REPORT FOR THE HEARING
delivered in Case C-342/87 *

I — Facts and procedure

A — *The main proceedings*

The tax entity Genius Holding BV (called 'Genius BV' at the material time), carries out assembly and machine-tooling work. It regularly uses subcontractors to fulfil the orders which it obtains.

For the period from 1 July to 31 December 1982 inclusive, the amount of turnover tax owed by Genius Holding was adjusted upward to HFL 79 833, that amount being single rate only, without surcharge. The notice of adjustment concerned turnover tax invoiced to Genicon Montage BV by two subcontractors, Vissers Pijpleiding en Montage BV and Montagebedrijf J. van Mierlo. The amounts entered on the invoices concerned work which had been contracted for before 1 July 1982.

Since the tax inspector rejected the objection lodged against the adjustment, Genius Holding BV brought an action before the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam). Since that court upheld the inspector's decision, an appeal was brought before the Hoge Raad (Supreme Court of the Netherlands) which, since it considered that the appeal raised questions the answers to which required an interpretation of the opening words of Articles 17(2), 17(2)(a), 18(1), 21(1) and 22(3) and (8) of the Sixth VAT Directive, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the right to deduct provided for in the Sixth Directive apply to the tax which is due solely because it is mentioned on the invoice?

(2) If so, does the directive still allow the Member States to exclude — either entirely or in certain special cases — the right to deduct such tax by laying down requirements regarding the invoice?'

B — *Written procedure*

1. The Hoge Raad der Nederlanden considers that the decision which it is called upon to give depends on the interpretation of the provisions of the Sixth Directive.

The order for reference, made on 28 October 1987, was received at the Court Registry on 4 November 1987.

2. In accordance with to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 1 February 1988 by the tax entity Genius

* Language of the case: Dutch.

Holding BV, on 2 February 1988 by the Netherlands Government, represented by H. J. Heinemann, Acting Secretary-General of the Ministry of Foreign Affairs, on 5 February 1988, by the Commission of the European Communities, represented by Johannes Føns Buhl, a member of its Legal Department, acting as Agent, assisted by M. Mees, of the Hague Bar, on 12 February 1988, by the Government of the Federal Republic of Germany, represented by Martin Seidel and Hans-Joachim Horn, acting as Agents of the Government of the Federal Republic of Germany before the Court, and, on 18 February 1988, by the Spanish Government, represented by Javier Conde de Saro and Rafael Garcia-Valdecasas y Fernández, acting as Agents.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — The applicable rules

A — *Community rules*

Article 17(2)(a) of the Sixth Directive provides that in so far as the goods and services are used for the purposes of his taxable transactions, the taxable person is to be entitled to deduct from the tax which he is liable to pay

'value-added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person'.

Article 18(1)(a) of the Sixth Directive provides that to exercise his right to deduct, the taxable person must hold an invoice, drawn up in accordance with Article 22(3).

Article 22(3) requires every taxable person to issue an invoice, or other document serving as invoice in respect of all goods and services supplied by him to another taxable person, and is to keep a copy thereof (subparagraph (a)).

According to the same article, every taxable person is likewise to issue an invoice in respect of payments on account made to him by another taxable person before the supply of goods or services is effected or completed. The invoice is also to state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions (subparagraph (b)). The Member States are to determine the criteria for considering whether a document serves as an invoice (subparagraph (c)).

Article 22(8) provides that, without prejudice to the provisions adopted by the Council pursuant to Article 17(4), Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

Article 21(1) provides that the following persons are to be liable to pay VAT under the internal system:

(i) taxable persons who carry out taxable transactions other than those referred to in Article 9(2)(a) and carried out by a taxable person resident abroad. When the taxable transaction is effected by a taxable person resident abroad Member States may adopt arrangements whereby tax is payable by someone other than the taxable person residing abroad. *Inter alia* a tax representative or other person for whom the taxable transaction is carried out may be designated as such other person. The Member States may also provide that someone other than the taxable person is to be held jointly and severally liable for payment of the tax (Article 21(1)(a));

(ii) persons to whom services covered by Article 9(2)(a) are supplied and carried out by a taxable person resident abroad. However, Member States may require that the supplier of services is to be held jointly and severally liable for payment of the tax (Article 21(1)(b));

(iii) any person who mentions VAT on an invoice or other document serving as invoice (Article 21(1)(c)).

B — *National legislation*

On 1 July 1981, the Law of 4 June 1981 known as the Wet Ketenaansprakelijkheid (Liability Transfer Law) (*Staatsblad* 370) came into force. That law contains *inter alia* amendments to the Wet op de Omzetbelasting (Law on Turnover Tax) 1968 (hereinafter referred to as 'the Law'). Article IX of the Liability Transfer Law provides that, for a period of one year after its entry into force, the Law is not to apply to contractors and subcontractors who had entered into a contract before that date.

Section 1 of Resolution No 282-9690 of the Secretary of State for Finance of 25 June 1982 provides that for the time being the Liability Transfer Law is not to be applied at all as far as turnover tax is concerned. In the building, metal construction (immovable constructions only) and shipbuilding industries, so-called transfer rules, to the effect that, where subcontracting takes place, the levying of VAT is transferred from the subcontractor performing the service to the (principal) contractor receiving it, are to apply to turnover tax. In other words, the (principal) contractor does not pay the VAT payable in respect of the subcontracted work to the subcontractor (who would then have to pay that VAT to the authorities) but himself declares it as tax due. On the same declaration the (principal) contractor may deduct that tax under the transfer rules. As a result, no turnover tax is in fact paid downstream from the (principal) contractor in respect of the work carried out. Therefore, the effect of the transfer rules in practice is that VAT is levied only once on the amount charged by the (principal) contractor to his client. Those rules were incorporated in Article 24b of the Uitvoeringsbesluit omzetbelasting (Turnover Tax Implementation Order) 1968 (here-

inafter referred to as 'the Order') as from 1 July 1982.

In Section 5 of the abovementioned resolution, it is stated that no transitional provisions are contained in the Order and that this means that the transfer rules also apply to work done under contracts concluded before 1 July 1982.

In accordance with Article 15(1)(b) of the Law of 1968, the right to make deductions of input tax is excluded if the invoice is not in accordance with the legislative provisions. Among those provisions, reference should be made, on the one hand, to Article 35(1)(g) of the same Law, according to which only the amount legally due must be mentioned on the invoice and, on the other, to Article 24b(8) of the Order, which provides that the words 'turnover tax transferred' must appear on invoices in the context of the special rules applicable to undertakings in the building industry and their subcontractors.

On 22 March 1982, the Netherlands Government informed the Commission that it intended to introduce into Netherlands legislation rules derogating from the Sixth Directive and designed to combat certain fraudulent activities on the part of subcontractors and persons providing labour which exist in the building, structural steelwork and shipbuilding industries. To that end, a request was made for a derogation from the Sixth Directive under Article 27(1) to (4) thereof. Under that derogation, authorized by the Council, which entered into force on 20 June 1982 (Official Journal C 197, 31.7.1982, p. 1), the Kingdom of the Netherlands was authorized to adopt the transfer rules mentioned above.

III — Written observations submitted to the Court

Written observations were submitted to the Court by the appellant in the main proceedings, the Commission, and the Governments of the Netherlands, the Federal Republic of Germany and Spain.

First question

The appellant in the main proceedings argues that it is implicit in the system of consumer taxes that the person receiving the services must be able to deduct the turnover tax invoiced to him. If that person, who must himself pay the tax, cannot, in such a case, deduct the amount of tax he has paid to his suppliers, there would be double taxation, contrary to the neutrality of turnover tax in relations between undertakings.

The Commission considers that the first question raised by the national court should be answered in the affirmative. In support of its view it refers to the Court's case-law according to which the procedure for deduction is the cornerstone of the common system of value-added tax (see, in particular, the judgments of 5 May 1982 in Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, and of 14 February 1985 in Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655). The right to deduct the amount of tax already paid at an earlier stage is

subject solely to the condition that another taxable person has supplied goods and services and has invoiced VAT for that transaction. There is no requirement that the tax be knowingly paid.

The Netherlands, German and Spanish Governments argue that the answer to this question should be in the negative. The right to deduct presupposes that the substantive conditions in Article 17(2) of the Sixth Directive and the evidentiary conditions in Articles 18(1) and 22(3) thereof have been fulfilled. According to the first of those provisions, the right to deduct is limited to amounts of VAT whose basis in law is the performance of a taxable transaction. Tax mentioned on an invoice, relating to another matter and due under Article 21(1)(c) of the Sixth Directive may therefore not be deducted. Moreover, the invoice in question does not fulfil the condition laid down in Article 22(3) of the directive.

Second question

The appellant in the main proceedings maintains that Article 22(3)(a) of the Sixth Directive permits the Member States to lay down criteria in their legislation for determining whether a document may be regarded as serving as an invoice. The Member States are not entitled to lay down conditions as to the contents of the invoice such as, in particular, the conditions at issue the effect of which is that the economic risk of the payment of taxes due from third parties is imposed on the principal contractor.

According to the Commission, the Community legislature did not wish to regulate exhaustively the conditions which documents must fulfil in order to be regarded as invoices. The Member States may require that a number of additional matters be mentioned in order to ensure that VAT is correctly applied and that its application is subject to supervision by the tax authorities. However, the matters to be mentioned must not go beyond what is strictly necessary to supervise the implementation of VAT and must not, by reason of their number or technical nature, make it difficult or impossible in practical terms to exercise the right to deduct. In the Commission's view, the current prohibition in the Netherlands of mentioning on the invoice any amount of tax other than that legally due must not be accompanied by a sanction depriving the customer of his right to deduct the tax unduly invoiced to him.

However, the Commission considers that the Netherlands rules applying to principal contractors in the building industry and their subcontractors contains a special feature which makes exclusion of the right of deduction permissible if the invoice does not comply with the provisions of Article 24b(8) of the implementing order and Article 35 of the Law of 1968.

The Netherlands and Spanish Governments maintain that Article 22(3) and (8) of the Sixth Directive permits the Member States to lay down criteria for determining whether a document may serve as an invoice and to impose such other obligations as they regard as necessary to ensure that the tax is collected correctly and to prevent fraud. That is true of the obligation laid down in Article 35 of the Law of 1968, which was regarded as necessary to avoid fraudulent

practices. According to the Netherlands Government, this makes it possible to avoid a situation in which, by mentioning on an invoice devoid of any legal basis a tax on the added value, a right to deduct could deliberately be created, that right not being paralysed even if the person who draws up the invoice has no intention to pay the tax to which he has thus become liable.

Even supposing that it is not permitted to lay down additional requirements for invoices which limit the right to deduct, measures such as those adopted in the Netherlands may be based on Article 18(1)(d) of the Sixth Directive.

J. C. Moitinho de Almeida
Judge-Rapporteur