OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 13 March 2008 (1)

Joined Cases C?95/07 and C?96/07

Ecotrade SpA

v

Agenzia Entrate Ufficio Genova 3

(VAT – Reverse charge mechanism – Taxable transaction mistakenly classified as exempt – Reclassification – Recovery and deduction of undeclared tax – Different time-limits in national law)

1. A company established in Italy received shipping services from operators established elsewhere, who did not charge VAT on their invoices. It mistakenly believed those services to be exempt, and did not include them in its VAT accounts. It should in fact, under the 'reverse charge' mechanism, have declared itself liable for input VAT on the supplies, which it should then have deducted from its output tax. That would have involved two accounting entries, cancelling each other out, so that no payment would have been due to the tax authority.

2. It none the less achieved the same result by not declaring or deducting any input tax but paying output tax in full.

3. Discovering the error, the tax authority seeks to recover the undeclared input tax, on the basis of its right under national law to reassess VAT returns made in the four preceding years, but refuses to allow any deduction which had not been claimed in the return for the second year following that in which the right to deduct arose, again on the basis of a limitation period under national law.

4. The question raised in the present references for a preliminary ruling, from the Commissione Tributaria Provinciale (Provincial Tax Court, Genoa) is therefore whether the situation arising out of that discrepancy between the two periods, leading to VAT being claimed by the tax authority which would not have been due if the procedures had been properly followed, is compatible with Community VAT law.

Relevant Community legislation

5. Community VAT law is now governed by Council Directive 2006/112/EEC, (2) which, with effect from 1 January 2007, repealed and replaced the existing legislation, with the aim of presenting all the applicable provisions clearly and rationally in a recast structure and wording without, in principle, bringing about material changes. (3)

6. The present case concerns the years 2000 and 2001, when the main provisions were contained in the First and Sixth Directives. (4) In what follows, I shall refer to the provisions of those directives and, for the sake of readability, I shall do so in the present tense even though they are no longer in force. Their substance and, to a large extent, their wording are unchanged in Directive 2006/112, and for reference purposes I shall indicate also the equivalent provisions of the latter.

7. The fundamental features of the common VAT system are set out in Article 2 of the First Directive: (5)

'The principle of the common system of value added tax entails 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 the tax is charged.

On each transaction, value added tax, 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 value added tax borne directly by the various cost components.

The common system of value added tax shall be applied up to and including the retail trade stage.

…'

8. The deduction mechanism is regulated, for transactions internal to a Member State, by Article 17(1) and (2)(a) of the Sixth Directive: (6)

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

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 within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…'

9. Thus, taxable persons at any intermediate stage in a chain of supply are normally charged VAT (input tax) by their suppliers and charge VAT (output tax) to their customers. They then pay to the tax authority the amount of that output tax, after deducting the amount of their relevant input tax.

10. However, that is not always the case.

11. First, Article 17(6) and (7) of the Sixth Directive provide for certain exceptions to the right to deduct. Paragraph 6 provides that (while VAT is in no circumstances to be deductible on

expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment), until the Council has decided what expenditure is not to be eligible for deduction, Member States may retain all the exclusions provided for under their national laws when the Directive came into force. Paragraph 7 allows Member States, for cyclical economic reasons and subject to a consultation procedure, to exclude all or some capital goods or other goods totally or partly from the system of deductions, or instead to tax the goods manufactured by the taxable person himself or which he has purchased in the country or imported, in such a way that the tax does not exceed the VAT which would have been charged on the acquisition of similar goods.

12. Second, some transactions are exempted from VAT, in which case there is nothing which the customer can deduct even if he uses the supplies for the purposes of his taxable output transactions.

13. Among such exempted transactions are the chartering and hiring of vessels used for navigation on the high seas, for the purpose of commercial activities. (7)

14. Third, for certain categories of supply, it is not the supplier but the customer who is liable for VAT. In such cases, the supplier deducts input tax as appropriate, but charges no output tax to the customer. The customer must himself account for the VAT on the transaction but, in so far as the supply is used for his own taxable outputs, the amount becomes immediately deductible pursuant to Article 17(1) and (2).

15. Thus, under Article 21(1)(b) of the Sixth Directive, (8) ‘persons who are identified for value added tax purposes within the territory of the country to whom services covered by Article 28b(C) … are supplied, if the services are carried out by a taxable person established abroad’, are liable to pay the tax on such services which they receive. (9) Article 28b(C) (10) covers ‘services in the intra-Community transport of goods’, which is defined in paragraph 1 as ‘transport where the place of departure and the place of arrival are situated within the territories of two different Member States’ and for which, under paragraph 2, the place of supply is the place of departure.

16. As regards the exercise of the right to deduct in such circumstances, Article 18(1)(d) (11) provides: ‘To exercise his right of deduction, a taxable person must: … when he is required to pay the tax as a customer or purchaser where Article 21(1) applies, comply with the formalities laid down by each Member State …’

17. Under Article 18(2) and (3): (12)

‘2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.

…

3. Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with the provisions of paragraphs 1 and 2.’

18. Article 22 of the Sixth Directive (13) lays down a wide-ranging series of obligations on persons liable for payment of VAT, of which however only the following appear potentially relevant to the present case:

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

…

4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. That deadline may not be more than two months later than the end of each tax period. The tax period shall be fixed by each Member State at one month, two months or a quarter. Member States may, however, set different periods provided that they do not exceed one year.

(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.

…

7. Member States shall take the measures necessary to ensure that those persons who, in accordance with Article 21(1) … (b), are considered to be liable to pay the tax instead of a taxable person established abroad … comply with the above obligations relating to declaration and payment.

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.'

Relevant national legislation

19. The Community VAT directives are currently implemented in Italian law essentially in Decreto del Presidente della Repubblica (Presidential Decree) No 633 of 26 October 1972 ('DPR 633/72'), as amended.

20. The first sentence of Article 17(3) of that decree reads: 'The obligations relating to … the supply of services in the territory of the State by non-resident persons … shall be met by the purchasers resident in the territory of the State who … use the services in the pursuit of business, artistic activities or professions.'

21. Article 19(1) of the same decree provides, inter alia: 'The right to deduct the tax on the goods and services purchased or imported shall arise at the time when the tax becomes chargeable and may be exercised, at the latest, in the tax return for the second year after the year in which the right to deduct arose and subject to the conditions applying at the time when the right arose.'

22. Article 23(1) and (2) require taxable persons to record their invoices in an appropriate register within 15 days, indicating the serial number, the date of issue, the taxable amount and the amount of tax, shown separately for each rate, and, in cases to which Article 17(3) refers, the supplier's name.

23. Article 25(1) requires taxable persons to number invoices relating to goods and services purchased or imported, including those issued in accordance with Article 17(3), sequentially and to record them in the appropriate register before making the periodic payment or the annual return in

which the right to deduction of the related tax is exercised.

24. Under Article 54(5): ‘Where [there is] evidence of amounts that are wholly or partially undeclared or deductions that are wholly or partially ineligible, the value added tax office may confine itself to assessing the tax, or the additional tax payable, or the reduced credit due, on the basis of the aforementioned evidence, without prejudice to further assessment within the time-limits laid down in Article 57.’

25. Finally, the first sentence of Article 57(1) reads: ‘The notices of amendment and assessment provided for in [Article 54] shall be served, on pain of loss of the related right, by 31 December of the fourth year after the year in which the tax return was submitted.’

Main proceedings and questions referred

26. Ecotrade SpA (‘Ecotrade’) is an Italian company engaged in international trade in granulated blast furnace slag and other ingredients for the manufacture of cement. In 2000 and 2001, (14) it made a number of shipments of such materials by sea from Italy to other Member States, using the services of shipping companies not established in Italy. Those companies invoiced Ecotrade for their services, which they described either as ‘chartering of a vessel’ or as ‘shipping’. None of the invoices indicated any VAT, and some specifically stated that the supply of services was exempt.

27. Ecotrade consequently took all those services to constitute chartering or hiring of seagoing vessels, exempt from VAT by virtue of the national provisions implementing Article 15(5) of the Sixth Directive. (15) It therefore entered them normally as purchases in its accounts, but did not include them in its VAT records or returns.

28. Following an inspection, the tax authority decided that the shipping services were in fact services in the intra-Community transport of goods on which, pursuant to the national provisions implementing Articles 21(1)(b) and 28b(C) of the Sixth Directive, Ecotrade was itself liable for VAT. With some minor reservations, Ecotrade accepts that reclassification. There is no suggestion of fraud or bad faith on its part.

29. Ecotrade should thus have declared VAT on the shipping services and entered it as input tax. It would have been liable to pay that tax but would at the same time have been able to deduct it from its output tax. Its overall tax liability would therefore not have been affected.

30. In December 2004, pursuant to Articles 54(5) and 57(1) of DPR 633/72 and within the time-limit laid down by the latter provision, the tax authority claimed payment of the VAT concerned, amounting to the equivalent of approximately EUR 320 000 for the two tax years, apparently representing VAT at the standard rate of 20% on invoices to a value equivalent to approximately EUR 1 600 000. (16) It refused, however, to allow Ecotrade to deduct the same amounts, on the ground that the time-limit for doing so, under Article 19(1) of DPR 633/72, had expired. It further imposed on Ecotrade administrative fines amounting to slightly over EUR 360 000.

31. Ecotrade has challenged that refusal and those fines before the referring court, which seeks a ruling on the following questions:

‘(1) Does a correct interpretation of Articles 17, 21(1) and 22 of Sixth Council Directive 77/388/EEC … preclude national legislation (in particular Article 19 of DPR 633/72 …) that makes the exercise of the right to deduct VAT, payable by a taxable person in the pursuit of his business activities, dependent on compliance with a (two-year) time-limit and penalises non-compliance with annulment of that right? That question is asked with reference, in particular, to cases where the liability to VAT on the purchase of the good or service stems from the application of the reverse charge procedure, which allows the authorities a longer period (of four years under Article 57 of DPR 633/72) in which to demand payment of the duty than the period allowed to the trader for deduction of the duty, on expiry of which the trader's right to such deduction lapses.

(2) Does it follow from a correct interpretation of Article 18(1)(d) of Sixth Council Directive 77/388/EEC … that national legislation may not, in regulating the "formalities" referred to in that provision by means of the reverse charge procedure governed by the combined provisions of Articles 17(3), 23 and 25 of DPR 633/72, make (solely to the detriment of the taxpayer) the exercise of the right to deduct permitted by Article 17 of the Directive conditional upon compliance with a time-limit such as that laid down in Article 19 of DPR 633/72?'

32. Written observations have been submitted by Ecotrade, the Italian and Cypriot Governments and the Commission, all of whom, apart from the Cypriot Government, were represented at the hearing.

Assessment

Preliminary remarks

33. The order for reference might be interpreted broadly as raising first and foremost the general question whether a two-year time-limit on the exercise of the right to deduct is compatible with Community VAT law, and only secondarily whether that is so in the specific case where the reverse charge mechanism applies and the tax authority enjoys a longer period in which to recover tax not properly accounted for.

34. However, I agree with the Italian Government and the Commission that it is unnecessary to focus too closely on the general question, which is not in itself central to the main proceedings. The essential issue is the compatibility with Community law of the result produced by the application of the Italian rules in circumstances such as those in which Ecotrade finds itself.

35. The factors stressed by the national court as combining to produce that result are: (i) the 'two-year' time-limit (17) on the exercise of the right to deduct, (ii) the 'four-year' time-limit (18) on the tax authority's right to recover and (iii) the reverse charge mechanism under which a taxable person's liability to pay input tax is, normally, exactly counterbalanced by his right to deduct the same tax.

36. However, and although the context of that mechanism is undoubtedly a key feature of this case, it is in my view at least as important to note that the result to which Ecotrade objects was triggered not by the mere combination of those three factors but by the reclassification of its input transactions from exempt to taxable.

37. Finally, although the referring court formally poses two questions, directed at assessing the Italian rules against different provisions of the Sixth Directive, I find it more helpful to address the two together.

Possibility of a time-limit on the exercise of the right to deduct

38. Nothing in any of the provisions cited by the national court in its questions – or indeed

elsewhere in the Sixth Directive – imposes any specific time-limit on the exercise of the right to deduct or refers explicitly to the possibility, or otherwise, of imposing such a time-limit in national law.

39. Of those provisions, at least one may none the less be seen as implicitly authorising the imposition of a time-limit: Article 18(1)(d) refers to formalities laid down by Member States for the exercise of the right to deduct. That a time-limit may be set seems, moreover, clear from the combined provisions of Article 18(2) and (3). The former indicates that the right to deduct is to be exercised in relation to amounts due for the same tax period as that in which the right arose, and the latter allows Member States to determine the conditions in which a taxable person may be authorised to deduct when he has not respected, inter alia, that condition. Taken together, they imply that it is open to a Member State to require that the right to deduct be exercised in respect of the tax period in question, (19) or to allow a longer period.

40. I disagree, therefore, with Ecotrade's contention that the right to deduct is so fundamental that no time-limit can ever be placed on its exercise. The right is indeed fundamental but it is also important, for reasons of legal (and financial) security, that settled fiscal situations should not be liable to be called in question indefinitely.

41. If the Sixth Directive thus allows a Member State to require the right to deduct to be exercised in the tax period in which it arose, the question does not arise whether a longer period, such as the clear two years allowed by the Italian legislation, is unduly restrictive as a general rule.

42. Suffice it to bear in mind that such a time-limit (which is in many ways comparable to that for bringing proceedings for the recovery of national charges levied in breach of Community law) should in any event comply with the principles of equivalence and effectiveness. (20) It should thus not be less favourable than those applicable to similar domestic situations (21) or render virtually impossible or excessively difficult the exercise of rights conferred by Community law. In the submissions to the Court in the present case, there has been no comparison with any time-limit applicable to similar domestic situations, nor has it been argued that a time-limit of two clear years renders in general – rather than in the specific circumstances – the exercise of the right to deduct virtually impossible or excessively difficult.

Possibility of reassessment by the tax authority after such a time-limit has expired

In general

43. That tax authorities should have at their disposal a period within which to verify taxable persons' VAT declarations and, where appropriate, reassess their liability, and that the period may be subject to some limit in the interests of legal certainty, seem unassailable propositions.

44. Nor can it be objectionable that the period allowed to the tax authority for verification and reassessment should extend beyond that within which the taxable person is required to make a definitive statement of his liabilities and claims for deduction. Until such a statement has been submitted, it cannot be verified. (22)

45. Where such verification reveals a liability to VAT which was not declared, clearly that liability may – and indeed should – be enforced, and the corresponding sum collected.

46. Nor does the discovery of liability impinge on any existing right to deduct input tax which is not dependent on the liability. Whether the taxable person has or has not exercised such a right within any applicable national time-limit of the kind I have outlined is a matter quite separate from

the reassessment of his liability for output tax.

In circumstances such as those of the present case

47. However, that is not true where verification brings to light an undeclared liability to VAT which, if it had been correctly declared, would have entailed a concomitant right to deduct but, in the absence of such liability, no right to deduct could exist. In such cases, the failure to exercise the right to deduct is indissociable from the failure to declare the tax liability which the authority now seeks to enforce. (23)

48. Where deduction and liability are thus two sides of the same coin, any reassessment by the tax authority must logically take both into account. To enforce the liability without allowing the concomitant right to deduct would, moreover, run completely counter to the principle of neutrality which is fundamental to the whole VAT system.

49. As the Court has repeatedly stated, the rules governing deduction are meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The system ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. (24)

50. By contrast, application of the Italian rules in the way sought by the tax authority in the present case would replace the neutrality of taxation which had been achieved (albeit on an incorrect basis) by a significant burden of which the trader should in principle have been relieved – and would lead to a greater amount of tax being collected overall than should have been collected.

Possible justifications for recovering undeclared tax while refusing the exercise of a linked right to deduct

51. The question arises whether there can none the less be any justification for overriding the fundamental requirement of neutrality on the basis of any Community provision. The national court refers in its questions to Articles 17, 18(1)(d), 21(1) and 22 of the Sixth Directive. (25) Of those, Articles 17(6) and (7), 18(1)(d) and 22(7) and (8) have been cited, at various stages in the proceedings, as capable of providing justification for applying the Italian rules in the manner sought by the tax authority.

52. However, with regard to Article 17(6) and (7), as the Cypriot Government rightly notes, the issue in the present case is not one of *exclusion* of the tax in issue from the *right* to deduct but a *limitation* of the *exercise* of that right in certain circumstances. Such a limitation does not fall within the scope of Article 17(6) or (7), which concern the complete exclusion of certain types of input.

53. Of the other provisions cited, Article 18(1)(d) authorises Member States to lay down formalities for the exercise of the right to deduct; Article 22(7) requires them to take measures to ensure that traders liable for input tax under the reverse charge mechanism comply with their obligations relating to declaration and payment; and Article 22(8) authorises them to impose other obligations for the correct collection of tax and prevention of evasion.

54. The Italian and Cypriot Governments have referred to these as capable of justifying the application of the Italian rules in the way sought by the tax authority in the present case, particularly in so far as it is likely to encourage proper, timely and accurate declaration and to preclude fraud or evasion.

55. I disagree. Whilst the provisions in question certainly authorise the imposition of formalities, and of penalties in the event of non-compliance with those formalities (it will be remembered that substantial fines were imposed on Ecotrade in the present case, although their compatibility with Community law is not raised by the referring court), they do not justify a distortion of the VAT system itself.

The judgment in Collée

56. In that connection, it may be useful to recall the Court's recent judgment in *Collée*. (26) Because it displays several parallels with the present case, I shall summarise it at some length.

57. A car dealer was entitled to commission only on sales to customers in his area. In order to claim commission on sales to a customer in another Member State, he engaged an intermediary to purchase and resell the vehicles for form's sake. He invoiced VAT to that intermediary, who sought to deduct it. The tax authority refused the deduction, because the transaction was a sham. The dealer then adjusted his records to show the true situation. The tax authority increased his taxable turnover by the sale price of the cars, but refused to allow exemption (with deduction of input tax, as would normally have been the case for an intra-Community supply), on the ground that his records had not been updated regularly and immediately after the relevant transaction, in accordance with rules flowing from national case-law. (27)

58. The Court noted that the exemption of intra-Community supplies in the Member State of dispatch, with (reverse charge) taxation of the corresponding intra-Community acquisition in the Member State of arrival, avoids double taxation and infringement of fiscal neutrality. (28)

59. Article 22 of the Sixth Directive imposes formal obligations relating to accounts, invoicing, returns and recapitulative statements, and Article 22(8) allows Member States to impose other obligations deemed necessary for the correct levying and collection of the tax and to prevent evasion. However, such measures must not go further than necessary to attain such objectives, or undermine VAT neutrality. (29)

60. A national measure which makes the right of exemption subject to compliance with formal obligations, without taking account of whether the substantive requirements have been satisfied, goes further than is necessary to ensure the correct levying and collection of the tax. (30)

61. Transactions should be taxed taking into account their objective characteristics. If a supply meets the conditions laid down for exemption, no VAT is payable. (31)

62. In the main case, since there was no dispute that an intra-Community supply was made, fiscal neutrality required that exemption be allowed if the substantive requirements were satisfied, even if the taxable person had failed to comply with some of the formal requirements. The only exception would be if non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied. (32)

63. It is important to allow amendments to the categorisation of an intra-Community supply made after the transaction has taken place to be reflected in taxable persons' accounts. The intra-

Community nature of a supply must therefore be recognised if the accounts are subsequently adjusted, provided that the objective criteria are met. (33)

64. Whether the fact that the taxable person initially concealed the intra-Community supply is relevant, and whether the exemption may be conditional upon his good faith, depends on whether the Member State concerned is at risk of losing any tax revenue. To ensure VAT neutrality, Member States must provide for correcting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith. However, where that person has in sufficient time wholly eliminated the risk of any loss in tax revenues, the principle of neutrality requires that VAT which has been improperly invoiced can be adjusted without adjustment being conditional on his having acted in good faith. The same applies to an account adjustment made to obtain exemption in respect of an intra-Community supply. (34)

65. Non-collection of VAT on an intra-Community supply which initially was incorrectly described as a supply within the territory of the country – giving rise, in principle, to the collection of VAT – cannot be regarded as a loss in tax revenue. The revenue belongs to the Member State of final consumption. (35)

66. Finally, Community law does not prevent Member States, in certain circumstances, from treating concealment of the existence of an intra-Community transaction as an attempt to evade VAT and from imposing penalties prescribed by domestic law. However, such penalties should always be proportionate to the gravity of the abuse. (36)

Transposition to the present case

67. It seems to me that the Court's reasoning in *Collée* can be transposed very neatly to the present case. I would do so as follows.

68. The reverse charge mechanism seeks to avoid double taxation and to ensure fiscal neutrality. Measures under Articles 18(1)(d) or 22(7) or (8) of the Sixth Directive must not go further than necessary to attain the objectives for which they are authorised, or undermine neutrality. A measure which subjects the right to deduct to compliance with formal obligations, regardless of whether the substantive requirements have been satisfied, goes further than is necessary. Transactions should be taxed on the basis of their objective characteristics. If a transaction meets the conditions for deduction, VAT is deductible. Where it is clear that liability under the reverse charge mechanism gives rise to a right to deduct, fiscal neutrality requires that deduction be allowed if the substantive requirements were satisfied, even if the taxable person failed to comply with some of the formal requirements. It is important to allow the categorisation of a supply to be amended in taxable persons' accounts. Its true nature must therefore be recognised if the accounts are subsequently adjusted, provided that the objective criteria are met. Where there is no risk of any loss in tax revenue, the principle of neutrality requires that VAT returns which have been erroneously completed can be adjusted. There is no such risk where liability and the right to deduct cancel each other out. Appropriate and proportionate penalties may none the less be imposed for failure to declare transactions correctly.

Conclusion

69. In the light of all the foregoing, I am of the opinion that the Court should answer the questions raised by the Commissione Tributaria Provinciale di Genova as follows:

(1) The provisions of the Community VAT directives do not preclude the imposition in national

law of a limitation period for the exercise of a taxable person's right to deduct input tax on goods and services which he uses for the purpose of his taxable transactions, provided that the period in question is not less favourable than those applicable to similar domestic situations and that it does not render the exercise of the right virtually impossible or excessively difficult.

(2) The provisions of the Community VAT directives do not preclude a tax authority from verifying taxable persons' VAT returns, even after the expiry of any such limitation period imposed, and claiming tax due but not paid.

(3) However, in a situation where such verification reveals an undeclared liability to VAT which, had it been declared, would have entailed a concomitant right to deduct, the liability may not be enforced without taking account of the right to deduct.

1 – Original language: English.

2 – Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – See recital 3 in the preamble.

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

5 – Article 1(2) of Directive 2006/112.

6 – At the material time, the text of Article 17(2) was in Article 28f. The equivalents of Article 17(1) and (2) are now contained in Articles 167 and 168(a) of Directive 2006/112.

7 – Article 15(5), read in conjunction with Article 15(4)(a), of the Sixth Directive; Article 148(a) and (c) of Directive 2006/112.

8 – In Article 28g at the material time; see Article 196 of Directive 2006/112.

9 – This mechanism is commonly known as the 'reverse charge' procedure. Under other provisions of Article 21(1), it applies also to other types of supply of goods or services where the supplier is not established in the customer's Member State (or the Member State in which the supply takes place), whether he is established within the Community or not.

10 – See Articles 47 and 48 of Directive 2006/112.

11 – In Article 28f(2); Article 178(f) of Directive 2006/112.

12 – Articles 179 and 180 of Directive 2006/112.

13 – In Article 28h at the material time; see Articles 213 to 271 of Directive 2006/112.

14 – Case C-95/07 concerns tax year 2001, Case C-96/07 concerns 2000.

15 – See point 13 above.

16 – The figures given in the order for reference in Case C-95/07 appear to reflect the application of a VAT rate of slightly over 20%. No explanation is given, but the discrepancy does not appear

relevant to the resolution of the problem.

17 – More accurately, the limit is the submission of the declaration for the second year following that in which the right to deduct arose.

18 – In fact, the end of the fourth year following that in which the declaration was made. Ecotrade stated at the hearing, without contradiction, that the period was regularly extended by temporary legislation to five, six or seven years.

19 – Subject to the requirements of equivalence and effectiveness – see point 42 below.

20 – Compare, for example, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 34 et seq.

21 – It seems to me that the Commission is misguided in arguing (if I have understood it correctly) that the principle of equivalence applies as between the respective periods available to the taxable person and to the tax authority.

22 – Compare Case C-85/97 *SFI* [1998] ECR I-7447, paragraph 32.

23 – In the present proceedings, Ecotrade finds itself in such a situation because of the reverse charge mechanism, but a similar situation could exist where a taxable person had classified his output supplies as exempt (when they were in fact taxable) and had therefore not been in a position to deduct any input tax on goods or services used for the purposes of those supplies.

24 – See, most recently, Case C-435/05 *Investrand* [2007] ECR I-1315, paragraph 22.

25 – See points 8, 11 and 15 to 18 above.

26 – Case C-146/05 [2007] ECR I-0000.

27 – See paragraphs 12 to 18 of the judgment.

28 – Paragraphs 21 to 23 (citing Case C?62/93 *BP Supergas* [1995] ECR I?1883, paragraph 16, Joined Cases C?354/03, C?355/03 and C?484/03 *Optigen* [2006] ECR I?483, paragraph 54, Joined Cases C?439/04 and C?440/04 *Kittel and Recolta Recycling* [2006] ECR I?6161, paragraph 49, and Case C?184/05 *Twoh International* [2007] ECR I?0000, paragraph 22).

29 – Paragraphs 25 and 26 (citing Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, paragraph 52, Case C-395/02 *Transport Service* [2004] ECR I-1991, paragraph 29, Case C?454/98 *Schmeink & Cofreth* [2000] ECR I?6973, paragraph 59, and Case C?255/02 *Halifax* [2006] ECR I?1609, paragraph 92).

30 – Paragraph 29.

31 – Paragraph 30 (citing *Optigen*, paragraph 44, *Kittel and Recolta Recycling*, paragraph 41, and *Transport Service*, paragraphs 18 and 19).

32 – Paragraph 31.

33 – Paragraph 33.

34 – Paragraphs 34 and 35 (citing *Schmeink & Cofreth*, paragraphs 60 and 63, and Joined Cases C?78/02 to C?80/02 *Karageorgou* [2003] ECR I?13295, paragraph 50). The apparent discrepancy between the two statements concerning the need for good faith stems from the fact that in *Schmeink & Cofreth*

the Court considered that the requirement of good faith which it had mentioned in Case C-342/87 *Genius Holding* [1989] ECR 4227 was not essential (see *Schmeink & Cofreth*, in particular at paragraphs 50 to 58 of the judgment).

35 – Paragraph 37.

36 – Paragraph 40 (citing *Schmeink & Cofreth*, paragraph 62).