OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 8 June 2006 (1)

Case C-35/05

Reemtsma Cigarettenfabriken GmbH

v

Ministero delle Finanze

1. The questions raised by the Italian Corte Suprema di Cassazione in the present case concern the means whereby a taxable person may recover VAT paid by him to a supplier who has invoiced it in error and accounted for it to the tax authorities.

2. Under the Sixth VAT Directive, (2) essentially, a supplier who invoices VAT to a customer must account for that amount to the tax authorities, whether it should have been invoiced or not. Also under that directive, a taxable person may deduct the tax charged to him on his input supplies from the tax for which he must account on his output supplies.

3. It is settled case-law (3) that the right to deduct input tax does not apply to tax which is due because it is mentioned on the invoice but would not otherwise have been due. In those circumstances, however, national law must allow for rectification of amounts charged (and/or deducted) in error.

4. Moreover, the right to deduct under the Sixth Directive applies only where a taxable person makes a taxable supply in the Member State in which the input tax was incurred, and thus has output tax to account for there, from which he can deduct the input tax.

5. In the present case, the taxable person to whom the VAT was invoiced in error (on supplies made to him of advertising services) did not make output supplies in the same Member State. Such a situation is normally governed by the Eighth VAT Directive, (4) under which input tax is not deducted from output tax, but refunded to the taxable person.

6. The national court wishes to know, essentially, whether in those circumstances (a) VAT invoiced and paid in error can be refunded under the Eighth Directive, even though it would not have been deductible under the Sixth Directive, and (b) a non-resident taxable person must be allowed to bring a claim directly against the authority which collected the tax, or whether it suffices that he should be entitled to act indirectly by claiming from the supplier who had invoiced the tax (and who could in turn claim against the tax authority).

Community VAT legislation and case-law

The situation within a Member State, under the Sixth Directive

7. Article 21(1) of the Sixth Directive read, at the material time in the present proceedings, (5) in so far as is relevant:

‘Under the internal system, the following shall be liable to pay value added tax:

(a) the taxable person carrying out the taxable supply of goods or services …

…

(c) any person who mentions the value added tax on an invoice or other document serving as invoice;

…’

8. Article 17(2) (6) provides, in so far as is relevant:

‘In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person within the territory of the country; [(7)]

…’

9. According to Article 18(1)(a), (8) in order to exercise his right to deduct the taxable person must hold an invoice, drawn up in accordance with Article 22(3)(b). (9) That provision requires the invoice to state clearly the price exclusive of tax and the corresponding tax at each rate, as well as any exemptions.

10. Article 20(1)(a) provides that the initial deduction is to be adjusted according to the procedures laid down by the Member States, in particular ‘where that deduction was higher or lower than that to which the taxable person was entitled’.

Relevant case-law on the Sixth Directive

11. *Genius Holding*, (10) the leading case, concerned a situation in which a subcontractor had wrongly invoiced VAT to a principal contractor. Under the then applicable national rules, authorised in accordance with the Sixth Directive, the tax was in fact due only from the principal contractor on the amount he invoiced to the person who had placed the order with him. The question arose whether the right to deduct applied to tax due, in accordance with Article 21(1)(c), solely because it was mentioned on the invoice.

12. The Court examined the wording of Article 17(2)(a), in particular in so far as it departed both from the wording of its predecessor, Article 11(1)(a) of the Second Council Directive, (11) and from that of Article 17(2)(a) of the Commission’s proposal for a Sixth Directive. (12) It concluded that the right to deduct could be exercised only in respect of taxes actually due, that is to say, the taxes

corresponding to a transaction subject to VAT or paid in so far as they were due. That interpretation was confirmed, moreover, by the need to hold an invoice showing the amount of tax corresponding to each transaction and by the existence of the adjustment mechanism applicable where the initial deduction was higher or lower than that to which the taxable person was entitled. (13)

13. Stressing that 'it is for the Member States to provide in their internal legal systems for the possibility of correcting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith', the Court ruled that 'the right to deduct … does not apply to tax which is due solely because it is mentioned on the invoice'. (14) The deduction mechanism was therefore not applicable, but some mechanism for correction or adjustment must be available to redress the situation where the error was made in good faith.

14. In his Opinion, however, Advocate General Mischo had argued (15) that, in order to preserve the principle of the neutrality of VAT, such tax should give rise to a right to deduct unless (in circumstances suggestive of fraud) the supplier who invoiced it had not accounted for it to the tax authorities.

15. *Schmeink & Cofreth* (16) also concerned a situation in which VAT had been invoiced in error. In that case, however, the amounts wrongly invoiced were in fact invoiced not in good faith but fraudulently. None the less, the Court took the view that the criterion of good faith was not necessary in order to obtain an adjustment, provided that any risk of loss of revenue had been eliminated. It ruled as follows:

'(1) Where the issuer of the invoice has in sufficient time wholly eliminated the risk of any loss in tax revenues, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be adjusted without such adjustment being made conditional upon the issuer of the relevant invoice having acted in good faith.

(2) It is for the Member States to lay down the procedures to apply as regards the adjustment of improperly invoiced VAT, provided that such adjustment is not dependent on the discretion of the tax authorities.'

16. In *Karageorgou* (17) the Court considered a situation in which an amount mentioned as VAT on an invoice drawn up by a person providing services to the State could not be classified as VAT. That situation arose because the persons concerned erroneously believed that they were providing those services as self-employed persons, whilst in reality there was an employer-employee relationship. The Court followed *Genius Holding* and *Schmeink & Cofreth* in finding that Article 21(1)(c) did not preclude reimbursement of such an amount. In the event of adjustment of the amount thus mentioned, which can in no event constitute VAT, there is no risk of a loss of tax revenue in the context of the VAT regime. The Court noted again that the Sixth Directive does not make express provision for such cases; and considered that, so long as the lacuna has not been filled by the Community legislature, it is for the Member States to provide a solution. (18)

17. Another judgment mentioned in the submissions in the present proceedings concerned a slightly different set of circumstances. In *Langhorst* (19) a farmer had sold pigs to livestock dealers. Instead of his issuing them with an invoice for the price, they issued him with credit notes for that price, on which they erroneously calculated VAT at a higher rate than was applicable. The Court held that such a credit note could be regarded as a 'document serving as invoice' and that the recipient of the note (namely, the farmer) was to be regarded as the person who had in fact mentioned VAT in that document within the meaning of Article 21(1)(c) and consequently as liable to pay the amount stated. (20)

Place of supply of advertising services

18. Article 9 of the Sixth Directive lays down rules as to the place where a service is to be deemed to be supplied for the purposes of the directive. Article 9(2)(e) provides:

'the place where the following services are supplied, when performed … for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

…

– advertising services,

…'

19. Under Article 21(1)(b), (21) 'the customer for a service referred to in Article 9(2)(e) … and effected by a taxable person established abroad' is liable to pay the VAT on the service in question. (22) 'However, Member States may require that the supplier of services shall be held jointly and severally liable for payment of the tax.'

Refunds in cross-border supplies under the Eighth Directive

20. Article 17(2)(a) of the Sixth Directive, set out above, (23) concerns the deduction of input VAT from output tax due within the same Member State. For other situations, Article 17(3) and (4) (24) provides, in so far as is relevant:

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

(a) transactions … carried out in another country, which would be deductible [(25)] if they had been performed within the territory of the country;

…

4. The refund of value added tax referred to in paragraph 3 shall be effected:

– to taxable persons who are not established within the territory of the country but who are established in another Member State in accordance with the detailed implementing rules laid down in [the Eighth Directive],

…'

21. Article 2 of the Eighth Directive provides:

'Each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any value added tax charged in respect of services or movable property supplied to him by other

taxable persons in the territory of the country or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) …' of the Sixth Directive.

22. Article 5 of the same directive provides:

'For the purposes of this Directive, goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 of [the Sixth Directive] as applicable in the Member State of refund.

…'

Summary of the effects of the legislation on cross-border supplies

23. By virtue of the above provisions, where supplies are provided in Member State A by a supplier established in that Member State to a trade customer (26) established in Member State B, who does not account for VAT in Member State A because he makes no taxable outputs there, the general rule is that the trade customer is entitled to a refund of the VAT invoiced to him by the supplier in Member State A, and will have no input tax on those supplies to deduct from his output tax in Member State B.

24. In specific situations where the reverse charge mechanism applies however (as for example where the supply is of advertising services, which are deemed to be provided in Member State B, not Member State A), the supplier should not invoice VAT on the supply in Member State A. Instead, the trade customer is liable for VAT on the supply to him in Member State B, and may deduct that input tax from the output tax for which he has to account in Member State B.

25. If the supplier nevertheless invoices the trade customer for VAT in Member State A (as though the supply had been in Member State A) in a situation in which the reverse charge mechanism ought to have applied (because the supply is deemed to have taken place in Member State B), the VAT has been invoiced in error. That is precisely what happened in the present case.

26. If the trade customer then pays the VAT erroneously invoiced and the supplier duly accounts for it to the VAT authorities in Member State A, then – unless and until the trade customer is able to recover the VAT and has paid in error either (a) from his supplier or (b) from the tax authorities – the transaction is *not* 'VAT neutral' for the trade customer, and the tax authorities in Member State A have received VAT that should not have been paid to them.

The main proceedings

Factual and procedural background

27. From the details given in the order for reference and the observations submitted to the Court, the facts of the case may be summarised as follows.

28. Reemtsma Cigarettenfabriken GmbH ('Reemtsma') is a company whose principal place of business is in Germany. It has no permanent establishment in Italy.

29. In 1994 an Italian firm provided Reemtsma with advertising and marketing services on which it charged VAT amounting to a total of LIT 175 022 025. (27)

30. Those services were exempt from VAT, according to the order for reference, so that it was in error that the tax was mentioned on the invoice and paid, first by Reemtsma to the Italian firm, and then by the latter to the tax authority.

31. It seems from the legislation cited (28) that the services were not exempt in the strict sense, but were deemed to have been provided in Germany, where Reemtsma was established, in accordance with Article 9(2)(e) of the Sixth Directive. None the less, it was still in error that VAT was invoiced and paid in Italy. Since the reverse charge rule applied, it was Reemtsma who was liable for VAT in Germany.

32. Reemtsma sought a partial refund of the VAT in question. It is not clear why the refund sought was only partial, but it may be that the services acquired were not used solely for the purposes of Reemtsma's taxable output supplies. In that situation, only a partial right to refund would arise. (29)

33. The refund was refused by the tax authorities and Reemtsma challenged the refusal before the courts.

34. Both at first instance and on appeal, the challenge was dismissed on the ground that the payment of tax related to services which were not among those subject to VAT, having been provided for a person who was taxable in another Member State.

35. Reemtsma has now applied to the Corte Suprema di Cassazione for review of the appeal judgment, alleging breach and misapplication of provisions of national law, (30) and failure to state adequate reasons.

36. The Corte Suprema is in doubt as to how to interpret the Italian legislation in the light of the Court's judgments in *Genius Holding*, *Langhorst*, *Schmeink & Cofreth* and *Karageorgou*. It therefore asks the Court of Justice to give a preliminary ruling on the following questions:

'(1) Must Articles 2 and 5 of the [Eighth Directive], in so far as they make reimbursement to a non-resident recipient of goods or services conditional on use of the goods and services for the purposes of taxable transactions, be interpreted as meaning that even VAT that is not due, and has been charged incorrectly as output tax and paid to the revenue authorities, is refundable? If the answer is in the affirmative, is a national provision which precludes reimbursement to a non-resident recipient of goods or services, on the ground that the tax charged and paid although not due is not deductible, contrary to the abovementioned provisions?

(2) In general, is it possible to infer from the uniform Community rules that the recipient of goods or services is the person liable for payment of tax to the revenue authorities? Is it compatible with those rules and in particular with the principles of neutrality of VAT, effectiveness and non-discrimination, not to grant under domestic law to a recipient of goods or services who is subject to VAT and who is treated under national law as being subject to the obligations of invoicing and payment of the tax, a right against the revenue authorities to claim reimbursement in cases where tax that is not due is charged and paid? Are national rules – as interpreted by the national courts – under which a recipient of goods or services may bring an action only against the supplier of the goods or services and not against the revenue authorities, despite the existence of a case of substitution of that kind under domestic law in relation to direct taxes where both parties (the withholding agent and the taxpayer) are entitled to apply to the revenue authorities for

reimbursement, contrary to the principles of effectiveness and non-discrimination in the matter of reimbursement of VAT collected in breach of Community law?'

37. Written observations have been submitted by Reemtsma, the Italian Government and the Commission. At the hearing on 30 March 2006, the Italian Government and the Commission presented oral submissions.

Assessment

The first question

38. In essence, the national court's first question is whether the approach taken in the case-law since *Genius Holding* with regard to deductions under the Sixth Directive should also be followed with regard to refunds under the Eighth Directive.

39. Before that question can be answered, however, it is necessary to examine Reemtsma's doubts as to the continued validity of the ruling in *Genius Holding*.

Is *Genius Holding* still good law?

40. Reemtsma believes that the Court's decision in *Genius Holding* was not justified by the wording of Article 21(1)(c) of the Sixth Directive and has moreover been superseded by *Langhorst*. It relies on the passage in the latter judgment where the Court stated that, if the taxable person deemed to have mentioned VAT in the credit note were not liable to pay the amount stated, 'part of the VAT appearing in the document serving as an invoice would not have to be paid by the taxable person, even though … that VAT might have been deducted in full by the recipient of the goods or services …'. (31) That, in Reemtsma's view, implies a reversal of *Genius Holding* and a return to an all-embracing right of deduction. Reemtsma stresses that the right to deduction is the principal means of ensuring application of the fundamental principle of neutrality of VAT, and that Member States have no power to limit that right. (32)

41. Reemtsma also seeks to distinguish *Karageorgou*. Even if the theoretical reasoning in that judgment is valid, it was delivered in a different factual context. (33) Here, the amount in issue cannot at the same time be VAT which the supplier who invoiced it is liable to pay pursuant to Article 21(1)(c) and 'non-VAT' from the customer's point of view.

42. For my part, I cannot agree that *Langhorst* calls in question the ruling in *Genius Holding*.

43. The passage from which Reemtsma infers that the Court has reversed itself forms part of the response to question 2 in *Langhorst*: whether a taxable person who has not contested the mention, in a credit note serving as an invoice, of an amount of VAT greater than that owed by reason of taxable transactions may be regarded as the person who has mentioned that amount, and is consequently liable for the amount stated, within the meaning of Article 21(1)(c) of the Sixth Directive.

44. To that question the Court gave the same (affirmative) answer as that proposed by Advocate General Léger, who based his analysis largely on the judgment in *Genius Holding*. (34) In those circumstances, it is very difficult to read a repudiation of *Genius Holding* into the reasoning of the Court, which simply follows that of the Advocate General, albeit in a much briefer formulation that omitted any mention of that judgment. Moreover, *Genius Holding* was subsequently followed, quite

clearly, in both *Schmeink & Cofreth* and *Karageorgou.*

45. As for the phrase ‘might have been deducted in full by the recipient of the goods or services’ in *Langhorst*, it seems to me clear that the Court was not saying that the recipient might have been *entitled* to deduct the tax invoiced in error. Rather, the Court was envisaging that he might *in fact* have deducted it, and that an opportunity for fraud might be created if the supplier were not liable to pay the full amount stated.

46. That said, I have considerable sympathy with Reemtsma’s view in one respect. It is illogical to regard an amount wrongly invoiced simultaneously as VAT which must be accounted for by the supplier under Article 21(1)(c) of the Sixth Directive and as ‘non-VAT’ which cannot be deducted by a trade customer under Article 17(2)(a).

47. Reemtsma’s view echoes to a large extent the analysis proposed to the Court by the Commission and by Advocate General Mischo in *Genius Holding*, to the effect that VAT which must be accounted for by the supplier by virtue of Article 21(1)(c) should also be regarded as tax which is ‘due or paid’ within the meaning of Article 17(2)(a). It should therefore be deductible by a trade customer (provided that fraud is ruled out by excluding cases where it can be shown that the amount in question was not actually paid).

48. That analysis, I confess, seems to me preferable, in terms of coherence and simplicity of the system, to the approach finally adopted by the Court in its judgment in *Genius Holding*. I also wonder whether it might not have been more in line with the Court’s more recent case-law in the field of carousel fraud.

49. Carousel fraud is admittedly a different situation, in which VAT is correctly invoiced throughout a chain of supply but is fraudulently withheld from the tax authorities at one or more stages. However, in *Optigen* (35) the Court took the view that where a taxable person carries out transactions which meet the objective criteria set out in the Sixth Directive, his right to deduct input VAT cannot be affected by the fact that another prior or subsequent transaction in the chain of supply is vitiated by VAT fraud without his knowing or having any means of knowing that that is the case. The question whether the VAT on an earlier or later sale of the goods concerned has, or has not, been paid to the public purse is irrelevant to his right to deduct input VAT.

50. It seems to me that, if the right to deduct remains intact in such circumstances, the system would be more coherent if that right were to remain intact also in circumstances such as those of *Genius Holding*. Moreover the Court has explicitly stated that adjustment pursuant to Article 20(1)(a) of the Sixth Directive is dependent on demonstrating, originally, good faith on the part of the person issuing the invoice (36) or, following *Schmeink & Cofreth*, that any risk of loss of tax revenue has been eliminated. (37) Such a proviso could equally have applied if the customer had retained a right to deduct rather than an entitlement to adjustment.

51. None the less, I do not propose that the Court should now reconsider its ruling in *Genius Holding*. That ruling is based on accepted principles of interpretation and achieves, albeit by a more cumbersome procedure, the same result as the approach proposed by the Advocate General, a result which seems clearly correct in terms of VAT neutrality. It has moreover been settled law for more than 15 years and any reversal now would presumably entail an undesirable degree of upheaval in Member States’ VAT practice.

52. That being so, it does not seem to me that any useful conclusion can be drawn from the fact that the principle in *Genius Holding* was applied to different circumstances in *Karageorgou*. I therefore turn now to examine whether that principle should be applied also to situations governed by the Eighth Directive.

Should *Genius Holding* be applied in the context of the Eighth Directive?

53. The national court notes that the reason for excluding deduction under the Sixth Directive where tax not due is invoiced in error is not to place the burden on a trade customer who would otherwise have been entitled to deduct, but rather to guard against tax evasion. Under the Eighth Directive, however, the purpose of restricting the right to a refund to cases where deduction would have been allowed under the Sixth Directive is different. It is to exclude customers who should bear the burden of the tax (either because they are final consumers or because their input supplies are used for exempt transactions). Given that difference in purpose, it is not clear whether the same approach should apply.

54. Reemtsma also notes the difference in purpose. It concludes that it is inappropriate to preclude a refund under the Eighth Directive where the reason for non-deductibility under the Sixth Directive would have been simply that the tax was invoiced in error.

55. The Italian Government however points out that this case concerns a refund of VAT improperly charged on a supply. In its view, the procedure under Articles 2 and 5 of the Eighth Directive cannot apply because the condition that the tax would have been deductible if the customer had been resident in Italy (38) is not met.

56. The Commission submits that *Debouche* (39) indicates that it is not the purpose of the Eighth Directive to undermine the scheme introduced by the Sixth Directive. As Advocate General Tesauro stated in his Opinion in that case, (40) the refund of VAT to taxable persons who are not established in the territory of the country is based on the same rationale and must, therefore, be subject to the same rules as apply to deduction made by a taxable person who is established in the country. That is confirmed by the Court's approach in *Monte dei Paschi di Siena* (41) applying the pro rata deduction rules in Article 17(5) of the Sixth Directive to a refund under the Eighth Directive.

57. On this question, I agree with the conclusion reached by the Italian Government and the Commission.

58. On a formal level, the references to Article 17 of the Sixth Directive in Articles 2 and 5 of the Eighth Directive are clear. Article 2 grants entitlement to refund 'in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) …' of the Sixth Directive. Article 5 expressly states that 'goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 of [the Sixth Directive] as applicable in the Member State of refund'.

59. Furthermore, taking the same literal approach as in the *Genius Holding* judgment, (42) it may be noted that Article 17(3) of the Commission's proposal for a Sixth Directive referred, like Article 17(2)(a) of that proposal, to VAT 'invoiced to' a taxable person, and the wording was changed to VAT 'referred to in paragraph 2' – where 'invoiced to him' was changed to 'due or paid'.

60. Moreover, the case-law cited by the Commission militates in favour of parallel treatment.

61. Perhaps most importantly of all, however, coherence between the refund and deduction systems seems desirable as a matter of principle, unless there is some difference in the nature of a cross-border chain of supply that calls for different treatment. There appears to be none.

62. It is true that the refund mechanism under the Eighth Directive is not identical to the deduction mechanism under the Sixth Directive. Nevertheless, there is considerable parallelism between the situations governed by the two directives.

63. Let us assume that X and Y are taxable persons, X being the supplier in a transaction and Y a trade customer. In a situation confined to a single Member State, X invoices VAT to Y, who deducts the same amount from the output tax for which he has to account.

64. If X is established in Member State A and Y is established in Member State B, and makes no taxable outputs in Member State A, either (a) under the Eighth Directive Y obtains a refund of the VAT invoiced in Member State A, and the amount of VAT which he invoices to his customers and for which he accounts to the tax authorities in Member State B is based on the full net price at which he makes his supply, or (b) where the reverse charge mechanism in the Sixth Directive applies, X invoices no VAT and Y is liable for, but may also deduct, VAT on the supply in Member State B. In both cases the chain then continues normally.

65. If X wrongly invoices VAT to Y on the transaction, if Y pays that invoice and if X accounts for the amount to the tax authorities, then, in accordance with *Genius Holding*, if the situation is confined to a single Member State (Member State A):

– X must repay to Y the amount wrongly invoiced;

– the tax authorities must refund the amount to X; and

– Y must exclude it from his deduction (or, if it has already been deducted, adjust his deduction in accordance with Article 20(1)(a) of the Sixth Directive).

66. If X and Y are in different Member States, the first and second of those requirements remain applicable. However, whether under the Eighth Directive (43) or the reverse charge mechanism of the Sixth Directive, (44) Y could never have deducted the VAT invoiced by X, because neither situation allows for deduction as such. The equivalent, therefore, is for Y not to be entitled to any refund. Again, the chain will continue normally.

67. In both those sets of scenarios, the neutrality of VAT is preserved (45) by means which are essentially parallel (albeit, as I have said, more complex than if deduction or refund, as the case may be, had been permitted).

68. Moreover, it may be noted that the national provision in issue in *Genius Holding* also imposed a reverse charge mechanism, albeit one authorised by the Council under Article 27 of the Sixth Directive rather than one of the kind with which the Eighth Directive is concerned. (46) It might be considered strange if the principle underlying that judgment were to be applied to one type of reverse charge situation and not another.

69. I am therefore of the view that the approach taken by the Court in *Genius Holding* with regard to deductions under the Sixth Directive should also be taken with regard to refunds under the Eighth Directive.

The second question

70. If a trade customer in Reemtsma's situation (that is to say, in the situation of Y in my example above) is not entitled to a refund in accordance with Article 17(3) and (4) of the Sixth Directive and the provisions of the Eighth Directive, the national court wishes to know, essentially, whether it is enough that he should be entitled to claim reimbursement from the supplier (X in my example) who invoiced the tax and who could in turn claim against the authority which collected the tax, or whether he must be allowed to bring a claim directly against the tax authority.

71. That question is posed, as the Italian Government and the Commission have pointed out, in three parts, which may be summarised as follows:

(a) May the customer be regarded in general as the person liable to pay the VAT on a transaction?

(b) Is it compatible with the Community VAT system (and with the principles of neutrality, effectiveness and equivalence or non-discrimination) for national law *not* to allow the customer a claim against the tax authorities where VAT which was not due has been invoiced and paid?

(c) Does it make any difference if other national rules (in the field of direct taxation) allow a joint action by both parties against the tax authorities in roughly comparable circumstances?

72. I shall deal with those three parts in turn.

May the customer be regarded in general as the person liable to pay the VAT on a transaction?

73. As Reemtsma points out, Article 21(1)(a) of the Sixth Directive (47) allows Member States to provide that, in addition to the supplier, 'someone other than the taxable person shall be held jointly and severally liable for payment of the tax'. Article 22(8) (48) allows Member States to impose 'other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion'. It is therefore compatible with the Sixth Directive for the customer to be one of the persons liable to pay the VAT.

74. On the other hand, as the Italian Government notes, even if Community law allows the customer to be held jointly and severally liable for the tax, Italian law made no such provision in 1994 (although there is now such a provision).

75. Furthermore, as the Commission rightly states, the first subparagraph of Article 21(1)(a) of the Sixth Directive lays down the general rule that it is in principle the supplier who is liable to pay VAT and who has obligations towards the tax authorities. The only exceptions are those specified in the remaining provisions of Article 21(1) (in particular the reverse charge mechanism in cross-border transactions) or authorised by the Council on the basis of Article 27 of the Sixth Directive (involving in such cases a reverse charge mechanism in specific circumstances within the Member State (49)).

76. I therefore agree with the Italian Government and the Commission. Reemtsma is correct in pointing out that in certain circumstances Member States *may* decide that the customer is to be jointly liable with the supplier, and in situations to which the reverse charge mechanism applies it is always the customer who is liable. Nevertheless, those are exceptions to the general rule that it is the supplier who must account to the authorities for VAT on a transaction. Consequently, it is in principle only the supplier who may bring a claim against those authorities in respect of tax paid in

error.

77. It is true that, where a reverse charge mechanism applies for any reason, the customer is liable for the VAT on the transaction. The customer will therefore in principle be entitled to seek reimbursement (50) from the authorities of any tax paid in error. It seems furthermore that the reverse charge mechanism under Article 9(2)(e) did apply in the case giving rise to the main proceedings, so that Reemtsma should be both liable for the tax and entitled to seek reimbursement of any tax paid in error. However, it must be remembered that Reemtsma's relationship under that mechanism is with the tax authorities of its own Member State, namely Germany, and not with those of the Member State in which its supplier erroneously invoiced and accounted for VAT, namely Italy.

78. I would therefore answer the first part of the second question to the effect that in principle only the supplier is to be regarded as liable to the tax authorities for VAT on a transaction, and consequently as entitled to seek reimbursement of tax paid in error. Where, exceptionally, another person is liable by virtue of Community or authorised national provisions, that person may seek reimbursement, from the tax authorities to which he was liable, of any tax paid in error by him.

Is it permissible for national law *not* to allow the customer a claim against the tax authorities where VAT which was not due has been invoiced and paid?

79. In Italy, in circumstances where neither deduction under the Sixth Directive nor refund under the Eighth Directive is available, it appears to be possible for a supplier who has invoiced and collected VAT on a transaction in error and paid it to the tax authorities to seek reimbursement of the amount from those authorities, but for the customer in the same transaction to be able to seek recovery of that amount only from the supplier in a civil action.

80. The national court's doubts as to that system of remedies concern the requirements of equivalence (or non-discrimination) and effectiveness in Community law. The most recent statement of those requirements is to be found in *MyTravel*: (51) 'In the absence of Community rules on applications for the repayment of taxes, it is for the domestic legal system of each Member State to lay down the conditions under which such applications may be made; those conditions must observe the principles of equivalence and effectiveness, that is to say, they must not be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible the exercise of rights conferred by the Community legal order.'

81. Reemtsma considers that compliance with the principle of effectiveness renders it necessary to allow the customer a direct claim against the tax authorities. Were it otherwise, at least two potential conflicts with that principle might arise: the supplier might be insolvent when the customer claims against him, or the supplier might find himself ordered to reimburse the customer in the civil courts but fail in his claim against the tax authorities in the tax courts.

82. The Commission recalls the Court's rulings, in particular *Schmeink & Cofreth*, to the effect that Member States must provide for rectifying errors in invoicing VAT, including both rectifying the invoice and reimbursing the tax wrongly paid. It submits that that duty flows from the principle of neutrality and from the prohibition of unjust enrichment (here, on the part of the tax authorities). Member States may choose whatever procedure is suitable, provided that the principle of effectiveness is respected. A situation in which normally only the supplier, as person liable for the tax, may seek reimbursement from the tax authorities and the customer must seek reimbursement from the supplier, under civil law, appears in principle acceptable. However, provided that any risk

of tax loss is wholly eliminated, the principle of effectiveness might require the customer to be able to claim against the tax authorities if recovery by the normal procedure proved ‘virtually impossible or excessively difficult’ (for example, in Reemtsma’s case, if its Italian supplier had ceased to exist). Finally, the principle of non-discrimination would require any Member State which allowed an action against the tax authorities for a customer established in its territory to allow the same right of action to a customer established in another Member State.

83. The Italian Government agrees with the Commission in so far as the Commission accepts the legitimacy of the system in place in Italy. It disagrees with the Commission’s further view that the customer must be entitled to claim reimbursement directly from the tax authorities if its civil claim against the supplier is for any reason impossible to enforce.

84. None the less, I find the Commission’s analysis persuasive in its entirety.

85. First, the system of remedies which has been described as applying in Italy appears in principle compatible with the legislation and the case-law on the Community VAT system. If it is possible for a supplier who has invoiced and collected VAT on a transaction in error and paid it to the tax authorities to seek reimbursement of the amount from those authorities, and for the customer in the same transaction to recover that amount from the supplier in a civil action, then the principles of the neutrality of VAT and the effectiveness of claims for the recovery of tax paid in error are respected.

86. Second, such a system is in principle sufficient. In all situations in which it can produce the required outcome – reimbursement in full to the person on whom the burden of tax paid in error has fallen – it is unnecessary to provide for any additional remedy for the customer against the tax authorities. Consequently, there is no need to allow a direct claim by the customer against the tax authorities, of the kind which Reemtsma appears to have attempted to bring, *unless* the basic system of remedies has been set in train but has, as a result of material circumstances unrelated to the merits of the claim, (52) failed to produce the normal outcome.

87. Third, there may be cases in which such failure occurs. In those cases some other solution must be available if the requirements of VAT neutrality and effectiveness are to be respected. It seems difficult to envisage any such solution other than permitting the customer, who has borne the full burden of the VAT invoiced in error, to bring a direct claim against the tax authorities, who would be unjustly enriched if they were to retain such VAT.

88. In that regard, two points were discussed at the hearing.

89. On the one hand, the Commission suggested that such cases were extremely rare and unlikely to impinge to any significant extent on the basic system of remedies, while the Italian Government asserted that they were likely to be considerably less rare. However, it does not seem to me that frequency of occurrence can be of any relevance. What matters is that, whenever such situations do occur, they must be dealt with in accordance with the requirements of neutrality and effectiveness.

90. On the other hand, the Italian Government suggested that a remedy to prevent unjust enrichment on the part of the tax authorities in the event of VAT paid in error should be available only if a corresponding remedy is also available to prevent unjust impoverishment of the public purse in the event of failure to pay VAT properly due. The argument appeared to be that otherwise there would be some form of unjust enrichment to the benefit of the customer. However, such an argument appears to me to be misconceived. If the supplier has invoiced VAT to the customer and collected it from him, but failed to account for it to the tax authorities, there is no unjust enrichment on the part of the customer (although there may indeed be unjust enrichment and/or fraud on the

part of the supplier). If the supplier has neither invoiced VAT to the customer on a taxable transaction nor collected it from him then, if the customer is a taxable person himself, he has no VAT to deduct and is thus not unjustly enriched – and/or, whether he is a trade customer or a final consumer, he may himself be implicated in an arrangement which defrauds the tax authorities. In the latter situation, national law will be justified in providing for both criminal penalties and compulsory payment of the sum in question.

91. Finally, I agree with the Commission that the principle of equivalence requires any Member State which allows a customer established in its territory to seek reimbursement directly from the tax authorities to allow the same right of action to a customer established in another Member State. The Court has not however been informed whether that is the case in Italy.

92. I am consequently of the view that, where VAT which was not due has been invoiced and paid to the tax authorities by a supplier in a transaction, who would have been liable to pay that tax if it had been due, it is in principle sufficient, in compliance with the principles of the neutrality of VAT and the effectiveness of national rules on the reimbursement of taxes collected contrary to Community law, for national procedures to allow that supplier to seek reimbursement of the amount from those authorities, and to allow the customer in the same transaction to recover that amount from the supplier in a civil action. Where however success in such a civil action is precluded by material circumstances unrelated to the merits of the claim, national law must provide, in compliance with the principle of neutrality of VAT, the principle of effectiveness and the prohibition of unjust enrichment on the part of the tax authorities, for a means whereby the customer who has borne the burden of the amount invoiced in error may recover that amount from the tax authorities. In any event, if a claim is available to a customer in such a transaction who is established within the Member State in question, it must also be available to a customer established in another Member State.

Does it make any difference to that assessment if other national rules in the field of direct taxation allow a joint action by both parties against the tax authorities in roughly comparable circumstances?

93. It appears that, where income tax has been erroneously retained at source by an employer and paid to the tax authorities, Italian law allows both the employer and the employee to seek reimbursement from the tax authorities. The referring court is concerned that the availability of such a joint or alternative remedy in that situation, combined with its non-availability for both supplier and customer with regard to a VAT situation of the kind at issue in the main proceedings, might offend against the principle of equivalence or non-discrimination imposed by Community law.

94. Whilst pointing out that the Court has not been fully informed of the Italian rules in the field of direct taxation, the Commission considers in general that a situation in that field is unlikely to be comparable to that in the field of VAT. In the latter it is in principle only the supplier who is in a direct legal relationship with the tax authorities. Indeed, the whole system of direct taxation is unrelated to that of VAT. Since the principle of non-discrimination concerns only comparable situations, it is thus not relevant here.

95. In that regard, I am in entire agreement with the Commission.

Conclusion

96. In the light of all the above considerations, I am of the opinion that the questions posed by the Corte Suprema di Cassazione should be answered to the following effect:

(1) Articles 2 and 5 of Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in the territory of the country are to be interpreted as meaning that VAT which is due solely because it is mentioned on the invoice does not meet the requirements for a refund under the provisions of that directive.

(2) In principle only the supplier is to be regarded as liable to the tax authorities for VAT on a transaction, and consequently as entitled to seek reimbursement of tax paid in error. Where, exceptionally, another person is liable by virtue of Community or authorised national provisions, that person may seek reimbursement, from the tax authorities to which he was liable, of any tax paid in error by him.

(3) Where VAT which was not due in a transaction has been invoiced and paid to the tax authorities by a supplier, who would have been liable to pay that tax if it had been due, it is in principle sufficient, in compliance with the principles of the neutrality of VAT and the effectiveness of national rules on the reimbursement of taxes collected contrary to Community law, for national procedures to allow that supplier to seek reimbursement of the amount from those authorities, and to allow the customer in the same transaction to recover that amount from the supplier in a civil action. Where however success in such a civil action is precluded by material circumstances unrelated to the merits of the claim, national law must provide, in compliance with the principle of neutrality of VAT, the principle of effectiveness and the prohibition of unjust enrichment on the part of the tax authorities, for a means whereby the customer who has borne the burden of the amount invoiced in error may recover that amount from the tax authorities. In any event, if a claim is available to a customer in such a transaction who is established within the Member State in question, it must also be available to a customer established in another Member State.

(4) The fact that under national law a claim against the tax authorities for reimbursement of an amount of direct tax withheld and paid in error is available to both the withholding party and the party from whom the amount is withheld is not in principle relevant when assessing the compatibility with the principle of equivalence of a situation in which only the supplier and not the customer in a transaction may seek reimbursement from the tax authorities of an amount of VAT invoiced and paid in error.

1 – Original language: English.

2 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, amended on numerous occasions; hereinafter ‘the Sixth Directive’).

3 – See Case C-342/87 *Genius Holding* [1989] ECR 4227, Case C-454/98 *Schmeink & Cofreth* [2000] ECR I-6973 and Joined Cases C-78/02 to C-80/02 *Karageorgou* [2003] ECR I-13295, discussed in further detail at point 11 et seq. below.

4 – Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11).

5 – The current text of Article 21 is to be found in Article 28g of the same directive, introduced by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and itself subsequently amended on several occasions. The present case concerns VAT paid in 1994. The provision which was at that time in Article 21(1)(c) is now in Article 21(1)(d). I have chosen to set out the provisions of the Sixth Directive not in their numerical order (which is in any event no longer the order in which they appear in the directive) but in an order which seems more helpful for a readier understanding of the legislation in the present context.

6 – Now to be found in Article 28f, also introduced by Directive 91/680, and also since amended.

7 – In the version applicable at the material time, the words ‘within the territory of the country’ or their equivalent, which had been introduced by Directive 91/680, appeared to refer to the liability of the supplier in many language versions, including the English, French, Italian and Spanish. In the German version, however, they referred to the place where the tax was due or paid, and in the Dutch to the place where the supply was made. Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax – scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18), which entered into force on 1 January 1996, has since unified all language versions in line with the German. Thus the English version of Article 17(2)(a) now reads: ‘value added tax due or paid *within the territory of the country* in respect of goods or services supplied or to be supplied to him by another taxable person’ (emphasis added).

8 – In Article 28f, unamended since Directive 91/680.

9 – In Article 28h, in the version introduced by Directive 91/680 and applicable at the material time; since amended.

10 – Cited above in footnote 3.

11 – Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of the laws of the Member States relating to turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16). Article 11(1)(a) read: ‘Where goods and services are used for the purposes of his undertaking, the taxable person shall be authorised to deduct from the tax for which he is liable: (a) the value added tax *invoiced to him* in respect of goods supplied to him or in respect of services rendered to him’ (emphasis added).

12 – OJ 1973 C 80, p. 1. Article 17(2)(a) of the proposal read: ‘Where goods and services are to be used for the purposes of his taxable business, the taxable person shall be entitled to deduct from the tax which he is liable to pay: (a) value added tax *invoiced to him in accordance with Article 22(3)* in respect of goods or of services supplied to him’ (emphasis added).

13 – Paragraphs 12 to 16 of the judgment.

14 – Paragraphs 18 and 19, and operative part, of the judgment.

15 – As had the Commission in its observations; the Court followed the approach advocated by

the Netherlands, German and Spanish Governments. See in particular points 17 to 27 of the Opinion.

16 – Cited above in footnote 3, paragraphs 58 and 59.

17 – Cited above in footnote 3.

18 – Paragraphs 42 and 48 to 53 of the judgment.

19 – Case C-141/96 [1997] ECR I-5073.

20 – Paragraphs 8, 9, 24, 27 and 28 of the judgment.

21 – In Article 28g, in the version introduced by Directive 91/680 and in force at the material time; since amended.

22 – This is often known as the ‘reverse charge’ mechanism.

23 – Point 8.

24 – In Article 28f.

25 – This formulation in English seems unfortunate. VAT is deductible, ‘transactions’ are not. The French reads ‘qui ouvriraient droit à déduction’, and it would seem preferable to read the English as ‘in respect of which VAT would be deductible’.

26 – To avoid constant repetition, I shall use the term ‘customer’ or ‘trade customer’ to mean a taxable person who acquires taxed supplies (of goods or services) and uses them for the purposes of his taxable output transactions, in order to distinguish such a person from a customer who is the final consumer.

27 – Roughly equivalent to EUR 91 000.

28 – Article 7, fourth paragraph, (d) and (e), of Decreto del Presidente della Repubblica No 633 of 1972 (‘DPR 633/1972’).

29 – Case C-136/99 *Monte Dei Paschi Di Siena* [2000] ECR I-6109.

30 – Article 19 of DPR 633/1972, which establishes the right to deduct, and Article 38bis of the same decree, which concerns reimbursement of, essentially, any excess of input over output tax. Article 38ter provides for refunds, in accordance with the Eighth Directive, to taxable persons established in another Member State of VAT which would be deductible under Article 19.

31 – Paragraphs 27 and 28 of the judgment.

32 – Reemtsma cites Case 50/87 *Commission* v *France* [1988] ECR 4797, paragraphs 16 and 17, and Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 27.

33 – That is to say, one in which the amount invoiced was not properly classifiable as VAT at all, because of the employed status of the supplier: see point 16 above.

34 – See point 52 et seq. of the Opinion.

35 – Joined Cases C-354/03, C-355/03 and C-484/03 [2006] ECR I-0000; see in particular paragraphs 51 to 54.

36 – *Genius Holding*, paragraph 18.

37 – *Schmeink & Cofreth*, paragraphs 56 to 63.

38 – See Article 17(3)(a) of the Sixth Directive.

39 – Case C-302/93 [1996] ECR I-4495, paragraph 18.

40 – Point 7, third paragraph, at p. I-4500.

41 – Cited above in footnote 29.

42 – See point 12 above.

43 – In respect of supplies whose place of supply was Member State A.

44 – In respect of supplies whose place of supply was deemed to be Member State B.

45 – Because X repays Y and then himself reclaims the amount from the tax authorities in Member State A.

46 – See paragraph 5 of the judgment.

47 – In the version applicable in 1994.

48 – In Article 28h.

49 – Such as the national rule in *Genius Holding*.

50 – I use the term ‘reimbursement’ here in a general sense, as distinct from the specific procedure for a ‘refund’ under the Eighth Directive.

51 – Case C-291/03 [2005] ECR I-0000, paragraph 17.

52 – For example, the insolvency of the supplier.