JUDGMENT OF THE COURT (Grand Chamber)

7 December 2010 *

In Case C-285/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 7 July 2009, received at the Court on 24 July 2009, in the criminal proceedings against

R.,

other parties:

Generalbundesanwalt beim Bundesgerichtshof,

Finanzamt Karlsruhe-Durlach,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Arabadjiev, Presidents of Chambers, E. Juhász, G. Arestis, U. Lõhmus (Rapporteur), T. von Danwitz and C. Toader, Judges,

Advocate General: P. Cruz Villalón,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2010,

after considering the observations submitted on behalf of:

— Mr R., by A. Parsch, D. Sauer, F. Kreilein, C. Prinz and K.-F. Zapf, Rechtsanwälte,

— the Generalbundesanwalt beim Bundesgerichtshof, by M. Harms and K. Lohse, acting as Agents,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, and by B. Doherty, Barrister,

— the Greek Government, by G. Kanellopoulos, Z. Chatzipavlou and V. Karra, acting as Agents,

— the European Commission, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 28c(A)(a) 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 (OJ 1977 L 145, p. 1), as amended by Council Directive 2000/65/EC of 17 October 2000 (OJ 2000 L 269, p. 44; 'the Sixth Directive').

2 The reference has been made in criminal proceedings brought against Mr R for alleged tax evasion in relation to the collection of value added tax ('VAT').

Legal context

The Sixth Directive

3 Article 2 of the Sixth Directive provides that the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such and the importation of goods are to be subject to VAT.

4 The Sixth Directive contains Title XVIa, entitled 'Transitional arrangements for the taxation of trade between Member States', which was added to it by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and which contains, inter alia, Articles 28a to 28m.

5 The first subparagraph of Article 28a(1)(a) of the Sixth Directive provides:

'The following shall also be subject to value added tax:

(a) 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 who is not eligible for the tax exemption provided for in Article 24 and who is not covered by the arrangements laid down in the second sentence of Article 8(1)(a) or in Article 28b(B)(1).'

6 The right of exemption in respect of intra-Community supplies of goods is provided for in the first subparagraph of Article 28c(A)(a) of the Sixth Directive, which is worded as follows:

'Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Article 5, dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, 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.'

National legislation

7 According to Paragraph 370(1) of the German 1977 Tax Code (Abgabenordnung 1977, BGBl. 1976 I, p. 613, and 1977 I, p. 269):

'(1) A person shall be liable to a term of imprisonment of up to five years or to a criminal fine if he

1. makes incorrect or incomplete declarations to the tax authorities … about facts which are relevant for tax purposes,

…

and as a consequence of this reduces his tax burden or thereby obtains undue tax advantages for himself or for a third party.'

8 According to the national court, Paragraph 370 of the 1977 Tax Code attributes criminal liability through a reference to other legislation, for it does not itself contain all the constituent elements of the offence. It is supplemented by substantive tax law provisions which determine what facts are relevant for tax purposes and the conditions in which tax is charged. Consequently, chargeability to tax is a legal requirement of criminal tax evasion.

9 Paragraph 1(1) of the 1999 Law on turnover tax (Umsatzsteuergesetz 1999, BGBl. 1999 I, p. 1270; 'the UStG') provides that the supply of goods or services for consideration within the territory of the country by a taxable person is, in principle, subject to German VAT.

10 Under Paragraph 4(1)(b) of the UStG, which transposes Article 28c(A)(a) of the Sixth Directive, transactions covered by Paragraph 1(1)(1) of the UStG are exempt from VAT where there is an intra-Community supply.

11 Paragraph 6a(1) of the UStG states:

'An intra-Community supply (Paragraph 4(1)(b)) occurs where a supply fulfils the following conditions:

1. the trader or the person acquiring the goods transported or dispatched the object of the supply to another part of the Community;

2. the person acquiring the goods is

(a) a trader who acquired the object of the supply for his undertaking;

(b) a legal person who is not a trader or who did not acquire the object of the supply for his undertaking; or

(c) any other purchaser in the case of the supply of a new vehicle;

and

3. the acquisition of the object of the supply is subject as regards the person acquiring the goods in another Member State to the provisions relating to the imposition of turnover tax.

…'

12 Pursuant to Paragraph 6a(3) of the UStG, a trader must prove that the conditions in paragraphs (1) and (2) have been fulfilled. With the approval of the Bundesrat (Federal Council), the Federal Minister for Finance can prescribe by regulation the manner in which that evidence is to be produced by traders.

13 Paragraph 18a(1) of the UStG imposes on a domestic trader who has made tax-free intra-Community supplies the obligation to make a declaration to the Bundeszentralamt für Steuern (Federal Tax Authority) in which he must provide details, inter alia, of the VAT identification number of the person acquiring the goods. That declaration provides the basis for the supervision of intra-Community trade, for the data are collected and may then be provided to national tax authorities within the VAT Information Exchange System.

14 Under Paragraph 18b of the UStG, a trader must declare the basis of assessment of his intra-Community supplies to the tax authorities. According to the second sentence of Paragraph 10(1) of the UStG, the basis of assessment of an intra-Community supply is normally the net amount which the recipient of the supply pays to the trader. By his declaration pursuant to Paragraph 18b of the UStG, the trader notifies the tax authorities that the supplies which have been made are exempt under Paragraphs 4(1)(b) and 6a of the UStG and that, accordingly, the trader does not owe any VAT for those supplies.

15 The evidential obligations of a trader making an intra-Community supply are described in more detail in the Turnover Tax Implementation Regulations of 1999 (Umsatzsteuer-Durchführungsverordnung 1999, BGBl. 1999 I, p. 1308; 'the UStDV').

16 In accordance with Paragraph 17a of the UStDV, a trader must produce appropriate documentary evidence to show that the object of the supply was transported or dispatched to another part of the European Union ('documentary evidence'). Moreover, pursuant to Paragraph 17c of the UStDV, he must produce accounting evidence to establish compliance with the requirements for exemption from tax, including the VAT identification number of the person acquiring the goods ('accounting evidence').

The dispute in the main proceedings and the question referred for a preliminary ruling

17 Mr R, a Portuguese national, was the manager of a German company engaged in the luxury car trade. According to the findings in the order for reference, since 2001 it had sold more than 500 vehicles per year. The buyers were, for the most part, car dealers established in Portugal.

18 From 2002, Mr R carried out a series of manipulations, concealing the identity of the true purchasers of the vehicles in order to enable the distributors established in the Portuguese Republic to evade the payment of VAT in Portugal. This allowed him to sell the vehicles at a more advantageous price and thereby to make more substantial profits.

19 Those manipulations consisted in the issuing, for the company's accounting purposes, of false invoices in the name of fictitious purchasers who appeared as recipients of the supplies. Those invoices stated in each case the business name of the alleged purchaser, his VAT identification number, the description of the vehicle (which was actually supplied to another purchaser), the purchase price and the endorsement 'tax-free intra-Community supply under Paragraph 6a of the UStG', which implied that the VAT would be paid in Portugal. The fictitious purchasers were real undertakings established in Portugal, some of which knew of the use of their business name, while others were unaware of it.

20 For their part, the real purchasers sold the vehicles on to private final purchasers in Portugal without declaring to the Portuguese tax authorities that there had been a prior intra-Community acquisition and without paying the VAT payable in respect of that acquisition. Moreover, the real business relationships were concealed by other means. If the final purchasers were known at the date of the supply, Mr R had the

vehicle registration documents issued to those purchasers at the outset. He then issued a further fictitious invoice showing the name of the final purchaser as the recipient and the deliberately inaccurate endorsement 'taxation of profit margin pursuant to Paragraph 25a of the UStG', which applies to second-hand vehicles.

21 In that way, the company of which Mr R was manager sold and supplied more than 1 100 vehicles for a sum of approximately EUR 19 million during 2002 and 2003. In his tax returns for those two years, Mr R referred to those transactions as tax-free intra-Community supplies and, in 'summary' returns made to the Bundeszentralamt für Steuern, described the fictitious purchasers as contractual partners, in order to prevent the identification of the real purchasers in Portugal via the VAT Information Exchange System at European Union level.

22 Criminal proceedings were brought against Mr R, who was held on remand from 30 January 2008. By judgment of 17 September 2008, the Landgericht Mannheim (Mannheim Regional Court) sentenced him to a total of three years' imprisonment on two counts of tax evasion by means of which he had evaded more than EUR 1 million of VAT in 2002 and more than EUR 1.5 million in 2003. According to the Landgericht, the falsified supplies to Portugal are not intra-Community supplies within the meaning of the first subparagraph of Article 28c(A)(a) of the Sixth Directive. The deliberate abuse of the rules of European Union law justifies the refusal of the tax exemption in Germany. As a result of the breach of his duty to collect German VAT on those supplies, to pay it to the tax authorities and to declare it in his annual returns, Mr R had committed tax evasion.

23 Mr R appealed on a point of law against that judgment to the Bundesgerichtshof (Federal Court of Justice). In his view, the Landgericht Mannheim had not correctly classified the transactions at issue, which were in fact VAT-exempt intra-Community

supplies because the vehicles were actually supplied to businesses in Portugal. There was never any risk of any loss of VAT revenues in Germany, since that tax was payable in the destination Member State, the Portuguese Republic. The fact that that tax was not paid in Portugal is irrelevant, in his view.

24 In its order for reference, the Bundesgerichtshof sets out its view that Article 28c(A)(a) of the Sixth Directive must be interpreted as meaning that the tax advantages generally attaching to a transaction must be refused in respect of anyone involved in such transactions with the aim of evading taxes if the taxable person concerned knew of the abuse or fraud and participated in it. That follows from the prohibition of abusive practices enshrined in EU law and applicable to VAT, and also from the broad logic and scope of that provision and the objectives of the Sixth Directive.

25 The Bundesgerichtshof observes that it has never had any doubt as to the interpretation of the Sixth Directive, owing to the sufficiently clear case-law of the Court of Justice of the European Union, and that it has already refused in two similar cases to grant the exemption in respect of an intra-Community supply.

26 However, it is apparent from the file that, in parallel tax proceedings brought against Mr R on the same facts, the Finanzgericht Baden-Württemberg (Baden-Württemberg Finance Court), in an order of 11 March 2009, raised doubts concerning the interpretation given by the Bundesgerichtshof in relation to the refusal of the exemption, and ordered the suspension of operation of the VAT assessment notices sent to Mr R. According to the Finanzgericht, the Community prohibition of abuse does not apply when the contested transactions can be explained by factors other than merely

obtaining tax advantages. Furthermore, the Bundesgerichtshof's proposition is at odds with the principles of neutrality and territoriality of VAT.

27 In the light of that difference of opinion between the German courts, the Bundesgerichtshof considers that it is necessary to refer a question for a preliminary ruling, since Mr R might avoid criminal prosecution if the transactions at issue are to be classified as intra-Community supplies covered by the exemption provided for in the first subparagraph of Article 28c(A)(a) of the Sixth Directive. In that case, a German trader's involvement in tax evasion in Portugal could not be a criminal offence under German fiscal criminal law, there being no reciprocity in respect of bringing criminal proceedings. A false statement concerning the person acquiring the goods does not amount to a criminal offence but merely an administrative offence punishable by a fine of up to EUR 5 000.

28 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 28c(A)(a) of the Sixth Directive be interpreted as meaning that a supply of goods within the meaning of that provision is to be refused exemption from value added tax if the supply has actually been effected, but it is established on the basis of objective factors that the vendor, a taxable person,

(a) knew that, by his supply, he was participating in a transaction aimed at evading VAT, or

(b) took actions aimed at concealing the true identity of the person to whom the goods were supplied in order to enable the latter person or a third person to evade VAT?'

The question referred for a preliminary ruling

Admissibility

29 Mr R challenges the admissibility of the reference for a preliminary ruling on two grounds. First, he submits that the national court presented the facts of the dispute in the main proceedings incorrectly, in that it took the view that second-hand cars were sold to 'fictitious undertakings' or 'missing traders', whereas in fact these were genuine supplies to real economic operators and constituted profitable transactions in line with market conditions. Inasmuch as the question referred for a preliminary ruling has no relation to the facts or the subject-matter of that dispute and does not correspond to an objective need for the purpose of settling the dispute before it, it is inadmissible.

30 Second, Mr R takes the view that the question referred is hypothetical owing to the fact that a directive cannot have direct effect in criminal matters. He refers, in that regard, to Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969; Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 23; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 73 et seq. According to Mr R, the national court's proposed interpretation of the Sixth Directive does not follow from the relevant provisions in force under German law. In his view, German constitutional law, in particular the principle of legality in criminal matters, would impose limits on the interpretation of national law in conformity with the Sixth Directive if such an interpretation were to lead to a criminal conviction in the main proceedings.

31 It must be observed in that regard that, under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the

particular circumstances of the case pending before it both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, to that effect, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973, paragraph 37; and Case C-97/09 *Schmelz* [2010] ECR I-10465, paragraph 28).

32 Thus, the Court may reject a request for a preliminary ruling submitted by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraph 26; and *Schmelz*, paragraph 29).

33 That is not the case in this instance. The national court has provided the Court of Justice with factual and legal material that is obviously related to the purpose of the main action and with the reasons that led it to conclude that an interpretation of Article 28c(A)(a) of the Sixth Directive was necessary in order for it to deliver judgment.

34 Therefore, the reference for a preliminary ruling must be considered to be admissible.

Substance

35 By its question, the national court asks, in essence, whether Article 28c(A)(a) of the Sixth Directive must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, in which the supply of goods to another Member State has actually taken place, but when, at the time of that supply, the supplier concealed the identity of the true purchaser in order to enable the latter to evade payment of the VAT payable on the corresponding intra-Community acquisition, such an intra-Community supply is to be refused exemption from VAT.

36 In order to answer that question, it must be observed, as a preliminary point, that the prevention of potential tax evasion, avoidance and abuse is an objective which is recognised and encouraged by the Sixth Directive (see, in particular, Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76, and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 71).

37 Intra-Community supplies of goods are exempt by virtue of the first subparagraph of Article 28c(A)(a) of the Sixth Directive, which forms part of the transitional arrangements for the taxation of trade between Member States as laid down in Title XVIa of that directive, the purpose of which is to transfer the tax revenue to the Member State in which final consumption of the goods supplied takes place (see Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraph 36; Case C-146/05 *Collée* [2007] ECR I-7861, paragraph 22; Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 22; and Joined Cases C-536/08 and C-539/08 *X and fiscale eenheid Facet-Facet Trading* [2010] ECR I-3581, paragraph 30).

38 The mechanism established under those transitional arrangements consists of (i) exemption by the Member State of departure of the supply giving rise to the intra-Community dispatch or transport, in conjunction with the right to deduction or reimbursement of the VAT paid as input tax in that Member State, and (ii) taxation, by the

Member State of destination, of the intra-Community acquisition. That mechanism thus makes it possible to delimit clearly the authority to tax of the Member States concerned (see, to that effect, Case C-245/04 *EMAG Handel Eder* [2006] ECR I-3227, paragraphs 30 and 40).

39 Just like other expressions which define taxable transactions for the purposes of the Sixth Directive (see, in particular, Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraph 44, and Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 41), the meanings of 'intra-Community supply' and 'intra-Community acquisition' are objective in nature and apply without regard to the purpose or results of the transactions concerned (*Teleos and Others*, paragraph 38).

40 As regards intra-Community supplies in particular, it is apparent from the first subparagraph of Article 28c(A)(a) of the Sixth Directive that supplies of goods dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory of a Member State but within the Community, 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, are covered by the term 'intra-Community supply' and are exempt, subject to conditions which the Member States are to lay down for the purpose of ensuring the correct and straightforward application of the exemptions subsequently provided for and preventing any evasion, avoidance or abuse.

41 The Court has interpreted that provision as meaning that the exemption of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, the goods have physically left the territory of the Member State of supply (see *Teleos and Others*, paragraph 42, and *Twoh International*, paragraph 23).

42 The Court has also held that, since the abolition of border controls between the Member States, it has been difficult for the tax authorities to check whether the goods have or have not physically left the territory of that Member State. As a result, it is principally on the basis of the evidence provided by taxable persons and of their statements that the national tax authorities are to carry out the necessary checks (*Teleos and Others*, paragraph 44, and *Twoh International*, paragraph 24).

43 However, given that none of the provisions of the Sixth Directive specifically lays down the evidence required to be furnished by taxable persons in order for them to be eligible for the exemption from VAT, that issue, as is apparent from the first part of the sentence in Article 28c(A) of the Sixth Directive, falls within the competence of the Member States (see *Collée*, paragraph 24).

44 Therefore, in accordance with that provision, it is for the Member States to lay down the conditions subject to which intra-Community supplies are to be exempt for the purpose of ensuring the correct and straightforward application of those exemptions and of preventing any evasion, avoidance or abuse.

45 Nevertheless, in exercising their powers, the Member States must observe the general principles of law that form part of the European Union legal order, which include, in particular, the principles of legal certainty and proportionality and the principle of protection of legitimate expectations (see, to that effect, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281, paragraph 48; Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-4191, paragraphs 29 and 30; and Case C-271/06 *Netto Supermarkt* [2008] ECR I-771, paragraph 18). As regards, in particular, the principle of proportionality, the Court has already held that, in accordance with that principle, the measures which the Member States may thus adopt must not go further than is necessary to attain the objectives of ensuring the correct levying and collection of the tax and

the prevention of tax evasion (see, in particular, Case C-188/09 *Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski* [2010] ECR I-7639, paragraph 26).

46 Moreover, it is apparent from the case-law of the Court that, in order to be eligible for the exemption under the first subparagraph of Article 28c(A)(a) of the Sixth Directive, it is for the supplier of the goods to furnish the proof that the conditions laid down for the application of that provision, including those imposed by the Member States for the purpose of ensuring the correct and straightforward application of the exemptions and for preventing any evasion, avoidance or abuse, are fulfilled (see, to that effect, *Twoh International*, paragraph 26).

47 It is apparent from the order for reference that, in the main proceedings, Mr R claimed to be entitled to exemption from VAT when the goods supplied had actually left Germany but the invoices and returns which he produced to the tax authorities as evidence of intra-Community transactions were deliberately substantively inaccurate. According to the national court, Mr R concealed in those invoices the identity of the true purchasers in order to enable them to evade payment of VAT payable on the intra-Community acquisition which took place in Portugal.

48 The presentation of false invoices or false declarations and any other manipulation of evidence is liable to prevent the correct collection of the tax and, therefore, to compromise the proper functioning of the common system of VAT. Such actions are all the more serious when committed in the context of the transitional arrangements for the taxation of intra-Community transactions, which, as noted in paragraph 42 of the present judgment, operate on the basis of the evidence provided by taxable persons.

49 Therefore, EU law does not prevent Member States from treating the issuing of irregular invoices as amounting to tax evasion and from refusing to grant the exemption in such cases (see, to that effect, *Schmeink & Cofreth and Strobel*, paragraph 62, and order in Case C-395/02 *Transport Service* [2004] ECR I-1991, paragraph 30).

50 The refusal of exemption in the case of non-compliance with an obligation provided for by national law — in this instance, the obligation to identify the person acquiring the goods and receiving the intra-Community supply — has a deterrent effect which is intended to ensure compliance with that obligation and to prevent any tax evasion or avoidance (see, by analogy, with regard to the withholding of a portion of the VAT which may be deducted, *Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski*, paragraph 28).

51 It follows from this that, in circumstances such as those at issue in the main proceedings, the Member State of departure of the intra-Community supply may refuse to apply the exemption pursuant to its powers under the first part of the sentence in Article 28c(A) of the Sixth Directive and for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any evasion, avoidance or abuse.

52 However, with regard to particular cases in which there are genuine reasons to assume that the intra-Community acquisition corresponding to the supply at issue might escape payment of the VAT in the destination Member State, notwithstanding the mutual assistance of and administrative cooperation between the tax authorities of the Member States concerned, the Member State of departure is, in principle, required to refuse to grant the exemption to the supplier of the goods and to require that supplier to pay the tax subsequently in order to ensure that the transaction in question does not escape taxation altogether. In accordance with the fundamental principle of the common system of VAT, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various

cost components (see, in particular, *Transport Service*, paragraphs 20 and 21; *Optigen and Others*, paragraph 54; and *Collée*, paragraph 22).

53 As regards the principle of proportionality, it must be observed that this does not preclude a supplier who participates in tax evasion from being obliged to pay the VAT subsequently on his intra-Community supply, inasmuch as his involvement in the evasion is a decisive factor to be taken into account in an assessment of the proportionality of a national measure.

54 Furthermore, the finding in paragraph 51 of the present judgment is not called into question by the principles of fiscal neutrality or legal certainty, or by the principle of the protection of legitimate expectations. Those principles cannot legitimately be invoked by a taxable person who has intentionally participated in tax evasion and who has jeopardised the operation of the common system of VAT.

55 Having regard to all the foregoing considerations, the answer to the question referred is that, in circumstances such as those at issue in the main proceedings, in which an intra-Community supply of goods has actually taken place, but when, at the time of that supply, the supplier concealed the identity of the true purchaser in order to enable the latter to evade payment of VAT, the Member State of departure of the intra-Community supply may, pursuant to its powers under the first part of the sentence in Article 28c(A) of the Sixth Directive, refuse to allow an exemption in respect of that transaction.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

In circumstances such as those at issue in the main proceedings, in which an intra-Community supply of goods has actually taken place, but when, at the time of that supply, the supplier concealed the identity of the true purchaser in order to enable the latter to evade payment of value added tax, the Member State of departure of the intra-Community supply may, pursuant to its powers under the first part of the sentence in Article 28c(A) 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, as amended by Council Directive 2000/65/EC of 17 October 2000, refuse to allow an exemption in respect of that transaction.

[Signatures]