OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 11 January 2007 1(1)

Case C-146/05

Albert Collée

v

Finanzamt Limburg an der Lahn

(Reference for a preliminary ruling from the Bundesfinanzhof (Germany))

(Sixth VAT Directive – Article 28c(A)(a) – Intra-Community supply – Exemption – Evidential requirements)

I – **Introduction**

1. The present reference for a preliminary ruling concerns questions as to the interpretation of the Sixth VAT Directive (2) which relate to the evidential requirements needed in order for intra-Community supplies to be exempt from tax. The questions are closely related to those raised in Case C?409/04 *Teleosand Others* and Case C?184/05 *TwohInternational*, in which my Opinions are also being delivered today.

2. In the main proceedings before the Bundesfinanzhof (Federal Finance Court), Albert Collée as successor in title to Collée KG ('the applicant') is in dispute with the Finanzamt Limburg an der Lahn (Tax Office, Limburg an der Lahn; 'the defendant') about the recognition of an intra-Community supply as being exempt from tax. Although it is common ground that such supply took place, the applicant nevertheless failed to produce in good time the accounting evidence required under national law, despite being aware that an intra-Community supply had taken place.

II – **Legal framework**

A – *Community law*

3. 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, (3) a new Title XVIa (Transitional arrangements for the taxation of trade between Member States (Articles 28a to 28m)) was inserted into the Sixth Directive. Those provisions remain authoritative, since there has not yet been any final regulation of the taxation of commercial goods traffic in respect of trade between Member States.

4. According to Article 28c(A) of the Sixth Directive, intra-Community supplies between two

Member States are exempt from the tax. The provision states inter alia:

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

(a) supplies of goods, as defined in Articles 5 and 28a(5)(a), dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

…’

5. Article 22 of the Sixth Directive governs the formal obligations of persons liable for payment and provides in the version applicable in the present case (4) inter alia as follows:

‘2. (a) Every taxable person shall keep accounts in sufficient detail for value added tax to be applied and inspected by the tax authority.

…

3. (a) Every taxable person shall issue an invoice, or other document serving as invoice, in respect of goods and services which he has supplied or rendered to another taxable person or to a non?taxable legal person. Every taxable person shall also issue an invoice, or other document serving as invoice, in respect of the supplies of goods referred to in Article 28b(B)(1) and in respect of goods supplied under the conditions laid down in Article 28c(A). A taxable person shall keep a copy of every document issued.

…

4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. …

(b) The return shall set out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, where appropriate, and in so far as it seems necessary for the establishment of the basis of assessment, the total value of the transactions relative to such tax and deductions and the value of any exempt transactions.

(c) The return shall also set out:

– on the one hand, the total value, less value added tax, of the supplies of goods referred to in Article 28c(A) on which tax has become chargeable during the period.

– …

6. …

(b) Every taxable person identified for value added tax purposes shall also submit a recapitulative statement of the acquirers identified for value added tax purposes to whom he has supplied goods under the conditions provided for in Article 28c(A)(a) and (d), …

7. …

8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal

treatment for domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

B – *National law*

6. According to Paragraph 4(1)(b) of the German Umsatzsteuergesetz (Turnover Tax Law; 'UStG'), intra-Community supplies within the meaning of Paragraph 6a of the UStG which are among the transactions falling within Paragraph 1(1)(1) of the UStG are exempt from tax.

7. Paragraph 6a(1) of the UStG defines intra-Community supply and includes the following rule as to the burden of proof in subparagraph (3):

'Evidence of the requirements of Paragraph 6a(1) and (2) must be produced by the trader. The Bundesministerium der Finanzen [Federal Ministry of Finance] may, with the approval of the Bundesrat [Federal Council], specify by way of regulations how that evidence is to be produced by a trader.'

8. The Umsatzsteuer-Durchführungsverordnung (Turnover Tax Implementation Regulations; 'UStDV') are such regulations within the meaning of the second sentence of Paragraph 6a(3) of the UStG. They define in Paragraph 17a the documentary evidence required in respect of intra-Community supplies transported or dispatched:

'(1) With regard to intra-Community supplies (Paragraph 6a(1) of the [UStG]) a trader to whom these Regulations apply must produce supporting documents as evidence that the trader or the customer transported or dispatched the object of the supply to another part of the Community. This must be clear and easily verifiable from the supporting documents produced.

(2) Where a trader or customer transports the goods supplied to another part of the Community, the trader shall produce evidence thereof by means of the following:

1. duplicate invoice (Paragraphs 14 and 14a of the [UStG]);

2. standard documentary evidence from which the destination can be ascertained, in particular the delivery note;

3. acknowledgement of receipt by the customer or his agent; and

4. where the goods are transported by a customer, the customer's or his agent's guarantee of delivery of the goods to another part of the Community.'

9. In addition, Paragraph 17c of the UStDV lays down the obligation to produce accounting evidence in respect of an intra-Community supply:

'(1) With regard to intra-Community supplies (Paragraph 6a(1) and (2) of the [UStG]) a trader to whom these Regulations apply must produce accounting evidence in support of the requirements for exemption from tax including the customer's identification number for value added tax purposes. The requirements must be clearly and easily verifiable from the accounts.

(2) A trader shall routinely record the following:

1. the customer's name and address;

2. the customer's agent's name and address where a supply is made in the retail trade or in a

manner customary to the retail trade;

3. the customer's trade or occupation;

4. the standard description and quantity of the goods supplied or the type and scope of any other service equivalent to a supply on the basis of a contract for manufacture;

5. the date of supply or of any other service equivalent to a supply on the basis of a contract for manufacture;

6. the agreed payment or, with regard to taxation after collection of payment, the payment collected and date of collection;

7. the type and scope of any preparation or processing before transport or dispatch to another part of the Community (second sentence of Paragraph 6a(1) of the [UStG]);

8. transport or dispatch to another part of the Community;

9. the destination in another part of the Community.

…'

III – **Facts and questions referred for a preliminary ruling**

10. In 1994 Collée KG was the parent company of a GmbH (a German-law limited liability company; 'the GmbH') car dealership established in Germany, which sold cars as the authorised dealer for A-AG (a German-law public limited company). However the GmbH was entitled to claim commission from A-AG only in respect of sales to customers in the local area.

11. In the spring of 1994 the GmbH entered into a written contract with a Belgian car dealer B for the sale of 20 demonstration vehicles for a total price of DEM 1 018 200. B transferred the net purchase monies to the GmbH and collected the cars after the money had been received.

12. In order to claim commission from A-AG, the GmbH engaged car dealer S which was established in the local area in Germany, which agreed – in return for payment – nominally to purchase the demonstration vehicles and then to resell them to B. To that end S left blank invoice forms with the GmbH, which the latter used to issue invoices in the name of S for the supply of the demonstration vehicles to B. Thereupon S claimed in its provisional turnover tax returns for July, August and September 1994 the turnover tax for which it had been invoiced by the GmbH (DEM 152 730) as an input tax.

13. Following a special investigation in October 1994, the defendant refused to allow S to deduct the input tax on the ground that S had intervened only for form's sake as a 'man of straw'. After the applicant, who had initially treated the transaction as taxable domestic turnover, became aware of that, he cancelled the relevant account entries on 25 November 1994 and from then on booked the sale proceeds to the 'tax-free intra-Community supplies' account. He took this process into account accordingly in the provisional turnover tax return for November 1994.

14. By a turnover tax amendment notice for 1994 dated 12 February 1998, the Finanzamt (Tax Office) increased the applicant's taxable turnover by DEM 1 018 200. The applicant was refused a tax exemption in respect of the supply of the cars to B because the prescribed accounts had not been updated regularly and immediately after the relevant transaction had been completed.

15. The applicant's objection to and action against that refusal were unsuccessful. In the appeal

on a point of law, the applicant is applying for the amendment of the 1998 turnover tax amendment notice so that turnover in the sum of DEM 1 018 200 is treated as being exempt from tax. In essence he argues in support of his claim that although there had not yet been any invoices from the GmbH to B when the investigation of S's business began, it was clear from the business records of the GmbH as well as from account movements that an intra-Community supply to B had taken place.

16. The Bundesfinanzhof has therefore referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a tax authority entitled to refuse to allow an intra-Community supply, which undoubtedly occurred, to be exempt from tax solely on the ground that the taxable person did not produce the prescribed accounting evidence in good time?

(2) Does the answer to the question depend on whether the taxable person initially knowingly concealed the fact that an intra-Community supply had occurred?'

IV – **Legal assessment**

17. By its first question, the referring court is essentially concerned with whether the mere fact of a taxable person's non-compliance with a particular formal requirement – in this case the timely maintenance of accounting evidence – can lead to the refusal to allow a tax exemption in respect of an intra-Community supply. The second question puts this more precisely and aims to determine whether, in a particular case, a further material circumstance – namely whether the taxable person initially knowingly concealed the fact that an intra-Community supply had taken place – may in some circumstances have to be taken into account in the context of a decision as to whether to allow or refuse an exemption. Accordingly the second question puts the first into concrete terms and is closely connected with it. The two questions referred by the Bundesfinanzhof for a preliminary ruling must therefore be examined together.

18. The Bundesfinanzhof wishes to know, first, whether the Sixth Directive conflicts with a practice of the national tax authority whereby merely the overdue production of accounting evidence that an – undisputed – intra-Community supply has taken place is enough to result in the refusal of an exemption.

19. The principle of exemption of an intra-Community supply from tax is laid down in Article 28c(A)(a) of the Sixth Directive. The exemption from tax of intra-Community supplies is based on the premiss that during the transitional regime applicable to Community turnover tax, VAT as a tax on consumption should continue to be levied in the Member State in which final consumption takes place (the principle of the destination State). In order to avoid double taxation, therefore, any intra-Community supply that is the corollary of a taxable intra-Community acquisition is to be exempt from tax in the country of origin. (5)

20. The Sixth Directive does not however include any specific rules as to a taxable person's evidence of an intra-Community supply. (6) Article 22 merely lays down some general rules in respect of a taxable person's accounts, the form of invoices and of tax returns. As for the rest, Article 22(8) leaves it to Member States '[to] impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion'.

21. Further, Member States exempt the intra-Community supply of goods under Article 28c(A) ‘subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse’.

22. Thus Article 28c(A) and Article 22(8) simply set out aims and leave it to Member States to define more closely the formal evidential requirements as regards the circumstances in which exemption from VAT will apply.

23. The underlying premiss is that the Sixth Directive is not intended fully to harmonise Member States’ VAT systems. Rather, ‘[i]t is clear from the Sixth Directive as a whole that it is intended to establish a uniform basis so as to guarantee the neutrality of the system’. (7) As the Court has already held in *BP Supergas*, the Member States however ‘enjoy a relatively wide discretion in implementing specific provisions of the Sixth Directive’. (8) In that regard Advocate General Fennelly explained inter alia in the Opinions in *Molenheide* and in *Schmeink & Cofreth*, that it can be said, more generally, ‘that Member States enjoy … the responsibility for managing the entire VAT system’. (9)

24. In adopting measures to implement the provisions of VAT systems, Member States must – in addition to the aims prescribed by Article 28c(A) and Article 22(8) of the Sixth Directive – adhere also to the principle of proportionality. Thus the Court recently emphasised once again in *Halifax* that ‘the measures which the Member States may adopt under Article 22(8) of the Sixth Directive in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives’. (10)

25. It is further stated in that judgment that the measures adopted by Member States ‘may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation’. (11) That neutrality would be jeopardised if a supply were to be subject to double taxation because its exemption as an intra-Community supply is refused and the intra-Community acquisition also is taxed in the Member State of destination. (12)

26. As regards the specific application of the principle of proportionality, it is for the national court to determine whether the national measures are compatible with Community law. However, the Court is competent to provide the national court with all criteria for the interpretation of Community law which may enable it to determine the issue of compatibility for the purposes of the decision in the case before it. (13)

27. German law provides in Paragraphs 17a and 17c of the UStDV that the conditions for the occurrence of an intra-Community supply must be ‘clear and easily verifiable’ from documents as well as from the accounts. According to the case-law of the Bundesfinanzhof in relation to the second sentence of Paragraph 13(1) of the UStDV, which governs the evidential requirements in respect of an export supply to a third country and contains similar wording to that contained in Paragraphs 17a and 17c of the UStDV, that requirement is to be understood to mean that accounts must be updated ‘regularly and immediately after the relevant transactions have been completed’.

28. In the present case the applicant initially treated the supplies completed in July, August and September 1994 as a taxable domestic supply for accounting purposes. In November 1994, in other words approximately two months after the last supply was completed, the transactions were rebooked as tax-free intra-Community supplies and taken into account accordingly in the provisional turnover tax return for November 1994. Referring to the fact that the accounts required

for exemption were not made regularly and immediately, the Finanzamt refused to allow the applicant a tax exemption, despite the fact that it could be clearly established that an intra-Community supply had taken place.

29. The German Government takes the view in that regard that the requirements under national law as to documentary and accounting evidence satisfy the principle of proportionality. The right to tax exemption in respect of an intra-Community supply is not systematically undermined by those requirements. The obligation to produce accounting evidence that is laid down in Paragraphs 17a et seq. of the UStDV has a purpose that is expressly provided for in Article 28c(A) of the Sixth Directive, namely to collect tax in a reliable and as straightforward as possible a manner and to combat tax abuse. In the opinion of the Federal Government, Paragraphs 17a to 17c of the UStDV are required also in pursuit of that purpose, in particular for the prevention of so called 'VAT-carousel fraud'. In that regard it is immaterial whether the supply is indisputably an intra-Community supply or not.

30. It must first be stated in that regard that the present case does not concern the interpretation of the provisions of the directive with regard to the rules themselves that are laid down in Paragraphs 17a to 17c of the UStDV. Rather, what is at issue in this case are the case-law and administrative practice adopted in pursuance of those provisions, which prescribe that accounting evidence of intra-Community supplies must be produced 'regularly and immediately'.

31. As is apparent from Article 22(8) and Article 28c(A) of the Sixth Directive, Member States can legitimately require up-to-date evidence in order to ensure the correct levying and collection of the tax and for the prevention of fraud. (14) Member States can provide for appropriate protection against the risk of any loss in tax revenues, in respect of which it is open to them to lay down formal requirements, including certain obligations as to time, in order to counter tax evasion or VAT-carousel fraud.

32. It remains to be seen in this case whether it is possible for the statutory prescription of specific time-limits in respect also of the production of documentary and accounting evidence to serve the purpose of, on the one hand, facilitating the effective collection of taxes and, on the other, guaranteeing legal certainty.

33. First, the national legislation in question does not lay down a specific time-limit. Paragraphs 17a and 17c of the UStDV merely envisage generally that the requirements for exemption should be 'clear and easily verifiable' from the documents or accounts. The case-law of the Bundesfinanzhof expanding upon those terms, according to which the wording referred to is to be regarded as a temporal obligation and the required records must be maintained 'regularly and immediately after the relevant transactions have been completed', itself remains open to interpretation.

34. That is in itself problematic as regards the principle of legal certainty which is recognised in Community law, and with which, according to the case-law of the Court, the Member States must comply when transposing directives. (15) Furthermore, the Court emphasised in *Halifax* that the requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences. (16)

35. Further, even specific time-limits should be such as would fundamentally allow amendments to the categorisation of the supply as intra-Community to be made in the accounts at a later date, as it is entirely possible that such corrections can be based in particular cases on circumstances for which the taxable person is not responsible. Nor must the collection of taxes necessarily be made more difficult or be put at risk by such corrections. Particularly where time-limits are short, exceptional circumstances, a restitutional situation or similar provisions could ensure that in

exceptional cases a genuine intra-Community supply can still be recognised as such through a subsequent amendment to the accounts.

36. If no allowance were made for such exceptional circumstances, there would be an excessive restriction on precisely that right of exemption for which the Sixth Directive provides in relation to intra-Community supplies, so as to take account of the principle of fiscal neutrality. Even where an intra-Community supply is belatedly categorised as such, Advocate General Fennelly's statement on the possibility of rectification of VAT where wrongly accounted for in invoices for non-transactions applies: '[it] would, however, be incompatible with the principle of fiscal neutrality if national law were to make no provision for rectification'. (17)

37. For so long as the law makes no provision for correspondingly specific time-limits or for the possibility of subsequent amendments, it is necessary therefore, when applying Paragraphs 17a and 17c of the UStDV, to examine in individual cases whether the refusal to allow the categorisation of the supply to be amended subsequently is proportionate.

38. In that regard, as the Commission rightly points out, it is necessary first to clarify whether or not an intra-Community supply has in fact taken place. If it has, the Sixth Directive provides in principle for exemption from tax, whereas if it has not, the principle is that of tax liability. Accordingly the Court held in *Transport Service* that '[i]t is for the national court to determine whether the supply in question in the main proceedings meets those conditions. If such is the case, no VAT is payable on that supply.' (18) That fundamental principle of the directive cannot be disapplied simply as a result of Member States' formal requirements. Rather, it is possible to depart from that principle only where it is necessary to do so in order to achieve the aims provided for in the relevant rules of Community law. The Federal Government's view that, where accounting evidence has not been produced in good time, it is immaterial whether an intra-Community supply has actually taken place cannot therefore be upheld.

39. If it is established that an intra-Community supply has in fact taken place, exemption from tax can still be refused where the requisite national formalities have not been adhered to, provided that they serve the purpose of the directive, namely the prevention of tax evasion and the correct levying and collection of the tax, in particular the correct and straightforward application of the exemptions. Moreover such formal requirements may not go further than is necessary to attain those objectives.

40. Each case must therefore be examined individually as to whether the delay in producing evidence has consequences for the effectiveness of the levying and collection of tax or whether it is attributable to some manipulation which could in any way jeopardise the levying and collection of taxes. On the other hand, it is not necessary, in order to achieve the aims expressly referred to in Article 28c(A) and Article 22(8) of the Sixth Directive, for tax exemptions to be systematically refused whenever the production of accounting evidence is overdue.

41. If it is possible to establish beyond doubt that an intra-Community supply has taken place, then even though the necessary accounting evidence has not been produced in good time, the principle contained in the Sixth Directive of exemption for intra-Community supplies must be upheld and exemption granted. For an exemption to be refused, there must – in addition to an infringement of the formal requirements laid down by case-law and the tax authority – always be a further ground that corresponds with the provisions of the Sixth Directive, which in particular can consist of the fact that it is impossible or significantly more difficult to complete a tax assessment or its collection correctly, because the accounting evidence was delayed.

42. This leads simultaneously to the answer to the second question, by which the referring court seeks to ascertain whether the answer to the question depends on whether the taxable person

initially knowingly concealed the fact that an intra-Community supply had occurred.

43. Given the above remarks, it is equally the case that, in conformity with the provisions of the Sixth Directive on exemption for intra-Community supplies, what matters is to a large extent what the reasons are for the belated production of evidence and what the consequences of the delay are for the correct levying and collection of taxes. That is for the referring court to examine and determine in each case. The fact that a taxable person initially wanted to involve a domestic intermediary for form's sake, so that an intra-Community supply was not made directly, but only on subsequent further delivery, is not, by itself, decisive.

44. This is confirmed by the findings of the Court of Justice in *Schmeink & Cofreth* on the subsequent adjustment of VAT which has been improperly invoiced, the Court having held that '… 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 by the Member States upon the issuer of the relevant invoice having acted in good faith'. If it is clear that '[the issuer of the invoice] has in sufficient time wholly eliminated any risk of lower tax yields', then 'the requirement that [he] should demonstrate his good faith … is not necessary to ensure the collection of VAT or to prevent tax evasion'. (19)

45. That line of reasoning can be applied to cases where a supply is subsequently treated as an intra-Community supply and the accounts are amended accordingly. If recognition of an intra-Community supply were determined by whether a taxable person knowingly or unknowingly blocked its classification as such, he would – in certain circumstances – fail to qualify for an exemption even where there was no risk to the levying or collection of taxes as a result of his conduct. Refusal of an exemption would thus operate as a means of penalising the initial concealment of the intra-Community supply, which would exceed the legitimate purpose of the formal requirements.

46. As already set out, it is for the national court to determine individual cases in the light of those points, taking into account all relevant circumstances. In doing so, it must examine in particular, in accordance with the foregoing, whether the fact that the accounting evidence was not produced in good time resulted in any risk to the levying or collection of tax.

47. For example, some significance may be attached to the fact that it is generally more difficult to investigate a procedure the longer ago it took place. The stricter the stipulations as to time, the more important it is, on the other hand, for it to remain possible for subsequent amendments to be taken into account. In examining individual cases, account can also be taken of the extent to which the taxable person was himself responsible for the delay in producing the accounting evidence.

48. The peculiarity in the present case is the fact that the proposed 'man of straw' structure was not connected with possible tax evasion but was intended to help secure the commission. (20) Unlike typical scenarios, this was not a case of feigning an intra-Community supply that did not take place, (21) but – for reasons which are not relevant from the point of view of taxation – of concealing the fact that such a supply had taken place. Considering the process as a whole, involving the 'man of straw' would have had no effect on the amount of revenue collected. The intra-Community supply would simply have been transposed from the GmbH to S, which itself would then have deducted the input tax and could have claimed exemption in respect of the intra-Community supply.

49. With regard to possible responsibility for the delay in the production of accounting evidence, it would be necessary also to examine to what extent the applicant had to know that bringing in S as an intermediary would be adjudged by the tax authority to be a sham, or that S would be regarded

as a ‘man of straw’. For it cannot be concluded merely from the fact that S did not itself deliver the goods supplied to B or that the applicant issued the invoices in the name of S that such an ‘artificial’ construct cannot be assessed as taxable turnover. According to the case-law of the Court of Justice, assessing whether or not there has been taxable turnover depends only on objective criteria. On the other hand, neither the intention of the taxable person nor the purpose of the supply is relevant to the categorisation of a supply for tax purposes. (22)

50. Therefore the answer to the first question must be that the Sixth Directive precludes a practice by the national tax authority of refusing to allow an intra-Community supply which undoubtedly occurred to be exempt from tax solely on the ground that the taxable person did not produce the prescribed accounting evidence regularly and immediately after completion of the transactions.

51. Whether the taxable person wanted to shift the intra-Community supply to a later transaction in the supply chain by engaging a domestic ‘man of straw’, albeit that the tax authority did not recognise the intermediary’s involvement as a sham, is not the only determining factor (Question 2). Where a Member State has not laid down a statutory time-limit for the production of evidence, all the relevant circumstances of the particular case must be taken into account in determining whether an intra-Community supply is to be exempt from tax. In that regard the determining factors are whether the taxable person bears any responsibility for the delayed production of accounting evidence and whether the delayed production of accounting evidence could put the levying or collection of taxes at risk.

V – **Conclusion**

52. I therefore propose the following replies to the questions which the Bundesfinanzhof has referred for a preliminary ruling:

(1) 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 precludes a practice by the national tax authority of refusing to allow an intra-Community supply which undoubtedly occurred to be exempt from tax solely on the ground that the taxable person did not produce the prescribed accounting evidence regularly and immediately after completion of the transactions.

(2) Where a Member State has not laid down a statutory time-limit for the production of evidence, all the relevant circumstances of the particular case must be taken into account in determining whether an intra-Community supply is to be exempt from tax. In that regard the determining factors are whether the taxable person bears any responsibility for the delayed production of accounting evidence and whether the delayed production of accounting evidence could put the levying or collection of taxes at risk.

1 – Original language: German.

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; ‘the Sixth Directive’).

3 – OJ 1991 L 376, p. 1.

4 – See Article 28h as introduced by Directive 91/680 and amended by Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47).

5 – Case C-245/04 *EMAG Handel Eder* [2006] ECR I?3227, paragraph 29, and points 24 and 25 of my Opinion of 10 November 2005 in that case. See also my Opinion of today's date in Case C?409/04 *Teleos and Others* [2007] ECR I?0000, point 29.

6 – See, to that effect, also the order of 3 March 2004 in Case C?395/02 *Transport Service* [2004] ECR I?1991, paragraphs 27 and 28, and Case C?255/02 *Halifax and Others* [2006] ECR I?1609, paragraphs 90 and 91.

7 – Joined Cases C?286/94, C?340/95, C?401/95 and C?47/96 *Molenheide and Others* [1997] ECR I?7281, paragraph 42.

8 – Case C?62/93 *BP Supergas* [1995] ECR I?1883, paragraph 34.

9 – Opinion in *Molenheide* (cited in footnote 7), point 41, and Opinion in Case C?454/98 *Schmeink & Cofreth* [2000] ECR I?6973, point 18.

10 – *Halifax* (cited in footnote 6), paragraph 92. Similarly, with regard to the right to deduct, see also Joined Cases C?110/98 to C?147/98 *Gabalfrisa and Others* [2000] ECR I?1577, paragraph 52, *Molenheide* (cited in footnote 7), paragraph 48, and, with reference to Article 21(3) of the Sixth Directive, Case C?384/04 *Federation of Technological Industries and Others* [2006] ECR I?4191, paragraph 29.

11 – *Halifax* (cited in footnote 6), paragraph 92.

12 – See *EMAG Handel Eder* (cited in footnote 5), paragraph 29, as well as points 24 and 25 of my Opinion in that case.

13 – See inter alia Case C?55/94 *Gebhard* [1995] ECR I?4165, paragraph 19, and *Molenheide* (cited in footnote 7), paragraph 49.

14 – *Gabalfrisa* (cited in footnote 10), paragraph 52.

15 – *Federation of Technological Industries* (cited in footnote 10), paragraph 29.

16 – *Halifax* (cited in footnote 6), paragraph 72.

17 – Opinion in *Schmeink & Cofreth* (cited in footnote 9), point 20.

18 – Order in *Transport Service* (cited in footnote 6), paragraph 19.

19 – *Schmeink & Cofreth* (cited in footnote 9), paragraphs 58 and 60.

20 – Although, according to the distribution agreement, there would have been no entitlement to that commission; however, it is not clear to what extent the relevant contractual provisions were permissible under competition law at that time.

21 – As to such a scenario, see the Opinion in *Teleos* (cited in footnote 5).

22 – *Halifax* (cited in footnote 6), paragraphs 56 to 60; Joined Cases C?354/03, C?355/03 and C?484/03 *Optigen* [2006] ECR I-483, paragraphs 44 and 45; and Joined Cases C?439/04 and

C?440/04 *Kittel and Recolta Recycling* [2006] ECR I?0000, paragraph 41.