OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 16 March 2006 [1]

I — Introduction

1. In these proceedings the Østre Landsret (Eastern Regional Court, Denmark) seeks the Court's interpretation of Article 11(A) of the Sixth VAT Directive [2] (hereinafter: 'Sixth Directive') concerning the relationship between VAT and motor vehicle registration duty.

2. This is already the second reference for a preliminary ruling to originate from the same proceedings in the national court. In *De Danske Bilimportører I* [3] the Court already held that the registration duty neither constitutes a charge having an equivalent effect to customs duties within the meaning of Article 25 EC because it is not charged on import but on registration nor does it fall within the scope of Article 28 EC. Nor, in the absence of Danish motor vehicle production competing with imports, does the prohibition on discriminatory internal taxation on imported products under Article 90 EC apply. [4]

3. The present proceedings raise the question whether on delivery of a motor vehicle the registration duty is to be included in the taxable amount for VAT. Currently, the Danish tax authorities first charge VAT on the sale price of the vehicle which is to be registered and then subsequently charge the registration duty on the whole amount. The applicant in the main proceedings takes the view, however, that the registration duty must be included in the taxable amount for VAT. Since the amount of the registration duty increases on a progressive basis the order in which the two duties are added to the price has an impact on the total amount of the tax charge.

1 — Original language: German.

2 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

3 — Case C-383/01 *De Danske Bilimportorer* v *Skattemunisteriet* [2003] ECR I-6065, paragraphs 32, 34, 35 and 42. The Danish provisions on vehicle registration duty were already the subject-matter of the judgments in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, Case C-138/04 *Commission* v *Denmark*, not published in the official reports but available in Danish and French at the Court's website [www.curia.eu.int] and Case C-464/02 *Commission* v *Denmark* [2005] ECR I-7929

4 — *De Danske Bilimportorer I*, cited in footnote 3, paragraphs 38 and 39, and Case C-47/88 *Commission* v *Denmark*, cited in footnote 3, paragraph 17.

II — Legal framework

A — *Community law*

4. The taxable amount for domestic transactions is governed by Article 11(A) of the Sixth Directive which provides inter alia as follows:

'(1) The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies;

...

(2) The taxable amount shall include:

(a) taxes, duties, levies and charges, excluding the value added tax itself;

(b) incidental expenses such as commission, packing, transport and insurance costs charged by the supplier to the purchaser or customer. Expenses covered by a separate agreement may be considered to be incidental expenses by the Member States.

(3) The taxable amount shall not include:

...

(c) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account. The taxable person must furnish proof of the actual amount of this expenditure and may not deduct any tax which may have been charged on these transactions.'

B — *National law*

5. Registration duty is charged on the basis of the Lov om registreringspligt af

motorkøretøjer m. v. (Law on the duty to register inter alia motor vehicles — hereinafter: 'Law on registration duty').[5] Under Paragraph 1 of the Law, duty is charged on motor vehicles which are required to be registered in accordance with the Law on road traffic. Registration duty is due on presenting the motor vehicle to be registered. In the absence of registration (and accordingly without payment of the duty) motor vehicles may not be driven on public roads.

6. Under Paragraph 8(1) of the Law on registration duty, the taxable value of a new motor vehicle is its usual price including VAT but excluding the duties levied under that law. The usual price is calculated on the basis of importers' price lists plus the dealer's profit. The value of used vehicles, including those imported in the course of a transfer of residence, is estimated in accordance with Paragraph 10 of the Law on registration duty. For those purposes this is taken to be the usual price of the vehicle including VAT but excluding registration duty.

7. Furthermore registration duty is payable in respect of motor vehicles which are repaired — for example, after a road accident — and which for tax purposes are subsequently considered no longer to correspond to the earlier vehicle in respect of which duty was paid. Equally, in that situation the duty is calculated on the basis of the market value of the vehicle including VAT.

8. In accordance with Paragraph 14 of the Law on registration duty, commercial vendors of motor vehicles which are required to be registered may register with the national tax and customs authorities. Unlike the vendors of various goods which are liable to excise duty they are not required, however, to register. Private individuals may themselves apply, therefore, for their vehicles to be registered. Registered dealers benefit merely from the fact that on presenting a vehicle they do not have to pay the registration duty in cash but may also pay it by means of a bank debit.

III — Facts, procedure and questions referred

9. De Danske Bilimportører, the applicant before the national court in the present proceedings (hereinafter: 'DBI'), is the trade association of Danish car importers. On 14

5 — For a more detailed account of registration duties in Denmark and in other Member States see in general the Opinion of Advocate General Jacobs in *De Danske Bilimportører I*, cited in footnote 3, point 10 et seq.

January 1999 it purchased a new motor vehicle which was destined to be used by the director of the trade association. As is conventional on purchase from an importer or from one of its dealers, the vendor arranged for the vehicle to be registered in the name of the purchaser and supplied the vehicle registration plates. Subsequently it delivered the vehicle in its registered state to the purchaser.

10. The vendor issued DBI with an invoice for the vehicle in which the total price including the registration duty (DKK 297 456) and VAT of DKK 498 596 was set out and which corresponded to the normal consumer price. In detail the price was arrived at as follows:

1. dealer's final price for the vehicle excluding VAT and duties,

2. VAT at the normal rate of 25% on the price set out at (1),

3. registration duty on the sum of items (1) and (2) with certain deductions and adjustments.

11. In DBI's view the total price should, however, have been calculated as follows:

1. dealer's final price

2. registration duty

3. VAT on items (1) and (2).

12. This method of calculation as claimed by the DBI would result in a DKK 14 899 lower tax charge. The difference can be explained by the progressive nature of the registration duty.

13. In this connection, by order of 11 February 2005, the Østre Landsret in accordance with Article 234 EC referred the following five questions to the Court for a preliminary ruling.

'1. Is Article 11(A)(2)(a) in conjunction with Article 11(A)(3)(c) of the Sixth VAT Directive to be interpreted as meaning that a registration duty for motor vehicles (cars) must be included

in the taxable amount for VAT, where a purchase agreement is entered into for the supply of a new motor vehicle for use for carrying passengers, where the motor vehicle is supplied, in accordance with the purchase agreement and the purchaser's intended use, by the dealer to the consumer already registered and for an overall price which includes both the price paid to the dealer and also the duty?

2. May a Member State arrange its tax system in such a way that the registration duty is regarded as an expense which the dealer pays on behalf of the final purchaser, so that it is the final purchaser who is directly liable to pay the duty?

3. Is it of significance with respect to Questions 1 and 2 that a car may be purchased and supplied without payment of registration duty, which will be possible if the purchaser does not intend to use the car for ordinary carriage of passengers or goods within the area in which the Law on road traffic applies?

4. Is it of significance that used motor vehicles are to a not insubstantial extent imported or brought inter alia as goods in connection with a transfer of residence by the final consumer, who pays the registration duty himself without the intervention of a dealer?

5. Is it of significance that the liability to registration duty arises or falls due — possibly as an expense — before the liability to VAT arises or falls due?'

IV — Legal appraisal

14. At the heart of this reference lies the first question concerning the interpretation of the provisions on the taxable amount set out in Article 11(A) of the Sixth Directive in respect of the inclusion or exclusion of a duty such as the Danish registration duty on motor vehicles. Questions 2 to 5 concern ancillary issues which may be of relevance when assessing the duty. It is appropriate, therefore, to examine the questions together.

A — *Preliminary observations concerning the interpretation of Article 11(A) of the Sixth Directive*

15. The basic rule of Article 11(A)(1)(a) of the Sixth Directive is that the value of the

consideration, that is to say in general the price paid, constitutes the taxable amount in respect of goods and services supplied within the national territory. Paragraphs 2 and 3 set out in more detail which amounts must be included in the taxable amount (paragraph 2) and which must be excluded (paragraph 3). Those provisions must therefore be examined first. [6] Nevertheless the basic rule in paragraph 1 remains of significance when interpreting paragraphs 2 and 3.

16. In accordance with Article 11(A)(2)(a) of the Sixth Directive taxes and duties in particular must be included within the taxable amount. At first sight that rule is surprising. It leads in fact to the result that a tax or a duty is itself subject to VAT even though payment of a tax is in itself not connected with the added value.

17. The provision can be understood if one interprets it in the light of Article 11(A)(1)(a) of the Sixth Directive and applies it only to duties which are so closely connected with the supply of goods that they have become incorporated in the value of that supply. The consideration, which constitutes the general basis for taxation, must accordingly relate to the supply of goods inclusive of the taxes or duties which contribute to its value. It is indeed evident from case-law, in particular, that only such consideration as is directly linked to the supply constitutes the taxable amount. [7]

18. The decisive test for including a duty in the value of goods supplied is whether the supplier paid the duty *in his own name and on his own account.* If this is the case the consideration relevant for determining the taxable amount includes the corresponding amount of duty. Thus, for example, excise duties on mineral oil, alcohol and alcoholic beverages and manufactured tobacco, for which Directive 92/12 [8] introduced a common system, are included in the taxable amount for VAT. It is generally the case that those taxes are payable by the person who releases the goods for consumption.

19. On the other hand, duties are not included in the taxable amount if they are entered 'in a suspense account' in accordance with Article 11(A)(3)(c) of the Sixth Directive. The broad wording of the provision thereby includes all types of 'amounts', thus also duties. If the person liable to VAT pays a duty *in the name and for the account of his customer* and if the corresponding amount is entered in the books of the taxable person in a suspense account, the duty does

6 — Case C-126/88 *Boots* [1990] ECR I-1235, paragraphs 15 and 16, and Case C-380/99 *Bertelsmann* [2001] ECR I-5163, paragraph 15.

7 — Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11, Case C-33/93 *Empire Stores* [1994] ECR I-2329, paragraph 12, and *Bertelsmann*, cited in footnote 6, paragraph 17.

8 — Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1). Most recently amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30).

not in fact constitute an element of the services supplied by that person. On repaying the duty paid out in advance, the customer is not, therefore, rewarding the taxable person for a service provided. [9] In those circumstances it is instead the customer himself who actually pays the duty; the taxable person is merely an intermediary used to facilitate payment.

20. The time at which the duty is payable does not however constitute a single decisive criterion. Admittedly, a duty paid after supply must generally no longer be regarded as a component of the taxable amount. Not every duty which is paid before supply [10] must be included, however, within the taxable amount. If the duty must be classified as an entry in the suspense account within the meaning of Article 11(A)(3)(c) of the Sixth Directive, it is not included within the taxable amount even if the supplier paid it before supply.

21. The parties are more or less agreed as to the interpretation in the abstract of Article 11(A) of the Sixth Directive. On the other hand they disagree as to how in practice a duty possessing the characteristics of the Danish registration duty must be categorised.

9 — See the Opinion of Advocate General Gulmann in Case C-18/92 *Bally* [1993] ECR I-2871, point 15.

10 — In this regard the time of supply is to be regarded as the date on which the vehicle is in fact handed over and not that of the conclusion of the sale contract, because in Community law the expression 'supply' presupposes transfer of the actual power of disposal (see Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraphs 7 and 8, and Case C-185/01 *Auto Lease Holland* [2003] ECR I-1317, paragraph 32).

B — *Categorisation of the Danish registration duty*

1. Views of the parties

22. The Danish and Netherlands Governments and the Commission take the view that the taxable amount for VAT does not include the registration duty because it is not connected to supply but to registration. [11] The Governments consider the duty to be an entry in the suspense account. The dealer registers the vehicle on behalf of the customer and it is in the latter's name that registration takes effect.

23. In DBI's view, the registration duty is, on the contrary, a tax on goods which must be included in the taxable amount. In levying the registration duty it is not use of the vehicle on the road which is being taxed, but the vehicle itself. It is in practice not possible to use a motor vehicle without registration.

24. DBI considers the registration duty to be a component of the price. Registration and purchase do not constitute separate acts: that which is purchased is a vehicle which has already been registered. The registration

11 — In that regard the parties refer to Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 47, and Case C-365/02 *Lindfors* [2004] ECR I-7183, paragraph 26.

duty is due before the act — the delivery of the vehicle — which gives rise to VAT liability. The judgments in *Weigel* and *Lindfors* do not allow any conclusions to be drawn regarding the present situation, because those cases were concerned with the interpretation of Directive 83/183.

25. DBI argues that the dealer who presents vehicles for registration does not pay the duty in the name of another, but is himself the taxable person.

2. Assessment

26. The taxation of motor vehicles has — apart from certain exceptions — not been harmonised. Member States are at liberty, therefore, to exercise their tax competence in this area provided that in doing so they comply with Community law. [12]

27. Nor does the Sixth Directive impose on Member States any conditions concerning the structuring of other duties which are levied on the supply or registration of motor vehicles, provided that they neither possess the characteristics of turnover taxes nor are connected with border-crossing formalities (Article 33(1) of the Sixth Directive). [13] Depending on their form, the effects of such national duties for VAT purposes can vary, however, as a result of the Sixth Directive.

28. It is not possible, therefore, to make a statement of general validity concerning the VAT treatment of domestic duties on motor vehicles. Instead each domestic duty must be examined on an individual basis taking its characteristics into account.

29. As the Danish Government correctly points out, however, it is not the task of the Court to interpret domestic tax legislation in that context. Nevertheless, the Court can interpret the Sixth Directive and in doing so take into account the features of national law which the national court has brought to its attention.

12 — Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 40, and Case C-464/02 *Commission* v *Denmark*, cited in footnote 3, paragraph 74.

13 — Joined Cases 93/88 and 94/88 *Wisselink* [1989] ECR 2671, paragraph 13.

30. First of all, it is of central importance in this case that the duty in question is charged when the motor vehicles are registered. The Court has confirmed the categorisation as registration duty on several occasions and has drawn various legal consequences therefrom.

31. In *De Danske Bilimportører I* it inferred from this that the duty at issue does not constitute an import duty, but an internal tax. [14] In *Commission* v *Denmark* (C-138/04) [15] it applied the conclusions reached in *Weigel* and *Lindfors* to the Danish registration duty. Accordingly the duty does not fall within the scope of Article 1 of Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals. [16] In that regard the Court also made reference to Article 1(2) of Directive 83/183, which expressly excludes from the directive's scope duties connected with the use of property within the country. [17]

32. The argument of DBI, that the registration duty is in fact linked to the supply of a motor vehicle and not to its use, is therefore untenable. The fact that the Court's findings were made in a different legal context does not affect the actual categorisation of the duty. Moreover, if it were correct that the registration duty is in fact a product-related duty, in *De Danske Bilimportører I* the Court would have had to examine it in the light of Article 25 EC and not Article 90 EC. As a product-related duty it would hinder imports.

33. Admittedly, it may in practice be rare that supply and registration of a new vehicle are separate events because dealers save purchasers the trouble of presenting the vehicle to the registration authorities. Supply and registration constitute in legal terms, however, two separate transactions. [18]

34. Firstly, it is possible to purchase a motor vehicle in its unregistered state from a Danish dealer. There is, in fact, no legal obligation on dealers only to sell vehicles which have been registered and taxed. That is why car dealers are not required to be registered with the tax authorities.

14 — Cited in footnote 3, paragraph 34.

15 — Cited in footnote 3, paragraphs 13 and 14.

16 — OJ 1983 L 105, p. 64.

17 — Case C-138/04 *Commission* v *Denmark*, cited in footnote 3, paragraph 15.

18 — The Court's findings in Case 391/85 *Commission* v *Belgium* [1988] ECR 579, paragraphs 25 and 26, cannot be used to support the argument that VAT and registration tax, even when they are in formal terms based on separate chargeable events, are to be regarded as a unity. Those findings relate to the particular facts of that case which can be distinguished from the present case because in that case both taxes were connected with one another by a compensatory mechanism. The purpose of the Belgian supplementary registration tax was in fact to compensate for a loss of VAT revenue arising out of an adjustment to the taxable amount as required by Community law.

35. A dealer will supply a vehicle in its unregistered state, for example, in those probably rare cases that the customer himself wishes to arrange for the registration or where registration is in fact unnecessary because it is not intended to drive the vehicle on public roads. Thus registration is unnecessary, for example, if the vehicle is only to be driven at the premises of an undertaking or to be exhibited in a museum. Nor is registration in Denmark necessary if the customer wishes to export the vehicle from Denmark in order to use it at his place of residence in another Member State.

36. Secondly, in certain cases motor vehicles are registered which have not been directly supplied by a dealer in Denmark, that is say, if a vehicle from another Member State is imported by its keeper, for example, in connection with a transfer of residence or if a vehicle which has been repaired is once again to be driven on public roads. Moreover, payment of the registration duty in Denmark may become necessary if a vehicle which has already been registered in another Member State is used for a lengthy period in Denmark by a person resident there. [19]

19 — See, in relation to those circumstances, Case C-464/02 *Commission* v *Denmark*, cited in footnote 3.

37. DBI argues that the duty is only linked to registration in order to permit the duty to be collected efficiently. The motives of the national legislature in the actual structuring of a chargeable event are not relevant, however, as regards the treatment of the duty for VAT purposes.

38. Even if registration is not inseparably connected with supply, it cannot be excluded, however, that it constitutes an element of the total service provided by the vendor. Some of the factual circumstances advanced by DBI appear at first to support this view. Thus the advertised prices for motor vehicles as a rule include the registration duty. Moreover, generally the contract relates to the supply of a registered vehicle.

39. Those circumstances do not shed any light, however, on the matter which is decisive for categorising the operation, that is, whether the vendor has paid the registration duty in his own name or in the name and for the account of the customer.

40. In law, that question must be answered by reference to Article 11(A)(3)(c) of the Sixth Directive, that is to say, the Community law notion of acting in the name and for

the account of another and not by reference to civil law provisions concerning agency and mandate which vary from one legal system to another.

41. Moreover, the operation must be categorised by reference to objective criteria and not solely to contractual provisions agreed between the dealer and the purchaser. Otherwise the parties could determine which elements are included in the taxable amount.

42. According to the information provided by the Danish Government, the Law on registration duty structures registration in such a manner that, whilst the dealer applies for the car to be registered, the ensuing registration is in the customer's name. That interpretation is supported by the fact that the dealer presents a vehicle for registration only when a contract of sale in respect of that specific vehicle has been concluded with a purchaser. Moreover, registration is a condition for using the vehicle on a public road which in practice is of interest only to the customer. Finally, the registration duty is invoiced in its entirety and as a separate item to the customer. If registration ensues in the customer's name, it must be assumed that the duty is also paid in his name and that it is entered in the dealer's books in a suspense account.

43. A registration duty of such a form is wholly compatible with the Sixth Directive, which in Article 11(A)(3)(c) contains an express rule for items entered in a suspense account that also applies to duties.

44. However, it is also lawful to charge other types of duties on motor vehicles which must be included in the taxable amount for VAT purposes. Thus, in *Wisselink* [20] the Netherlands duty at issue, which was charged as an excise duty on the supply and import of vehicles, was held by the Court to be lawful. Accordingly, it was included in the taxable amount for VAT. [21] Those observations do not permit, however, any conclusions to be drawn regarding the categorisation for VAT purposes of the Danish duty, which is linked to registration.

45. DBI disputes, however, that under the Danish legislation the dealer pays the registration duty in his customer's name. It is for the national court to make a definitive interpretation of national law and to resolve that question.

46. The Danish and Netherlands Governments and the Commission also take the view that the inclusion of registration duty in

20 — *Wisselink*, cited in footnote 13.

21 — *Wisselink*, cited in footnote 13, paragraph 22.

the taxable amount for VAT as claimed by DBI infringes the principle of the neutrality of VAT. The supply of a vehicle which the dealer has already had registered would be treated differently from the supply of a vehicle which the customer himself applies to have registered after delivery.

47. In essence, the principle of the neutrality of VAT requires comparable transactions to be taxed equally. [22] If one were to adopt the view of DBI the transactions would not be comparable because in the one case a vehicle is supplied unregistered and in the other case a vehicle is supplied already registered, and in such circumstances registration is considered to be an integral element of the supply. However, as I have already concluded registration is *not* in fact an element of the supply provided by the dealer. Therefore, the service he provides is in any event solely the supply of a motor vehicle. It would not be compatible with the principle of the neutrality of VAT, therefore, to tax such comparable transactions differently depending on whether the vehicle is presented for registration by the dealer before supply or by the customer after supply.

48. Finally, the Danish Government points to the likelihood of discrimination in respect of imported used vehicles arising if the registration duty was charged prior to VAT.

49. Given the lack of harmonisation of motor vehicle registration duties Member States are at liberty to choose the reference amount on which the duty is based. However, as held by the Court in particular in *Commission* v *Denmark* (C-47/88), Article 90 EC precludes, when determining the basis of assessment, the use of a less favourable value in respect of imported used vehicles than that which is applied to vehicles acquired on the domestic market. [23] Therefore it would be unlawful to base the registration duty for imported used vehicles on their value at the reference date inclusive of the VAT already contained therein, if the registration duty levied on vehicles acquired on the domestic market is calculated according to their price exclusive of VAT.

50. It is possible, nevertheless, to avoid such discrimination also by levying registration duty for imported used vehicles on their value at the reference date less the amount of VAT contained therein. Moreover, the national legislature is not precluded from levying registration duty on the net price (exclusive of VAT). Whether or not registration duty is included within the taxable

22 — Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20, Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 30, and Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] I-1131, paragraph 24.

23 — Case C-47/88 *Commission* v *Denmark*, cited in footnote 3, paragraphs 21 and 22.

amount for VAT, it is possible to use the net price as the taxable amount for the purposes of registration duty. Therefore, the prohibition on discriminatory internal taxation on imported goods does not permit any conclusions to be drawn concerning the interpretation of provisions governing the basis of assessment for VAT.

V — Conclusion

51. In conclusion, I propose that the questions referred by the Østre Landsret should be answered as follows:

A registration duty for motor vehicles (cars) which the dealer has paid in his customer's name prior to delivery, which has been entered in his books in a suspense account and which together with the price of the vehicle is subsequently invoiced to the customer, does not constitute a duty which is to be included in the basis of assessment for VAT in accordance with Article 11(A)(2)(a) of the 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, but constitutes an amount which must be excluded from the taxable amount in accordance with Article 11(A)(3)(c) of the Directive.