OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 16 February 2006 1(1)

Case C-494/04

Heintz van Landewijck SARL

v

Staatssecretaris van Financiën

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(VAT – Products subject to excise duty – Tobacco product tax stamps that go missing prior to use)

1. In this reference for a preliminary ruling the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) refers to the Court of Justice questions concerning the interpretation of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (2) and of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to VATes – Common system of value added tax: uniform basis of assessment. (3)

2. This case concerns the taxation of tobacco products which are subject, on the one hand, to VAT and, on the other, to excise duty, a tax generally considered to provide revenue for the State tax authorities and, paradoxically, to deter smokers from smoking.

3. More specifically, this case is concerned with ascertaining whether a company which places tobacco products on the market is entitled to obtain reimbursement or the offsetting of sums it has paid to acquire tax stamps, which represent the amounts due by way of excise duty and VAT, where those stamps go missing before they have been affixed to those products.

I – **Relevant legislation, the main proceedings and the questions referred to the Court for a preliminary ruling**

A – *The relevant provisions of Community law*

4. Under Article 6 of the Excise Duty Directive, which applies pursuant to Article 3(1) thereof to manufactured tobacco:

‘1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

(a) any departure, including irregular departure, from a suspension arrangement;

(b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;

(c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States.'

5. Article 14(1) of that directive provides that:

'1. Authorised warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or force majeure and established by the authori[ties] of the Member State concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. These exemptions shall apply equally to the traders referred to in Article 16 during the transport of products under excise duty suspension arrangements.'

6. Article 21(1) of the directive provides that '[w]ithout prejudice to Article 6(1), Member States may require that products released for consumption in their territory shall carry tax markings or national identification marks used for fiscal purposes.'

7. Article 22(2)(d) of that directive provides that 'products subject to excise duty and released for consumption in a Member State and thus bearing a tax marking or an identification mark of that Member State may be eligible for reimbursement of the excise duty due from the tax authorities of the Member States which issued the tax markings or identification marks, provided that the tax authorities of the Member State which issued them ha[ve] established that such markings or marks have been destroyed.'

8. Under Article 10 of Council Directive 95/59/EC of 27 November 1995 on taxes other than VATes which affect the consumption of manufactured tobacco: (4)

'1. At the final stage at the latest the rules for collecting the excise duty shall be harmonised. During the preceding stages the excise duty shall, in principle, be collected by means of tax stamps. If they collect the excise duty by means of tax stamps, Member States shall be obliged to make these stamps available to manufacturers and dealers in other Member States. If they collect the excise duty by other means, Member States shall ensure that no obstacle, either administrative or technical, affects trade between Member States on that account.

2. Importers and national manufacturers of manufactured tobacco shall be subject to the system set out in paragraph 1 as regards the detailed rules for levying and paying the excise duty.'

9. Article 2 of the Sixth Directive provides that:

‘The following shall be subject to value added tax:

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

2. the importation of goods.’

10. Article 5(1) of the Sixth Directive further 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 that:

‘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. Under Article 11 of that directive, the taxable amount is to be, in respect of supplies of goods, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies. The first subparagraph of Article 11(C)(1) provides that:

‘In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.’

13. In addition, Article 27 of the Sixth Directive, on ‘simplification procedures’, (5) provides that:

‘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.’

14. Under Article 1 of Ninth Council Directive 78/583/EEC of 26 June 1978 on the harmonisation of the laws of the Member States relating to VATes, (6) some Member States were authorised to implement the Sixth Directive by 1 January 1979 at the latest.

B – *Netherlands legislation, the facts of the main proceedings and the questions referred for a preliminary ruling*

15. Under Article 1 of the Law on excise duty (Wet op de accijns of 31 October 1991, *Staatsblad* 1991, p. 561; hereinafter: 'Law on excise duty'):

'1. A tax, referred to as excise duty, shall be charged on:

…

(f) tobacco products.

2. Excise duty shall become chargeable on the release for consumption and importation of the goods referred to in paragraph 1.'

16. Under Article 73(1) of that law, '[w]hen they are released for consumption and imported, tobacco products must have affixed to them the excise stamp required for the tobacco product concerned.'

17. Under Article 76(1) and (2) of that law:

'1. The amount by way of excise duty that the excise stamps represent according to the information affixed thereto must be paid when the request [for the stamps] is made.

2. In derogation from paragraph 1, payment may be deferred to a date no later than the last day of the third month following that in which the excise stamps were requested, provided that security is lodged to that end.'

18. Heintz van Landewijck SARL (hereinafter: 'van Landewijck') operates in Luxembourg a wholesale business in manufactured tobacco and has a licence to operate an excise duty warehouse for that purpose.

19. On 6 October 1998 van Landewijck submitted to the Belastingdienst/Douane te Amsterdam (Amsterdam Tax and Customs Authorities; hereinafter: 'Inspector') pursuant to Article 75 of the Law on excise duty (7) two requests for excise stamps for tobacco products. The company entrusted Securicor Omega with delivering those stamps to it.

20. On 9 October 1998 the Inspector charged van Landewijck the amounts due in respect of the two requests for stamps, that is to say NLG 177 809 (NLG 140 575 by way of excise duty and NLG 37 234 by way of VAT) and NLG 2 711 474 (NLG 2 202 857 by way of excise duty and NLG 508 617 by way of VAT) respectively.

21. On 12 October 1998 the requested stamps were collected from PTT Post Filatelie, now known as Geldnet Services B.V., by the courier company Smit Koerier, acting on behalf of Securicor Omega.

22. It is apparent from the report drawn up on 17 December 1998 by an expert acting for the Luxembourg insurance company Le Foyer that, at 19.40 on 13 October 1998, Smit Koerier delivered three packages of stamps to Securicor Omega in Utrecht (Netherlands) and that, at

10.00 on 14 October 1998, Securicor Omega noticed that those packages had gone missing.

23. By letter of 23 November 1998 van Landewijck notified the Inspector that the stamps handed over to Smit Koerier still had not been delivered to it, that they were not ready for consumption and that Securicor Omega accepted no responsibility for their going missing. In that letter, van Landewijck also asked the Inspector 'to consider this special case before the deadline for payment, which falls on 31 January 1999.'

24. The Inspector regarded that letter as a request made pursuant to Article 79(3) of the Law on excise duty in conjunction with Article 52 of the Decree implementing that law for the offsetting or reimbursement of the amount paid by van Landewijck for the stamps at issue. The Inspector refused that request by decision of 30 January 2001.

25. Article 79(3) of the Law on excise duty provides that:

'The minister may, subject to the conditions and restrictions to be introduced by him, lay down rules on the offsetting or reimbursement of the amounts paid or due in respect of requests for excise stamps which:

(a) have been returned by the traders which requested them;

(b) have been lost as a result of an accident or force majeure without having been affixed to tobacco products which have been sold or imported;

(c) have been destroyed under the supervision of the authorities.'

26. Article 79(3), cited above, was implemented by Article 52 of the Decree implementing the Law on excise duty (Uitvoeringsregeling accijns of 20 December 1991, No WV 91/440, *Nederlandse Staatscourant* 1991, p. 252; hereinafter the 'implementing decree') under which traders which have requested excise stamps may obtain reimbursement of the amount of duty represented by the stamps 'which have been lost as a result of an accident or force majeure', provided *inter alia* that their request for reimbursement is submitted within one month following the date of the loss and that the time, place and cause of the loss are notified immediately to the Inspector. Article 52(6) provides that reimbursement in respect of the lost stamps is possible 'only if the exact amount of the excise duty concerned can be determined.'

27. The Inspector rejected the objection raised by van Landewijck against his decision. Similarly, the appeal brought before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) against that ruling was declared unfounded. First, the Gerechtshof held that the claimant had failed to establish with sufficient certainty that the stamps no longer existed or that the risk of their still being used was negligible, and therefore concluded that the stamps could not be regarded as lost within the meaning of Article 79(3)(b) of the Law on excise duty.

28. Secondly, the Gerechtshof held, in accordance with Article 28 of the Law on VAT (Wet op de omzetbelasting 1968, of 28 June 1968, *Staatsblad* 1968, p. 329; hereinafter 'Law on VAT'), that the request for reimbursement of the VAT had to be rejected on the same grounds as those underlying the refusal to reimburse the excise duty. (8)

29. Van Landewijck consequently brought an appeal on a point of law before the Hoge Raad, which decided to stay the proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

'1. Must the Excise Directive be interpreted as requiring Member States to enact a statutory provision on the basis of which, in cases such as the present, they must reimburse or offset

amounts by way of excise duty that have been paid or become chargeable at the time excise stamps are requested in a case in which the requesting party (an authorised warehousekeeper) has not used, nor will be able to use, stamps which disappeared before they were affixed to products subject to excise duty, and third parties cannot have made and will not be able to make lawful use of the stamps, even though it cannot be ruled out that they have used, or will use, the stamps by affixing them to tobacco products which have been put on the market unlawfully?

2(a). Must the Sixth Directive, and in particular Article 27(1) and (5) thereof, be interpreted as meaning that the fact that the Netherlands Government failed to notify the Commission that it wished to maintain the special procedure for charging tax on tobacco products until after the expiry of the time-limit prescribed by Article 27(5) of the Sixth Directive, as amended by the Ninth Directive, means that, if an individual invokes the failure to observe the time-limit after the date when notification was in fact made, that special procedure for charging tax must be disapplied even after the notification is made?

2(b). If the answer to Question 2(a) is in the negative, must the Sixth Directive, and in particular Article 27(1) and (5) thereof, be interpreted as meaning that the special procedure for charging tax on tobacco products laid down in Article 28 of [the Law on VAT] must be disapplied on the grounds that it is incompatible with the conditions laid down by the abovementioned provisions of the directive?

2(c). If the answer to Question 2(b) is in the negative, must the Sixth Directive, and in particular Article 27(1) and (5) thereof, be interpreted as meaning that failure to reimburse VAT in circumstances such as those referred to in Question 1 is contrary to that directive?'

II – **Analysis**

30. On a first view, this case is a source of some bewilderment. As an authorised warehousekeeper for tobacco products, van Landewijck is, under Netherlands law, required to take part in the process for collecting amounts of excise duty and VAT on tobacco products, which will ultimately be borne by the consumers. It is thus required to request and pay for tax stamps, and to affix them to tobacco products before they are released from its warehouses.

31. Even though van Landewijck paid to the Netherlands tax authorities the amounts of excise duty and VAT due in respect of tobacco products which did not leave the warehouse, it has been asked to settle the same tax debt for a second time. Van Landewijck is in fact under an obligation to pay the excise duty and VAT again in order to place its products on the market.

32. This could be a situation where the proverb 'he who pays cheap pays twice' might be considered appropriate. However, that is not the case here. As shown in the order for reference, there is no doubt that van Landewijck paid in full the amounts of excise duty and VAT owed, in accordance with the relevant Netherlands law, for the purpose of placing the tobacco products concerned on the market. Double taxation arises here because van Landewijck, whose stamps – representing the payment of the excise duty and VAT – disappeared without trace in transit, is obliged to pay a second time to obtain new stamps enabling it to release the tobacco products concerned from the warehouse.

33. In order to determine whether such an obligation can legitimately be imposed in the light of the directives on excise duty and VAT, it is imperative to ascertain whether the stamps have an intrinsic value which distinguishes them from straightforward documents proving that van Landewijck paid a given sum of money to the Inspector.

34. In that regard, the Netherlands Government, the German Government, the Commission of

the European Communities and even van Landewijck agree that there is a risk – albeit a very small risk, according to van Landewijck – that third parties which acquire the missing stamps would use them in a fraudulent manner. Those third parties could affix them to tobacco products which, for example, were smuggled or stolen without the corresponding tax stamps from a warehouse,(9) so as to give the appearance that the excise duty and VAT have been paid. The intrinsic value of the stamps stems specifically from the fact that, if lost, they may be used, by third parties that acquire them, for very specific unlawful purposes. Such a risk would not arise if tax stamps were straightforward documents representing the settlement of a given debt between two persons clearly identified on each stamp. However, that is not the case as the stamps comprise only three separate references to the type or nature of the tobacco product concerned (cigarettes or cigars, for example), the number of items or quantity, and the retail price.

35. In this case, allocation as between van Landewijck and the Netherlands tax authorities of the risk of tax stamps being used unlawfully is an issue that is bound to arise when tax stamps go missing (there being no guarantee that they have been destroyed), because of their intrinsic value. Netherlands law deals with that issue in the same manner, whether dealing with the rules governing excise duty or those governing VAT. In either case, no legislative provision allows van Landewijck to obtain reimbursement or the offsetting of the amounts that it has paid by way of excise duty and VAT in the situation at issue.

36. Consistent with the order in which the questions are referred by the Hoge Raad, I shall begin by considering the refusal to reimburse excise duty. I shall then deal with the refusal to reimburse the VAT.

A – *The first question referred*

37. Allocation of the risk of stamps going missing is an issue that neither the Excise Directive nor the Directive on manufactured tobacco addresses. In their respective Articles 21 and 10(1), those directives merely allow Member States the option of using tax stamps as a means of collecting excise duty on manufactured tobacco.

38. In principle, there is nothing to prevent a Member State from laying down rules on allocating the risk of tax stamps going missing and on their resulting unlawful use at a later stage. Accordingly, Netherlands law provides that, except in the cases provided for in Article 79(3) of the Law on excise duty and in Article 52 of the implementing decree, (10) the risk of stamps going missing and of their consequential unlawful use, as in the circumstances of this case, is borne by the person who requested the stamps and on whose behalf they were collected from PTT Post Filatelie. That person, who has the stamps under its supervision, is considered by Netherlands law to be in the best position for ensuring that the risk of unlawful use does not materialise, or, at the very least, for protecting itself somehow against that risk, for instance by taking out insurance. Such an arrangement probably involves allocating the risk based on an assumption of responsibility by the party best placed to carry out monitoring of the stamps. (11)

39. Even though it clearly appears that the Community legislature sought to allow Member States discretion in allocating the risk of tax stamps going missing, that still does not mean that any answer to that question is bound to be consistent with the Excise Directive and with the general principles of Community law, in particular with the principle of proportionality.

40. The claimant in the main proceedings maintains that, in view of the fact that the stamps can be used only fraudulently by third parties, there is no increased loss to the national tax authority in terms of excise duty because those who commit such offences never, as a rule, had any intention of paying excise duty on the tobacco products that they place on the market. I cannot concur with that line of reasoning.

41. Admittedly, van Landewijck suffers a greater economic loss than the Inspector if it bears the risk of the stamps going missing. Although the tax authorities bear the risk of the unlawful or fraudulent use of the missing stamps, that does not automatically result in a loss of revenue to the State in respect of the amount of excise duty represented by the missing stamps, since there is no absolute guarantee that all the stamps will be used unlawfully.

42. If stamps are available to be used unlawfully, then this will obviously create opportunities for their abuse. Even though the chances of the stamps actually being used unlawfully are relatively strong (yet less than 100%), the mere fact that stamps become available for such unlawful use of course points to lost revenue for the national tax authority. Consequently, a refusal to offset or reimburse the amount corresponding to the missing stamps, as defined in the Netherlands legislation, in fact helps to guard against revenue losses for the national tax authority.

43. It is common knowledge that the trade in tobacco products is affected by smuggling and that the tax stamps for those products are much sought-after items for conducting the illegal trade in tobacco products. Clearly, the prevention of fraud, evasion and abuse is a legitimate objective of the national legislation concerning the legal rules governing tax stamps. (12) That objective is also relevant to laying down the rules applicable if stamps go missing, as in the circumstances of this case.

44. An arrangement for allocating the risk of stamps going missing which would, in the case in point, enable the party requesting the stamps, on whose behalf they were collected from PTT Post Filatelie, to obtain reimbursement or the offsetting of the amounts paid for those stamps would encourage abuse. There would be no incentive for the party requesting excise duty stamps to take care of them if the Inspector reimbursed or offset the amounts concerned in the light of the stamps simply going missing. As the Netherlands Government points out in its written observations, the party requesting the stamps could – indeed knowingly – choose to have the stamps go missing so that it could then take advantage of the corresponding reimbursement.

45. Admittedly, van Landewijck claims that the risk of unlawful use is so low in this particular case (for instance, because of the special retail price that it applies, the price increase that took place after the stamps went missing and the price conversion in the wake of the introduction of the euro) that it would be disproportionate to refuse any reimbursement or offsetting whatsoever of the amounts paid when the missing stamps were requested.

46. In that regard, it should be borne in mind that all national authorities responsible for applying Community law are bound to observe the general principles of Community law. (13) It is settled case-law that ‘[t]he Court has consistently held that the principle of proportionality is one of the general principles of Community law.’ (14) That principle must therefore be observed by Member States when they implement Community rules. (15) In order to establish whether the Netherlands rules on reimbursing and offsetting amounts paid by way of excise duty, which are the subject-matter of the question referred for a preliminary ruling, are compatible with the principle of proportionality, it is necessary to ascertain whether the means which those rules employ are appropriate to achieve the objective that they pursue and do not go beyond what is necessary to achieve it. (16)

47. In that connection, the Netherlands rules on reimbursement are, first, a means appropriate to achieving the objective of preventing stamps from going missing and the risk of their subsequent fraudulent use, because they take into account van Landewijck's position as the person best placed to monitor the whereabouts of those stamps. Secondly, those rules do not go beyond what is necessary to achieve the objectives that they pursue. The outcome would be different if those rules did not provide for any possibility to reimburse or offset the amounts concerned if, in the event of an accident or force majeure, the stamps were destroyed or made definitively unusable. Thus it seems to me that the Netherlands rules on reimbursing and offsetting the amounts of excise duty paid in the event of tax stamps going missing are perfectly compatible with the general principles of Community law and, in particular, with the principle of proportionality.

48. I therefore suggest that the Court's answer to the first question raised by the referring court should be that the Excise Directive does not prevent Member States from applying statutory provisions under which those Member States attribute the financial responsibility for tax stamps going missing to the parties which requested and received those stamps, and under which those Member States are not obliged to refund or offset the amount of excise duty paid when the request for the tax stamps was made in circumstances such as those arising in this case. Those statutory provisions also comply with the principle of proportionality.

B – *The questions on VAT*

49. Article 28 of the Law on VAT provides that VAT is to be charged on tobacco products in the same manner as excise duty, that is to say, once only on release of products subject to excise duty from a tax warehouse (or on their importation or intra-Community acquisition). As in the case of excise duty, the amount of VAT due must be paid in one instalment, the requesting party having no right to a prior deduction, when it receives the excise stamps.

50. That arrangement is a special arrangement derogating (for the purposes of Article 27(1) of the Sixth Directive) from the usual Community system for charging VAT established by the Sixth Directive. Under that directive, VAT is charged when the tobacco products are supplied. The aim of such an arrangement derogating from the usual system is, on the one hand, to simplify the levying of VAT, it being charged at one stage only of the chain in placing tobacco products on the market, on their release from a tax warehouse or on importation, in accordance with the excise duty system, and, on the other hand, to combat fraud, bearing in mind that the retail trade is not involved in the process for charging the tax.

51. Questions 2(a) and 2(b) referred to the Court focus specifically on the applicability of Article 28 of the Law on VAT because the special rules for charging VAT laid down in that article were not notified to the Commission within the period prescribed in Article 27(5) of the Sixth Directive, as amended by the Ninth Directive, that is to say by 1 January 1979.

1. Question 2(a)

52. The initial question raised involves the consequences of the late notification of those rules to the Commission, on 12 June 1979.

53. Van Landewijck argues that the consequences of the failure to notify the derogating measure within the time allowed should be the same as those for any failure to notify. The derogating rules in question were therefore unlawful and could not be applied as against individuals invoking an irregularity of that kind. The fact that the Kingdom of the Netherlands did actually notify those derogating rules to the Commission a little less than six months after the deadline for notification was, in its view, irrelevant. I do not share that viewpoint.

54. Article 27(5) of the Sixth Directive does not expressly provide for the penalty to be imposed in the event of a failure to observe the time-limit laid down therein. Thus it is necessary to consider, on the one hand, the nature and purpose of the decision required to be taken during the period in question and, on the other hand, the situation of an addressee whose interests have been affected. (17)

55. I concur with the Netherlands Government and with the Commission that the time-limit at issue is merely a formal limit. The objective of such notification is not to obtain the Commission's agreement but merely to allow it to assess the measures concerned. As notification has actually been made and the Commission has therefore been able to assess the derogating measures at issue and to express its opinion on them (which it did without raising any concerns), the applicability of those measures cannot be called into question. That is not the case so long as the Commission has not expressed an opinion on the matter.

56. It is clear that a derogating measure which has not been notified to the Commission pursuant to Article 27(5) cannot remain in force. As van Landewijck notes in its observations, the judgment in *Commission* v *Germany* (18) makes it clear that 'although Article 27(5) of the Sixth Directive allows the Member States which, on 1 January 1977, applied special derogating measures for the purpose of simplification to maintain them, that possibility is available only under certain conditions, including the requirement of notification of such measures to the Commission before 1 January 1978.' (19)

57. However, that case-law does not deal with the more specific issue under consideration in this case, namely the specific repercussions of notification which did in fact take place but after expiry of the period prescribed. In this context, going beyond the time allowed in that way must have implications for the defaulting government; otherwise, it would make no difference to the applicability of the measure concerned whether it was notified before 1 January 1979 or months or even years later. The consequence of exceeding the time-limit in that way is therefore that the derogating measure cannot be applied or relied on as against a taxable person during the period between the deadline for the time allowed for notification and the time, after notification, when the Commission has expressed its opinion on that measure without raising any concerns.

58. I therefore suggest that the Court's answer to Question 2(a) should be that Article 27(5) of the Sixth Directive lays down a formal time-limit and must not be interpreted as meaning that an individual may have a special procedure for charging tax disapplied on the ground that the period within which Member States must notify that special charging procedure to the Commission has expired, provided that the Commission has actually had the chance to assess the charging procedure at issue and to express its opinion on the matter.

2. Question 2(b)

59. Even though the special procedure for charging VAT on tobacco products which was the subject-matter of the notification made by the Kingdom of the Netherlands cannot be disapplied as a result of its late notification, and even though the Commission did not raise any concerns in that regard, it is still necessary to assess whether those derogating rules are compatible with the

requirements under Article 27(1) of the Sixth Directive.

60. Article 27(5) of the Sixth Directive provides that measures adopted with a view to simplifying the procedure for charging VAT must meet the specific conditions laid down in Article 27(1). ‘[E]xcept to a negligible extent, [they] may not affect the amount of tax due at the final consumption stage.’

61. There is no doubt that the procedure for charging VAT by way of tax stamps simplifies, as a whole, the procedure for charging VAT on tobacco products since the tax is charged once only. Furthermore, the VAT is calculated on the basis of the price paid by the final consumer. Thus, as the Commission points out in its observations, the charging procedure at issue means that the amount of VAT due is linked to the price of the products at the final consumption stage, as required by Article 27(1). Under that derogating system for charging VAT, where it is mandatory to use excise stamps and prohibited to sell the tobacco products to consumers at a price other than the retail price stated on the stamps, the amount of tax paid remains, in principle, strictly proportionate to the retail prices for tobacco products, irrespective of the number of transactions that took place during their production and distribution. Under that system there is no failure to comply with the conditions laid down in Article 27(1) of the Sixth Directive.

62. However, the referring court indicates that where, for example, products remain unsold or go missing in the intermediary or retail trade, or where, in the retail trade, tobacco products are sold (unlawfully) at a price other than the retail price stated on the stamps, doubts are then raised as to the compatibility with the specific condition laid down in Article 27(1) *in fine*. After all, in those exceptional circumstances, the manufacturer may be required to pay more VAT than it would normally be required to pay if the ordinary Community system for charging VAT established by the Sixth Directive were to apply. Therefore, questions can legitimately be raised as to the impact that such derogating rules may have on the amount of tax due at the final consumption stage and as to whether they do not, after all, go beyond what is required by the objectives pursued, namely simplification of the procedure for charging tax and the prevention of evasion, avoidance and abuse.

63. My view, in that regard, is that clearly exceptional circumstances, such as when tobacco products remain unsold or when, in the retail trade, tobacco products are sold illegally at a price other than the retail price indicated on the tax stamps, cannot be relied on to conclude, generally, that the rules on charging VAT once only, at the same time as excise duty, by way of tax stamps, fail to meet the requirement under Article 27(1) that the simplification measure at issue, ‘except to a negligible extent, may not affect the amount of tax due at the final consumption stage.’ It must also be borne in mind that not every variation threatens to make the derogating rules incompatible with Article 27(1); only those variations which are not negligible can give rise to such incompatibility. Since the variations made possible by the Netherlands derogating rules arise only on an exceptional basis rather than generally and systematically, it cannot be demonstrated that they, as a whole, lead to more than negligible changes in the amounts of tax due at the final consumption stage.

64. Moreover, according to the Court’s case-law, the national derogating measures referred to in Article 27(5) of the Sixth Directive, which are designed to simplify the procedure for charging tax or to prevent tax evasion or avoidance, ‘in principle ... may not derogate from the basis for charging VAT laid down in Article 11 [of the Sixth Directive], except within the limits strictly necessary for achieving that aim.’ (20) Only the 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 allowed. (21)

65. The objective of the derogating rules at issue for charging VAT by way of tax stamps is to

contribute to simplification of the procedure for charging tax and to prevent tax evasion and avoidance. Considered in their entirety, they pursue that objective without going beyond what is necessary to achieve it and do not create any major obstacles hindering achievement of the objectives of the Sixth Directive.

66. I therefore suggest that the Court's answer to Question 2(b) raised by the referring court should be that the provisions of Article 27(1) and (5) of the Sixth Directive must be interpreted as meaning that a special procedure for charging VAT on tobacco products, as established in Article 28 of the Law on VAT, is compatible with the requirements laid down in those provisions and does not, as a whole, go beyond what is necessary for the purpose of simplifying the procedure for charging the tax and of preventing tax evasion and avoidance.

3. Question 2(c)

67. Compared with the previous question, this last question raised by the Hoge Raad is more specifically concerned with whether the rules on reimbursing or offsetting amounts of VAT paid in respect of stamps that went missing in the circumstances described in Question 1 are compatible with the Sixth Directive and, in particular, with Article 27(1) and (5) thereof.

68. As in the case of the first question raised by the referring court, the fact that the tax stamps at issue have an intrinsic value and that a real risk of their fraudulent use arises as a result of their going missing is also a key consideration for the purposes of answering this final question. As is apparent from assessment of the two previous questions, Community law does not, in this case, preclude the procedure under which the amounts of VAT due in respect of tobacco products are charged by way of tax stamps. Since those stamps – because of their special characteristics and the information stated on them – have the intrinsic value mentioned above, it is understandable that the arrangement for allocating the risk of their going missing is based on the principle that responsibility is attributed to the party requesting the stamps, which have been collected either by that party itself or by another party on its behalf, as it is the party best placed to monitor the whereabouts of the stamps concerned.

69. The application of such an arrangement for allocating the risk of the stamps going missing in the circumstances of this case leads to very harsh financial consequences for an economic operator such as van Landewijck which lost stamps through no fault of its own. However, such allocation of risk, which places it on the recipient of the stamps who has actual control of them, must be regarded as a general, abstract rule. The harsh financial consequences borne by the party bearing the risk is the logical outcome of applying any rule for allocating the risk of goods going missing in the course of trade. That cannot mean that such a general rule is contrary to the Sixth Directive, or in particular to Article 27(1) and (5) thereof.

70. Inasmuch as it provides that there is to be no reimbursement in respect of stamps that have gone missing but have not been destroyed, the arrangement at issue in this case can, in practice, result in VAT being charged twice for the same tobacco products. However, such an arrangement is justified for reasons which are broadly the same as those stated in the answer to the first question. In this case, the arrangement for allocating the risk of the stamps going missing and of their possible fraudulent use at a later stage is also justified by the fact that 'preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive.' (22)

71. One final question is raised. The Commission and van Landewijck take the view that the judgment in *British American Tobacco and Newman Shipping*, cited above, is relevant to assessing this case and provides the basis for giving an affirmative answer to Question 2(c). They argue that, since, in that judgment, the Court held that the theft of tobacco products from a tax

warehouse does not constitute a supply of goods within the meaning of the Sixth Directive, that conclusion applies a fortiori to cases where tax stamps intended to be affixed to tobacco products go missing or are stolen.

72. I do not share that viewpoint. In *British American Tobacco and Newman Shipping*, cited above, the theft of tobacco products was considered to be a chargeable event within the meaning of the Sixth Directive under the Belgian legislation at issue. The Court ruled in that regard that a Member State may not include the theft of goods subject to excise duty in the categories of chargeable events established in the Sixth Directive. (23)

73. The facts and the Netherlands legislation at issue in this case are entirely different from those in the *British American Tobacco and Newman Shipping* case, cited above. In that case, the derogating measure in question was not justified by an approach whereby the owner of the tobacco products is given the incentive to monitor their whereabouts. Such an incentive would be entirely redundant in relation to an owner who – unless there is reason to suggest its fraudulent involvement in the theft – naturally seeks to prevent his tobacco products going missing, which is more than sufficient reason for him to monitor the products concerned. If tax stamps went missing, however, but there was no rule attributing responsibility to the recipient of the stamps, as adopted in this case by the Netherlands Government, there would be no actual incentive for the recipient of the stamps to monitor their whereabouts if reimbursement or the offsetting of the amounts paid for their purchase could easily be obtained in the wake of their going missing without being destroyed. In the light of that difference in circumstances, it is possible to disregard the argument that it can be concluded a fortiori from the case of *British American Tobacco and Newman Shipping*, cited above, that van Landewijck must have a right in the present case to reimbursement or to the offsetting of the amounts paid by way of the VAT due.

74. It therefore seems to me that the Court's answer to Question 2(c) should be that the absence of an obligation to reimburse the amounts paid in respect of the excise stamps which correspond to the amounts of VAT due, in circumstances such as those arising in this case, is compatible with the Sixth Directive, and in particular with Article 27(1) and (5) thereof.

III – **Conclusion**

75. In the light of the considerations set out above, I propose that the Court should answer the questions referred by the Hoge Raad as follows:

'1. Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products does not prevent Member States from applying statutory provisions under which they attribute the financial responsibility for tax stamps going missing to the parties which requested and received those stamps, and under which those Member States are not obliged to refund or offset the amount of excise duty paid when the request for the tax stamps was made in circumstances such as those arising in this case. Those statutory provisions also comply with the principle of proportionality.

2. Article 27(5) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to VATes – Common system of value added tax: uniform basis of assessment lays down a formal time-limit and must therefore be interpreted as meaning that an individual may not have a special procedure for charging tax disapplied on the ground that the period within which Member States must notify that special charging procedure to the Commission has expired, provided that the Commission has actually had the chance to assess the charging procedure at issue and to express its opinion on the matter.

3. The provisions of Article 27(1) and (5) of Sixth Council Directive 77/388/EEC must be

interpreted as meaning that a special procedure for charging VAT on tobacco products, as established in Article 28 of the Law on VAT, is compatible with the requirements laid down in those provisions and does not, as a whole, go beyond what is necessary and proportionate for simplifying the procedure for charging the tax and for preventing tax evasion and avoidance.

4. The absence of an obligation to reimburse the amounts paid in respect of the excise stamps which correspond to the amounts of VAT due, in circumstances such as those arising in this case, is compatible with the Sixth Directive, and in particular with Article 27(1) and (5) thereof.'

1 – Original language: Portuguese.

2 – OJ 1992 L 76, p. 1 (hereinafter: 'Directive 92/12/EEC' or 'Excise Duty Directive').

3 – OJ 1977 L 145, p. 1 (hereinafter: 'Sixth Directive').

4 – OJ 1995 L 291, p. 40, (hereinafter: 'Directive on Manufactured Tobacco').

5 – In the version applying prior to the amendments introduced by Council Directive 2004/7/EC of 20 January 2004 (OJ 2004 L 27, p. 44).

6 – OJ 1978 L 194, p. 16, (hereinafter: 'Ninth Directive').

7 – That article provides that persons who may request excise stamps from the Inspector include authorised warehousekeepers for tobacco products and traders which affix excise stamps to tobacco products outside the Netherlands.

8 – The abovementioned Article 28 of the Law on VAT provides for a procedure for charging VAT on tobacco products similar to the procedure applying to excise duty. It specifies that the rate of VAT chargeable on those products is 19/119ths of the retail price taken into consideration for calculating the excise duty, and that the VAT in question is unlikely to be deductible.

9 – The situation in Case C-435/03 *British American Tobacco and Newman Shipping* [2005] ECR I?0000 specifically involves the theft of tobacco products without tax stamps from a tax warehouse.

10 – In accordance with Article 79 of the Netherlands Law on excise duty, if it had been established that the stamps at issue had been destroyed, van Landewijck would have been entitled to have the amounts of excise duty paid reimbursed or offset. That is a coherent argument because, in those circumstances, as opposed to if the stamps simply go missing, there would be no risk of the stamps being used unlawfully.

11 – Furthermore, from the point of view of calculating the appropriate level of insurance, the requesting party is in a much more favourable position than the tax authorities once the stamps have been issued.

12 – See the second subparagraph of Article 21(2) of the Excise Directive, as amended by Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46), under which '[w]ithout prejudice to any provisions they may lay down in order to ensure that this Article is implemented properly and to prevent any fraud, evasion or abuse, Member States shall ensure that these marks do not create obstacles to the free movement of products subject to excise duty.'

13 – See, for example, Case 316/86 *Krücken* [1988] ECR 2213, paragraph 22, and Case 230/78 *Eridania* [1979] ECR 2749, paragraph 31.

14 – Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21, and, more recently, Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 47.

15 – See, to that effect, Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 65, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 44.

16 – See Case C-339/92 *ADM Ölmühlen* [1993] ECR I-6473, paragraph 15, and *Tempelman and van Schaijk*, cited above, at paragraph 47.

17 – See, by analogy, Case 349/85 *Denmark* v *Commission* [1988] ECR 169, paragraph 19, where the Court held that '[n]o penalty is imposed for failure to comply with that time-limit, which may therefore be regarded, having regard to the nature of the decision on the clearance of the accounts, the essential purpose of which is to ensure that expenditure incurred by the national authorities is in accordance with the Community rules, as a merely formal limit, save where the interests of a Member State are affected.'

18 – Case C-74/91 [1992] ECR I-5437, paragraph 21.

19 – To the same effect, see Case 5/84 *Direct Cosmetics* [1985] ECR 617, paragraph 22, and Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 33, which states that '[i]n so far as a derogation has not been established in accordance with Article 27, which imposes a duty of notification on the Member States, the tax authorities of a Member State may not rely, as against a taxable person, on a provision derogating from the scheme of the directive.'

20 – Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 29, Case C-63/96 *Skripalle* [1997] ECR I-2847, paragraph 24, and *British American Tobacco and Newman Shipping*, cited above, at paragraph 44.

21 – 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-4271, paragraph 46.

22 – Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76.

23 – See paragraphs 42 and 48 of this judgment.