser is invoiced with the supplies in question in accordance with Article 18 (1) (a) and Article 22 (3) of the Sixth Directive and that the goods in question are used exclusively, in the course of the undertaking's business, for the purposes of its taxable transactions'.