OPINION OF ADVOCATE GENERAL

Mazák

delivered on 26 February 2008 (1)

**Case C?25/07**

**Alicja Sosnowska**

**v**

**Dyrektor Izby Skarbowej we Wroc?awiu O?rodek Zamiejscowy w Wa?brzychu**

(Reference for a preliminary ruling from the Wojewódzki S?d Administracyjny we Wroc?awiu (Poland))

(Taxation – VAT – Council Directives 67/227/EEC and 77/388/EEC – National legislation laying down rules for refunds of excess VAT – Principles of fiscal neutrality and proportionality)

1. The present reference for a preliminary ruling from the Wojewódzki S?d Administracyjny we Wroc?awiu (Regional Administrative Court, Wroclaw) (Poland) seeks an interpretation of the third paragraph of Article 5 EC, in conjunction with Article 2 of the First VAT Directive (2) as well as with Articles 18(4) and 27(1) of the Sixth VAT Directive. (3)

2. In particular, the referring court harbours doubts as to whether provisions of Polish law laying down a period for repayment of an excess of input tax over that due ('excess VAT') to the bank account of EU VAT payers (4) during the first 12 months of their registration and the conditions governing the shortening of that period are compatible with Community law.

## I – **Legal framework**

### A – *Community law*

3. The third paragraph of Article 5 EC provides that '[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'.

4. Article 2 of the First Directive states as follows:

'The principle of the common system of [VAT] involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, [VAT], calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of [VAT] borne

directly by the various cost components.

The common system of [VAT] shall be applied up to and including the retail trade stage.'

5. Article 18(4) of the Sixth Directive provides as follows:

'Where for a given tax period the amount of authorised deductions exceeds the amount of tax due, the Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine.

…'

6. Finally, under the terms of Article 27(1) of the Sixth Directive:

'The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.'

B – *National law*

7. Under Article 87 of the Law on the tax on goods and services of 11 March 2004 (Ustawa o podatku od towarów i us?ug), (5) in the version applicable to the case before the referring court, ('the Law on VAT'):

'1. Where the amount of deductible input tax … exceeds the output tax during a given tax period, taxable persons shall enjoy the right to a reduction of the output tax due for the following periods by the said difference or to a refund of such a difference into his bank account.

2. … [T]he tax difference shall be refunded … within 60 days from the day on which the return was submitted by the taxable person.

Where further investigation is required into whether or not the refund should be granted, the tax office may extend that period until the necessary investigations have been carried out. Where such investigations establish that the refund referred to in the preceding sentence is justified, the tax office shall pay to the taxable person the amount due, together with interest in an amount equivalent to the interest that would have been payable by the taxable person in the event of deferred payment being allowed or where payment is permitted to be made in instalments.

3. Where the refundable tax difference exceeds the amount of input tax on acquisition of goods or services that are treated by the taxable person as forming part of his depreciable fixed assets, intangible assets and legal assets under the provisions applying to income tax, … increased by 22 per cent of the taxable person's turnover liable to taxation at rates lower than those specified in Article 41(1), and by the turnover from deliveries of goods or provision of services referred to in Article 86(8)(1), the said difference shall be refunded within 180 days of submission of the tax return.

3a. The turnover referred to in paragraph 3 shall include the turnover from the receipt of trading debts, in respect of which the tax liability arises in accordance with Article 19(12) or Article 20(3), provided that a security deposit is lodged with the tax authorities in the amount corresponding to the amount of tax which would be due if the turnover had concerned a supply of goods in the territory of the country until documents confirming export of goods or an intra-Community supply of goods covered by the relevant trading debt are submitted. …'

8. Article 97 of the Law on VAT provides:

'1. Prior to making the first intra-Community supply or acquisition, the taxable persons referred to in Article 15 who are under a duty to register as active VAT payers shall be obliged to notify the head of a tax authority their intention to carry out such activities, by filing the application for registration referred to in Article 96.

…

5. In the case of taxable persons who commence the activities referred to in Article 5 and taxable persons who commenced such activities within less than 12 months prior to filing the application referred to in paragraph 1 and who have been registered as European Union VAT payers, [(6)] the period for refunding the tax difference referred to in Article 87(2), (4) to (6) shall extend to 180 days. [(7)]

…

7. The provisions of paragraph 5 shall not apply if the taxable person [lodges] with a revenue office a guarantee by way of (i) a security deposit, (ii) material security or (iii) a bank [guarantee] in the amount of PLN 250 000, hereinafter referred to as a "security deposit".'

## II – **Factual and procedural background and the questions referred for a preliminary ruling**

9. In a 'VAT-7' return for January 2006, the applicant (Ms Alicja Sosnowska) recorded an excess VAT in the amount of PLN 44 782. Relying inter alia on Article 18(4) of the Sixth Directive, she requested the Swidnica Tax Office to repay that excess VAT within 60 days of the date on which the return was submitted.

10. However, pursuant to Article 87(1) and (2) and Article 97(5) and (7) of the Law on VAT, the Swidnica tax authority refused to do so. In the grounds for that decision, the tax authority stated that the applicant did not satisfy the conditions laid down in the Law on VAT for repayment of the difference of the VAT to a bank account within 60 days because she had failed to lodge a security deposit, material security or bank guarantee in the amount of PLN 250 000 (approximately EUR 62 000) with the tax authority.

11. The applicant lodged an administrative appeal against that decision with the Dyrektor Izby Skarbowej we Wroc?awiu O?rodek Zamiejscowy w Wa?brzychu (Director of the Wroclaw Tax Office, Walbrzych branch, 'the Tax Office'), which upheld the decision taken by the authority at first instance. Therefore, the applicant brought an action against the decision of the Tax Office before the Wojewódzki S?d Administracyjny in Wroclaw.

12. The referring court has doubts as to the compatibility of the national provisions at issue with Community law and in those circumstances, it has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does [Article 5(3)] EC, in conjunction with Article 2 of [the First Directive] and Article 18(4) of

[the Sixth Directive], confer on a Member State the right to incorporate into national provisions on [VAT] the rules laid down in Article 97(5) and (7) of the [Law on VAT]?

2. Do the rules laid down in Article 97(5) and (7) of the [Law on VAT] constitute special measures to prevent certain types of tax evasion and avoidance within the meaning of Article 27(1) of the Sixth Directive?'

13. Written observations have been submitted, and oral observations were made at the hearing on 22 November 2007, by the Polish Government and by the Commission. As for the applicant, she did not put forward arguments of her own, but instead referred in a general manner to the point of view of the referring court in the order for reference, which she shares.

## III – **Assessment**

### A – *First question*

14. Even though, by its first question, the national court asks whether Article 5(3) EC, in conjunction with Article 2 of the First Directive and Article 18(4) of the Sixth Directive, confers on a Member State the right to incorporate into national provisions on VAT rules such as those laid down in Article 97(5) and (7) of the Law on VAT, I understand the question as asking in effect whether the Polish rules regarding the refunding of excess VAT – in essence prolonging the period for such repayment from 60 to 180 days in the case of new EU VAT payers unless they lodge a security deposit in the amount of PLN 250 000 – are compatible with Community law, in particular with Article 18(4) of the Sixth Directive, regard being had to the principles of fiscal neutrality and proportionality.

15. First of all, it should be noted that the Sixth Directive does not specify the precise conditions under which the Member States have to effect repayment of excess VAT to a taxable person's account.

16. However, it should be recalled that, where they exercise the powers conferred on them by Community directives, Member States must in any event take account of the general principles of law which form part of the Community legal order, such as the principle of proportionality. In addition, in the interpretation and application of the Sixth Directive, account must be taken of the principle of fiscal neutrality underlying it.

17. In that connection, while the Court has held that the Member States have a certain freedom to manoeuvre in determining the conditions for the refund of excess VAT, since the refund of excess VAT is one of the fundamental factors ensuring the application of the principle of neutrality of the common system of VAT, the conditions determined by the Member States cannot undermine that principle by making the taxable person, in whole or in part, bear the burden of VAT. (8)

18. The Court has held that the conditions for the refund of excess VAT that a Member State sets must enable the taxable person, in appropriate conditions, to recover the entirety of the credit arising from that excess VAT. This implies that the refund is carried out within a reasonable period of time by a payment in liquid funds or equivalent means. In any case, the method of refund adopted must not entail any financial risk for the taxable person. (9)

19. Here, it should be noted that the Polish Government argues that the national measures in question are necessary to prevent tax evasion and avoidance. In that connection, I appreciate that tackling tax evasion and avoidance is a genuine aim. (10) Indeed, the Member States have a legitimate interest in taking appropriate steps to protect their financial interests and the Court has

held that ‘[p]reventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive’. (11)

20. None the less, it appears from the Court’s case-law that, in accordance with the principle of proportionality, the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant Community legislation. Accordingly, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the exchequer as effectively as possible, they must not go further than is necessary for that purpose. They may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation. (12)

21. As regards the question whether the national provisions on the repayment of excess VAT at issue in the present case comply with those requirements, it should be noted, first, that the right of taxable persons to recover the excess VAT in full is not, per se, called into question. Moreover, recovery of that kind was, in the case in the main proceedings, also allowed by way of carrying forward the excess VAT to the next accounting period. (13) Therefore, what are at issue in the present case are the procedures which govern the right to repayment.

22. Subject to Article 87(3) and (3a) of the Law on VAT, repayment of the excess VAT is to be made to the taxable person’s bank account within 60 days. As a new EU VAT payer, the applicant has a right to have her excess VAT repaid in 180 days. Provided that a security deposit in the amount of PLN 250 000 is lodged with the tax authorities, the latter period may, however, be shortened to 60 days. (14)

23. I should note that, contrary to what the parties seem to suggest, I do not consider it decisive in the present context which of the two periods for refunds of excess VAT – that is to say 60 and 180 days respectively – is to be considered as the ‘basic’ period. Rather, what should in my view be assessed is the Polish legislation at issue as a whole, regard being had, in particular, to (the extension of) the period applicable to new EU VAT payers.

24. In my view, the legislation at issue does not comply with the requirements applicable to repayments of excess VAT as set out above.

25. First, it should be noted that with regard to all new EU VAT payers the period of 60 days is (automatically) extended to 180 days unless they lodge a security deposit with the tax authorities. Thus, the national measures in question impose the 180-day period in a sweeping and fixed manner without making any differentiation, as regards that period, between the various groups of taxable persons within the ‘subsystem’ of new EU VAT payers. It is thus assumed in a general fashion and without any objective basis that the activity of those taxable persons might be directed at causing harm to the interests of the exchequer. (15)

26. Second, I also agree with the referring court that in view of the fact that the period of 180 days – over which the exercise of the taxable person’s right to deduct VAT is *de facto* suspended – is: (i) six times longer than the applicable accounting period for VAT (one month), and (ii) three times longer than the basic period for dealing with particularly complicated matters (two months), (16) it can consequently be regarded as unreasonable. The amount of the security deposit which is meant to safeguard the interests of the exchequer is approximately EUR 62 000, which is 100 times the average monthly income in the Polish economy.

27. In addition, as regards the context in which a new EU VAT payer is called on to lodge such a security deposit and benefit from the 60-day period, a trader is at that point just developing his

economic activities and, as practice shows, that involves substantial investment expenditure and often he will not yet be operating on a large scale. Therefore, the need to wait for 180 days to obtain the refund of excess VAT and/or the inability to dispose of PLN 250 000 may have a marked effect on a taxable person's financial results. (17) Also, a larger Polish company would appear to gain access to the Community market much more easily than a small Polish trader would (in fact, such an amount may even constitute an insurmountable obstacle for the latter).

28. Indeed, to require a security deposit in the amount of PLN 250 000 and the alternative option of receiving the refund of excess VAT merely in 180 days may in practice well represent an obstacle for small and medium-sized enterprises wishing to trade on the Community market. In any event, I agree with the Commission that automatically requiring a fixed amount of PLN 250 000 (18) from all new EU VAT payers in order for them to benefit from the 60-day period would appear, as a general rule, to go beyond what is necessary to prevent fraud and to protect the interests of the exchequer.

29. As to the argument that 180 days (or, alternatively, the lodging of the security deposit) are necessary to verify intra-Community transactions, (19) first of all, the Polish Government has not adequately explained why, as a rule, it needs to avail itself of 180 days. Even if, as it contends, the time it took other Member States to answer the Polish authorities exceeded three months in 60% of cases, it still does not automatically follow that 180 days (that is to say six full months) is the least onerous period which can be imposed in order to prevent tax evasion or avoidance.

30. It may be recalled that the Member State's authorities have at their disposal the Community instruments for cooperation and administrative assistance adopted to allow the correct assessment of VAT and counter evasion and avoidance in that area, such as the measures provided for by Council Regulation (EC) No 1798/2003, (20) and Commission Regulation (EC) No 1925/2004. (21)

31. Furthermore, to use the argument advanced by the Advocate General in the *N* case by analogy, I agree that even though in practice the various cooperation mechanisms available to the Member States may not function in an efficient and satisfactory manner, the Member States should not be able to rely on deficiencies in the cooperation between their tax authorities in order to justify a restriction of such a fundamental principle of the common system of VAT as is the right to deduction. (22)

32. In any event, most importantly, it would appear that such a necessity – to have sufficient time for verification – is already taken into account through the provisions in Article 87(2) and (3), and through those of Article 97(5), of the Law on VAT. (23) Therefore, the arguments of the Polish Government for a 180-day period (or the alternative, the lodging of the security deposit) are not particularly compelling.

33. In these circumstances, although the Member States are in principle not precluded from adopting precautionary measures designed to ensure the veracity of the apparent excess of VAT arising from the information contained in the underlying declaration made by the taxable person, the national measures in question are in my view disproportionate in that they place a particularly high burden on new EU VAT payers. They do not enable those taxpayers to recover the entirety of the credit in appropriate conditions, in particular, within a reasonable period of time.

34. To my mind, the Member States should not be able to protect themselves from tax evasion or avoidance by way of making all, or even only a few, new EU VAT payers bear the burden of VAT. If periods are too long that implies that taxable persons bear, even if only partially, the burden of VAT which puts at risk the neutrality of the system. Rather, it should be primarily the State that bears: (i) the responsibility for the management of its tax system, including the

prevention of tax evasion and avoidance, as well as (ii) the corresponding risks.

35. I would add that, '[a]lthough it is not for the Court to comment on the appropriateness of other means of combating tax evasion and avoidance which might be contemplated', (24) there must surely be less onerous and restrictive means of safeguarding such interests of the exchequer. For instance, it would be possible for the amount of the security deposit to be proportionate to the excess VAT to be refunded (25) or for it to depend on the economic size and/or the ability to pay of the taxable person's business, which could, one imagines, be inferred from his return. In the alternative, certain thresholds could be applied instead.

36. To conclude, Article 18(4) of the Sixth Directive precludes in principle national measures such as those at issue in the main proceedings which are disproportionate and as such undermine the implementation of fundamental principles of the common system of VAT, in particular the right to deduction.

37. In the light of the above considerations, it is for the national court to determine and verify – taking into account all the relevant circumstances of the case before it – whether the national measures in question are compatible with the principles of neutrality and proportionality, disapplying, if necessary, any contrary provision of domestic law. (26)

B – *Second question*

38. By its second question, the national court asks whether the national measures in question may none the less be considered to constitute special measures to prevent certain types of tax evasion and avoidance under Article 27(1) of the Sixth Directive.

39. In my opinion, the second question calls for a brief answer. Regardless of whether or not the national measures in question in fact constitute special measures of that kind, they cannot be considered as such simply because – as appears from the documents before the Court and indirectly from the arguments put forward by the Polish Government (27) – the Republic of Poland did not have recourse to the formal procedure which is expressly provided for in Article 27 of the Sixth Directive and did not obtain the authorisation referred to in Article 27(1). (28)

IV – **Conclusion**

40. I am therefore of the opinion that the Court should give the following answers to the questions referred by the Wojewódzki S?d Administracyjny we Wroc?awiu:

(1) Article 18(4) of 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 in principle national measures like those at issue in the main proceedings which are disproportionate and as such undermine the implementation of fundamental principles of the common system of VAT, in particular the right to deduction.

(2) The rules laid down in national measures like those at issue in the main proceedings cannot be considered to constitute special measures to prevent certain types of tax evasion and avoidance within the meaning of Article 27(1) of Directive 77/388 where the formal procedure which is expressly provided for in Article 27 of Directive 77/388 has not been followed.

1 – Original language: English.

2 – First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967(I), p. 14) ('the First Directive').

3 – 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').

4 – That is to say, taxable persons who have notified their tax office that they intend to make their first intra-Community supply of goods or services or their first intra-Community acquisition. See further below for the provisions of the Polish legislation governing the requirement to register in such circumstances.

5 – *Dziennik Ustaw* (Journal of Laws) No 54, heading 535.

6 – Referred to below as 'new EU VAT payers'.

7 – The second and third sentences of Article 87(2), which apply to cases where further investigation is required, are to apply *mutatis mutandis*.

8 – See Case C?78/00 *Commission* v *Italy* [2001] ECR I?8195, paragraphs 32 and 33.

9 – Ibidem, paragraph 34.

10 – See, in this connection, the Opinion of Advocate General Fennelly in Joined Cases C?286/94, C?340/95, C?401/95 and C?47/96 *Molenheide and Others* [1997] ECR I?7281, points 37 to 39.

11 – See Case C?255/02 *Halifax and Others* [2006] ECR I?1609, paragraph 71 and the case-law cited there; Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 54; and Joined Cases C?487/01 and C?7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I?5337, paragraph 76. See also the Opinion of Advocate General Cosmas in Joined Cases C?177/99 and C?181/99 *Ampafrance and Sanofi* [2000] ECR I?7013, points 70 and 72; the judgment in *Molenheide and Others*, cited in footnote 10, paragraph 47; and the Opinion of Advocate General Poiares Maduro in Joined Cases C?354/03, C?355/03 and C?484/03 *Optigen and Others* [2006] ECR I?483, point 43.

12 – See the judgment in *Molenheide and Others*, cited in footnote 10, paragraphs 46 and 47. See also, by way of example, with regard to Article 22(8) of the Sixth Directive, *Halifax and Others*, cited in footnote 11, paragraph 92 and the case-law cited there. As regards the prevention of fraud, see Case C?146/05 *Collée* [2007] ECR I?0000, paragraph 26, and see also the Opinion of Advocate General Cosmas in Case C?361/96 *Société générale des grandes sources* [1998] ECR I?3495, point 14.

13 – In the present case, the applicant requested, in conformity with Polish law, that the excess VAT be repaid into her bank account (so-called direct repayment). The other option of carrying the excess VAT over to the following accounting period is referred to as indirect repayment.

14 – The security deposit is not a condition for obtaining a refund of excess VAT. Rather, it is a condition for those who want to benefit from a period shorter than 180 days. Following a period of 12 months during which the taxable person has submitted a tax return and timeously paid all taxes, including income tax on natural persons, he may apply for release or repayment of the security deposit.

15 – As the referring court rightly points out, for the period of 180 days to include (during their first 12 months) all EU VAT payers in the category of persons whose operations pose a threat to the interests of the exchequer would appear to be an excessively mechanical approach, since the relevant national provisions do not take account of the conditions whose satisfaction would allow the objective finding that the activity of those taxable persons might be directed at causing harm to the exchequer. Such a finding would justify the penalisation and less favourable treatment of 'dishonest' taxable persons in relation not only to persons carrying on activities subject to VAT for a period of more than 12 months from the date of registration but also in relation to persons duly paying VAT during the first year of operation.

16 – As established in the Polish Tax Code. The national court refers to Article 139(1) of the Law establishing the Tax Code (Ustawa Ordynacja Podatkowa) of 29 August 1997.

17 – As it is clear that such an amount undoubtedly constitutes a financial burden.

18 – As the tax authorities have no possibility of adapting the amount of the security deposit to a particular case.

19 – The Polish Government submits that the 180-day period is required because of the need to verify intra-Community transactions, inter alia in the framework of the VIES (VAT Information Exchange) system which, it argues, take time.

20 – Council Regulation 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).

21 – Commission Regulation of 29 October 2004 laying down detailed rules for implementing certain provisions of Council Regulation (EC) No 1798/2003 (OJ 2004 L 331, p. 13). See, in this connection, Case C?73/06 *Planzer Luxembourg* [2007] ECR I?5655, paragraph 48.

22 – Even though Advocate General Kokott uses that argument with regard to restrictions on fundamental freedoms. See her Opinion in Case C?470/04 *N* [2006] ECR I?7409, point 114.

23 – Namely, where the reasons for the refund require additional investigation. No time-limits are laid down for that extension. Where the refund is ultimately determined to be lawful, the tax authorities are to pay the taxable person the amount due plus interest.

24 – See *Ampafrance and Sanofi*, cited in footnote 11, paragraph 62.

25 – Which appears to have been originally foreseen as regards the security deposit in a relatively recent proposed amendment to the Polish Law on VAT. Such considerations (for the security deposit to be proportionate to the excess VAT) come to mind not least in view of the fact that the amount of the security deposit (as it stands) does not correspond in any way to the effective or real risk for the exchequer to which it is exposed vis-à-vis a new EU VAT payer. Cf., for instance, Case C?262/99 *Louloudakis* [2001] ECR I?5547, paragraph 69. I may add that at present, in fact, a security deposit of PLN 250 000 is required even in a case of an intra-Community supply of an otherwise completely insignificant value. As an aside, in the present case, the amount of the security deposit is four times higher than the excess VAT indicated as being refundable to the

applicant.

26 – With regard to the question of disapplication, see Case C?357/06 *Frigerio Luigi & C.* [2007] ECR I?0000, paragraph 28, which refers to Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C?208/05 *ITC* [2007] ECR I?181, paragraphs 68 and 69.

27 – Where it maintains that the measures at issue cannot be considered ‘special measures’ within the meaning of Article 27(1) of the Sixth Directive, as the latter does not regulate questions regarding the periods and procedures applying to refunds of excess VAT. These are matters which lie within the discretion of the Member States.

28 – See Case 50/87 *Commission* v *France* [1988] ECR 4797, paragraph 22; the Opinion of Advocate General Slynn in Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* [1988] ECR 4517, 4535; Case 5/84 *Direct Cosmetics* [1985] ECR 617, paragraph 37; and Case C?97/90 *Lennartz* [1991] ECR I?3795, paragraphs 33 to 35. Cf. also Case 324/82 *Commission* v *Belgium* [1984] ECR 1861.