OPINION OF ADVOCATE GENERAL

TRSTENJAK

delivered on 19 April 2007 1(1)

Case C?73/06

Planzer Luxembourg Sàrl

v

Bundeszentralamt für Steuern

(Reference for a preliminary ruling from the Finanzgericht Köln (Cologne Finance Court) (Germany))

(Sixth VAT Directive – Article 17(3) and (4) – Refund of VAT– Eighth VAT Directive – Refund of VAT to taxable persons not established inside the country – Articles 3(b) and 9, second paragraph – Annex B – Certificate of status as a taxable person – Scope – Thirteenth VAT Directive – Refund of VAT to taxable persons not established in Community territory – Article 1(1) – Meaning of place of business)

I – **Introduction**

1. A transport undertaking registered in the Grand Duchy of Luxembourg made several applications to the German tax authorities for refunds of the value added tax ('VAT') it had paid in Germany on purchases of motor fuel.

2. Each application was accompanied by a certificate issued by the Luxembourg tax authorities in accordance with Annex B to the 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, (2) according to which the undertaking concerned was liable to VAT under a Luxembourg tax number.

3. However, the German tax authorities dismissed the claims for reimbursement, on the ground that the undertaking's place of management was in Switzerland, not Luxembourg.

4. In this reference for a preliminary ruling, the Finanzgericht Köln asks the Court whether a certificate of the above kind creates an irrebuttable presumption that the undertaking is established in the Member State issuing the certificate.

5. If the answer to that question is in the negative, the Finanzgericht Köln considers that it must be determined whether that undertaking is established outside the territory of the European Community, in which case it is not entitled, under German law, to a refund of the VAT paid on purchases of motor fuel made in Germany, and therefore asks the Court to indicate the

interpretation to be given to the concept of ‘business’ in Article 1(1) of the Thirteenth Council Directive 86/560/EEC of 17 November 1986 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 Community territory. (3)

II – **Legal framework**

A – *Applicable Community law*

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 (‘Sixth Directive’) (4)

6. According to Article 4 (1) and (2) of the Sixth Directive 77/388/EEC:

‘“Taxable person” shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions …

7. Article 17(2) to (4) of that Directive, in the version applicable at the time of the facts, (5) provides as follows:

‘2. 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 liable for the tax within the territory of the country;

…

3. Member States shall also grant to every taxable person the right to a 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 relating to the economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if they had occurred in 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 Directive 79/1072/EEC …,

– to taxable persons who are not established within the territory of the Community, in accordance with the detailed implementing rules laid down in Directive 86/560/EEC …’.

2. 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 ('Eighth Directive')

8. Article 1 of that directive provides as follows:

'For the purposes of this Directive, "a taxable person not established in the territory of the country" shall mean a person as referred to in Article 4(1) of Directive 77/388/EEC who, during the period referred to in the first and second sentences of the first subparagraph of Article 7(1), has had in that country neither the seat of his economic activity, nor a fixed establishment from which business transactions are effected, nor, if no such seat or fixed establishment exists, his domicile or normal place of residence, and who, during the same period, has supplied no goods or services deemed to have been supplied in that country, with the exception of:

(a) transport services and services ancillary thereto, exempted pursuant to Article 14(1)(i), Article 15 or Article 16(1), B, C and D of Directive 77/388/EEC;

…'

9. According to Article 2 of the same directive:

'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 …'

10. Article 3 of the Eighth Directive provides that:

'To qualify for refund, any taxable person as referred to in Article 2 who supplies no goods or services deemed to be supplied in the territory of the country shall:

…

(b) produce evidence, in the form of a certificate issued by the official authority of the State in which he is established, that he is a taxable person for the purposes of value added tax in that State …

…'

11. Article 5 of the said directive provides that:

'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 Directive 77/388/EEC as applicable in the Member State of refund.

…'.

12. Article 6 of the Eighth Directive provides as follows:

'Member States may not impose on the taxable persons referred to in Article 2 any obligation, in addition to those referred to in Articles 3 and 4, other than the obligation to provide, in specific cases, the information necessary to determine whether the application for refund is justified.'

13. The second paragraph of Article 9 of the Eighth Directive provides that:

‘The certificates referred to in Article 3(b) and in Article 4(a), establishing that the person concerned is a taxable person, shall be modelled on the specimens contained in Annex B.’

3. Thirteenth Council Directive 86/560/EEC of 17 November 1986 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 Community territory (‘Thirteenth Directive’)

14. According to Article 1 of that directive:

‘For the purposes of this Directive:

1. “A taxable person not established in the territory of the Community” shall mean a taxable person as referred to in Article 4(1) of Directive 77/388/EEC who, during the period referred to in Article 3(1) of this Directive, has had in that territory neither his business nor a fixed establishment from which business transactions are effected, nor, if no such business or fixed establishment exists, his permanent address or usual place of residence, and who, during the same period, has supplied no goods or services deemed to have been supplied in the Member State referred to in Article 2, with the exception of:

(a) transport services and services ancillary thereto, exempted pursuant to Article 14(1)(i), Article 15 or Article 16(1), B, C and D of Directive 77/388/EEC;

…’.

15. According to Article 2 of the Thirteenth Directive:

‘1. Without prejudice to Articles 3 and 4, each Member State shall refund to any taxable person not established in the territory of the Community, subject to the conditions set out below, any value added tax charged in respect of services rendered or moveable property supplied to him in the territory or the country by other taxable persons 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) and (b) of Directive 77/388/EEC or of the provision of services referred to in point 1(b) of Article 1 of this Directive.

2. Member States may make the refunds referred to in paragraph 1 conditional upon the granting by third States of comparable advantages regarding turnover taxes.

…’

16. Article 4 of the same directive provides as follows:

‘1. For the purposes of this Directive, eligibility for refunds shall be determined in accordance with Article 17 of Directive 77/388/EEC as applied in the Member State where the refund is paid.

2. Member States may, however, provide for the exclusion of certain expenditure or make refunds subject to additional conditions.

…’

B – *Relevant provisions of national law*

17. Under Paragraph 18(9) of the Umsatzsteuergesetz 1993 (Law on Turnover Tax 1993, ‘UStG

1993') (6) read in conjunction with Paragraph 59 et seq. of the Umsatzsteuer-Durchführungsverordnung 1993 (VAT Implementing Regulation; 'the UStDV'), (7) taxable persons not established in the territory of the Community are not entitled to a refund of input tax on purchases of motor fuel.

III – **The main proceedings and the reference for a preliminary ruling**

18. Planzer Luxembourg Sàrl ('Planzer Luxembourg') has its registered office in Frisange (Grand Duchy of Luxembourg). Its sole shareholder is Planzer Transport AG, which is established in Dietikon (Switzerland).

19. At the applicant's registered office, Mr Deltgen runs Helvetia House, the firm from which Planzer Luxembourg rented its offices. He had also, as the sole shareholder's representative, arranged for Planzer Luxembourg's incorporation. Planzer Luxembourg is managed by two employees of Planzer AG. One resides in Switzerland and the other in Italy. Thirteen other companies, including three subsidiaries of Swiss haulage businesses, also have their registered offices at the same address as Planzer Luxembourg.

20. In 1997 and 1998, Planzer Luxembourg lodged two claims with the German tax authorities for refunds of VAT paid in Germany on the purchase of motor fuel. The first was in an amount of DEM 11 004.25 for 1996 and the second was in the amount of DEM 16 670 for 1997. Each application was accompanied by a certificate issued by the Luxembourg tax authorities modelled on the specimens contained in Annex B to the Eighth Directive.

21. That certificate indicated that Planzer Luxembourg was liable to value added tax under a Luxembourg tax number.

22. However, having been informed by its foreign information office that Planzer Luxembourg did not have a telephone line at the address stated in the certificate, the German tax authorities came to the conclusion that Planzer Luxembourg had not adduced evidence to show that the seat of its management was situated in Luxembourg and rejected the claims for refund on the ground that the conditions laid down in national law for such a refund had not been fulfilled.

23. The German legislation is based on the option made available by Article 4(2) of the Thirteenth Directive, and Paragraph 18(9) of the UStG thus excluded from refund claims in respect of motor fuel made by taxable persons not established in Community territory.

24. Planzer Luxembourg lodged objections to those decisions. It submitted a further certificate according to which it is a commercial company liable to Luxembourg direct taxation and argued that the two directors, together with Mr Deltgen and one other person, responsible for the company's administration and accounts, were working in Luxembourg; that five persons work part-time as drivers at the registered office; that it had a telephone line, as was apparent from its letterhead; that goods vehicles registered in Luxembourg are used for the transport of air freight; and that its accounts are drawn up at its registered office in Luxembourg.

25. By decisions dated 1 July 1999, the German tax authorities dismissed the objections on the ground that the company's place of management was in Switzerland and not Luxembourg.

26. Planzer Luxembourg brought an action against those decisions.

27. By judgment of 26 October 2001, taking the view that Luxembourg constituted the main starting point for Planzer Luxembourg's operations in relation to its Swiss parent company, and on the basis that its registered office was in Luxembourg, the Finanzgericht Köln upheld that action.

28. By judgment of 22 May 2003, the Bundesfinanzhof (Federal Finance Court), set aside the above judgment and referred the case back to the Finanzgericht Köln on the ground that that court had wrongly concluded, on the basis that Planzer Luxembourg's registered office was in Luxembourg, that the company was established there.

29. In its order for reference, the Finanzgericht Köln points out that the central point in this case is to determine whether Planzer Luxembourg is established outside the territory of the Community, in which case it is not entitled, under national law, to a refund of the VAT paid on purchases of motor fuel made in Germany. In that court's view, the vital question is the legal effect of the certificates produced by Planzer Luxembourg, which are modelled on the specimens contained in Annex B to the Eighth Directive. The Finanzgericht Köln accepts that such certificates raise an irrebuttable presumption that the plaintiff in the main proceedings is a taxable person for the purposes of VAT but is uncertain whether any binding effect or an irebuttable presumption that the undertaking is established in the State issuing the certificates may be inferred from them. If that question is answered in the negative, it asks whether the term 'business' in Article 1(1) of the Thirteenth Directive should be construed as meaning the place where the company has its registered office and where management decisions are taken (namely Luxembourg) or the place where decisions vital to normal everyday operations are taken (namely Switzerland).

30. The Finanzgericht Köln decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Does an undertaking's certificate according to the specimen form in Annex B to the 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 have binding effect or create an irrefutable assumption that the undertaking is established in the State issuing the certificate?

2. If the first question should be answered in the negative:

Should the term "business" in Article 1(1) of the Thirteenth Directive be construed as meaning the place where the company has its registered office

or should it mean the place where management decisions are taken

or is the crucial factor the place where decisions vital to normal everyday operations are taken?'

IV – **Observations submitted to the Court**

31. Written observations have been submitted by Planzer Luxembourg, the German, French, Italian and Luxembourg Governments and by the Commission.

A – *The first question*

32. In the view of Planzer Luxembourg and the Luxembourg Government, the answer to the first question should be in the affirmative.

33. Planzer Luxembourg starts from the principle that the certificate submitted has binding effect or, at the very least, raises an irrebutable presumption that it is established in the Member State

which issued the certificate. An objection by a Member State to a certificate issued by another Member State would run counter to the objective of harmonising legal provisions and the simplification of the movement of goods within the Community.

34. According to the Luxembourg Government, the question of the place of establishment, in so far as that place is to be regarded as the place of business or a fixed establishment, is secondary inasmuch as it is but one of several criteria which may be applied to determine whether or not a taxable person is established within the meaning of the Eighth Directive. The certificate referred to in Article 3(b) of the Eighth Directive is intended to certify that the taxable person is registered as such in the Member State which issued the certificate. It is therefore unthinkable that the authorities of another Member State might legitimately contest what has been certified.

35. The Commission's position is close to that of Planzer Luxembourg and the Luxembourg Government. It considers that harmonious co-operation and reciprocal confidence between national tax authorities justifies the requirement of mutual recognition of certificates issued by the competent national authorities, all the more so as an authority which doubted the accuracy of the contents of such a certificate could avail itself of the specific instruments provided for in Council Regulation (EC) No 1798/2003 (8) ('Regulation No 1798/2003'). The Commission points out that that possibility should be used only in cases of serious doubt. If the Member State to which the enquiry is addressed verifies the facts underlying its certificate and confirms them, the Member States to which the claim for refund has been made have no alternative but to grant that refund.

36. On the other hand, the German, Italian and French Governments consider that the certificate merely proves that, in the Member State which issued the certificate, the taxable person is regarded by the authorities as being liable to VAT but in no way proves that he is established there.

37. The French Government adds that if the Member State where the refund is paid has doubts as to whether the undertaking is established in another Member State, it should be able to raise an objection to the certificate issued by the Member State of establishment. However, such an objection should be possible only after the Member State where the refund is paid has availed itself of the procedures for administrative co-operation. (9)

B – *The second question*

38. Planzer Luxembourg considers that its place of business within the meaning of Article 1(1) of the Thirteenth Directive is the place where the company has its registered office. If the Court of Justice does not agree with that point of view, the place of business should be the place where management decisions are taken.

39. The Luxembourg Government considers that since the first question should, in its view, be answered in the affirmative, there is no need to answer the second question.

40. The German, French and Italian Governments consider that the concepts of place of business and registered office should not be confused and refer to the Court's case-law on Article 9(1) of the Sixth Directive (10) according to which the concepts of the place of business and of a fixed establishment used in Article 1(1) of the Thirteenth Directive imply a sufficient degree of permanence and an appropriate structure, from both a human and a technical point of view, to make it possible to carry on the activities in question in an autonomous manner.

41. The German Government also refers to Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. (11) According to that provision, the place of the registered office is to be presumed to be the centre of its main interests only in the absence of

proof to the contrary.

42. The German Government points out that, in the specific case submitted by the Finanzgericht Köln, Planzer Luxembourg could have a registered office in the territory of the Community but not its place of business. It argues that, on the facts as presented by the national court, the undertaking in question does not carry on an economic activity at the place of its registered office in Community territory (Luxembourg). The registered office was transferred from the territory of a non-member State (Switzerland) to Community territory in order to circumvent the exclusion of VAT refunds on purchases of motor fuel.

43. The German Government proposes by way of answer that a place of 'business' 'implies that the undertaking should carry on activities specific to that place or departing from that place with a minimum of human and material resources'.

44. The French Government proposes by way of answer that a place of 'business' 'should involve a sufficient degree of permanence and that economic transactions should be carried out in respect of which refund of input tax is claimed'.

45. The Italian Government proposes that the place of 'business' should refer to the place, which may be distinct from domicile or habitual residence, in which decisions governing normal everyday operations are taken.

46. Having regard to the answer it proposes to the first question, the Commission considers that there is no need to answer the second question. Very much in the alternative, it puts forward arguments similar to those of the German French and Italian Governments and proposes that the answer should be that 'when an undertaking such as the plaintiff (Planzer Luxembourg), which has its registered office in a Member State and which has its administration, has offices, pays its heating bills, may be contacted by telephone, registers the lorries it uses to provide its services and enters into contracts of employment, is registered for VAT and direct taxation, and takes economic management decisions in that State, that undertaking has its business or a fixed establishment from which its operations are carried out within the meaning of Article 1 of the Eighth Directive'.

V – **Assessment**

A – *The first question*

47. Since the certificate is, according to Article 3(b) of the Eighth Directive, issued 'by the official authority of the State in which [the taxable person] is established', there is a strong presumption that the taxable person is actually established in the State which issued the certificate.

48. None the less, that certificate proves only that the person concerned is, to employ the form of words used therein, 'a taxable person for the purposes of value added tax', but not that the taxable person is really established in the issuing State. Before issuing the certificate in question, the official authority does not verify whether that is really the case. The certificate is thus a condition which is necessary, but not sufficient, in order to benefit from the refund procedure laid down in the Eighth Directive.

49. The good faith of the authority which issued the certificate is not in doubt. That authority clearly cannot carry out a thorough verification of whether the applicant is really established in its territory each time a certificate is sought.

50. It is more a question of not totally excluding the possibility that a taxable person, that is to say

a person carrying out an economic activity, (12) might, having regard, in particular, to the difference in VAT rates between the Member States, claim to be established in the Member State which was most advantageous to him. (13)

51. Since the abolition of fiscal borders on 1 January 1993, enabling undertakings to transport goods within the territory of the Community without having to comply with formalities at internal borders, the prevention of fraud has become a subject of the highest concern. (14)

52. It must be emphasised here that although the purpose of the Eighth Directive, according to the fourth recital in the preamble thereto, is to make progress towards the 'effective liberalisation of the movement of persons, goods and services', the sixth recital in the preamble states that 'certain forms of tax evasion or avoidance' should be prevented.

53. Article 6 of the Eighth Directive also expressly provides that taxable persons may be required to 'provide, in specific cases, the information necessary to determine whether the application for refund is justified'.

54. The French Government and the Commission consider that, in case of doubt, the Member State making the refund is required to have recourse to the procedures for exchanging information provided for in Regulation No 1798/2003 on administrative cooperation in the field of value added tax. Unlike the French Government, the Commission even considers that the information obtained through that co-operation is binding on the refunding Member State.

55. The other intervening governments, namely those of Luxembourg, Germany and Italy, do not mention such cooperation, which suggests that they do not regard it as binding, regardless of the weight which they accord to the certificate at issue.

56. The purpose of Regulation No 1798/2003 is to combat evasion. In the first two recitals in the preamble, it points out that tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation. That practice, which is thus liable to bring about distortions of capital movements and of the conditions of competition, affects the operation of the internal market. Combating VAT evasion therefore calls for close cooperation between the administrative authorities in each Member State responsible for the application of the provisions in that field.

57. According to the third recital in its preamble, Regulation No 1798/2003 thus seeks 'the establishment of a common system for the exchange of information between the Member States whereby the Member States' administrative authorities are to assist each other and cooperate with the Commission in order to ensure the proper application of VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods'. (15)

58. However, 'assist each other' supposes that there is an obligation to reply to a request for information, not an obligation to ask in case of doubt and even less to be bound by the reply obtained. Indeed, administrative co-operation in fiscal matters has been rather inefficient for many years. (16)

59. The obligation on a Member State to accept the information obtained, without any other opportunity of verifiying it, even though the Member State which issues the certificate clearly cannot, in response to every request, carry out a systematic and thorough verification as to whether the taxable person liable to VAT in its territory is really established there, would obviously run counter to the objective of combating evasion.

60. The answer to the first question should therefore be that a certificate attesting that a taxable

person is liable to VAT, modelled on the specimens contained in Annex B to the Eighth Council Directive, does not raise an irrebuttable presumption that the undertaking is established in the State issuing the certificate.

B – *The second question*

61. First of all, it should be pointed out that although neither the Community law of companies (17) nor Community tax law defines the concept of registered office, (18) that concept is not the same in company as in tax law. 'Registered office' may thus be defined differently in tax law. National legislation determines the concept of registered office in company law. (19) It may also be observed that, in line with the Court's case-law, (20) certain national legal systems have much more detailed provisions concerning the concept of registered office in company law. (21)

62. The legal rationale behind the difference in the concept of registered office used in tax law is the increasing desire to combat tax evasion and tax avoidance. That objective is referred to in the third recital in the preamble to the Thirteenth Directive. Combatting evasion is a vital objective both at Community level and at the level of the Member States. (22) The Court has already held that '[p]reventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive'. (23)

63. It should also be noted that, as the Commission contends, the term 'business' can only imply effective activity. The Court stated in its judgment in *DFDS*, (24) '[a]s the Advocate General points out in paragraphs 32 to 34 of his Opinion [(25)], consideration of the actual economic situation is a fundamental criterion for the application of the common VAT system'.

64. In most cases, the place of business is the same as the registered office. In his Opinion in *Berkholz*, Advocate General Mancini pointed out that '[t]he concept of the "place where the supplier has established his business" … should be understood in its technical sense of the registered office, as indicated by the statutes of the company owning the supplier undertaking'. (26) However, it may be necessary to verify that fact so as to avoid artificial constructions capable of circumventing the rules of the community VAT system.

65. As several of the interveners have pointed out, the Court, in the context of Article 9(1) of the Sixth Directive, has provided useful clarification of the concept of the place of business. That concept as used in Article 1 of the Eighth Directive and Article 1(1) of the Thirteenth Directive has the same meaning as in Article 9(1) of the Sixth Directive, since the purpose of the Eighth and Thirteenth Directives is to implement the VAT refund system provided for in Article 17 of the Sixth Directive.

66. The judgment in *Berkholz* indicates that the place where the supplier has established his business is a primary point of reference and that services cannot be deemed to be supplied from an establishment other than that place unless 'that establishment is of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present'. (27)

67. The judgment in *ARO Lease* decides that in order to be treated, by way of derogation from the primary criterion of the main place of business, as the place where a taxable person provides services, an establishment 'must possess a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis'. (28)

68. In addition, whilst reference must be made to the Court's case-law in regard to Article 9(1) of the Sixth Directive in order to define the term 'business' in Article 1(1) of the Thirteenth Directive, it

would also be useful to consider, as the German Government invites us to do, the case-law concerning Regulation No 1346/2000 on insolvency proceedings.

69. Article 3(1) of that regulation provides that '[t]he courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary'. That regulation does not therefore exclude the hypothesis that the registered office and the place of business might be different.

70. The provision has already been interpreted on one occasion by the Court. In a case in which the debtor was a subsidiary company whose registered office was different from that of its parent company, the Court decided that the presumption whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated can be rebutted in the case of a company not carrying out any business in the territory of that Member State. However, the Court also pointed out that where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by Regulation No 1346/2000. (29)

71. Thus the place of a company's 'business' refers *a priori* to the registered office. However, in transnational business, the registered office may be artificially chosen, in particular for fiscal reasons, and may not have sufficient real connection to the place where the business is actually carried on. In case of doubt, an assessment *in concreto* must ensure that a series of facts exists demonstrating that genuine business acitivities are being carried on.

72. The answer to the second question should therefore be that the concept of 'business' within the meaning of Article 1(1) of the Thirteenth Directive means the place where the undertaking's business activities are carried on, which may be identified by the existence of adequate human and technical resources to carry on that business on an independent basis. In the absence of proof to the contrary, that is the place in which the registered office is located.

73. In the alternative, it could be added that the second question, as drafted by the Finanzgericht Köln, is formulated in an abstract manner and does not correspond to the situation of the undertaking which is at the origin of the questions referred to the Court. The German Government and the Commission none the less saw fit to express their views as to where such an undertaking is located. On the basis of the same reasoning, they arrive at opposite conclusions, the former considering that the registered office and the place of business of the undertaking in question are different, whereas the Commission considers that they are identical.

74. It is sufficient to point out that, having regard to the rebuttable presumption that the registered office and the place of business are the same, if it cannot be shown that the economic activity is carried on in another place, then it must be concluded that the registered office and the place of business are identical. In other words, doubt works in favour of their locations being identical.

VI – **Conclusion**

75. In view of the foregoing considerations, I propose that the Court of Justice give the following answers to the questions referred to it by the Finanzgericht Köln:

(1) A certificate attesting that a taxable person is liable to VAT, modelled on the specimen contained in Annex B to the 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, does not raise an irrebuttable presumption that the undertaking is established in the State issuing the certificate.

(2) The term ‘business’ within the meaning of Article 1(1) of the Thirteenth Directive 86/560/EEC of 17 November 1986 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 Community territory refers to the place where the undertaking’s business activities are actually carried on, which may be identified by the presence of adequate human and technical resources to carry on that business on an independent basis. In the absence of proof to the contrary, that is the place in which the registered office is located.

1 – Original language: French.

2 – OJ 1979 L 331, p. 11.

3 – OJ 1986 L 326, p. 40.

4 – OJ 1977 L 145, p. 1.

5 – 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)

6 – BGB1. 1993, I, p. 565 et seq.

7 – BGB1. 1993, I, p. 600 et seq.

8 – 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 (OJ 2003 L 264, p. 1).

9 – In its observations, the French Government cites Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) (OJ 1992 L 24, p. 1). However, that regulation has been repealed.

10 – Case 168/84 *Berkholz* [1985] ECR 2251, paragraphs 17 and 18; Case C?260/95 *DFDS* [1997] ECR I?1005; and Case C?190/95 *ARO Lease* [1997] ECR I?4383, paragraph 16.

11 – OJ 2000 L 160, p. 1.

12 – See the provisions of article 4 of the Sixth Directive defining the concept of taxable person.

13 – In a certain sense, go ‘Member State of establishment’ shopping.

14 – See M. Papon, ‘La lutte contre la fraude dans le domaine fiscal’, in *La lutte contre la fraude à la TVA dans l’Union européenne*, Bruylant, p. 203, Bruxelles, 1996.

15 – For an in-depth study of the system for the exchange of information, see, in particular: Ben J.M. Terra and Peter J. Watte, *European Tax Law*, fourth edition, p. 708 et seq., Deventer, 2005; Laurence W. Gormley, *EU Taxation Law*, Richmond, page 11 et seq., 2005, and A.A. Aronowitz, D.C.G. Laagland and G. Paulides, *Value-Added Tax Fraud in the European Union*, Kugler Publications, page 19 et seq., Amsterdam/New York, 1996.

16 – See J.-M. Communier, *Droit fiscal communautaire*, Bruylant, Bruxelles, 2001, p. 186.

17 – M. Menjucq, ‘La notion de siège social : une unité introuvable en droit international et en droit communautaire’, *Droit et actualité*, Études offertes à J. Béguin, Paris, 2005, p. 499. Community law has a definition of ‘registered office’ in the context of judicial proceedings. However, that definition does not apply to tax law. In the context of judicial proceedings, Article 60(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) lays down a specific definition of the the domicile of legal persons:

‘For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business’.

18 – With regard to national legislation, it should be pointed out that in German tax law, Paragraph 1(1) of the law on company taxation (Körperschaftssteuergesetz), two concepts are employed to establish the tax liability of companies. One is the registered office (‘Sitz’), determined, inter alia, by the company's statutes (Paragraph 11 of the tax code (‘Abgabenordnung’)). The other is the ‘place where business decisions are taken’ (‘Ort der Geschäftsleitung’) as defined in Paragraph 10 of the tax code; it is defined as the undertaking's principal place of business (‘Mittelpunkt der geschäftlichen Oberleitung’), that is to say, the place where decisions of considerable importance are taken (BFH-Urteil 1998, I R 138/97) (BStBI. 1999 II, p. 437). French tax law employs a very pragmatic formulation: ‘company tax is levied at the legal person's principal place of business. However, the authorities may designate as the place where tax is levied either the company's effective centre of management or the place in which its registered office is located’ (Article 218 A, paragraph 1, of the Code Général des Impôts). In the United Kingdom, company taxation is based on two criteria, namely, incorporation of the company (Finance Act 1988) and the place of central management and control (Case-law).

19 – For example, in German company law, in accordance with Paragraph 5 of the Law on public limited companies (Aktiengesetz) and Paragraph 4a of the Law on private companies (GmbHG), the registered office is defined as the office designated in the company's statutes. Subparagraph 2 of both of those paragraphs indicates that company statutes generally place the registered office either at the place where the company's management is located or where the company's administration is located or one of the places where the undertaking carries on business. French company law does not define the concept of registered office and uses the expressions ‘siège statutaire’ (Code de Commerce, Article L 210-3, paragraph 2; Code Civil, Article 1837), ‘siège social’ (for example, Code de commerce, Article L 210-3, Articles L 221-14, L 225-23, L 225-103 and Code Civil, Article 1835), ‘adresse du siège social’ (Decree n° 67-236, 23 March 1967, Articles 59, 123 and 130) or ‘siège de la société’ (Decree of 23 March 1967, Articles 3, 206-6, 219, 231 and 295). In the United Kingdom, company law employs ‘registered office’ for the ‘siège statutaire’. In accordance with Section 9(2) of the Companies Act 2006, the statutes of the company may fix the domicile either in England and Wales, Scotland or Northern Ireland. The domicile may be freely chosen.

20 – In paragraph 82 of Case C?208/00 *Überseering* [2002] ECR I?9919, the Court stated that the refusal by a Member State to recognise the legal capacity of a company formed in accordance with the law of another Member State in which it has its registered office on the ground, in particular, that the company moved its actual centre of administration to that Member State

following the acquisition of all its shares by nationals of that State residing there, with the result that the company cannot, in the host Member State, bring legal proceedings to defend rights under a contract unless it is reincorporated under the law of that Member State, constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC.

21 – For example, Article 30 of the new Slovenian Law on Commercial Companies (Zakon o gospodarskih družbah, ZGD-1, UL RS 42/2006) provides that 'the registered office of a company may be located either in the place where it carries on business, the principal place of management of the company or the place where its active centre of administration is located'.

22 – Thus, although the company law of some Member States is sufficiently liberal to permit the incorporation of 'shell companies' ('Briefkastengesellschaft' in German, 'Družba poštni nabiralnik' in Slovene), the fiscal legislation of those States tries to prevent such companies being used as a means of avoiding the legal obligation to pay taxes such as VAT.

23 – Case C?255/02 *Halifax and Others* [2006] ECR I?1609, paragraph 71. See also, in the field of Community company law, Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraph 51: '… a national measure restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned'.

24 – Paragraph 23.

25 – Opinion of Advocate General La Pergola in that case, delivered on 16 January 1997. According to paragraph 32, 'the VAT system must be applied in a manner as far as possible in harmony with the actual economic situation'.

26 – Paragraph 2.

27– Paragraphs 17 and 18.

28 – Paragraph 16.

29 – Case C?341/04 *Eurofood IFSC* [2006] ECR I?3813.