

## 61995C0085

Opinion of Mr Advocate General Fennelly delivered on 11 July 1996. - John Reisdorf v Finanzamt Köln-West. - Reference for a preliminary ruling: Bundesfinanzhof - Germany. - Value added tax - Interpretation of Article 18(1)(a) of the Sixth Council Directive 77/388/EEC - Deduction of input tax paid - Obligation of the taxable person - Possession of an invoice. - Case C-85/95.

*European Court reports 1996 Page I-06257*

### Opinion of the Advocate-General

*1 The invoice functions as the essential record of purchases and sales under the Community value added tax regime. A German court has posed some important preliminary questions concerning the definition of the VAT invoice and whether a taxable person, seeking to make a deduction, may be excused from producing it.*

*I - Legal and factual context*

*The relevant Community and national legislation*

*2 The questions referred raise a number of issues concerning the interpretation of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (hereinafter 'the Sixth Directive'). (1) As the tax year at issue in the main proceedings is 1988, I shall only discuss the provisions as they existed in the original version of the Sixth Directive, although they have all now, with some amendments, been re-enacted. (2)*

*3 Title XI of the Sixth Directive is entitled 'Deductions'. Article 17 is headed: 'Origin and scope of the right to deduct'. Article 17(1) provides that this right 'shall arise at the time when the deductible tax becomes chargeable'. Article 17(2)(a) entitles a taxable person to deduct from the tax which he is liable to pay the 'value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person', provided the goods and services supplied 'are used for the purposes of his taxable transactions'.*

*4 Article 18 of the Sixth Directive is entitled 'Rules governing the exercise of the right to deduct'. Article 18(1)(a) provides:*

*'To exercise his right to deduct, the taxable person must:*

*(a) in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3).'*

Article 18(2) describes, *inter alia*, how the deduction is to be effected, while Article 18(3) provides that:

*'Member States shall determine the conditions and procedures whereby a taxable person may be authorized to make a deduction which he has not made in accordance with the provisions of paragraphs 1 and 2.'*

5 Article 22 is one of two articles in Title XIII concerning *'Obligations of Persons Liable for Payment'*. It is entitled *'Obligations under the internal system'*. At paragraph (3), it provides that:

*'(a) Every taxable person shall issue an invoice, or other document serving as invoice in respect of all goods and services supplied by him to another taxable person, and shall keep a copy thereof.'*

*Every taxable person shall likewise issue an invoice in respect of payments on account made to him by another taxable person before the supply of goods or services is effected or completed.*

*(b) The invoice shall state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions.*

*(c) The Member States shall determine the criteria for considering whether a document serves as an invoice.'*

Furthermore, Article 22(8) provides that:

*'Without prejudice to the provisions to be adopted pursuant to Article 17(4), Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.'* (3)

6 The Sixth Directive is implemented in Germany by the Umsatzsteuergesetz (Turnover Tax Act, hereinafter *'the UStG'*). Under Paragraph 15(1)(1) of the UStG, a taxable person may deduct, as amounts of input tax, the tax which is shown separately on invoices drawn up under Paragraph 14 in respect of supplies and other services provided for his undertaking by other traders. According to Paragraph 14(4) an invoice means any document by which a trader or a third party on his behalf charges the recipient of goods or services for a supply or other service, irrespective of how that document is described in business dealings. The referring court states that the German courts have consistently held that the drawing up and handing over of the invoice is the substantive requirement for the existence of a claim to deduct input tax.

*The proceedings before the national court*

7 In 1988 the plaintiff and appellant in the main proceedings (hereinafter *'the plaintiff'*) had commercial premises built in a building owned by him. He subsequently let those premises to a supermarket operator. Having waived exemption from value added tax under Paragraph 4(12)(a) of the UStG, he sought to deduct amounts of input tax paid as part of the costs of the building.

8 During the course of a special VAT inspection carried out on behalf of the Finanzamt, Koeln-West (the respondent in the main proceedings, hereinafter 'the respondent'), the plaintiff was asked to produce the original invoices in respect of the amounts claimed as input tax deductions. However, he merely produced copies of the intermediate invoices from the head contractor, and the respondent reduced the amount of input tax allowed. After an unsuccessful objection to this reduction, the plaintiff brought an action before the Finanzgericht (Finance Court), which held that, despite having been called upon by the court to produce the original copies of the relevant invoices which, 'by his own account, were available and accessible', the plaintiff had failed to prove that the requirements for deduction of input tax laid down by Paragraph 15(1)(1) of the UStG had been fulfilled.

9 The plaintiff indicated at the hearing, for the first time, that this finding of fact is contested and that there was no question of his being unwilling to produce the original, but that the original invoice had actually been presented to the national tax authorities. However, he stated that it had been lost, for reasons which were not fully explained, prior to the special VAT investigation and that, furthermore, what was described as a 'composite' invoice had been produced to the Finanzgericht. In response, the agent representing Germany pointed out that the Bundesfinanzhof (Federal Finance Court) hears appeals only on points of law and that the facts are determined by the Finanzgericht. He said, and I agree, that the present case must be considered in the light of the facts as found and related in the order for reference. It seems to me, in any event, that the Court is in a position to furnish answers which may be applied by the national court to either set of facts.

10 The plaintiff appealed to the Bundesfinanzhof (hereinafter 'the national court'). The national court points out (by reference to the judgment of the Finanzgericht) that under Article 14(1) of the UStG 'only the document by which a supplier of goods or services charges the recipient of goods or services can be regarded as an invoice'. Only the original invoice sent to the recipient by the supplier can be regarded as 'a document capable of serving as evidence justifying the deduction of input tax'. It differs from other invoices 'in so far as it is recognizable as a unique copy and cannot be confused with multiple copies, duplicates or copies of invoices'. According to the national court, 'it is only possible to dispense with the submission of an original invoice where it has been mislaid or is unable, for more than a short period, to be procured'. In such cases the evidence necessary to claim a deduction may be adduced in other ways, such as, for example, by way of copies of invoices. In this case, the national court states that, as the plaintiff has not claimed that the invoices were lost, he should be regarded in law as not having produced the evidence necessary to justify a deduction of input tax. As noted in the preceding paragraph, the plaintiff now claims the invoices were lost. However, the national court states that its decision turns on whether national law may require as evidence the presentation of the original invoice. It takes the view that this decision raises a question of Community law, since Article 18 of the Sixth Directive contains rules governing the exercise of the right to deduct.

11 Therefore, the national court decided to refer the following questions to the Court:

'1. Is an invoice within the meaning of Article 18(1)(a) of the Sixth Directive 77/388/EEC only the original, that is to say, the original copy of the statement of account, or are carbon copies, duplicates or photocopies also to be regarded as being invoices in that sense?

2. Does the term "hold" within the meaning of Article 18(1)(a) of the Sixth Directive 77/388/EEC signify that the taxable person must at all times be in a position to present the invoice to the tax authorities?

3. Is the exercise of the right to deduct input tax precluded by virtue of Article 18(1)(a) of the Sixth Directive 77/388/EEC where the taxable person no longer "holds" an invoice?

## *II - Observations submitted to the Court*

12 Written observations were submitted by the plaintiff, the French Republic, the Federal Republic of Germany, the Hellenic Republic, the United Kingdom of Great Britain and Northern Ireland and the Commission, which, with the exception of the United Kingdom, also presented oral observations.

## *III - Analysis*

### *The admissibility of the questions referred*

13 The plaintiff submits that, as Article 22(3)(c) of the Sixth Directive expressly provides that it is the Member States which are responsible for determining the criteria which enable a document to serve as an invoice, if the national court thinks that Germany has not properly fulfilled its obligation in this respect, it should, rather than referring questions of interpretation to the Court, have filled in the relevant gaps itself. I do not agree. It is settled case-law that 'the right to determine the questions to be brought before the Court of Justice ... devolves upon the court or tribunal of the Member State alone ...'. (4) Moreover, the procedure pursuant to Article 177 of the Treaty 'establishes direct cooperation between the Court and the courts and tribunals of the Member States by way of a non-contentious procedure excluding any initiative of the parties who are merely invited to be heard in the course of that procedure'. (5) The Court does not, other than in exceptional circumstances, such as evidence that the dispute is contrived, 'look into the circumstances in which national courts were prompted to submit the questions and envisage applying the provision of Community law which they have asked the Court to interpret'. (6)

14 The questions referred relate to the extent of the requirement under Article 18(1)(a) of the Sixth Directive to 'hold' an 'invoice' as a prerequisite to exercising a right to deduct and, thus, clearly raise issues regarding the proper interpretation of that provision, which is manifestly a proper matter for referral to the Court pursuant to Article 177 of the Treaty. I am satisfied that the Court has jurisdiction to answer and must answer the questions submitted in the present case, which all concern the interpretation of Community law.

### *Analysis of Question 1*

15 The plaintiff submits that while the existence of an invoice constitutes an important proof in the exercise of a right to deduct, continued possession of it cannot constitute a precondition to the enjoyment of that right, and that a duplicate or copy of the invoice should be regarded as being capable of providing the same evidence. In his view the right to deduct cannot depend on the ongoing ability to produce a document whose continued existence is subject to a variety of hazards. Germany submits that it follows from Articles 18(1)(a) and 22(3) of the Sixth Directive that the taxable person must be in possession of the original invoice at the time when he seeks to exercise his right to deduct. That document must contain, in accordance with rules which, subject to the mandatory information required by Article 22(3)(b), are for the Member States to determine, all the information necessary for satisfying the substantive criteria governing the right to deduct. The United Kingdom submits essentially that Article 18(1)(a) should be interpreted as normally requiring the production of the original invoice but that an unduly strict approach ought to be avoided. Member States should therefore be free to accept other evidence where appropriate. The Commission submits that a combined interpretation of Articles 18(1)(a) and 22(3) permits a Member State to lay down criteria for recognizing, in place of an invoice, any other document, including duplicates and copies, capable of 'serving as an invoice' in accordance with the requirements which it has laid down. France and Greece however maintain that Article 18(1)(a)

*refers only to the original invoice, although Member States may permit a number of duplicates of an invoice to be issued simultaneously with the invoice. Greece also contends that a national rule which requires the production of the original invoice whenever it is available is perfectly compatible with the objective of ensuring the proper functioning of the VAT system and the prevention of fraud. At the hearing, Greece stated that neither Article 18(1)(a) nor Article 22(3) prohibits a national rule which makes the exercise of the right to deduct dependent upon production of an original invoice.*

*16 It is instructive, in my opinion, to begin by looking at the wording of Article 18(1)(a), which is expressed in mandatory terms. In so far as is relevant in the present case, it states that, to exercise a right of deduction under Article 17(2)(a), a taxable person 'must ... hold an invoice ... drawn up in accordance with Article 22(3)', which is, in turn, equally mandatory so far as the issuing of an invoice is concerned. The only formal requirements in respect of the contents of an invoice are to be found in Article 22(3)(b): it must 'state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions'. On the other hand, it is the Member States who are obliged to prescribe 'the criteria for considering whether a document serves as an invoice' (Article 22(3)(c)) and who 'may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud' (Article 22(8)).*

*17 At the hearing, the Commission referred to the German, French, Italian, Danish, Dutch and English texts of Article 22(3)(a) and (c), which were authentic at the time of adoption of the Sixth Directive in 1977. It stated that the French was the clearest and showed that what was at issue was the adoption of rules permitting, as an alternative, the substitution of other documents. The German text of Article 22(3)(c) reads 'Die Mitgliedstaaten legen die Kriterien fest, nach denen ein Dokument als Rechnung betrachtet werden kann'. I agree with the Commission that, if that wording is ambiguous, the French text is particularly helpful: 'Les États membres fixent les critères selon lesquels un document peut être considéré comme tenant lieu de facture' (emphasis added). Save in the German text, the idea of recognizing a separate document is reflected in all the language versions of the provision which were cited by the Commission. Read alone, the German text is open to the interpretation that the Member States can define the criteria for considering whether a document can constitute an invoice. However, when read in the light of the other texts, including the English, of Article 22(3)(a) and (c), Article 22(3)(c) clearly means that the Member States may determine the criteria for considering whether a document other than the invoice may serve as one.*

*18 The role of the invoice in the operation of the VAT system is pivotal. It must be issued by each supplier of goods or services to a purchaser who is a taxable person; it must be held by the taxable person at the time he claims the right to make a deduction of the VAT shown thereby to have been paid by him to the supplier. No issue of the content of the invoice arises in the present case. In the first question, the national court seeks guidance as to the meaning of the word 'invoice' for the purposes of Article 18(1)(a) of the Sixth Directive. It tells us that, in German law, only the document by which a supplier charges the recipient of goods or services can be regarded as an invoice and that consequently only the original invoice can be regarded as a document of account capable of serving as evidence justifying the deduction of the input tax. The possibility of dispensing with production of the original is a separate matter, more relevant to the second and third questions, and must be clearly distinguished, as it is by the national court, from the first issue of principle.*

*19 The Court has left no room for doubt as to the necessity for the taxable person 'in order to be entitled to deduct the value-added tax payable or paid in respect of goods delivered or to be delivered or services supplied or to be supplied by another taxable person ... [to] ... hold an invoice drawn up in accordance with Article 22(3) of the Sixth Directive (Article 18(1)(a))'. (7) The citation of Article 18(1)(a) shows that the Court was here referring to the original invoice. In my view, a Member State would have to adopt criteria pursuant to Article 22(3)(c) if it were to accord*

recognition to a document other than the original invoice. Member States may, under that provision, consonant with their obligation 'to ensure the correct levying of value-added tax', determine other documents which may serve as invoices. The terms of the order for reference suggest that German law does not contain such rules.

20 In my opinion, a taxable person desirous of exercising a right to deduct must normally be in possession of the original invoice or other document which the authorities in that Member State have accepted as constituting the invoice for the purposes of Articles 18(1)(a) and 22(3) of the Sixth Directive. Member States are not, therefore, free to accept as an invoice any other document which may contain the same information either as the original invoice or other original document which may have been prescribed by the Member State to serve as an invoice. This interpretation seems to me best 'adapted to prevent tax evasion'. (8)

21 I do not here address the scope of the discretion allowed to Member States, by Article 22(3)(c) of the Sixth Directive, to determine criteria for considering whether a document - implicitly, other than the original invoice - may serve as an invoice. It would be necessary to consider very carefully the circumstances in which, for example, duplicates, photocopies of other copies, or computerized records, might be recognized. Clearly, for example, any such alternative document would have to record the minimum information required by Article 22(3)(b). Furthermore, the need to counter irregularity or fraud would have to be borne in mind. I am, of course, conscious of the reference in the first question to 'carbon copies, duplicates or photocopies'. It seems possible that the comparative ambiguity of the German text of Article 22(3) has suggested to the national court that such documents might be admitted as invoices without the adoption of national rules to that effect. I think that the linguistic comparison made by the Commission and discussed at paragraph 17 above shows that this is not so.

#### Analysis of Questions 2 and 3

22 It is appropriate to deal with the second and third questions simultaneously as they effectively raise, in my opinion, two aspects of the same issue; i.e. the extent of the requirement to 'hold an invoice' for the purposes of exercising a right to deduct. Thus, the second question asks whether the taxable person must always be able to present the invoice to the relevant national tax authorities while the third question enquires as to the consequences of no longer holding it.

23 The plaintiff submits essentially that the invoice merely constitutes proof that the relevant supply has taken place and that its subsequent non-production should not affect a right to deduct which would otherwise arise from that supply. In his opinion, the relevant provisions of the UStG are in conformity with this interpretation of Article 18(1)(a) of the Sixth Directive. Germany submits that the possession of the invoice is merely a formal and not a substantive requirement of the right to deduct. Since Article 18(1)(a) only requires possession of the invoice at the time when the deduction occurs, the right to deduct cannot be excluded simply because the taxable person no longer possesses that invoice at a later stage. However, Germany also maintains that the obligations of the taxable person to facilitate supervision by the fiscal authorities are governed by Article 22(2) of the Sixth Directive, which obliges the taxpayer to 'keep his accounts in sufficient detail to permit the application of the value added tax and inspection by the tax authority'. Since Member States retain the power to lay down the criteria for determining the nature and content of an invoice, in its opinion, they also have the power to determine the proofs which the taxable person must be able to adduce in order to be considered to hold an invoice for the purposes of Article 18(1)(a) of the Sixth Directive. Thus, Germany submits that Member States may accept the original invoice, duplicates or photocopies for this purpose.

24 The United Kingdom and Greece submit that, in general, the taxable person must be able, where he is requested by the fiscal authorities, to present the original invoice. They contend that there may be cases where it can no longer be produced but that it is for the Member States to adopt rules governing the circumstances when the production of other documents may be

acceptable. However, that is not the case in the main proceedings where it is clear from the order for reference that the plaintiff has simply refused to produce the relevant invoices despite being in a position to do so. France, supported on this point by the Commission, considers the obligation of the taxable person to hold the invoice as an essential element of the evidence necessary in order to exercise the right to deduct. However, France accepts that, where circumstances amounting to force majeure occur so as to render impossible the production of that invoice, the relevant national authorities may, pursuant to Article 18(3) of the Sixth Directive, decide what other forms of proof are acceptable to prove that the alleged supply took place.

25 As I have said, Article 18(1)(a), subject only to Article 22(3)(c), unambiguously requires the taxable person to 'hold an invoice' in respect of the deductions which he claims are due under Article 17(2). Member States are also free to specify, in addition to the information required by Article 22(3)(b), the other information which must be contained in an invoice. (9) The powers reserved to the Member States in this respect should not, in my opinion, be interpreted as diminishing the importance of the invoice. I am satisfied that the basic obligation imposed upon the taxable person by Article 18(1)(a) to retain possession of the invoice remains unless and until the relevant Member State prescribes other documents or proofs which may be accepted in its place. However, such other documents or proofs must satisfy the overriding objective of the Sixth Directive of ensuring the proper application of the Community VAT scheme.

26 This interpretation does not conflict with Article 18(3) of the Sixth Directive, which permits the Member States to determine conditions and procedures for the making of deductions notwithstanding failure to comply with the requirements of Article 18(1) and (2). It is clear, in my opinion, that this is an exceptional provision which should not be interpreted broadly. Where a Member State's tax authorities are, however, satisfied that, despite the inability of the taxable person to produce an invoice, a deductible supply has occurred, then it is perfectly in accordance with the overall scheme of the Sixth Directive that they should nevertheless permit the claimed deduction. As the Court held in *Jeunehomme*, the powers of the Member States to lay down the details which must be contained on an invoice '... must be limited to what is necessary to ensure the correct levying of value-added tax and permit supervision by tax authorities. Moreover, such particulars must not, by reason of their number or technical nature, render the exercise of the right to deduct practically impossible or excessively difficult'. (10) The plaintiff and Germany are correct to submit that the right to deduct cannot be subject to the ability of the taxable person to present the original invoice in circumstances where he is able to produce other probative evidence in accordance with the rules laid down by the national authorities. I think that it follows by analogy with *Jeunehomme* that Member States are entitled, as a general rule, to require that taxable persons retain the original invoice for whatever period of time they determine, so long as that period is not so extended as to infringe the principle of proportionality articulated in that case.

27 In *Jeunehomme*, the Belgian tax authorities had refused to accept invoices which did not contain all the information required by Belgian law. Subject only to the principle of proportionality, the Court unequivocally endorsed the right of national authorities to insist on the provision on invoices of whatever information they deemed necessary to prevent fraudulent claims. In *Genius Holding* the Court, dealing with a claim to deduct based upon invoices which, while correctly drawn up, had not been issued in accordance with the rules in force in the relevant sector at the material time in the Netherlands, confirmed the important role of the invoice. It stated that 'the right [to deduct] cannot be exercised in respect of tax which does not correspond to a given transaction, either because it is higher than that legally due or because the transaction in question is not subject to VAT'. (11) In my opinion, it would be perfectly reasonable for national fiscal authorities to take the view, as the German authorities appear from the order for reference to have done in this case, that a taxable person who simply refuses to produce his invoice or 'ticket of admission' (12) when requested should be deprived of the deduction claimed. On the other hand, as the Sixth Directive essentially leaves the administration of the Community VAT system to national authorities, I do not think that Article 18(1)(a) should be interpreted as obliging those authorities to

*require the presentation of the original invoice in circumstances where they are satisfied that the original invoice has been lost or destroyed and that the genuineness of the claimed deduction can be shown by other evidence. The decision as to whether to require the production of that invoice should, in my view, be left to the Member States.*

#### *IV - Conclusion*

*I recommend, accordingly, that the Court answer the questions referred by the Bundesfinanzhof as follows:*

*(1) An invoice within the meaning of Article 18(1)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment should be interpreted as referring to the original document drawn up by the supplier of goods or services for the purposes of establishing that a taxable supply has occurred. Member States may, pursuant to Article 22(3)(c) of the Sixth Directive, determine criteria for considering whether another document may serve as an invoice.*

*(2) Member States are entitled under Article 18(1)(a) of the Sixth Directive to require a taxable person to be in a position to present the original invoice to national tax authorities carrying out fiscal inspections.*

*(3) Article 18(1)(a) of the Sixth Directive should not be interpreted as precluding the exercise of the right to deduct where the taxable person no longer holds the original invoice but where he is able to produce other probative evidence, pursuant to rules laid down under Article 18(3) by the Member States, that the underlying transaction in respect of which the deduction is claimed has actually occurred.*

*(1) - OJ 1977 L 145, p. 1.*

*(2) - See 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.*

*(3) - Article 17(4) of the Sixth Directive is a special provision which permits Member States to adopt various measures concerning 'capital goods'.*

*(4) - Case 44/65 Hessische Knappschaft v Singer [1965] ECR 965, p. 970.*

*(5) - Case C-364/92 SAT Fluggesellschaft v Eurocontrol [1994] ECR I-43, paragraph 9 of the judgment.*

*(6) - Case C-118/94 Associazione Italiana per il World Wildlife Fund and Others v Regione Veneto [1996] ECR I-0000, paragraph 14 of the judgment.*

*(7) - Joined Cases 123/87 and 330/87 Jeunehomme and Others v Belgian State [1988] ECR 4517, paragraph 14 of the judgment (hereinafter 'Jeunehomme'). To the same effect, see Case C-342/87 Genius Holding v Staatssecretaris van Financiën [1989] ECR 4227, paragraph 15 (hereinafter 'Genius Holding').*

*(8) - See Genius Holding, paragraph 17 of the judgment.*

*(9) - See Jeunehomme and, in particular, paragraph 16 of the judgment.*



(10) - *Paragraph 17 of the judgment.*

(11) - *Paragraph 15 of the judgment.*

(12) - *See the description used by Advocate General Sir Gordon Slynn in his Opinion in Jeunehomme, loc. cit., [1988] ECR 4517, p. 4534.*