Case C-240/05

Administration de l’enregistrement et des domaines

v

Eurodental Sàrl

(Reference for a preliminary ruling from the Cour d’appel (Luxembourg))

(Sixth VAT Directive – Exemptions – Articles 13A(1)(e), 17(3)(b) and 28cA(a) – Right to deduct – Manufacture and repair of dental prostheses – Intra-Community transactions relating to transactions which are exempt within the Member State – Effect of the derogating and transitional arrangements provided for in Article 28(3)(a) in conjunction with point 2 of annex E – Principle of fiscal neutrality – Partial harmonisation of VAT)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value-added tax – Deduction of input tax

(Council Directive 77/388, Arts 13A(1)(e), and 17(3)(b))

A transaction such as the making and repair of dental prostheses which is exempted from value added tax within the territory of a Member State under Article 13A(1)(e) of the Sixth Council Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directives 91/680 and 92/111, does not give rise to the right to deduct input value added tax pursuant to Article 17(3)(b) of that directive, even when it is an intra-Community transaction, and regardless of the system of value added tax applicable in the Member State of destination.

That interpretation, inferred from the wording of the Sixth Directive itself, is borne out by the objective it pursues as well as by its scheme and the principle of fiscal neutrality.

It is apparent, first of all, from the objective of the common system of value added tax and of the transitional arrangements introduced by Directive 91/680 for the taxation of trade between the Member States that a taxable person who benefits from exemption and is consequently not entitled to deduct input tax within the territory of a Member State is not entitled to do so either where the transaction concerned is of an intra-Community nature.

Secondly, the exemptions provided for in Article 13A, as they benefit only certain activities in the public interest which are listed and described in detail in that provision, are of a specific nature, whereas, the exemption for transactions of an intra-Community nature, is of a general nature, as it refers in an unspecified manner to economic transactions between the Member States. In those circumstances, it is consistent with the scheme of the Sixth Directive that the rules applicable to the specific exemptions provided for in Article 13A of that directive are accorded precedence over the rules applicable to the general exemptions provided for by the directive as regards transactions of an intra-Community nature.

Thirdly, the principle of fiscal neutrality precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for value added tax purposes. If the

transactions exempted under Article 13A(e) of the Sixth Directive gave rise to the right to deduct tax where they were of an intra-Community nature, that principle would not be observed as the same transactions do not give rise to a deduction where they are carried out within the territory of a Member State.

The fact that the Member State of destination applies the transitional arrangements provided for in Article 28(3)(a) of the Sixth Directive in conjunction with point 2 of Annex E of the directive, arrangements which permit it to continue to tax the transactions in question, is irrelevant. The taxation allowed by that provision is not harmonised taxation that is an integral part of the value added tax regime as arranged by the Sixth Directive for certain activities in the public interest, but taxation authorised only for a transitional period. Those exceptions must be strictly interpreted and their scope cannot therefore be extended to Member States which have complied with the principle enshrined in the Sixth Directive in exempting certain activities in the public interest listed in Article 13 of that directive.

(see paras 38, 41, 43-44, 46-48, 52, 54, 58, operative part)

JUDGMENT OF THE COURT (Third Chamber)

7 December 2006 (*)

(Sixth VAT Directive – Exemptions – Articles 13A(1)(e), 17(3)(b) and 28cA(a) – Right to deduct – Manufacture and repair of dental prostheses – Intra-Community transactions relating to transactions which are exempt within the Member State – Effect of the derogating and transitional arrangements provided for in Article 28(3)(a) in conjunction with point 2 of annex E – Principle of fiscal neutrality – Partial harmonisation of VAT)

In Case C?240/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour d’appel (Luxembourg), made by decision of 1 June 2005, received at the Court on 3 June 2005, in the proceedings

Administration de l’enregistrement et des domaines

v

Eurodental Sàrl,

THE COURT (Third Chamber),

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

Advocate General: D. Ruiz?Jarabo Colomer,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

having regard to the order of 4 May 2006 reopening the oral procedure and further to the hearing on 31 May 2006,

after considering the observations submitted on behalf of:

– the Administration de l'enregistrement et des domaines, by A. Kronshagen, avocat,

– Eurodental Sàrl, by M. Molitor, P. Lopes Da Silva, N. Cambonie and R. Muller, avocats,

– the German Government, by M. Lumma and U. Forsthoff, acting as Agents,

– the Commission of the European Communities, by R. Lyal and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 13A(1)(e), 15(1) to (3), 17(3)(b) and 28cA(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 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47) ('the Sixth Directive').

2 This reference was made in the course of proceedings between Eurodental Sàrl ('Eurodental') and the Administration de l'enregistrement et des domains luxembourgeoise (Luxembourg Land Registration and Estates Department) ('the competent tax authority') following the latter's refusal to allow Eurodental, for the accounting periods 1992 and 1993, to deduct the input value added tax ('VAT') on the making and repair of dental prostheses where those transactions were carried out for recipients based in Germany.

Legal context

Community legislation

3 Article 13A(1)(e) of the Sixth Directive provides:

'Exemptions within the territory of the country

A. Exemptions for certain activities in the public interest

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

…

(e) services supplied by dental technicians in their professional capacity and dental prostheses supplied by dentists and dental technicians'.

4 However, under Article 28(3)(a) of that directive:

'3. During the transitional period referred to in paragraph 4, Member States may:

(a) continue to subject to tax the transactions exempt under Article 13 … set out in Annex E to this Directive'.

5 Point 2 of that annex mentions the transactions referred to in Article 13A(1)(e) of the Sixth Directive.

6 Article 17 of the Sixth Directive, entitled 'Origin and scope of the right to deduct', provided as follows in paragraphs 2(a) and 3 of the version applicable before the entry into force of Directive 91/680:

'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) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

…

3. Member States shall also grant to every taxable person the right to a deduction or refund of the [VAT] referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

(a) transactions relating to the economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if they had occurred in the territory of the country;

(b) transactions which are exempt under … Article 15 …;

(c) any of the transactions exempted under Article 13B(a) and (d), paragraphs 1 to 5, when the customer is established outside the Community or when these transactions are directly linked with goods intended to be exported to a country outside the Community.'

7 Point 22 of Article 1 of Directive 91/680 inserted into the Sixth Directive, in its original version, Title XVIa, entitled 'Transitional arrangements for the taxation of trade between Member States' which comprises, inter alia, Articles 28a to 28f. Directive 91/680 had to be transposed into national law by 1 January 1993.

8 Article 28a of the Sixth Directive provides:

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

(a) intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax exemption provided for in Article 24 …

…'

9 Article 28bA(1) of the Sixth Directive provides:

'The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends.'

10 Article 28cA(a), first subparagraph, and Article 28cB(a) of the Sixth Directive provide:

'A. Exempt supplies of goods

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

(a) supplies of goods, as defined in Article 5 …, dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

…

B. Exempt intra-Community acquisitions of goods

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

(a) the intra-Community acquisition of goods the supply of which by taxable persons would in all circumstances be exempt within the territory of the country'.

11 Article 28f(1) of the Sixth Directive states:

'1. Article 17(2), (3) and (4) shall be replaced by the following:

"…

3. Member States shall also grant every taxable person the right to the deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

…

(b) transactions which are exempt pursuant to Article … 28c(A) and (C)"'.

12 Prior to 1 January 1993, intra-Community transactions were covered by Article 15 of the Sixth Directive, 'Exemption of exports and like transactions and international transport'. Paragraphs 1 to 3 and 13 of that article in the version which applied before the entry into force of Directives 91/680 and 92/111 provided:

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

1. the supply of goods dispatched or transported to a destination outside the territory of the country as defined in Article 3 by or on behalf of the vendor;

2. the supply of goods dispatched or transported to a destination outside the territory of the country as defined in Article 3 by or on behalf of a purchaser not established within the territory of the country …;

3. the supply of services consisting of work on movable property acquired or imported for the purpose of undergoing such work in the territory of the country as defined in Article 3, and dispatched or transported out of the territory of that country by the person providing the services or by his customer who is not established within the territory of the country or on behalf of either of them;

…

13. the supply of services including transport and ancillary transactions but excluding the supply of services exempted under Article 13, when these are directly linked to the transit or the export of goods, or to the imports of goods benefiting from the provisions of Articles 14(1)(b) and (c), and 16(1)’.

National legislation

Luxembourg legislation

13 Article 43(1)(a) and (c) of the Law of 12 February 1979, amending and supplementing the law of 5 August 1969 on value added tax (*Mémorial* A 1979, p. 186, ‘the Law on VAT’), provided in the version in force before 1 January 1993:

‘The following are [exempted] from [VAT] within the limits and under the conditions to be laid down by Grand-Ducal Regulation:

(a) supplies of goods which are dispatched or transported to destinations abroad by the supplier or by a third party acting on his behalf;

…

(c) supplies of services carried out, in the course of a processing operation, on goods which have been acquired or imported for the purposes of that operation and are dispatched or transported to destinations abroad by the person supplying the services or by a third party acting on his behalf’.

14 In the version in force after that date, Article 43, as amended by Article II of the Law of 18 December 1992, amending and supplementing the law of 12 February 1979 on value added tax (*Mémorial* A 1992, p. 3032), provides in paragraph (1)(d):

‘The following are [exempted] from [VAT] within the limits and under the conditions to be laid down by Grand-Ducal Regulation:

…

(d) supplies of goods, within the meaning of Articles 9 and 12(a) to (e), which are dispatched or transported by the supplier or by a third person acting on his behalf or by the person acquiring the goods or by a third person acting on his behalf outside the territory of the country but within the Community and which are made to another taxable person acting in the course of his business or to a non-taxable legal person in another Member State…'

15 Under the second and third indents of Article 44(1)(1) of the Law on VAT:

'The following are [exempted] from [VAT] within the limits and under the conditions to be laid down by Grand-Ducal Regulation:

…

(1) the following supplies of services and supplies of goods:

…

– services supplied in the legitimate exercise of the profession of dental technician;

– supplies of dental prostheses made by dentists and dental technicians in the legitimate exercise of their professions'.

16 Article 49(1) and (2)(a) of the Law on VAT provides:

'1. The [VAT] charged on goods and services which are used to supply goods and services which are exempt or do not fall within the scope of the tax shall not be deductible.

…

2. Notwithstanding the provisions in paragraph 1, a taxable person is permitted to make a deduction where the goods and services are used for the purposes:

(a) of his transactions, which are exempt under the provisions in Article 43 or in the implementing regulations relating thereto'.

German legislation

17 Under the fourth sentence of Paragraph 4(14) of the Law on value added tax (Umsatzsteuergesetz, 'the UStG'), the exemption for transactions relating to the activities, inter alia, of dentists does not apply to the supply or repair of dental prostheses and orthodontic equipment if the trader has manufactured or repaired them in his business premises.

18 Under Paragraph 12(2)(6) of the UStG, those transactions are taxed at a reduced rate.

The main proceedings and the questions referred for a preliminary ruling

19 Eurodental is a company established in Luxembourg and is engaged, in essence, in making and repairing dental prostheses for customers based in Germany.

20 By decision of 26 March 1997, the competent tax authority refused to permit Eurodental, for the accounting periods 1992 and 1993, to deduct the input VAT charged on goods used to supply goods and services to customers based in Germany on the ground that Article 44 of the Law on

VAT takes precedence over Article 43 thereof, in the versions applicable before and after 1 January 1993, with the result that Article 49(2)(a) of that law, which permits deduction of input VAT, does not apply.

21 The Tribunal d'arrondissement (Luxembourg) (District Court, Luxembourg), before which Eurodental brought an action for annulment and variation of that decision, held, by judgment of 16 December 2002, that the deduction had been incorrectly refused. After finding that Articles 43 and 44 above each relate to separate transactions, the former concerning transactions which are not meant for the territory of the country, while the latter concerns transactions carried out within the territory of the country, that court held that Article 49 of the Law on VAT authorises the deduction of input VAT for the transactions referred to in Article 43 of that law, in the version applicable before and after 1 January 1993, regardless of the VAT exemption rules applicable within the territory of the country. No provision of national law implies that Article 44 of the Law on VAT takes precedence over Article 43.

22 The competent tax authority lodged an appeal against that judgment before the referring court. As it found that the question whether Article 13 of the Sixth Directive takes precedence over Article 28c thereof is not settled by the legislation, the Cour d'appel (Court of Appeal) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does a supply of goods which, when made within a Member State, is exempted by reason of Article 13A(1)(e) of the Sixth Directive … and does not give rise to the right to deduct input tax pursuant to Article 17 of the directive, fall within the ambit of Article 15(1) and (2) of the directive as worded prior to 1 January 1993 or Article 28cA(a), applicable as of 1 January 1993, and thus within the ambit of Article 17(3)(b) of the directive giving rise to the right to deduct input tax when the goods are supplied by an operator established in a Member State of the Community to an operator established in another Member State and when the conditions relating to the application of Article 15(1) and (2) of the directive as worded prior to 1 January 1993 and of Article 28cA(a), applicable as of 1 January 1993, are met?

2. Does a supply of services which, when made within a Member State, is exempted by reason of Article 13A(1)(e) of the Sixth Directive … and does not give rise to the right to deduct input tax pursuant to Article 17 of the directive fall within the ambit of Article 15(3) as worded prior to 1 January 1993 (no exemptions were laid down for 1993) and thus within the ambit of Article 17(3)(b) of the directive giving rise to the right to deduct input tax when the services are supplied by an operator established in a Member State of the Community to an operator established in another Member State and when the conditions relating to the application of Article 15(3) as worded prior to 1 January 1993 are met?'

The questions referred for a preliminary ruling

23 By its two questions, which must be examined together, the national court asks, in essence, whether transactions like the making and repair of dental prostheses which, when they take place within the territory of a Member State, are exempt from VAT as activities in the public interest may give rise to a deduction of input VAT when they are intra-Community transactions.

24 It is apparent from the wording of the questions that this order for reference concerns, firstly, supplies of goods and services made before 1 January 1993 and, secondly, supplies of goods made after that date. It does not, on the other hand, relate to supplies of services made after 1 January 1993.

25 It must be borne in mind that Article 13A of the Sixth Directive provides for the exemption from VAT of certain activities in the public interest, including, under Article 13A(1)(e), services

supplied by dental technicians in their professional capacity and dental prostheses supplied by them.

26 Under Article 17(2)(a) of the Sixth Directive, where a taxable person supplies goods or services to another taxable person who uses them for an exempt transaction pursuant to Article 13A of the directive, the latter person is not, as a rule, entitled to deduct the input VAT paid as, in such a case, the goods and services concerned are not used for taxable transactions (see, to that effect, Case 8/81 *Becker* [1982] ECR 53, paragraph 44, and Case C-302/93 *Debouche* [1996] ECR I-4495, paragraph 16).

27 In the present case, according to the order for reference, it is not disputed, in the main proceedings, that the transactions carried out by Eurodental are covered by those provisions when they take place within the territory of the Member State in which that company is established. By its order for reference, the national court seeks, therefore, solely to establish whether the transactions are still covered by those provisions where they are effected for customers based in another Member State, in this case in Germany.

28 As regards transactions of an intra-Community nature, Article 15(1) to (3) of the Sixth Directive, in the version applicable before 1 January 1993, provided for the exemption of supplies of goods and supplies of services relating to goods which were dispatched or transported to a destination outside of the territory of the Member State. As from that date, the exemption of those supplies to another Member State has been provided for in the first subparagraph of Article 28cA(a) of that directive. Under Article 17(3)(b) of the directive, as amended by Article 28f(1) thereof, the deduction of input VAT on such transactions is permitted in the Member State of the departure of the dispatch or intra-Community transport of the goods (see Case C-245/04 *EMAG Handel Eder* [2006] ECR I-3227, paragraph 30).

29 However, the competent tax authority submits that the intra-Community transactions at issue in the main proceedings do not give rise to such a right to deduct because Article 13A(1)(e) of the Sixth Directive, which provides for a special exemption, takes precedence over the more general provisions laid down in Articles 15 and 28cA(a) of the directive.

30 By contrast, Eurodental submits that, as Article 13 of the Sixth Directive, on the one hand, and Articles 15 and 28c of the directive, on the other hand, have different fields of application, Article 13 cannot take precedence over Articles 15 and 28. It is apparent from the wording of the headings to each of those provisions that Article 13 of the directive is only applicable to transactions carried out within the territory of Member States whilst transactions between Member States are covered, for their part, by Articles 15 and 28c of the directive.

31 In that regard, it must be pointed out that, as Eurodental submits, Article 13 of the Sixth Directive relates, according to the wording of its heading, to exemptions ‘within the territory of the country’ whilst, according to the wording of their respective headings, Article 15 of the directive, in the version applicable before 1 January 1993, and Article 28c of the directive, as applicable from that date, relate respectively to ‘exports’ and ‘trade between Member States’.

32 However, contrary to Eurodental’s submissions, it does not follow that a transaction covered by Article 13 of the Sixth Directive, where it is intra-Community in nature, necessarily, and on that sole ground, falls within the scope of Articles 15 and 28c with the effect that, given the reference made by Article 17(3)(b) of the directive to those provisions, that transaction may give rise to the deduction of input VAT.

33 It is only by way of exception that the Sixth Directive provides, in particular in Article 17(3)(b), for the right to deduct VAT on goods or services used for exempt transactions (see, to

that effect, Case C-4/94 *BLP* [1995] ECR I-983, paragraph 23). Therefore, the terms used by the directive in that regard must be interpreted strictly.

34 Although Article 17(3)(b) of the Sixth Directive refers generally to the provisions of that directive which provide for the exemption of intra-Community transactions, namely, Article 15 of the directive, for the period before 1 January 1993, and Article 28c, for the period after that date, respectively, clearly that provision does not refer at all to the exemptions provided for in Article 13 of the directive for certain activities.

35 On the contrary, before 1 January 1993, Article 15 of the Sixth Directive, to which Article 17(3)(b) referred, expressly excluded, in paragraph 13, the supply of services exempted under Article 13 of the directive when they were directly linked to certain cross-border transactions.

36 Furthermore, Article 17(3)(c) of the Sixth Directive specifically grants the right to deduct VAT as regards certain transactions exempted under Article 13B of that directive. As the Commission of the European Communities correctly submits, that provision would have no purpose if the exemptions provided for in Article 13 of the directive were already covered by Article 17(3)(b).

37 Therefore, notwithstanding the wording of the headings of the relevant provisions of the Sixth Directive, it is apparent from the examination of their content that the transactions exempted under Article 13 of the directive do not give rise to the right to deduct input VAT even where those transactions are of an intra-Community nature.

38 That interpretation, inferred from the wording of the Sixth Directive itself, is borne out by the objective it pursues as well as by its scheme and the principle of fiscal neutrality.

39 As regards, firstly, the objective of the Sixth Directive, it must be borne in mind that, under Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967 (I), p. 14), the principle of the common system of VAT involves the application, in the Community, to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged (order in Case C-395/02 *Transport Service* [2004] ECR I-1991, paragraph 20).

40 As the competent tax authority and the Commission correctly submit, if intra-Community transactions such as those at issue in the main proceedings were to give rise to the right to deduct input VAT in the Member State of departure, they could be supplied in the Community totally exempt from VAT. Where those transactions are, in any event, exempt in the territory of the Member State of destination under Article 13 of the Sixth Directive, they should, firstly, be exempt in that Member State as intra-Community acquisitions under Article 28cB(a) of the directive and, secondly, they should not give rise to any collection of VAT in the Member State of origin as the input tax would be deducted and, under the first subparagraph of Article 28cA(a) of the directive, no output taxation would take place.

41 It is thus apparent from the objective of the common system of VAT and of the transitional arrangements introduced by Directive 91/680 for the taxation of trade between the Member States that a taxable person who benefits from exemption and is consequently not entitled to deduct input tax within the territory of a Member State is not entitled to so either where the transaction concerned is of an intra-Community nature (see, to that effect, *Debouche*, paragraph 15).

42 That principle is enshrined in Article 17(3)(a) of the Sixth Directive as, under that provision, the right to deduct the VAT relating to a transaction carried out in another country is precluded if

that transaction is not eligible for deduction of tax within the territory of the Member State.

43 Secondly, as regards the scheme of the Sixth Directive, it must be pointed out that the exemptions provided for in Article 13A, as they benefit only certain activities in the public interest which are listed and described in detail in that provision, are of a specific nature (see, to that effect, Case C-307/01 *D'Ambrumenil and Dispute Resolution Services* [2003] ECR I-13989, paragraph 54). On the other hand, the exemption for transactions of an intra-Community nature which arises from Article 15 of that directive, for the period before 1 January 1993, and is provided for in Article 28c thereof, for the period after that date, is of a general nature, as it refers in an unspecified manner to economic transactions between the Member States.

44 In those circumstances, it is consistent with the scheme of the Sixth Directive that the rules applicable to the specific exemptions provided for in Article 13A of that directive are accorded precedence over the rules applicable to the general exemptions provided for by the directive as regards transactions of an intra-Community nature.

45 Contrary to the submission of the German Government, that finding cannot be called into question by Article 26bG(1) of the Sixth Directive. Even if, as that government submits, it could be inferred from the provisions of that article, which establishes a special tax regime for investment gold, that a Member State cannot disapply the exemption for intra-Community supplies as regards that commodity, although, under certain conditions, it may, in principle, waive the right to apply the exemption provided for by that regime to specific transactions which take place in that Member State, that does not in any way show that the first exemption takes precedence over the second, but at the most confirms that each of those exemptions is subject to its own rules, the wording and purpose of which are different.

46 Thirdly and lastly, as regards the principle of fiscal neutrality, it must be recalled that that principle precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see, to that effect, Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 54).

47 If the transactions at issue in the main proceedings gave rise to the right to deduct tax where they were of an intra-Community nature, that principle would not be observed as the same transactions do not give rise to a deduction where they are carried out within the territory of a Member State. Consequently, taxable persons carrying out intra-Community transactions would be treated more favourably than taxable persons effecting domestic transactions (see, to that effect, *Debouche*, paragraph 19).

48 However, the German Government states that, in the case in the main proceedings, since the Federal Republic of Germany applies the transitional arrangements provided for in Article 28(3)(a) of the Sixth Directive in conjunction with point 2 of Annex E of the directive, arrangements which permit it to continue to tax the transactions in question, those transactions could be subject to double taxation as they could be taxed again in that Member State under that provision read in conjunction with the first subparagraph of Article 28a(1)(a) and Article 28bA(1) of the Sixth Directive, whereas the input VAT in Luxembourg could not be deducted. On the other hand, the same transactions, although taxable where they are carried out within the territory of that Member State, give rise to a deduction. It follows from this that taxable persons based in Germany would be treated more favourably than their competitors based in Luxembourg.

49 That line of argument, which is disputed by the Commission and the competent tax authority, cannot be accepted.

50 It must be borne in mind that the Community system of VAT is the result of a gradual

harmonisation of national legislation pursuant to Articles 93 EC and 94 EC. The Court has consistently held that this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is still only partial (Case C-165/88 *ORO Amsterdam Beheer and Concerto* [1989] ECR I-4081, paragraph 21).

51 Thus, the harmonisation envisaged has not yet been achieved in so far as Article 28(3)(a) of the Sixth Directive authorises the Member States to retain certain provisions of their national legislation predating that directive which would, without that authorisation, be incompatible with the directive (see, to that effect, Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 38).

52 Whilst it is true that a Member State which, like the Federal Republic of Germany, retains such provisions in its national legislation does not infringe the Sixth Directive (see, to that effect, *Idéal tourisme*, paragraph 38), the fact remains that the taxation allowed by Article 28(3)(a) of the directive is not harmonised taxation that is an integral part of the VAT regime as arranged by the Sixth Directive for certain activities in the public interest, but taxation authorised only for a transitional period (see, to that effect, Case C-169/00 *Commission* v *Finland* [2002] ECR I-2433, paragraph 34). The objective of Article 28(4) of the Sixth Directive is the abolition of such derogating and transitional arrangements (see, to that effect, Case C-136/97 *Norbury Developments* [1999] ECR I-2491, paragraph 20, and *Idéal tourisme*, paragraph 32).

53 Clearly, therefore, the particular situation relied on by the German Government in the present case in support of the deduction of input VAT in Luxembourg, a situation which, moreover, has not led the national court to vary its questions according to the system of VAT used in the Member State of destination, results both from the fact that the option, granted by the transitional arrangements, to continue to tax the transactions at issue has not yet been abolished and from the Federal Republic of Germany’s decision to opt for such derogating and transitional arrangements, so that that situation is entailed by the fact that VAT has not yet, at this stage, been subject to complete harmonisation by the Community legislature.

54 The exceptions provided for in Article 28(3)(a) of the Sixth Directive must be strictly interpreted (see, to that effect, *Commission* v *Finland*, paragraph 34) and their scope cannot therefore be extended to Member States which have complied with the principle enshrined in the Sixth Directive in exempting certain activities in the public interest listed in Article 13 of that directive. It cannot be accepted that the obligation of those Member States not to allow the deduction, under Article 17(2)(a) of the directive, of input VAT on those exempt activities can be affected by the decision of another Member State to opt for derogating and transitional arrangements, particularly because the abolition of those arrangements is the objective of Article 28(4) of the Sixth Directive.

55 Such an extension would also be contrary to Article 28(3)(a) of the Sixth Directive since that provision does not permit a Member State which, like the Grand Duchy of Luxembourg, exempts the transaction at issue in accordance with the harmonised system, as is provided for in Article 13 of the directive, to introduce or reintroduce a taxation scheme in respect of that transaction, thus giving rise to the right to deduct input VAT, even for the purpose of remedying a possible distortion of competition undermining the Community principle of equal treatment, which is reflected in the area of VAT by the principle of fiscal neutrality (see, to that effect, Case C-35/90 *Commission* v *Spain* [1991] ECR I?5073, paragraphs 8 and 9, and *Idéal tourisme*, paragraph 33). On the other hand, in view of the transitional nature of the derogating taxation arrangements chosen by the Federal Republic of Germany, there is nothing to prevent it, in accordance with the objective of Article 28(4) of the Sixth Directive, from also deciding to exempt, as generally required by that directive, the transaction in question in order to remove such a distortion of competition (see, to that effect, *Idéal tourisme*, paragraph 33).

56 In that regard, it must, in particular, be emphasised that the fact that maintenance of the derogating and transitional arrangements in question in certain Member States may, in some circumstances, give rise to distortions of competition in Germany, cannot in any way authorise that Member State to create itself distortions of competition to the detriment of the Member States which have transposed the provisions of the Sixth Directive (see, to that effect, Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 25). That would be the case here if Eurodental were permitted to deduct VAT in Luxembourg, since, in such a situation, domestic transactions in that Member State, which do not give rise to the right to deduct input VAT, would be treated less favourably than intra-Community transactions which originated there.

57 As regards the particular situation relied on by the German Government, it is therefore for the Community legislature to do everything necessary to establish the definitive Community system of exemptions from VAT and thereby to bring about the progressive harmonisation of national VAT laws, which is the only means of abolishing the distortions of competition stemming from the existence of the derogating and transitional arrangements permitted by the Sixth Directive (see, to that effect, Case C-305/97 *Royscot and Others* [1999] ECR I?6671, paragraph 31, and *Idéal tourisme*, paragraph 39).

58 Consequently, the answer to the questions asked must be that a transaction which is exempted from VAT within the territory of a Member State under Article 13A(1)(e) of the Sixth Directive does not give rise to the right to deduct input VAT pursuant to Article 17(3)(b) of that directive, even when it is an intra-Community transaction, and regardless of the system of VAT applicable in the Member State of destination.

Costs

59 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:

A transaction which is exempted from value added tax within the territory of a Member State under Article 13A(1)(e) 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, as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers and Council Directive 92/111/EEC of 14 December 1992 introducing simplification measures with regard to value added tax, does not give rise to the right to deduct input value added

tax pursuant to Article 17(3)(b) of that directive, even when it is an intra-Community transaction, and regardless of the system of value added tax applicable in the Member State of destination.

[Signatures]

* Language of the case: French.