OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 11 January 2007 1(1)

**Case C?184/05**

**Twoh International B.V.**

**v**

**Staatssekretaris van Finaciën**

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

(Sixth VAT Directive – Article 28c (A) (a) – Intra-Community supply – Exemption – Requirements for proof – Directive 77/799/EEC – Regulation (EEC) No 218/92)

## I – **Introduction**

1. .By this order for reference the Hoge Raad der Nederlanden (Supreme Court of the Netherlands, 'Hoge Raad') seeks the interpretation of the Sixth VAT Directive (2) and other legal instruments which regulate mutual assistance by taxation authorities. Essentially it concerns the issue of whether the taxation authority is obliged to obtain information in another Member State when a taxable person cannot itself prove that it has carried out a tax-exempt intra-Community supply because the person acquiring the goods, who is resident in another Member State, has not sent him the required declarations or documents. The issues are closely connected to the issues raised by Cases C?409/04 *Teleos and Others* and C?146/05 *Collée* in which I am also delivering Opinions today.

## II – **Legal context**

### A – *Community law*

2. Council Directive 91/680 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) inserted a new Title XVIa (Transitional arrangements for the taxation of trade between Member States; Article 28a to 28m) in the Sixth Directive. These provisions still apply, since to date no definitive rules on the taxation of the movement of goods between undertakings in trade between Member States have been enacted.

3. Article 28c (A) of the Sixth Directive regulates exempt supplies of goods. According to this:

'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'.

…'

4. Article 22 of the Sixth Directive governs the formal obligations of the person liable for payment and in the version applicable to the present case (4) provides, 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 all goods and services supplied by him to another taxable person, and shall keep a copy thereof..( 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), …

…

The recapitulative statement shall set out:

– …

– the number by which each person acquiring goods is identified for purposes of value added tax in another Member State and under which the goods were supplied to him…

(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.'

5. According to Article 1(1) of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (5) that directive applies in particular to information in relation to the assessment of value added tax. Article 2(1) of Directive 77/799 reads:

'The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1 (1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilised, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.'

6. According to Article 3 of the directive, in certain circumstances Member States must exchange information automatically. Under Article 4, Member States are also supposed to provide information to each other spontaneously in particular circumstances.

7. Article 4 of Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) (6) provides that the competent authority of each Member State is to maintain an electronic database in which to store and process the information that it collects in accordance with Article 22 (6) (b) of Directive 77/388/EEC. From those data the Member States are to inform each other of certain information or may even have direct access to the relevant information.

8. Article 5 of Regulation No 218/92 governs the exchange of further information in specific cases as follows:

'(1) Where the information provided under Article 4 is insufficient, the competent authority of a Member State may at any time and in specific cases request further information. The requested authority shall provide the information as quickly as possible and in any event no more than three months after receipt of the request.

(2) In the circumstances described in paragraph 1 the requested authority shall at least provide the applicant authority with invoice numbers, dates and values in relation to individual transactions between persons in the Member States concerned.'

9. However, according to Article 7 of Regulation No 218/92, the requested State need provide such information only if:

'– the number and the nature of the requests for information made by the applicant authority within a specific period of time do not impose a disproportionate administrative burden on that requested authority,

– that applicant authority exhausts the usual sources of information which it can use in the circumstances to obtain the information requested, without running the risk of jeopardizing the achievement of the desired end,

– that applicant authority requests assistance only if it would be able to provide similar assistance to the applicant authority of another Member State.'

10. With effect from 1 January 2004, Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (7)consolidated the provisions relating to mutual assistance on VAT. Article 5 of the regulation provides for requests for information. Article 40 of Regulation No 1798/2003 contains a similar proviso to the provision of information to the provisos contained in the second sentence of Article 2(1) of Directive 77/799 and Article 7 of Regulation No 218/92.

B – *National law*

11. Under Article 9(2) (b) of the Wet op de omzetbelasting (Law on turnover tax) 1968 in conjunction with point 6 in Table II(a) of that Law there is a nil rate of tax for intra-Community supplies. Under Article 12 of the Uitvoeringsbesluit omzetbelasting 1968 (Implementing Regulation on turnover tax) the exemption applies if the preconditions for it are apparent from the accounts or documents.

12. Section 4.3 of the Decision of the Staatssecretaris van Financien of 20 June 1995, No VB 95/2120 ('Notice 38') (8) imposes the following conditions in relation to the proof of an intra-Community supply in relation to collect transactions:

'If goods are supplied 'ex-works' or 'ex-warehouse' to a foreign purchaser (collect transactions) the intra-Community nature of the consignment may not be apparent from the consignment note or from the supplier's transport administration records. Nevertheless, circumstances are conceivable in which the supplier may be sure that the foreign purchaser will transport the goods to another Member State. In addition to the existing system of administration documents and records, the purchaser in question must be an established purchaser – save where the supplier is aware that intra-Community supplies by him to that purchaser have led to problems – and that purchaser must also have given the following declaration. That declaration, to be signed by the person who takes delivery of the goods supplied, shall contain at least the following details: the purchaser's name and, if the purchaser does not take delivery of the goods personally, the name of the person who does so on his behalf, the registration number of the vehicle with which the goods are to be transported, the number of the invoice on which the delivered goods are specified, the place to which the collector of the goods is to transport them and an acknowledgement that the purchaser is prepared to provide the tax authority with any further information concerning the destination of the goods. A model form of declaration is annexed hereto.

In the case of collect transactions in which the purchaser is not an established purchaser and in which the goods are paid for in cash and where the supplier is not in possession of documents confirming the intra-Community nature of the consignment, i.e. cases in which he has, apart from the invoice issued in the name of a foreign purchaser (on which the foreign VAT identification number of the purchaser is indicated), no other documents indicating the intra-Community nature of the supply, the supplier will be unable, without more evidence, to justify a nil rate. In those circumstances, the supplier can avoid the risk of additional assessment by charging Netherlands VAT to the purchaser. The purchaser must, when he transports the goods to another Member State, declare that to the Netherlands taxation authority. On that declaration he will be able to deduct the Netherlands VAT that has been charged.'

## III – **Facts and question referred**

13. By means of an additional assessment Twoh International B.V ('Twoh') was assessed to turnover tax plus a penalty in respect of supplies which it had carried out in 1996. As intra-Community supplies the relevant supplies were exempt from tax in Twoh's opinion. Nevertheless the tax authority refused the exemption since Twoh could not provide sufficient evidence of the dispatch or transportation of the goods to another Member State. In response, Twoh argued that on the basis of Directive 77/799 and Regulation No 218/92 the Netherlands tax authorities had to obtain information to confirm the intra-Community nature of the supplies from the tax authorities of the Member State of destination. The taxation authority rejected that argument. Twoh was largely unsuccessful in relation to the main claim at first instance.

14. By order of 22 April 2005 in an appeal on a point of law, the Hoge Raad refers the following question to the Court for a preliminary ruling under Article 234 EC:

Is Article 28c A (a) of the Sixth Directive – in conjunction with the mutual assistance directive [77/799] and the regulation [No 218/92] – to be interpreted as meaning that, if no relevant information has been provided voluntarily by the Member State of arrival, the Member State of the dispatch or transport of the goods must request the alleged Member State of arrival of those goods to provide information and must take the results of that request into account when examining the evidence of the dispatch or transport of the goods?

15. Twoh, the French Government, Ireland, the Italian, Netherlands, Polish and Portuguese Governments and the Commission of the European Communities have submitted observations in the proceedings before the Court.

## IV – **Legal appraisal**

16. As I have stated in my Opinion today in the *Teleos and Others* case exemption of an intra-Community supply under Article 28c (A)(a) of the Sixth Directive is subject to the condition that the goods supplied are dispatched or transported to another Member State and have consequently physically left the Member State of origin. (9)

17. It should be noted that the Sixth Directive confers a very wide scope of application to value added tax and that, as exceptions to that principle, exemptions from the tax must be interpreted restrictively. (10) A person wishing to rely on such an exception must prove the existence of the preconditions for its application. As a precondition for the exemption from tax of intra-Community supplies, the supplier's obligation to adduce evidence of the transportation of the goods from the Member State of origin cannot be waived, in order to ensure that the Sixth Directive is applied properly.

18. As is apparent from the introductory sentence of Article 28c (A) of the Sixth Directive it is for the Member States to lay down the formal requirements for evidence of the preconditions for the exemption of an intra-Community supply. (11) Under Article 22(8) of the Sixth Directive Member States may also impose other obligations on the taxable person which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud. (12) However, in exercising the discretion conferred upon them by the Sixth Directive, Member States must comply with the requirements of the EC Treaty, the rationale of the directive itself and general principles of law such as the principle of proportionality. (13)

19. Under Netherlands law the evidential requirements for collect transactions are formed in detail in Notice 38. Neither the referring court nor one of the parties to the proceedings has expressed any doubt as to the compatibility of those requirements with the Sixth Directive or general principles of law.

20. According to the trial judge's findings in the main proceedings Twoh did not succeed in adducing evidence of the purchaser's transportation of the goods supplied from the Netherlands to another Member State which complied with the requirements of Notice 38. Twoh argues, however, that the tax authority is obliged, pursuant to Directive 77/799 and Regulation No 218/92, to obtain information from the authorities of the Member State of destination in order to confirm the cross-border nature of the supplies.

21. That argument cannot be accepted.

22. Directive 77/799 is intended to promote administrative assistance and the exchange of information between the Member States in order to combat tax fraud. (14) That is also the objective of Regulation No 218/92, which supplements Directive 77/799 in the field of indirect taxation. (15) The system of exchange of information introduced by Regulation No 218/92 was particularly necessary as a result of the establishment of the internal market and the associated abolition of border controls and is supposed to prevent tax revenue losses in relation to intra-Community trade during the application of the Sixth Directive's transitional provisions. (16)

23. These legal instruments are therefore primarily aimed at cooperation between the taxation authorities of the Member States and do not confer any rights on the individual save in one instance in relation to information about value added tax identification numbers pursuant to Article 6(4) of Regulation No 218/92. The purpose of the cross-border exchange of information is not to relieve taxable persons of their obligations to provide the evidence which they are obliged to provide in accordance with the Sixth Directive. The information enables the authorities to check taxable persons' statements and evidence but should not replace them. It is apparent from the very wording of Article 2(1) of Directive 77/799 and of Article 5 of Regulation No 218/92 that the authorities of a Member State *may* request information but do not have to request it.

24. In addition, as the Commission emphasises, the authorities of the requested State are not obliged to forward information in certain circumstances. Thus, pursuant to Article 7 of Regulation No 218/92, information need be forwarded only if answering the number and the nature of the requests for information made by the applicant authority within a specific period of time does not impose a disproportionate administrative burden on that requested authority and if the applicant authority has exhausted its usual sources of information. (17)

25. If there were always an obligation to obtain information about the intra-Community acquisition in the Member State of destination where the party who effected the intra-Community supply is unable to produce evidence, then the number of requests could increase to such an extent that the requested authorities reject requests under Article 7 of Regulation No 218/92 on grounds of

enormous administrative burden.

26. Quite apart from such practical considerations, information from the taxation authorities of the Member State of destination is not unreservedly appropriate as a means of adducing evidence of the exemption of an intra-Community supply under Article 28c (A)(a) of the Sixth Directive.

27. As I stated in my Opinion in *Teleos* the taxation authorities of the Member State of origin and those of the Member State of destination independently check whether the preconditions for the exemption of an intra-Community supply or for the taxation of an intra-Community acquisition of goods are met. (18) The fact that the intra-Community acquisition of goods has been declared in the Member State of destination thus constitutes only an indication that those goods have actually physically left the Member State of origin. If corresponding information is available to the authorities of the Member State of origin, because the authorities of the Member State of destination have provided it spontaneously, (19) that may if necessary provide additional support for the claim for the exemption of the supply. (20)

28. I do not deny that, according to the view expressed here, a taxable person in Twoh's situation is refused exemption of the supply although the only reason he cannot prove the transportation out of the country is the default of his business partner. However if the supplier leaves it to the person acquiring the goods to take the goods out of the country then he knowingly takes the risk that he will lack the relevant evidence if the person acquiring the goods does not make them available to him. In this situation the taxation authority cannot help out. Rather, the supplier must rely on his business partner and obtain the evidence from him, claiming VAT from him if he does not produce evidence of transportation from the State of origin. The supplier can protect himself against such risks by obtaining security of the same amount as the VAT and releasing it only as and when the transportation documents are produced.

29. Accordingly, in a situation such as the present, a tax authority is not obliged to request information from the authorities of another Member State as to whether tax declarations have been made there in relation to the intra-Community acquisition of certain goods.

## V – **Conclusion**

30. In light of the foregoing considerations, I propose that the Court should reply as follows to the question referred by the Hoge Raad:

Persons seeking the exemption of an intra-community supply under Article 28c (A)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment must prove that the person acquiring the goods has obtained the right to deal as owner with the goods supplied, which are dispatched or transported to another Member State, and that the goods have consequently physically left the Member State of origin.

The tax authorities of the State of origin are not obliged to request information from the tax authorities of the State of destination under Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation and Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) where the taxable person himself has not been able to adduce evidence of the dispatch or transportation of the goods.

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 in the version inserted by Directive 91/680/EEC and amended for the last time by Council 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 1991 L 102, p. 18).

5 – OJ 1977 L 336, p. 15, in the version of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1). Since Council Directive 2003/93/EC of 7 October 2003 amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 2003 L 264, p. 23) came into force Directive 77/799 no longer applies in relation to value added tax.

6 – OJ 1992 L 24, p. 1.

7 – OJ 2003 L 264, p. 1.

8 – V-N 1995, p. 2324.

9 – See in particular paragraphs 45 and 59 of the Opinion of 11 January 2007 in Case C?409/04 *Teleos and Others* [2006] ECR I?0000.

10 – Opinion in *Teleos and Others* (cited in footnote 9, paragraph 63) with further references.

11 – See also in relation to this the order of 3 March 2004 in Case C?395/02 *Transport Service* [2004] ECR I?1991, paragraph 27 and 28 and Case C?255/02 *Halifax and Others* [2006] ECR I?1609, paragraph 90 and 91. More details on this are found in paragraphs 20 et seq. of my Opinion of 11 January 2007 in Case C?146/05 *Collée* [2007] ECR I?0000.

12 – *Halifax and Others* (cited in footnote 11, paragraph 92).

13 – See also in relation to this on the right to deduct Joined Cases C?110/98 to C?147/98 *Gabalfrisa and Others* [2000] ECR I?1577, paragraph 52; and Joined Cases C?286/94, C?340/95, C?401/95 and C?47/96 *Molenheide and Others* [1997] ECR I?7281, paragraph 48; and in relation to Article 21(3) of the Sixth Directive Case C?384/04 *Federation of Technological Industries and Others* [2006] ECR I?4191, paragraph 29.

14 – See the first recital to Directive 77/799. The revision resulting from Regulation No 1798/2003 has not changed anything about this objective (see the first recital to Regulation No 1798/2003).

15 – See the fourth recital to Regulation No 218/92.

16 – See the first to third recitals to Regulation No. 218/92.

17 – See also the second sentence of Article 2(1) of Directive 77/799.

18 – Opinion in *Teleos and Others* (cited in footnote 9, paragraph 90).

19 – In the present case it is undisputed that no corresponding information had been forwarded spontaneously and was available to the Netherlands authorities. It is also doubtful whether statements by the Member State of destination as to the taxation of intra-Community acquisitions

of goods are included in the information which must be provided automatically. The Member State of destination does not have to provide the information necessary for the exemption from tax of the intra-Community supply to the Member State of origin. On the contrary, pursuant to Article 4 of Regulation No 218/92 the Member State of origin must provide the information that it collects in accordance with Article 22 (6) (b) to the Member State of destination (that is the supplier's statements in relation to the person acquiring the goods) so that the Member State of destination's authorities can ensure the taxation of the acquisition.

20 – See Opinion in *Teleos and Others* (cited in footnote 9, paragraph 91).