Case C-111/05

Aktiebolaget NN

v

Skatteverket

(Reference for a preliminary ruling from the Regeringsrätten)

(Sixth VAT Directive – Supply of goods – Article 8(1)(a) – Fibre-optic cable between two Member States running in part outside Community territory – Tax jurisdiction of each Member State limited to the length of cable installed on its territory – Non-taxation of the part lying in the exclusive economic zone, on the continental shelf or on the seabed)

Opinion of Advocate General Léger delivered on 14 September 2006

Judgment of the Court (Third Chamber), 29 March 2007

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Supply of goods*

(Council Directive 77/388, Art. 5(1))

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Supply of goods*

(Council Directive 77/388, Art. 8(1)(a))

3. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Sixth Directive – Scope of territorial application*

(Council Directive 77/388, Arts 2, point 1, 3 and 8(1)(a))

1. A transaction for the supply and installation of a fibre-optic cable linking two Member States and sited in part outside Community territory must be considered a supply of goods within the meaning of Article 5(1) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2002/93, where it is apparent that, after functionality tests carried out by the supplier, the cable will be transferred to the client who will dispose of it as owner, that the price of the cable itself clearly represents the greater part of the total cost of that transaction, and that the supplier's services are limited to the laying of the cable without altering its nature and without adapting it to the specific requirements of the client.

The fact that the supply of that cable is accompanied by its installation does not, in principle, preclude the transaction falling within the scope of Article 5(1) of the Sixth Directive. Firstly, it follows from Article 8(1)(a) of the Sixth Directive that tangible property can be installed or assembled, with or without a trial run, by or on behalf of the supplier without the transaction necessarily losing its classification as 'supply of goods'. Secondly, that provision does not distinguish between the methods of installation, such that movable property may be installed in the

ground in such a way as to be incorporated in it without for that reason necessarily having to be classified as ‘works of construction’ within the meaning of Article 5(5) of the Sixth Directive.

(see paras 34-35, 40, operative part 1)

2. Article 8(1)(a) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that the right to tax the supply and laying of a fibre-optic cable linking two Member States and sited in part outside the territory of the Community is held by each Member State pro rata according to the length of cable in its territory with regard both to the price of the cable itself and the rest of the materials and to the cost of the services relating to the laying of the cable.

It is true that, in order to function, a rule of conflict of laws must allow for attribution of tax jurisdiction in order to make a transaction subject to value added tax in only one of the Member States involved. To that effect, where goods have to be installed, the supply is deemed, in principle, to take place only in the territory of a single Member State and, where installation of the goods consists of their incorporation in the ground, it is the site of that incorporation which determines the State having jurisdiction to tax the supply. That still does not mean that the second sentence of Article 8(1)(a) of the Sixth Directive does not apply where installation of goods in the territory of one of the Member States continues into the territory of another Member State. Where those goods are installed in the territory first of one Member State then in that of a second, the place of supply is deemed to be in the territory of each of those States in succession. It follows that, in such a case, each Member State must have the right to tax the transaction in respect of that part of the goods installed in its territory.

(see paras 45-47, 50, operative part 2)

3. Article 8(1)(a) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, read in conjunction with Articles 2(1) and 3 of that directive, must be interpreted as meaning that the transaction concerning the supply and laying of a fibre-optic cable linking two Member States is not subject to value added tax for that part of the transaction which is carried out in the exclusive economic zone, on the continental shelf and at sea.

The rules laid down in the Sixth Directive have binding and mandatory force throughout the national territory of the Member States within the meaning of Article 299 EC, which, pursuant to Article 2 of the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, extends to the territorial sea, its bed and its subsoil.

However, the sovereignty of the coastal State over the exclusive economic zone and the continental shelf is merely functional and, as such, is limited to the right to exercise the activities of exploration and exploitation laid down in Articles 56 and 77 of the Convention on the Law of the Sea. To the extent that the supply and laying of an undersea cable is not included in the activities listed in those articles, that part of the operation carried out in those two zones is not within the sovereignty of the coastal State. That finding is confirmed by Articles 58(1) and 79(1) of the Convention, which permit, subject to certain conditions, any State to lay undersea cables in those zones. It follows that that part of the transaction cannot be regarded as having been carried out in the territory of the country within the meaning of Article 2(1) of the Sixth Directive. The same is true, a fortiori, of that part of the transaction which is carried out at sea, a zone which, pursuant to Article 89 of the Convention on the Law of the Sea, is outside the sovereignty of any State.

(see paras 55-57, 59-61, operative part 3)

JUDGMENT OF THE COURT (Third Chamber)

29 March 2007 (*)

(Sixth VAT Directive – Supply of goods – Article 8(1)(a) – Fibre-optic cable between two Member States running in part outside Community territory – Tax jurisdiction of each Member State limited to the length of cable installed on its territory – Non-taxation of the part lying in the exclusive economic zone, on the continental shelf or on the seabed)

In Case C-111/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Regeringsrätten (Sweden), made by decision of 24 February 2005, received at the Court on 4 March 2005, in the proceedings

Aktiebolaget NN

v

Skatteverket,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J. Malenovský, U. Lõhmus (Rapporteur) and A. Ó Caoimh, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Aktiebolaget NN, by U. Grefberg Nyberg, processansvarig,

– Skatteverket, by B. Persson, acting as Agent,

– the Commission of the European Communities, by L. Ström van Lier and D. Triantafyllou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(1), 3(1), 5, 6, 8(1)(a) and 9(2)(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 2002/93/EC of 3 December 2002 (OJ 2002 L 331, p. 27; 'the Sixth Directive').

2 The questions referred by the national court have arisen in the context of an action brought by Aktiebolaget NN ('Aktiebolaget NN'), established in Sweden, against a preliminary opinion given by the Skatterättsnämnden (Revenue Law Commission) with regard to the application of the provisions relating to value added tax ('VAT') to the installation, between Sweden and another Member State, of a fibre-optic cable, part of which must be laid on the seabed in international waters.

Legal context

Community legislation

3 Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…'

4 Article 3 of that directive provides:

'1. For the purposes of this Directive:

– "territory of a Member State" shall mean the territory of the country as defined in respect of each Member State in paragraphs 2 and 3,

– "Community" and "territory of the Community" shall mean the territory of the Member States as defined in respect of each Member State in paragraphs 2 and 3,

– …

2. For the purposes of this Directive, the "territory of the country" shall be the area of application of the Treaty establishing the European Economic Community as defined in respect of each Member State in Article [299 EC].

…'

5 Pursuant to Article 5 of the Directive:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

…'

6 Article 6 of the Sixth Directive provides:

‘1. “Supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

…’

7 Article 8 of that directive states:

‘1. The place of supply of goods shall be deemed to be:

(a) in the case of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person: the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins. Where the goods are installed or assembled, with or without a trial run, by or on behalf of the supplier, the place of supply shall be deemed to be the place where the goods are installed or assembled. In cases where the installation or assembly is carried out in a country other than that of the supplier, the Member State into which the goods are imported shall take any necessary steps to avoid double taxation in that State;

…’

8 Article 9 of that directive provides:

‘1. The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. However:

(a) the place of the supply of services connected with immovable property, including the services of estate agents and experts, and of services for preparing and coordinating construction works, such as the services of architects and of firms providing on-site supervision, shall be the place where the property is situated;

…’

National legislation

9 It follows from Chapter 1, Paragraph 1, of the mervärdesskattelagen (SFS 1994, No 200) (VAT law; ‘ML’) that tax liability under the ML presupposes, inter alia, that turnover is regarded as having been effected within the country.

10 In Chapter 1, Paragraph 6, of the ML, ‘goods’ are defined as ‘tangible objects’, including immovable property and gas, heat, refrigeration and electric power. According to Chapter 5, Paragraph 2, thereof, goods which are to be transported to a purchaser under a contract between a seller and a purchaser are sold within the country if the goods are situated in the country when the seller, the purchaser or some other party initiates the transport to the purchaser (subparagraph 1) or if the goods are not situated in the country when the transport is initiated but are assembled or installed there by the seller or on his behalf (subparagraph 2).

11 In Chapter 1, Paragraph 6, of the ML, ‘services’ are defined as everything which is not to be regarded as goods and which can be supplied as part of a professional activity. In accordance with the first subparagraph of Chapter 5, Paragraph 4, services which relate to immovable property are

supplied within the country if the property is situated there. According to point 4 of the first subparagraph of Chapter 5, Paragraph 6, services are supplied within the country if they are performed in Sweden and relate to work for goods which are movable property, including checking or analysis of such goods. The first subparagraph of Chapter 5, Paragraph 8, of the ML provides, inter alia, that for services other than those mentioned in Paragraphs 4 to 6a or 7a (with the exception, inter alia, of telecommunications services) the transaction is to be regarded as having been made within the country if the party supplying the services has the seat of its economic activity or has a permanent trading establishment in Sweden from which the services are supplied. The same subparagraph further provides that services not supplied from such a seat or place of establishment in Sweden or abroad are supplied within the country if the party supplying the services is regarded as being habitually or permanently resident in Sweden.

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

12 Aktiebolaget NN's activities are in the area of telecommunications, consisting, inter alia, of laying, maintaining and repairing fibre-optic cable. The company intends to conclude contracts involving the supply and laying, between Sweden and another EU country, of an undersea fibre-optic cable which will be used for the supply of transmission services to different telecommunications operators. Aktiebolaget NN will buy the cable and all other material necessary from different manufacturers, charter a vessel with its crew and employ staff specialising in the laying of cables.

13 The cable is fixed and buried in the ground on the Swedish mainland, then, if possible, buried in the seabed, firstly in Sweden's inland and territorial waters, then on the Swedish continental shelf and the other country's continental shelf as coastal countries and, finally, in the other country's territorial and inland waters, and is fixed and buried in the ground of the mainland of the other country. Depending on the distance between the fixing points, it can in certain cases be necessary to lengthen the cable, which is a relatively complicated technical procedure. In normal circumstances, the cost of materials accounts for up to 80 to 85% of the total cost. In unfavourable circumstances, for example in storms, the percentage of the total cost accounted for by materials is reduced.

14 After laying and after certain preliminary tests have been carried out, ownership of the cable is transferred to the purchaser. Thereafter, the work is brought to a close by further testing over about 30 days, when Aktiebolaget NN repairs any faults.

15 Aktiebolaget NN requested an interim decision from the Skatterättsnämnden regarding, on the one hand, whether the proposed service relates to immovable property in accordance with Chapter 5, Paragraph 4, of the ML or to work on movable property in accordance with Chapter 5, Paragraph 6, of the ML, or whether it constitutes some other service and, on the other, whether Sweden is the country of performance of the service.

16 The Skatterättsnämnden gave its decision on 13 June 2003. It found that the proposed service was to be regarded as a service provided in Sweden under the first subparagraph of Chapter 5, Paragraph 8, of the ML, since the service is of such a nature that the special connecting factors in Chapter 5, Paragraphs 4 to 6(a) and 7(a) of the ML cannot be applied.

17 Aktiebolaget NN appealed against the interim decision to the Regeringsrätten (Supreme Administrative Court). It claims that the laying of the undersea cable at issue in the main proceedings constitutes a service relating to property in accordance with Chapter 5, Paragraph 4, of the ML and that, consequently, VAT is due only on services carried out on the Swedish mainland and in Swedish internal waters and territorial waters.

18 Taking the view that an interpretation of Community law was necessary for the resolution of the dispute, the Regeringsrätten decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is a taxable transaction for the supply and installation of a cable, which is run between the territories of two Member States and also outside Community territory and to which the clearly greater part of the total cost is attributable, to be considered a supply of goods for the purposes of the provisions of the Sixth Directive regarding the place of taxable transactions?

(2) If such a transaction is instead to be considered the supply of a service, is that service to be regarded as having such a connection with immovable property that the place of the service is to be determined in accordance with Article 9(2)(a) [of the Sixth Directive]?

(3) If the answer to either the first or second question is in the affirmative, is Article 8(1)(a), or alternatively Article 9(2)(a) [of the Sixth Directive], to be interpreted as meaning that the transaction is to be split on the basis of the territorial positioning of the cable?

(4) If the answer to the third question is in the affirmative, are Article 8(1)(a), or alternatively Article 9(2)(a), and Articles 2(1) and 3(1) [of the Sixth Directive] to be understood as meaning that value added tax is not payable on that part of the supply of goods or services relating to the area outside the territory of the Community?’

The questions referred

The first question

19 By its first question, the national court asks whether, for the purposes of collection of VAT, a transaction for the supply and installation of a fibre-optic cable linking two Member States and sited in part outside Community territory, in which the price of the cable itself clearly represents the greater part of the total cost, is to be considered a supply of goods within the meaning of Article 5(1) of the Sixth Directive.

20 As a preliminary point, it must be established whether, for the purposes of VAT, the supply and laying of a cable, in the circumstances described by the national court, are to be treated as two distinct taxable transactions or as a single complex transaction comprising a number of elements.

21 According to the Court’s case-law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of services (see, to that effect, Case C?231/94 *Faaborg?Gelting Linien* [1996] ECR I?2395, paragraphs 12 to 14; Case C?349/96 *CPP* [1999] ECR I?973, paragraph 28; and Case C?41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I?9433, paragraph 19).

22 Taking into account the two facts that, firstly, it follows from Article 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer several distinct principal supplies or a single supply (see, to that effect, *CPP*, paragraph 29, and *Levob Verzekeringen and OV Bank*, paragraph 20).

23 In that regard, the Court has held that it is a single supply where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Levob Verzekeringen and OV Bank*, paragraph 22).

24 In the present case, the contract proposed by Aktiebolaget NN concerns the transfer, after completion of the installation and functionality tests, of a cable laid and in working condition.

25 It follows therefrom, firstly, that all the elements of the transaction at issue in the main proceedings appear to be necessary to its completion and, secondly, they are all closely linked. In those circumstances, it is not possible, without undue contrivance, to take the view that such a consumer will acquire, firstly, the fibre-optic cable and, subsequently, from the same supplier, the supply of services relating to the laying thereof (see, by analogy, *Levob Verzekeringen and OV Bank*, paragraph 24).

26 Consequently, the supply and laying of a cable, in the circumstances described by the national court, must be regarded as forming a single transaction for the purposes of VAT.

27 Next, in order to determine whether a single complex supply, such as that in the main proceedings, is to be classified as a supply of services, it is vital to identify the predominant elements of that supply (see, inter alia, *Faaborg-Gelting Linien*, paragraphs 12 and 14, and *Levob Verzekeringen and OV Bank*, paragraph 27).

28 It is clear from the case-law of the Court that, assuming that there is a single complex supply, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see, to that effect, Joined Cases C-308/96 and
C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 24, and *CPP*, paragraph 30).

29 It follows from the decision for reference that the laying of the cable at issue in the main proceedings requires the implementation of complex technical procedures and the use of specialised equipment and specific knowledge, and appears not only inseparable from delivery of the goods in such a wide-ranging transaction but also vital to the later use and exploitation of those goods. It follows that the laying of that cable is not merely an element ancillary to its supply.

30 Nevertheless, it remains to be determined whether, in the light of the elements which distinguish the supply at issue in the main proceedings, it is the supply of the cable or the laying thereof which must dominate with regard to classification of the transaction as either a supply of goods or a supply of services.

31 In that regard, it must be recalled that, pursuant to Article 5(1) of the Sixth Directive, '"supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

32 According to the case-law of the Court, it follows from the wording of that provision that the

notion of supply of goods does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property. The purpose of the Sixth Directive might be jeopardised if the requirements for there to be a supply of goods, which is one of the three taxable transactions, were to differ according to the civil law of the Member State concerned (see, to that effect, Case C?320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I?285, paragraphs 7 and 8; Case C?291/92 *Armbrecht* [1995] ECR I?2775, paragraphs 13 and 14; Case C?185/01 *Auto Lease Holland* [2003] ECR I?1317, paragraphs 32 and 33; and Case C?25/03 *HE* [2005] ECR I?3123, paragraph 64).

33 It is clear from the information supplied by the national court that the contract envisaged relates to a tangible object, namely a fibre-optic cable, which is bought and laid by the supplier and which, after functionality tests carried out by the supplier, is intended to be transferred to the client, who will dispose of it as owner.

34 The fact that the supply of that cable is accompanied by its installation does not, in principle, preclude the transaction falling within the scope of Article 5(1) of the Sixth Directive.

35 Firstly, it follows from Article 8(1)(a) of the Sixth Directive that tangible property can be installed or assembled, with or without a trial run, by or on behalf of the supplier without the transaction necessarily losing its classification as ‘supply of goods’. Secondly, as the Advocate General observed in point 51 of his Opinion, that provision does not distinguish between the methods of installation, such that movable property may be installed in the ground in such a way as to be incorporated in it without for that reason necessarily having to be classified as ‘works of construction’ within the meaning of Article 5(5) of the Sixth Directive.

36 It is also clear from the decision for reference that if the laying of the cable at issue in the main proceedings is carried out in normal circumstances, the turnover which the supplier will achieve from the transaction is mainly composed of the cost of the cable itself and the rest of the material, which represents 80 to 85% of the total amount thereof, whereas if the conditions are unfavourable, for example because of difficult terrain, the state of the seabed, the need to extend the cable or the occurrence of storms, the proportion of the cost of materials to the total cost decreases.

37 In that regard, although it is true that the relationship between the price of the goods and that of the services is an objective piece of information constituting an indication which may be taken into account for the purposes of classifying the main transaction, none the less, as the Commission of the European Communities argues in its observations, the cost of materials and work must not, of itself, be a decisive factor.

38 It is therefore necessary also to consider the importance of the supply of services in the light of the supply of the cable in order to classify the transaction envisaged.

39 In that regard, even if it is essential that the cable be installed in order to be usable and even if, by reason in particular of the distance and difficulty of the terrain, the installation of the cable in the ground is, as is apparent from paragraph 29 of this judgment, a very complex operation requiring extensive equipment, it still does not follow that the supply of services predominates over the supply of the goods. It follows from the description of the clauses of the contract set out in the decision for reference that the work to be carried out by the supplier is limited to installation of the cable at issue in the main proceedings and neither its purpose nor its effect is to alter the nature of that cable or to adapt it to the specific requirements of the client (see, by analogy, *Levob Verzekeringen and OV Bank*, paragraphs 28 and 29).

40 Having regard to all those elements, the answer to the first question must be that a transaction for the supply and installation of a fibre-optic cable linking two Member States and sited in part outside Community territory must be considered a supply of goods within the meaning of Article 5(1) of the Sixth Directive where it is apparent that, after functionality tests carried out by the supplier, the cable will be transferred to the client who will dispose of it as owner, that the price of the cable itself clearly represents the greater part of the total cost of that transaction, and that the supplier's services are limited to the laying of the cable without altering its nature and without adapting it to the specific requirements of the client.

The second question

41 The second question has been asked in the event that the taxable transaction is held to constitute a supply of services. Having regard to the answer to the first question, it is not necessary to consider it.

The third question

42 By its third question, the referring court asks, in order to determine the place of a transaction subject to VAT for the supply and installation of a fibre-optic cable linking two Member States and sited in part outside Community territory, whether Article 8(1)(a) of the Sixth Directive is to be interpreted as meaning that the tax jurisdiction of each Member State is limited to that part of the cable sited in its territory.

43 As a preliminary point, it should be pointed out that Title VI of the Sixth Directive contains specific provisions for determination of the place of taxable transactions, namely Article 8 for supplies of goods and Article 9 for supplies of services. The objective pursued by those provisions within the context of the general scheme of the Sixth Directive, as the seventh recital in the preamble implies, is designed to secure the rational delimitation of the respective areas covered by national VAT rules by determining in a uniform manner the place where supplies of goods and supplies of services are deemed to be provided for tax purposes. The object of those provisions is also to avoid conflicts of jurisdiction which may result in double taxation or non-taxation (see, by analogy, Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14; Case C?452/03 *RAL (Channel Islands) and Others* [2005] ECR I?3947, paragraph 23; and Case C?58/04 *Köhler* [2005] ECR I?8219, paragraph 22).

44 With regard to determination of the place where a supply of goods is deemed to take place, Article 8 of the Sixth Directive establishes a number of specific connecting factors according to whether there is a supply of goods with or without transport, a supply of goods on board ships, aircraft or trains, supplies of gas or electricity over distribution networks, or a supply of goods requiring installation or assembly with or without a trial run carried out by or on behalf of the supplier. In the last case, pursuant to the second sentence of Article 8(1)(a), the place of supply is deemed to be the place where the goods are installed or assembled.

45 It is true that, in order to function, a rule of conflict of laws must allow for attribution of tax jurisdiction in order to make a transaction subject to VAT in only one of the Member States involved. To that effect, where goods have to be installed, the supply is deemed, in principle, to take place only in the territory of a single Member State and, where installation of the goods consists of their incorporation in the ground, it is the site of that incorporation which determines the State having jurisdiction to tax the supply.

46 That still does not mean that the second sentence of Article 8(1)(a) of the Sixth Directive does not apply where installation of goods in the territory of one of the Member States continues

into the territory of another Member State. Where those goods, a fibre-optic cable in the case in the main proceedings, are installed in the territory first of one Member State then in that of a second, the place of supply is deemed to be in the territory of each of those Member States in succession.

47 It follows that, in such a case, as the Advocate General observed in point 88 of his Opinion, each Member State must have the right to tax the transaction in respect of that part of the goods installed in its territory.

48 The respective tax jurisdiction of each Member State with respect to the transaction as a whole covers not only the collectability of the tax due on the price of the cable itself but also includes the right to tax the services relating to installation.

49 In the main proceedings, the services related to installation of the fibre-optic cable include not only the laying itself and any lengthening of the cable but also the regular tests carried out during the laying, certain preliminary functionality tests carried out once laying is complete and the carrying-out of additional tests over about 30 days after the cable's entry into service, during which the supplier repairs any faults. That group of services, some of which are not connected to a precise geographical location, concern the entire cable and must, accordingly, like the price of the cable itself and the rest of the materials, be taxed by each Member State pro rata according to the length of cable in its territory.

50 The answer to the third question must therefore be that Article 8(1)(a) of the Sixth Directive must be interpreted as meaning that the right to tax the supply and laying of a fibre-optic cable linking two Member States and sited in part outside the territory of the Community is held by each Member State pro rata according to the length of cable in its territory with regard both to the price of the cable itself and the rest of the materials and to the cost of the services relating to the laying of the cable.

The fourth question

51 By its fourth question, the referring court asks, in essence, whether Article 8(1)(a) of the Sixth Directive, read in conjunction with Articles 2(1) and 3 of that directive, is to be interpreted as meaning that the supply and laying of a fibre-optic cable linking two Member States is not subject to VAT for that part of the operation relating to an area outside the territory of the Community.

52 Article 2(1) of the Sixth Directive requires Member States to make subject to VAT all supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such.

53 The territorial scope of the Sixth Directive is determined in Article 3 thereof, according to which 'territory of a Member State' is to mean the territory of the country as defined in respect of each Member State in paragraphs 2 and 3 thereof, and 'territory of the Community' is to mean the territory of the Member States as defined in respect of each Member State in those paragraphs. With the exception of certain national territories expressly excluded in Article 3(3), pursuant to paragraph 2 thereof, the 'territory of the country' corresponds to the scope of the Treaty as defined for each Member State by Article 299 EC.

54 In the absence, in the Treaty, of a more precise definition of the territory falling within the sovereignty of each Member State, it is for each of the Member States to determine the extent and limits of that territory, in accordance with the rules of international public law.

55 With regard to the scope of the Sixth Directive, the Court has held that the rules laid down in

the Directive have binding and mandatory force throughout the national territory of the Member States (see, to that effect, Case 283/84 *Trans Tirreno Express* [1986] ECR 231, paragraph 20).

56 Pursuant to Article 2 of the United Nations Convention on the Law of the Sea, which was signed at Montego Bay on 10 December 1982, entered into force on 16 November 1994 and approved by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1; 'the Convention on the Law of the Sea'), the sovereignty of the coastal State extends to the territorial sea as well as to its bed and subsoil.

57 The national territory of the Member States within the meaning of Article 299 EC thus also consists of the territorial sea, its bed and subsoil, it being understood that it is for each Member State to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles in accordance with Article 3 of the Convention on the Law of the Sea.

58 Accordingly, a Member State is required to subject to VAT a supply of goods which takes place in its territorial sea, on the bed thereof and in its subsoil (see also, with regard to the supply of transport services, Case C?331/94 *Commission* v *Greece* [1996] ECR I?2675, paragraph 10).

59 However, the sovereignty of the coastal State over the exclusive economic zone and the continental shelf is merely functional and, as such, is limited to the right to exercise the activities of exploration and exploitation laid down in Articles 56 and 77 of the Convention on the Law of the Sea. To the extent that the supply and laying of an undersea cable is not included in the activities listed in those articles, that part of the operation carried out in those two zones is not within the sovereignty of the coastal State. That finding is confirmed by Articles 58(1) and 79(1) of the Convention, which permit, subject to certain conditions, any State to lay undersea cables in those zones.

60 It follows that that part of the transaction cannot be regarded as having been carried out in the territory of the country within the meaning of Article 2(1) of the Sixth Directive. The same is true, a fortiori, of that part of the transaction which is carried out at sea, a zone which, pursuant to Article 89 of the Convention on the Law of the Sea, is outside the sovereignty of any State (see also, in the area of supply of transport services, Case C?30/89 *Commission* v *France* [1990] ECR I?691, paragraph 17).

61 The answer to the fourth question must be that Article 8(1)(a) of the Sixth Directive, read in conjunction with Articles 2(1) and 3 of that directive, must be interpreted as meaning that the supply and laying of a fibre-optic cable linking two Member States is not subject to VAT for that part of the transaction which is carried out in the exclusive economic zone, on the continental shelf and at sea.

Costs

62 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 (Third Chamber) hereby rules:

1. **A transaction for the supply and installation of a fibre-optic cable linking two Member States and sited in part outside Community territory must be considered a supply of goods within the meaning of Article 5(1) 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 2002/93/EC of 3 December 2002, where it is apparent that, after functionality tests carried out by the supplier, the cable will be transferred to the client who will dispose of it as**

owner, that the price of the cable itself clearly represents the greater part of the total cost of that transaction, and that the supplier's services are limited to the laying of the cable without altering its nature and without adapting it to the specific requirements of the client.

2. **Article 8(1)(a) of Sixth Directive 77/388 must be interpreted as meaning that the right to tax the supply and laying of a fibre-optic cable linking two Member States and sited in part outside the territory of the Community is held by each Member State pro rata according to the length of cable in its territory with regard both to the price of the cable itself and the rest of the materials and to the cost of the services relating to the laying of the cable.**

3. **Article 8(1)(a) of Sixth Directive 77/388, read in conjunction with Articles 2(1) and 3 of that directive, must be interpreted as meaning that the supply and laying of a fibre-optic cable linking two Member States is not subject to VAT for that part of the transaction which is carried out in the exclusive economic zone, on the continental shelf and at sea.**

[Signatures]

* Language of the case: Swedish.