OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 25 May 2005 1(1)

Case C-435/03

British American Tobacco International Ltd,

Newman Shipping & Agency Company NV

v

Ministerie van Financiën

(Reference for a preliminary ruling from the Hof van Beroep te Antwerpen (Belgium))

(Sixth VAT Directive – Articles 2(1), 5(1) and 27(1) and (5) – Scope – Chargeable event – Supply of goods for consideration – Theft from a tax warehouse of goods subject to excise duty – Derogating national measure)

1. By this reference for a preliminary ruling, the Hof van Beroep te Antwerpen (Court of Appeal, Antwerp) (Belgium) is referring to the Court of Justice questions concerning the interpretation 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 (2) ('the Sixth Directive').

I – **Facts in the main proceedings and the questions referred to the Court**

2. Newman Shipping & Agency Company NV ('Newman') operates a tax warehouse in Antwerp, where manufactured tobacco, produced and packaged in Belgium by British American Tobacco International Ltd ('BATI') and owned by that company, was stored. No tax stamps were placed on those goods.

3. Cigarettes were stolen from the warehouse on 4 December 1995 and 29 January 1996, and also on the night of 14-15 June 1998. The Belgian Customs and Excise Administration sent Newman a tax notice instructing it to pay excise duty and VAT on the missing cigarettes, in accordance with the system introduced by Article 58(1) of the Belgian VAT Code and Article 1 of Royal Decree No 13 of 29 December 1992 on the VAT arrangements for manufactured tobacco (*Belgisch Staatsblad*, 31 December 1992, p. 28086, 'the Royal Decree'), on the ground that VAT on manufactured tobacco is chargeable at the same time as excise duty and, since the excise duty had been paid following the discovery of the shortages at the warehouse, VAT also was chargeable.

4. Article 58(1) of the 1969 Belgian VAT Code reads:

‘For manufactured tobacco imported into, acquired within the meaning of Article 25 *ter*, or produced in Belgium, tax shall be charged whenever Belgian excise duty is to be paid in accordance with the statutory or regulatory provisions relating to the tax arrangements for tobacco.

…

The King shall lay down the detailed rules for charging the tax on manufactured tobacco and determine which persons shall be required to pay that tax.’

5. Article 1 of the Royal Decree provides that ‘[v]alue added tax on manufactured tobacco … shall be chargeable at the same time as excise duty’.

6. Following an unsuccessful complaint, Newman paid the amounts required, but without prejudice to any rights as regards VAT. BATI reimbursed those amounts to Newman in full.

7. Newman and BATI brought an action before the Rechtbank van Eerste Aanleg te Antwerpen (Court of First Instance, Antwerp) seeking reimbursement of the amounts they had paid. That action was dismissed by a judgment of 4 April 2001, which stated that excise duty was due on goods which were missing as a result of thefts and that therefore, pursuant to Article 58(1) of the VAT Code and Article 1 of the Royal Decree, VAT was also chargeable on those goods. Furthermore, the Rechtbank van Eerste Aanleg held that those provisions were intended to simplify the procedure for charging the tax and were therefore consistent with Article 27 of the Sixth VAT Directive.

8. On 7 May 2001 Newman and BATI appealed against that judgment to the Hof van Beroep te Antwerpen, which decided to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can there be a “supply of goods” within the meaning of the Sixth Directive, with the consequence that VAT can be charged:

– in the absence of any consideration?

– in the absence of transfer of the right to dispose freely of the goods as owner?

– if the goods cannot lawfully be placed on the market because they are stolen goods and/or contraband?

(2) Is the answer to the first question different if the goods in question are products subject to excise duty and in particular manufactured tobacco?

(3) If no excise duty is charged on products which are subject to excise duty, is it compatible with the provisions of the Sixth Directive to charge VAT in such a case?

(4) May Member States supplement the categories of transaction subject to VAT if they lodge a notification, as referred to in Article 27(2) or Article 27(5) of the Sixth Directive, of their intention to charge VAT at national level in the event of theft of products subject to excise duty from a tax warehouse, or is Article 2 of the Sixth Directive exhaustive?

(5) If a notification as referred to in Article 27(5) of the Sixth Directive relates only to the prepayment of VAT by means of fiscal stamps, may a Member State supplement the categories of

transaction subject to VAT by, for example, requiring the payment of VAT where products subject to excise duty have been stolen from a tax warehouse?'

9. These questions require me to interpret several provisions of the Sixth Directive, in particular Article 2(1), which reads: '[t]he following shall be subject to value added tax: … the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.

10. Article 5(1) of the Sixth Directive provides that '"[s]upply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

11. Article 10 of that directive provides:

'1. (a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes "chargeable" when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. …

…'

12. In addition, Article 27 of the Sixth Directive, concerning simplification procedures, (3) provides:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

…

5. Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.'

13. Under those arrangements, the Belgian State notified the Commission on 19 December 1977 of Article 58(1) of the Belgian VAT Code and of Royal Decree No 13 of 3 June 1970 on the VAT arrangements for manufactured tobacco (*Belgisch Staatsblad*, 5 June 1970, p. 6103), which were in force at the time the Sixth Directive was adopted, as follows:

'B. Prepayment of tax.

1. Manufactured tobacco products.

In order to facilitate monitoring of the charging of VAT, VAT that is due when manufactured

tobacco products are supplied is paid on the price to be paid by the consumer at the same time as excise duty, when the manufacturer or importer purchases the tax stamps. No VAT is charged at later stages, but naturally no deduction can be made. All sales of manufactured tobacco products must be invoiced including VAT. …'

II – **Assessment**

14. The questions referred by the national court essentially concern, first, whether the theft of goods subject to excise duty may be considered to be a 'supply of goods for consideration' under Article 2(1) of the Sixth Directive and therefore be subject to VAT. Secondly, in the event of a negative answer to that first question, a further question arises: whether payment of VAT may nonetheless be required in such a case on the basis of an authorisation granted to a Member State under Article 27 of the Sixth Directive.

15. I should like to reply first of all to the Belgian Government's argument that the questions referred by the national court are irrelevant and should be completely reworded. This is said to stem from the fact that Belgian law would apparently allow the VAT paid by the appellants to be refunded if they could prove that no taxable transaction ever took place following the theft.

16. The answers given by the Belgian Government and the appellants to the Court's written question as to what specific evidence must be adduced in order for Newman and BATI to be granted any right to a refund of VAT show that evidence of theft is not sufficient in this regard. It is essential also to demonstrate that no taxable transaction took place following the theft.

17. Proof of events verified after the theft, such as, for example, that the stolen goods have not been marketed or that they were destroyed by the thieves, is necessarily proof of facts that it is impossible for the appellants to ascertain. It is real *probatio diabolica*, impossible proof which cannot be required as a condition for refunding the VAT paid by the appellants. In that regard, the Court has already had occasion to declare that 'any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in breach of Community law are incompatible with Community law'. (4)

18. In the present case, it is clear from the order for reference that there is no doubt that the tobacco products at issue were actually stolen. The fact that a demand for payment of VAT on those goods, which are subject to excise duty, was made following the theft shows that it was the theft itself which made the goods subject to VAT. It was not a later event, such as the thieves possibly introducing the goods into the distribution chain, that was the decisive event.

19. Because it was the theft itself which was essentially made by the Belgian tax authorities into the chargeable event for VAT, it is correct to raise the question as framed by the referring court.

A – *Can the theft of goods subject to excise duty be considered as such to be a 'supply of goods' for consideration under Article 2(1) of the Sixth Directive and therefore subject to VAT?*

20. The theft of tobacco products from a tax warehouse cannot be regarded as a 'supply of goods … effected for consideration' within the meaning of Articles 2(1) and 5(1) of the Sixth Directive.

21. First of all, the wording of those articles does not support the view that a person who has been robbed may be liable to payment of VAT as if he had voluntarily transferred the goods to the thieves in exchange for consideration. That conclusion is moreover amply confirmed by the case-law of the Court concerning the interpretation of the concept of 'supplies of goods and services for consideration', which plays a central role in determining the scope of the Sixth Directive.

22. As regards first of all the interpretation of the concept 'supplies of goods and services for consideration', the Court clearly held in its judgment in *Tolsma* that a supply of services is 'effected *for consideration* within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is *a legal relationship* between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. (5) In my view, there is nothing to justify different treatment for supplies of goods.

23. In that judgment, the Court reaffirmed the interpretive guidance of its earlier case-law concerning the concept of the supply of goods or services effected for consideration, that a provision of services is taxable 'only if there is a *direct link* between the service provided and the consideration received'. (6) In *Hong Kong Trade Development Council*, the Court had also held that 'taxable transactions …, within the framework of the value added tax system, presuppose the stipulation of a price or consideration'. (7) Thus, 'where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the free services in question are therefore not subject to value added tax'. (8)

24. In the light of that case-law, the conclusion must be drawn that the idea that a theft could mean that the person who has been robbed must pay VAT on the goods which have been unlawfully stolen from him without consideration is manifestly indefensible. (9)

25. Therefore, contrary to the line of argument put forward by the Belgian Government, the situations provided for in Article 5(6) and (7) of the Sixth Directive (concerning some private use of goods and goods produced by a taxable person in the course of his business), which the Community legislature expressly treated in the same way as supplies effected for consideration, are not comparable to the situation of theft in which the owner not only receives no consideration for the goods stolen but also, involuntarily, loses the goods themselves. (10)

26. May I also say that the conclusion that a theft of goods cannot be classified as a supply effected for consideration or be considered to be one of the transactions likened to it under Article 5(6) and (7) of the Sixth Directive is irrespective of the fact that the stolen goods may be placed on the market either by the thieves themselves or by other persons.

27. In that regard, the Court has clearly held that a supply effected by a taxable person of goods which he has unlawfully acquired (as contraband, for example) falls within the scope of the Sixth Directive and is subject to VAT. (11) According to that case-law, the principle of fiscal neutrality requires that even unlawful transactions fall within the scope of the Sixth Directive and are subject to VAT. (12) This is because those goods are competing with other goods that have been lawfully acquired and they cannot therefore enjoy advantages in relation to the latter. The operation of unlawful roulette, for example, falls within the common system of VAT because it is competing with other lawful gaming activities. (13)

28. This reasoning applies also in the case of a supply of stolen goods effected by the thief, or by third parties, to another person for consideration. Those subsequent supplies of stolen goods are subject to VAT. It is obvious, however, that the situation in the present case is different: it is a question of whether a transfer of goods which results from the theft itself is subject to VAT. In that

regard, the actual theft is not a supply effected for consideration within the meaning of Article 2(1) of the Sixth Directive.

29. Also, the fact that the goods at issue in the present case are goods subject to excise duty is totally irrelevant as regards determining whether the theft of those goods can be regarded as a supply of goods for consideration. As the Commission stated in its written observations, with regard to the supply of goods, none of the provisions of the Sixth Directive distinguishes between the supply of goods subject to excise duty and the supply of goods not subject to excise duty.

30. In the light of all the above considerations, it appears to me that the answer the Court should give to the referring court is that the theft of goods subject to excise duty cannot be regarded as a 'supply of goods … for consideration' under Article 2(1) of the Sixth Directive.

B – *Can payment of VAT nonetheless be required following a theft of goods on the basis of an authorisation granted to a Member State under Article 27 of the Sixth Directive?*

31. Article 27 of the Sixth Directive provides that any Member State may be authorised to introduce special measures for derogation from the provisions of the Sixth Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.

32. Under Article 27(5) of the Sixth Directive, the Kingdom of Belgium notified the measure at issue, under which the VAT on manufactured tobacco is due at the same time as excise duty. The central question in the present case is therefore whether such a measure can have the effect of adding to the categories of chargeable events provided for in the Sixth Directive.

33. Article 10 of the Sixth Directive draws a clear distinction between the chargeability of the tax, that is to say, the time when VAT may be regarded as falling due, and the chargeable event for VAT, which is 'the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled'.

34. That distinction elucidates the essential difference between legislative measures which have an impact on one or other of those concepts. It is necessary to distinguish between, on the one hand, a measure intended to advance the time when VAT becomes chargeable in order to make it coincide with the time when excise duties are charged and, on the other hand, a measure which derogates from the rules establishing which transactions are subject to VAT by adding a new chargeable event not provided for in the Sixth Directive.

35. The fact that proof of the theft is insufficient to prevent the owner of the stolen goods from being required to pay VAT on the goods demonstrates that the scope attached by the Belgian Government to its measure goes beyond mere prepayment of VAT. Application of that measure, as effected by the Belgian tax authorities, means that a theft is considered per se to be a supply of goods for consideration, and hence that a new chargeable event not provided for in the Sixth Directive has in fact been created.

36. A reading of the measure notified by the Belgian Government shows that it cannot have such a scope. It provides simply that 'in order to facilitate monitoring of the charging of VAT, *VAT that is due* when manufactured tobacco products are supplied shall be paid … at the same time as excise duty, when the manufacturer or importer purchases the tax stamps'. (14)

37. It should be noted in that regard that, according to the case-law of the Court concerning Article 27 of the Sixth Directive, 'national derogating measures designed to prevent the evasion or avoidance of tax must be strictly interpreted'. (15) The wording of the notification in question clearly shows that the measure notified only relates to *advancement of the time when VAT is chargeable*

, by means of tax stamps, in order to make it coincide with the time when excise duties are charged. The Belgian measure is intended solely to bring about the charging of VAT in the form of a prepayment, and therefore relates exclusively to the time when the tax becomes chargeable. As the applicants and the Commission rightly state, the purpose of that notification is not to recover VAT in the absence of any effective verification of a chargeable event, that is to say, in the present case, the supply of goods for consideration. The notification indicates the relevant chargeable event, namely *the supply* of manufactured tobacco products, without giving any reason to think that the simplification measure in question could make any derogation from it.

38. It must be concluded from this that no derogating measure was notified under Article 27(5) of the Sixth Directive which authorised the Belgian State to require an owner to pay VAT on goods which had been stolen from him, when the owner concerned had not made any supply of those goods for consideration.

39. Such a derogating measure cannot therefore be relied upon as against taxable persons. (16) It is appropriate to mention in this connection the judgment in *Direct Cosmetics*, in which the Court held that measures derogating from the Sixth Directive 'do not accord with Community law unless, on the one hand, they remain within the limits of the aims referred to in Article 27(1) and, on the other hand, they have been notified to the Commission'. (17)

40. At any event, even if it were possible to consider that a derogating measure whose effect was to permit a theft to be regarded as a supply of goods for consideration had been notified, that measure would be contrary to Community law.

41. Not only does the Court state that the possibility of adopting national derogating measures as provided for in Article 27 of the Sixth Directive must be strictly interpreted, (18) it also points out that only measures that are 'necessary and appropriate for the attainment of the specific objective which they pursue and … have the least possible effect on the objectives and principles of the Sixth Directive' are authorised. (19) In other words, measures for derogation from the Sixth Directive in order to simplify the procedure for charging the tax or to prevent tax evasion or avoidance are not permitted 'except within the limits strictly necessary for achieving that aim', (20) and 'a strict approach is required to the question of [the] compatibility [of such a measure] with the conditions laid down under Article 27(1) of the Sixth Directive'. (21)

42. It has not been shown that the derogating measure in question has objectives, such as simplification of the procedure for charging the tax or prevention of tax evasion or avoidance, which justify a theft of goods being considered to be a supply of goods for consideration. Such a measure would in fact imply a derogation from the fundamental principles of the Sixth Directive that determine chargeable events, by adding new categories of taxable events, and doing so in the context of an unchallenged theft of goods and in the absence of evidence of fraud.

III – **Conclusion**

43. In the light of the considerations set out above, I propose that the Court should answer the questions referred by the Hof van Beroep te Antwerpen as follows:

(1) The term 'supply of goods … for consideration' within the meaning of Article 2(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 must be interpreted as not covering a theft of goods, irrespective of whether the stolen goods are subject to excise duty.

(2) An authorisation granted to a Member State, following a notification under Article 27(5) of

the Sixth Directive in order to introduce a special derogating measure which establishes prepayment of value added tax on manufactured tobacco products, at the same time as excise duties, does not cover the possibility of requiring payment of value added tax as a consequence of the theft of those goods.

1 – Original language: Portuguese.

2 – OJ 1977 L 145, p. 1.

3 – As in force before the amendments introduced by Council Directive 2004/7/EC of 20 January 2004 (OJ 2004 L 27, p. 44).

4 – Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14, and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 48.

5 – Case C-16/93 [1994] ECR I-743, paragraph 14; emphasis added.

6 – *Tolsma*, cited in footnote 5 above, paragraph 13 (emphasis added); Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12; Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11; and Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraph 12.

7 – Case 89/81 [1982] 1277, paragraphs 9 and 10.

8 – Ibid., paragraph 10.

9 – This conclusion is strengthened if one considers the position adopted by the Court in Case C?320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285. In that judgment, the Court held that ‘Article 5(1) of the Sixth Directive provides as follows “‘supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner’ (paragraph 6) and that ‘[i]t is clear from the wording of this provision that “supply of goods” … 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’ (paragraph 7). The existence of an element of consent or agreement (to adopt the expression used in paragraph 17 of *Tolsma*, cited above, which speaks of the need for ‘agreement between the parties’) is inherent in any operation involving the transfer of goods which entitles the other party to dispose of those goods. That element does not exist in the case of a theft. In such a situation there is neither the transfer of power over goods granted by the owner who has been robbed nor, obviously, any consideration, directly linked to the service, paid by the thieves to the owner.

10– It should also be pointed out that the situations at issue in Case C-342/87 *Genius Holding* [1989] ECR 4227, paragraph 18, and Joined Cases C-78/02 to C-80/02 *Karageorgou and Others* [2003] ECR I-13295, paragraphs 50 to 52, are completely different from that in the present case. In those cases, the VAT had been invoiced but it appears that the services in question were not actually subject to VAT. In *Genius Holding*, the Court held that ‘[t]he right to deduct provided for in the Sixth … Directive … does not apply to tax which is due solely because it is mentioned on the invoice)’.

11 – See, to that effect, Case C-455/98 *Salumets and Others* [2000] ECR I-4993, paragraph 24.

12 – Case 269/86 *Mol* [1988] ECR 3627, paragraph 18; Case 289/86 *Happy Family* [1988] ECR 3655, paragraph 20; Case C-111/92 *Lange* [1993] ECR I-4677, paragraph 16; Case C-3/97 *Goodwin and Unstead* [1998] ECR I-3257, paragraph 9; Case C-158/98 *Coffeeshop 'Siberië'* [1999] ECR I-3971, paragraphs 14 and 21; and *Salumets and Others*, cited above, paragraph 19.

13 – Case C-283/95 *Fischer* [1998] ECR I-3369, paragraphs 19 to 23 and 28.

14 – See point 13 above; emphasis added.

15 – Case C-63/96 *Skripalle* [1997] ECR I-2847, paragraph 24.

16 – That conclusion is irrespective of the question, which is not raised in this case, whether a measure merely advancing payment of VAT, such as the measure that has been notified in the present case, is a derogating measure in accordance with Article 27(1).

17 – Case 5/84 [1985] ECR 617, paragraph 24. See also Case C-62/93 *BP Supergas* [1995] ECR I?1883, paragraphs 22 and 23.

18 – See point 37 above.

19 – Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, paragraph 43, and Case C-17/01 *Sudholz* [2004] ECR I-4243, paragraph 46.

20 – Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 29.

21 – *Sudholz*, cited in footnote 19 above, paragraph 45.