OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 7 October 1999 *

1. By a number of orders, similar in content, the Tribunal Económico-Administrativo Regional (Regional Economic-Administrative Court), Catalonia, seeks a ruling from the Court on the interpretation of Article 17 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 (hereinafter 'the Directive'). [1]

In particular, the Court is asked to determine whether that provision precludes legislation such as the Spanish legislation which makes exercise of the right to deduct the VAT paid by an undertaking on expenditure incurred before the commencement of its business activities subject to two conditions: the company must submit a declaration to the tax authorities before incurring the expenditure and no more than a year may then elapse before it actually commences its business or professional activities.

The legislative background

The Community legislation

2. Article 17 of the Directive concerns the origin and scope of the right to deduct. Under Article 17(1) and (2)(a):

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. 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;

...'.

* Original language: Italian.

1 — OJ 1977 L 145, p. 1.

3. Article 22 of the Directive, entitled 'Obligations under the internal system', is also relevant. Under Article 22(1), 'every taxable person shall state when his activity as a taxable person commences, changes or ceases'. Article 22(8) provides that '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'.

The national legislation

4. The provision of Spanish legislation whose compatibility with the Directive is at issue in the main proceedings is Article 111 of Law No 37 of 28 December 1992 on value added tax, as amended by Law No 13/1996 of 30 December 1996.[2] Article 111 provides that VAT paid before the commencement of business or professional activities may be deducted as soon as such activity (or activities in a separately identifiable sector) is actually commenced, provided that the taxpayer is not time-barred because of failure to exercise that right within the five-year period prescribed in Article 100 of the Law. Article 111(3) states that 'commencement of activities' indicates the time when the taxable person (entrepreneur or professional practitioner) begins to provide on a regular basis the goods or services that constitute his business or professional activities.

Article 111(5) adds that, by way of exception to Article 111(1), entrepreneurs or professional practitioners seeking to deduct such tax before commencement of activities must satisfy the following two requirements:

(a) they must have submitted, before paying the VAT, a declaration preceding the commencement of business or professional activities;

(b) they must commence the activities in question within one year following submission of that declaration; the tax authorities may, however, grant an extension of one year where this is warranted by the nature of the activities to be engaged in or by the circumstances surrounding the start-up of the activities.

Where those requirements are not fulfilled, the general rule applies, under which VAT paid may not be deducted until the business or professional activities actually commence. In any case, where the tax has been paid in respect of the acquisition of land, the provisions that are more favourable than the general rule do not apply, and the right to deduct arises only upon actual commencement of the business activities in question.

5. Thus, under the system introduced by the 1996 amendment, two possibilities are

2 — BOE No 315 of 31 December 1996.

open to the taxable person. In the first place, the general rule provides that VAT paid before the commencement of activities may be deducted only upon actual commencement of those activities. Alternatively, by way of exception to the general rule, the right to deduct may be exercised even before commencement if the two requirements set out above are satisfied. It follows that availability of the right to deduct may vary with respect to the time when the tax becomes chargeable, as in the case where a year has elapsed without any extension being requested or where the tax authorities have refused such a request. Moreover, where the taxable person never carries out any taxable transactions in the form of the provision of goods or services, the right to deduct VAT paid in respect of expenditure on 'preparatory' or ancillary activities is in principle denied.

The facts and the question referred for a preliminary ruling

6. The plaintiffs in the main proceedings are entrepreneurs or professional practitioners whose head office or domicile is in Spain. [3] They were not allowed to deduct VAT paid on transactions pre-dating commencement of their activities (construction work, in many cases) because of failure to fulfil the requirements laid down in Article 111 of Law No 37/92, as amended by Law No 13/1966. By way of grounds for that refusal, the tax authorities cited in some cases failure to comply with the time-limit of one year between submission of the declaration required by law and actual commencement of activities and, in others, failure to submit a request for an extension provided for under the law (or the request had been refused). The undertakings concerned contested those decisions before the Tribunal Económico-Administrativo Regional. They maintained that the national legislation was incompatible with Community law in that its application would deprive them of the right to deduct conferred by Article 17 of the Directive.

7. The Tribunal decided, in each of the cases, to refer the following question to the Court for a preliminary ruling:

'With respect to the VAT paid by a taxable person liable thereto before he starts regularly carrying out taxable transactions, may the terms in which the right to deduct VAT is defined in Article 17 of the Sixth Council Directive 77/388/EEC of 17 May 1977 be interpreted as meaning that the exercise of that right may be made conditional, with a view to avoiding fraud, upon the fulfilment of certain requirements such as the submission of an express request before the tax concerned becomes due and commencement of taxable transactions on a regular basis within a specified time-limit reckoned from the date of that request, the penalty for infringement of those require-

3 — With the exception of the applicant in Case C-147/98 *Bungy Fun Germany GBDR*, whose head office is at Ochsenfurt in Germany.

ments being forfeiture of the right to deduct or, at least, deferment of its availability until the time at which taxable transactions begin to be carried out on a regular basis?'

8. In accordance with Article 43 of the Rules of Procedure, the cases — being identical in respect of their subject-matter — were joined, by order of the President of the Court of 8 May 1998, for the purposes of the written procedure and the judgment.

Admissibility

9. Before considering the substance of the question referred to the Court by the Tribunal Económico-Administrativo Regional, it must first be determined whether the latter may be regarded as 'a court or tribunal of a Member State' within the meaning and for the purposes of Article 177 of the EC Treaty (now Article 234 EC). When specifically queried on that point by the Court, the plaintiffs in the main proceedings, as well as the Commission and the Spanish Government, all expressed the view that the Tribunal could be so regarded. Although the plaintiffs gave no reasons in support of their position, the Commission expressly agreed with the statement to that effect made by the Tribunal Económico-Administrativo Central in an order of 29 March 1990. However, while that order (and, accordingly, the observations submitted by the Commission) refer to provisions of Spanish law covering some of the conditions stipulated by the Court of Justice in this connection — in particular, that the body be established by law, that it be permanent, that its jurisdiction be compulsory, that its procedure be *inter partes* and that it apply rules of law — they are silent as regards a requirement which nevertheless raises serious problems, namely that the body be impartial and independent of the executive. In a lengthy written statement, the Spanish Government explained the mechanism for reviewing acts of the tax authorities by means of 'economic-administrative complaint proceedings' and described the composition and *modus operandi* of the Tribunales Económico-Administrativos, concluding that these must be regarded as courts or tribunals for the purposes of Article 177 of the EC Treaty since they satisfy all the conditions laid down by the Court. It should be noted, however, that this statement, too, makes no mention of any provision of law specifying what legal safeguards are in place to preserve the independence of the Tribunales Económico-Administrativos from the executive.

10. I must confess at once that I am not persuaded by the views expressed by the parties and the interveners referred to above. To my mind, there is good reason to doubt the independence and impartiality of the Tribunales Económico-Administrativos and their compliance with the *inter partes* principle.

11. On that point, it should first be noted that, because of the need to ensure the

uniform application of Community law, the terms 'court or tribunal', when used in the context of bodies with jurisdiction to refer questions for a preliminary ruling, have a meaning quite separate from their ordinary meaning within the various national legal systems. The Court has consistently ruled that, in order to determine whether a body is a court or tribunal within the meaning of Article 177 of the EC Treaty, a number of factors must be taken into account, namely whether it is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it fulfils the requirements of impartiality and independence. [4]

12. In my view, it is clear from the relevant Spanish legislation [5] that the Tribunales Económico-Administrativos are established by law and that they are permanent. Their task is to adjudicate in actions brought by individuals against acts adopted by the various tax administration offices throughout the country. Moreover, they are obliged to reach a decision in cases brought before them: acts of the tax authorities cannot be contested before the administrative courts until complaint proceedings have been brought before the Tribunales. [6] Nor is there any doubt that in reaching their decisions they apply rules of law, in accordance with Articles 1, 38, 44 and 102 of the RPEA.

13. Doubts do arise, however, concerning their impartiality and independence *vis-à-vis* the executive and the question whether their procedure is *inter partes*. [7] Clearly, it is crucial to determine whether those conditions are satisfied. It goes without saying that the fact that the requirements of permanence, statutory origin and compulsory jurisdiction are fulfilled is not enough to distinguish an administrative authority from a judicial body. [8]

14. As regards the point concerning *inter partes* procedure, the Tribunal Económico-Administrativo Central concedes (in the order referred to above) that the question whether that condition is fulfilled 'is arguably more debatable', but states in conclusion that 'Article 177 of the Treaty of Rome does not predicate the right to refer to the Court of Justice upon the procedure

4 — See *inter alia* Case 61/65 *Vaassen* [1966] ECR 407; Case 43/71 *Politi* [1971] ECR 1039; Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 7; Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15; Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9; Joined Cases C-74/95 and C-129/95, *Criminal proceedings against X* [1996] ECR I-6609, paragraph 18; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Joined Cases C-9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECR I-6267; Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14; and Case C-416/96 *El-Yassini* [1999] ECR I-1209, paragraph 17.

5 — Ley General Tributaria No 230/1963 of 28 December 1963 (BOE of 31 December 1963); Real Decreto Legislativo No 2795/1980 of 12 December 1980 *por el que se articula la Ley 39/1980, de 5 de Julio, de Bases sobre Procedimiento Económico-Administrativo* (BOE of 30 December 1980); Real Decreto No 391/1996 of 1 March, *por el que se aprueba el Reglamento de Procedimiento en las Reclamaciones Económico-Administrativas* (BOE of 23 March 1996; hereinafter 'the RPEA').

6 — See Article 163 of the Ley General Tributaria; Article 23 of Real Decreto Legislativo No 2795/1980.

7 — I note in this connection that these doubts were expressed by Advocate General Ruiz-Jarabo Colomer in footnote 5 to his Opinion in Joined Cases C-7495 and C-129/95, *Criminal Proceedings against X* [1996] ECR I-6609 and in the book *El Juez Nacional como Juez Comunitario*, Madrid, 1993, p. 81 et seq.

8 — 'Otherwise', as Advocate General Darmon pointed out in his Opinion in *Corbiau*, cited above, 'references could be made to the Court by any administrative body whatsoever, a state of affairs which Article 177 is designed to prevent' (point 16).

being *inter partes* in the strict sense of that term'. However, while it is apparent from a number of recent judgments handed down by the Court that the fact that procedure is not *inter partes* is not a sufficient ground for refusing to regard the referring body as a court or tribunal,[9] the fact remains that in cases where the Court has admitted references for a preliminary ruling in summary proceedings where the defendant was not present, it has taken care to ensure that this deficiency was offset by a high level of impartiality and independence in the adjudicating body.[10] In any case, it seems to me that the procedure before the Tribunales Económico-Administrativos, as governed by the RPEA, affords the persons concerned only a limited opportunity to be heard. Admittedly, they are allowed to lodge submissions and evidence in support of their claims (Article 90 RPEA) and to request a public hearing (Article 97 RPEA), but the Tribunal may grant or refuse such a request on the basis of a discretionary assessment which the person concerned is expressly precluded by law from challenging (Article 97(2) RPEA).

15. Turning now to the requirement of independence, it should be noted first that the Court has emphasised on a number of occasions that reference may be made to it under Article 177 only by 'a body required to give a ruling in complete independence in proceedings which are intended to result in a judicial decision'.[11] To my mind, it cannot be inferred from the provisions governing the constitution and *modus operandi* of the Tribunales Económico-Administrativos that when dealing with complaints submitted by a taxable person against decisions taken by the tax authorities, they will take all the requisite precautions to ensure impartiality and independence — even though this is necessary in view of their close 'structural' links with the administration.

16. On this point, the Spanish Government itself admits that, in organisational terms, the Tribunales Económico-Administrativos do not officially come under the auspices of the departments responsible for the administration of justice; rather, they are incorporated in the Ministry of Economic Affairs and Finance (Ministerio de Economia y Hacienda), that is to say, the very authority whose acts taxpayers contest before them. As regards the constitution of each Tribunal, the president and members are civil servants appointed with the approval of the Minister.[12] Under Article 16(5) of the RPEA, the Minister also has the power to remove them from office, but the circumstances in which that power may be exercised do not appear to be

9 — I refer in particular to *Dorsch Consult*, cited above, in which the Court, in dismissing the Commission's argument that 'according to the [referring body]'s own evidence, procedure before that body is not *inter partes*', merely stated that 'the requirement that the procedure before the hearing body concerned must be *inter partes* is not an absolute criterion'. That statement, for which no reasons were given in relation to the case under consideration, raises difficulties if we consider that the Court had previously accepted references for a preliminary ruling in cases where the procedure was not *inter partes* at the time but would (or in some cases might) be so later (see *Politi* and *Pretore di Salò*, cited above, and Case 70/77 *Simmenthal* [1978] ECR 1453 and Case 338/85 *Pardini* [1988] ECR 2041).

10 — See the judgments cited in the preceding footnote, in particular *Pretore di Salò*, paragraph 7, and the Opinion of Advocate General Darmon in *Corbiau*, points 7 to 10. It should also be noted that the Spanish Government itself draws attention in its written statement to the connection between the *inter partes* nature of the procedure and the independence of the adjudicating body.

11 — See, *inter alia*, *Criminal Proceedings against X*, cited above, paragraph 18.

12 — The office of Registrar of the Tribunal is held by an Abogado del Estado, who has the same voting rights as the President and Members (Article 16(1) and (7) RPEA).

clearly and exhaustively defined by law. The rules governing the *modus operandi* of the Tribunales do not, therefore, guarantee security of tenure for their members. In these circumstances, it appears unlikely to say the least that the Tribunales enjoy a measure of independence sufficient to ward off undue interference or pressure from the executive.

17. Furthermore, it would be a false assumption to conclude that the impartiality of the Tribunales Económico-Administrativos is adequately assured merely on the basis of the fact — the only fact referred to by the Spanish Government in support of its argument — that pursuant to Article 90 of the Ley General Tributaria the departments responsible for financial administration are organised in such a way that the management, calculation and collection of taxes are handled by a body officially quite separate from the body responsible for the adjudication of disputes concerning the management of fiscal affairs. Far from confirming that the Tribunales should be regarded as courts or tribunals, the Spanish Government's assertion that they are independent in terms of 'organisation and function' from the bodies responsible for fiscal management simply confirms the impression that they are, in fact, a branch of the administration with the specific task of determining whether measures adopted by the management bodies are lawful.

What is more, the Spanish Government itself appears to agree with this analysis — although, as mentioned above, it reaches a different conclusion — when it points out in its written pleadings that the procedure for dealing with an 'economic-administrative complaint' (*reclamación económico-administrativa*), which it classes as an 'administrative action', comprises a procedure for 'reviewing' contested acts. The primary feature of that procedure, according to the Spanish Government, is that the authority with jurisdiction has the power to re-examine all issues arising at the 'management' stage, *even if those points have not been contested by the persons concerned.* [13] This is clearly a role which, albeit in the interests of 'justice' *lato sensu* in that it provides citizens with a mechanism for the equitable settling of disputes in individual cases, is far from being classifiable as 'judicial'. It is a system which bears all the hallmarks of an administrative 'appeals' procedure and of a general power of self-regulation, manifested here by the administration's power to revoke invalid administrative acts even where no express request has been submitted by the individual concerned. Obviously no such power could be conferred on a genuine court, whose role is traditionally limited by the principle that the 'ruling' made must reflect the 'remedy' sought.

18. A further factor to be taken into account is that decisions taken by the Tribunales Económico-Administrativos are

13 — See Article 17 of Real Decreto Legislativo No 2795/1980 and Article 40 RPEA. It should be noted that the provisions governing the economic-administrative procedure describe the individual as the person concerned ('interesado'), not the party ('parte').

in principle always open to appeal before the administrative courts [14] (whether immediately or after the Tribunal Central has made a ruling); thus the *reclamación económico-administrativa* serves the purpose, typical of administrative actions, of enabling the administrative authority to hand down its own final decision after hearing the views of the individuals concerned. This does no more than permit the administrative authorities to state their position once again, at a higher level than the administrative action that was the subject of the original complaint. That measure, which becomes final once the administrative remedies available to the individual have been exhausted, may thus be challenged before the administrative courts. [15] Moreover, it is clear from Article 23 of Legislative Decree No 2795/1980 and from Articles 64 and 104 of the RPEA that the bodies dealing with economic-administrative complaints are not obliged to consider the substance of the complaints submitted by the 'persons concerned'. Pursuant to those provisions, if the Tribunales do not adopt a decision within one year of the complaint being lodged, the complaint will be deemed to have been rejected and the person concerned will thereupon be able to bring proceedings before the administrative courts. To my mind this is further confirmation that the role of the bodies in question is typically administrative rather than judicial. Furthermore, Article 4(1)(3)(a) of Legislative Decree No 2795/1980 provides that the Tribunal Económico-Administrativo Central may decline cases which it considers particularly important or which involve large sums, and refer them to the Finance Minister. Given that the Tribunal Económico-Administrativo Central is the body to which taxable persons may appeal against decisions of the local Tribunales, it seems clear that the whole mechanism for dealing with economic-administrative complaints is conditioned by the executive's ability, conferred by law, to arrogate to itself power of decision.

19. However, it should be borne in mind that refusal to recognise the order for reference as emanating from a 'court or tribunal' for the purposes of the preliminary ruling procedure must not have the effect of jeopardising the uniform application of Community law. That risk, to which the Court gave due consideration in *Broekmeulen* [16] — in which it held that the Appeals Committee for General Medicine, which delivers decisions that are recognised as final in the national legal system, must be considered as a court or tribunal [17] — does not arise in the present case. As I pointed out above, decisions taken by the Tribunales Económico-Administrativos are in any event subject to appeal before the administrative courts. Ultimately, it will be for those courts to appraise the need for a preliminary ruling from the Court of Justice, thus securing the intervention of the

14 — Article 40 of Real Decreto Legislativo No 2795/1980; Article 4(2) RPEA.

15 — It is significant that the Spanish Government itself acknowledges, at the beginning of its written pleadings, that 'it is a privilege of the public administrative authorities that they may review measures on administrative appeal; this is recognised as a general principle of public law, which makes provision for such a remedy in the form of a pre-litigation procedure, thus giving the *administrative authority responsible for the measure* an opportunity to reconsider measures that it has adopted' (my emphasis).

16 — Case 246/80 *Broekmeulen* [1981] ECR 2311.

17 — The Court emphasised on that occasion 'the absence, in practice, of any right of appeal to the ordinary courts ... in a matter involving the application of Community law' (judgment cited above, paragraph 17).

Court and confirming the right of individuals to obtain proper judicial review. [18]

20. Lastly, I consider that the conclusion I have just reached is not invalidated by the fact that in *Diversinte and Iberlacta* [19] the Court answered a question referred by the Tribunal Económico-Administrativo Central, Madrid, without considering whether the latter was a 'court or tribunal' within the meaning of Article 177 of the EC Treaty. In my view, that cannot be accorded the authority of precedent since the Court did not touch upon the issue of admissibility at all. The question whether the referring body was a court or tribunal had not been raised by any of the parties involved in the case, including the Commission and the intervening governments. Consequently, the judgment in that case does not preclude the Court from appraising, in the light of the relevant legislation, the rules governing the constitution and *modus operandi* of the Tribunales Económico-Administrativos, in order to determine whether they may be regarded as courts or tribunals for the purposes of Article 177 of the Treaty.

21. In the light of the foregoing considerations, I suggest that the Court dismiss as inadmissible the reference made by the Tribunal Económico-Administrativo Regional de Cataluña.

Substance

22. If, contrary to my first proposal, the Court should regard the Tribunal as a 'court or tribunal' within the meaning of Article 177 of the Treaty, the substance of the question referred for a preliminary ruling would have to be considered. The following observations bear on that aspect of the case.

23. It will be recalled that the question essentially concerns the compatibility with the Sixth VAT Directive of the Spanish legislation on the deduction of VAT paid by a taxable person in respect of expenditure incurred before the actual commencement of business or professional activities. This predicates exercise of the right to deduct upon fulfilment of two conditions, namely submission of an appropriate declaration and commencement of activities within one year thereafter.

24. Let me say at once that it seems to me unlikely that such a system is compatible with the Directive. In my view, the provisions of the Directive, in conjunction with

18 — See Case 222/84 *Johnston* [1986] ECR 1651 and the Opinion of Advocate General Darmon, point 4; and, more recently, Case C-126/97 *Eco Swiss China Time* [1999] ECR I-3055 and point 43 of my Opinion in that case.

19 — Joined Cases C-260/91 and C-261/91 *Diversinte and Iberlacta* v *Administración Principal de Aduanas de la Junquera* [1993] ECR I-1885.

the fundamental principle that VAT should be neutral, preclude a Member State from imposing conditions or limits, as provided for by the Spanish legislation at issue, on the right to deduct tax paid by a taxable person.

Sufficient grounds for that conclusion may be gleaned from an analysis of the Court's case-law on the classification of preparatory activities as 'economic activities' within the meaning of Article 4 of the Directive. That provision, which comes under Title IV of the Directive, under the heading of 'Taxable persons', states:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

25. This issue was first raised before the Court in *Rompelman*, a case in which it was sought to determine whether the acquisition of a right to the future transfer of property rights in part of a building yet to be constructed, with a view to letting such premises in due course, could be regarded as an 'economic activity' within the meaning of Article 4(1) of the Directive. After rehearsing the characteristics of the VAT system, with particular emphasis on its guiding principle — the principle of neutrality — as well as the rules governing deduction and the concept of a taxable person, the Court held that 'the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities; [t]he common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way'. [20]

26. On the interpretation of the concept of 'economic activity', the Court held in the same judgment that economic activities 'may consist in several consecutive transactions, as is indeed suggested by the wording of Article 4(2) which refers to "all activities of producers, traders and persons supplying services"; [t]he preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, which form part of those transactions must themselves be treated as constituting economic activity'. [21] Thus the Court espoused a

20 — Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19.
21 — Ibid., paragraph 22.

broad interpretation of the concept of 'economic activity' for the purposes of Article 4 of the Directive, encompassing acts ancillary to the pursuit of the commercial or professional activity itself.

After pointing out that 'it is not necessary to distinguish the various legal forms which such preparatory acts may take', the Court added that 'the principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of and with a view to commencing a business must be regarded as an economic activity; [i]t would be contrary to that principle if such an activity did not commence until the property was actually exploited, that is to say until it began to yield taxable income'. [22] The Court explained that any other interpretation would burden the trader with the cost of VAT without allowing him to deduct it in accordance with Article 17 of the Directive and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of a business and expenditure incurred during exploitation.

27. I would add that the Court has already disapproved mechanisms, such as that provided for in the Spanish legislation at issue, whereby exercise of the right to deduct is deferred until the actual commencement of the economic activity. Thus, the Court also states in *Rompelman* that 'even in cases in which the input tax paid on preparatory transactions is refunded after the commencement of actual exploitation of immovable property, a financial charge will encumber the property during the period, which may sometimes be considerable, between the first investment expenditure and the commencement of exploitation; [a]nyone who carries out such investment transactions which are closely connected with and necessary for the future exploitation of immovable property must therefore be regarded as a taxable person within the meaning of Article 4'. [23]

28. The conclusion reached in *Rompelman*, that the concept of 'economic activities' also covers preparatory activities, ancillary to the primary activity, was subsequently confirmed. In *Lennartz*, the Court was asked *inter alia* to determine whether it is sufficient, for the application of the rules laid down in Article 20(2) for the adjustment of input tax, for a person to acquire goods as a taxable person or whether there must be immediate use of the goods for the purposes of economic activities. After referring to the relevant passages in *Rompelman*, the Court stated that 'it follows from that judgment that a person who acquires goods for the purposes of an economic activity within the meaning of Article 4 does so as a taxable person, even if the goods are not used immediately for such economic activities'. [24] The Court went on

22 — Ibid., paragraph 23.

23 — Ibid., paragraph 23. In the following paragraph, in response to the question whether the intention to pursue an activity is a sufficient ground for assuming that an investor must be treated as a taxable person for the purposes of VAT, the Court stated that 'it is for the person applying to deduct VAT to show that the conditions for deduction are met .... Article 4 does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation'. It should be noted that, on that occasion, the expenditure had been incurred by natural persons with a view to commencing a commercial activity, namely the letting of a property.

24 — Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 14.

to say that, consequently, 'it is the acquisition of the goods by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism; [t]he use to which the goods are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 and the extent of any adjustments in the course of the following periods'. Accordingly, the Court concluded that the immediate use of the goods for taxable or exempt supplies does not in itself constitute a condition for the application of the provision on the right to adjustment of deductions.

29. The subsequent judgment in *INZO*[25] is extremely interesting in this connection. The issue to be determined on that occasion was whether the first investment expenditure — in particular, expenditure on feasibility studies — incurred by a taxable person with a view to carrying out commercial transactions in the future should be regarded as 'economic activities' within the meaning of Article 4 of the Directive even where the transactions, following an assessment of their profitability in the light of research, were in fact never carried out. Referring to the principles established in *Rompelman*, the Court again emphasised that 'the first investment expenditure incurred for the purposes of a business may be regarded as an economic activity within the meaning of Article 4 of the Directive' and that 'in that context, the tax authority must take into account the declared intention of the business'.[26] It follows, therefore, that where the tax authority has accepted that a company has the status of a taxable person for the purposes of VAT, tax paid in respect of such preparatory activities 'may in principle be deducted in accordance with Article 17 of the Directive'.[27] Since the deduction relates to 'economic activities', entitlement to it is retained even if the shareholders in the company in question subsequently decide not to move to the operational phase but to put the company into liquidation, with the result that the economic activity envisaged has never given rise to taxable transactions. The Court added that any other interpretation 'would, moreover, be contrary to the principle that VAT should be neutral as regards the tax burden on a business; [i]t would be liable to create, as regards the tax treatment of the same investment activities, unjustified differences between businesses already carrying out taxable transactions and other businesses seeking by investment to commence activities which will in future be a source of taxable transactions; [l]ikewise, arbitrary differences would be established between the latter businesses, in that final acceptance of the deductions would depend on whether or not the investment resulted in taxable transactions'.

30. Ultimately, what the Court sought to establish in the judgments referred to above was that the concept of 'economic activities' for the purposes of the Directive also includes activities prior and ancillary to those that directly constitute the commercial or professional activity. Consequently, they must in principle be treated in the

25 — Case C-110/94 *INZO* [1996] ECR I-857.

26 — *Ibid.*, paragraph 17.

27 — Ibid., paragraph 19.

same way for tax purposes. The right to deduct referred to in Article 17 must be extended to expenditure incurred in respect of 'preparatory' or ancillary activities, such as the acquisition of immovable property or land, provided that such activities are carried out by a person recognised as a taxable person by the authorities. Moreover, as Article 17(1) clearly states, the right to deduct arises immediately or, to be precise, 'at the time when the deductible tax becomes chargeable'.

Of course, as the Court made clear in *Rompelman*[28] and *INZO*,[29] that does not preclude the tax authority from requiring objective evidence in support of a declared intention to commence economic activities. Obviously, in cases of fraud or abuse in which the person concerned, on the pretext of intending to pursue a particular economic activity, in fact seeks to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations. However, in that case, of course, there is a substantive assessment of the actual conduct of the taxable person, based on the undisputed assumption that the right to deduct arises, under Article 17 of the Directive, at the time when the deductible tax becomes chargeable.

31. The appraisals made by the Court in the above judgments seem to me to be convincing. They also have a direct bearing on the question raised in the present case. Here, too, the right to deduct is determined — and sometimes refused — on the basis, not of a substantive assessment of the conduct of the taxable person, but of a general rule under which the term 'economic activity' applies only to the actual transactions that constitute the primary professional or business activity. Ancillary transactions connected with those activities qualify for deduction only if they are followed by 'economic activities' as thus defined and provided that they meet certain formal requirements laid down by law. In my view, such a system is in flagrant breach of the Directive as interpreted by the Court.

32. That said, it remains to be determined whether the measures adopted by the Spanish legislature may nevertheless be justified on the ground that they are designed to prevent the defrauding of the public purse. In that connection, it should be recalled that Article 22(8) of the Directive allows Member States to impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

In *Molenheide*,[30] however, the Court clearly delimited the exercise of that right. On being asked whether the Directive precluded Belgian legislation allowing the

28 — Judgment cited above, paragraph 24.

29 — Judgment cited above, paragraph 23.

30 — Case C-286/94 *Molenheide* [1997] ECR I-7281.

tax authorities to retain, as a protective measure, refundable amounts of VAT where there were grounds for a presumption of tax evasion, the Court held that this must be considered in the light of the principle of proportionality.[31] It stated that, consequently, 'the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant Community legislation; [a]ccordingly, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the Treasury as effectively as possible, they must not go further than is necessary for that purpose; [t]hey may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation'.

33. To my mind, it is clear that the Spanish legislation at issue — in so far as it systematically defers the exercise of the right to deduct, or simply refuses it, if the taxable person does not commence on a regular basis to carry out the taxable transactions constituting the activity — is out of all proportion to the objective sought. Separate penalties could have been provided for failure to submit a declaration before 'preparatory' expenditure is incurred or for delay in effecting the transactions that constitute the primary business activity; these need not have prejudiced the right to deduct in the case of expenditure which, I repeat, falls to be classed as an 'economic activity' under the Directive.

34. Moreover, my negative findings in respect of the requirements imposed by Spanish legislation are unaffected by the fact that this allows the tax authorities to extend the one-year time-limit prescribed by Article 111(1) of Law No 37/92 where warranted by the nature of the activities to be carried on in the future or by the circumstances surrounding the commencement of the activities. Clearly, if the preparatory activities are fully covered by the concept of 'economic activities' within the meaning of Article 4 of the Directive, the right to deduct tax paid in respect of expenditure incurred in connection with those activities cannot be made conditional upon discretionary decisions taken by the authorities.

35. In conclusion, I consider the Spanish legislation to be incompatible with the Directive, in that it makes exercise of the right to deduct tax paid before the commencement of the taxable transactions that constitute the business activities conditional upon the fulfilment of two requirements — that the taxable person submit a declaration before the commencement of the activities and that the business or professional activities commence within a year of submitting that declaration — and that it does not class preparatory transac-

31 — Ibid., paragraphs 46 and 47.

tions ancillary to the main activity as 'actual commencement of taxable transactions' and defers exercise of the right to deduct until the actual commencement of the taxable transactions that constitute the primary business activity.

Conclusion

36. In the light of the foregoing, I propose that the Court declare that the question referred by the Tribunal Económico-Administrativo Regional de Cataluña is inadmissible on the ground that the latter is not a 'court or tribunal of a Member State' within the meaning of Article 177 of the EC Treaty (now Article 234 EC).

In the alternative, I propose that the Court reply to the question as follows:

Article 17 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 precluding a national measure which

— makes exercise of the right to deduct VAT paid before taxable transactions commence on a regular basis conditional upon fulfilment of the requirements that

(a) an express request to that effect be submitted before the tax becomes chargeable;

(b) a time-limit of one year be observed between submission of that request and the actual commencement of taxable transactions;

— penalises failure to fulfil those requirements by forfeiture of the right to deduct or deferment of the exercise of that right until such time as taxable transactions commence on a regular basis.