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OPINION OF ADVOCATE GENERAL

MAZÁK

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Case C-277/09

Commissioners for Her Majesty's Revenue and Customs

v

RBS Deutschland Holdings GmbH

(Reference for a preliminary ruling from the Court of Session of Scotland (First Division, Inner House) (United Kingdom))

(Interpretation of Article 17(3)(a) of the Sixth VAT Directive – Transactions carried out with the sole aim of obtaining a tax advantage – Provision of vehicle leasing services in the United Kingdom by the German subsidiary of a bank established in the United Kingdom)

I – **Introduction**

1. By order of 10 July 2009, received at the Court on 21 July 2009, the Court of Session of Scotland (First Division, Inner House) (United Kingdom) referred questions to the Court of Justice under Article 234 EC for a preliminary ruling concerning the interpretation 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 (2) ('the Sixth Directive').

2. The reference was made in proceedings between the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners'), the United Kingdom authority responsible for the collection of value added tax ('VAT') and other taxes, and RBS Deutschland Holdings GmbH ('RBSD'), concerning the Commissioners' refusal to allow deduction of VAT on the purchase of motor vehicles used for cross-border leasing within the Community.

3. By its questions, the referring court essentially wishes to ascertain, in the first place, whether Article 17(3)(a) of the Sixth Directive must be interpreted as entitling the tax authorities of a Member State to refuse deduction of (input) VAT in respect of the purchase of cars for the purpose of leasing them in circumstances such as those of the present case where no (output) VAT was charged on the car leasing transactions either in that Member State or in another Member State concerned.

4. In the second place, the referring court seeks guidance as to whether the transactions at issue may be qualified as constituting an ‘abusive practice’ within the meaning of the Court’s decision in *Halifax and Others*. (3)

II – **Legal framework**

A – *The Sixth Directive*

5. Article 5 of the Sixth Directive provides, in so far as is relevant, as follows:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

…

4. The following shall also be considered supplies within the meaning of paragraph 1:

…

(b) the actual handing over of goods, pursuant to a contract for the hire of goods for a certain period or for the sale of goods on deferred terms, which provides that in the normal course of events ownership shall pass at the latest upon payment of the final instalment;

…’

6. Article 6 of the Sixth Directive provides:

‘1. “Supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

…’

7. Article 8(1) of the Sixth Directive states that:

‘The place of supply of goods shall be deemed to be:

(a) in the case of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person: the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins. ...

(b) in the case of goods not dispatched or transported: the place where the goods are when the supply takes place.

…’

8. Article 9 of the Sixth Directive provides as follows:

‘1. The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

…’

9. Article 17 of the Sixth Directive, entitled ‘Origin and scope of the right to deduct’, provides, in so far as is relevant:

‘…

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) [VAT] 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;

...

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 referred to in Article 4(2), carried out in another country, which would be deductible if they had been performed within the territory of the country;

…’

B – *Relevant national law*

10. Schedule 4, paragraph 1(2) of the Value Added Tax Act 1994 (‘the VAT Act’), which contains a definition of the term ‘supply of goods’, provides:

‘If the possession of goods is transferred –

(a) under an agreement for the sale of the goods, or

(b) under agreements which expressly contemplate that the property also will pass at some time in the future (determined by, or ascertainable from, the agreements but in any case not later than when the goods are fully paid for),

it is then in either case a supply of the goods.’

11. Pursuant to that rule, national law deems leasing to be a supply of goods only if it is provided for under conditions where, on expiry of the contract, title to the goods leased passes to the user or to third parties. In other cases, leasing is deemed to be a supply of services under section 5(2)(b) of the VAT Act, which provides that anything which is not a supply of goods but is done ‘for a consideration’ is a supply of services.

III – **Factual background, procedure and questions referred**

12. RBSD is a company established in Germany carrying on business providing banking and leasing services. RBSD is a member of the Royal Bank of Scotland Group. It does not have any place of establishment in the United Kingdom, but it is registered there for VAT purposes as a non-established taxable person.

13. In January 2000, Vinci plc (‘Vinci’), an unconnected company incorporated in the United Kingdom, was introduced, via Lombard North Central plc, to RBSD with a view to RBSD supplying lease finance to Vinci. To that end, on 28 March 2001, RBSD entered into a number of

agreements with the Vinci Group.

14. First, RBSD purchased motor cars in the United Kingdom from Vinci Fleet Services ('VFS'), a subsidiary of Vinci. VFS had acquired the cars from car dealerships established in the United Kingdom.

15. Second, RBSD and VFS entered into a Put Option Agreement in respect of the same cars. Under the terms of that agreement, VFS granted RBSD an option to require VFS to buy back cars which have been the subject of a lease agreement between RBSD and a company within the Vinci Group.

16. Third, a leasing agreement was concluded for a term of two years, which could be extended, called the 'Master Lease Agreement', under which RBSD acted as lessor and Vinci as lessee in respect of equipment identified in the schedules to that agreement as motor cars. On the expiry of the lease, Vinci was liable to pay to RBSD the full residual value of the cars. However, if (as was expected by the parties) RBSD sold the cars to a third person, Vinci would be entitled to or liable for the difference between the sale prices of the cars and their residual value, depending on the circumstances.

17. Between 28 March 2001 and 29 August 2002, RBSD charged rentals of GBP 335 977 to Vinci and charged no VAT on those transactions.

18. On 29 August 2002, RBSD assigned the agreements in question to a German subsidiary of the Royal Bank of Scotland Group, Lombard Leasing GmbH ('LL'). LL then charged rentals of GBP 1 682 876 to Vinci and charged no VAT on those rentals during the period from 29 August 2002 to 27 June 2004.

19. Subsequently, and until 15 December 2004, LL exercised the put option with VFS in relation to the cars covered by the leasing agreements. VFS bought back the cars for GBP 663 158 and output tax totalling GBP 116 052 was charged to it by LL, which was then paid to the Commissioners.

20. The rental payments, received first by RBSD and then by LL, were not subject to VAT in the United Kingdom since, under United Kingdom law, the transactions in question were treated as supplies of services and were regarded as having been made in Germany, that is to say, where the supplier had his business. Nor were those payments subject to VAT in Germany since, under German law, the transactions in question were treated as supplies of goods and were regarded as having been made in the United Kingdom, that is to say, where the goods were located when the supplies took place.

21. Accordingly, no VAT was paid on the rental payments in either of the two Member States. However, as noted above, (4) VAT was levied in the United Kingdom on the proceeds of the sale of the cars following exercise of the put option by LL.

22. Before the national tax authorities, RBSD claimed deduction in full of the input VAT of GBP 314 056 charged to it by VFS when it purchased the cars from that company. (5) RBSD maintained inter alia that Article 17(3)(a) of the Sixth Directive entitled it to deduct the input tax on the acquisition of those goods. Furthermore, the conditions governing application of the doctrine of abuse of rights were not met in this case, since these were leasing transactions conducted between three independent traders operating at arm's length.

23. The Commissioners refused to allow RBSD the VAT deduction it had claimed and demanded repayment of the input tax which had been credited to RBSD, contending in essence

that Article 17(3)(a) of the Sixth Directive did not permit deduction of input VAT paid in respect of the acquisition of goods subsequently used for transactions which were not chargeable to output VAT. The Commissioners took the view, furthermore, that RBSD had engaged in an abusive practice because the legal arrangement it had put in place had the essential aim of obtaining a fiscal advantage contrary to the purpose of the directive and that the leasing terms were drawn up in order to enable it to exploit the differences in the ways the directive was transposed in the United Kingdom and in Germany.

24. RBSD appealed to the VAT and Duties Tribunal in Edinburgh against the Commissioners' decision. In its decision of 24 July 2007, the Tribunal held that the principle of fiscal neutrality did not require that a VAT deduction should be refused merely because there was no corresponding liability to output VAT. The VAT and Duties Tribunal also found that the arrangements at issue did not constitute an abusive practice.

25. It falls to the referring court to decide on the appeal which the Commissioners lodged against that decision.

26. Taking the view that it requires guidance on the interpretation of Article 17(3) of the Sixth Directive and the possible applicability of the principle prohibiting abusive practices, the Court of Session of Scotland thus decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'In circumstances such as those of the present case, where:

(a) a German subsidiary of a United Kingdom bank purchased cars in the United Kingdom with a view to leasing them to an unconnected company in the United Kingdom and paid value added tax on these purchases;

(b) under the relevant United Kingdom legislation the supplies consisting of the rental of cars were treated as supplies of services made in Germany and accordingly not subject to value added tax in the United Kingdom. Under German law these supplies were treated as supplies of goods made in the United Kingdom and accordingly not subject to value added tax in Germany. The consequence was that no output tax was charged on these supplies in either Member State;

(c) the United Kingdom bank selected its German subsidiary as lessor and determined the duration of the leasing arrangements with a view to obtaining the tax advantage of no VAT being chargeable on the rental payments:

(1) Is Article 17(3)(a) of the Sixth Directive … to be interpreted as entitling the United Kingdom tax authorities to refuse to allow the German subsidiary to deduct VAT which it paid in the United Kingdom in respect of the purchase of the cars?

(2) In determining the answer to the first question, is it necessary for the national court to extend its analysis to consider the possible application of the principle of prohibiting abusive practices?

(3) If the answer to Question 2 is yes, would the deduction of input tax on the purchase of the cars be contrary to the purpose of the relevant provisions of the Sixth Directive and thus satisfy the first requirement for an abusive practice as described in paragraph 74 of the decision of the Court in [*Halifax*] having regard among other principles to the principle of the neutrality of taxation?

(4) Again if the answer to Question 2 is yes, should the court consider that the essential aim of the transactions is to obtain a tax advantage, so that the second requirement for an abusive

practice as described in paragraph 75 of the said decision of the Court is satisfied, in circumstances where in a commercial transaction between parties operating at arm's length, the choice of a German subsidiary to lease the cars to a United Kingdom customer, and of the terms of the leases, are made with a view to obtaining the tax advantage of no output tax being charged on the rental payments?'

IV – **Legal analysis**

A – *Preliminary observations*

27. The four questions referred are essentially designed to determine whether under the Sixth Directive RBSD may, in the circumstances of the present case, have a right to deduct, or obtain a refund of, VAT which it paid in respect of the purchase of cars used for the purposes of its leasing transactions despite the fact that, because of a difference in the way two Member States have implemented that directive, no output VAT has been levied on those transactions in either of the Member States concerned.

28. Those questions can in fact be regrouped into two main issues, which I shall examine in the following order: first, the interpretation of Article 17(3)(a) of the Sixth Directive (Question 1) and, second, the role and scope in the circumstances of the present case of the prohibition of abusive practices (Questions 2 to 4).

29. Contrary to what the wording of Question 2 appears to suggest, those two issues are conceptually distinct and should accordingly be dealt with one after the other rather than together.

30. Thus, as a first step, consideration must be given to whether a taxable person can, as a matter of principle, claim deduction of input VAT by virtue of the relevant provisions of the Sixth Directive, in particular Article 17(3)(a) thereof, in a series of transactions such as that at issue in the main proceedings.

31. Only if it is established that, at least formally, the conditions laid down by the relevant provisions of the Sixth Directive for obtaining the deduction in question are in principle met will it be necessary to consider, as a second step, whether the taxable person concerned seeks, in the specific circumstances of the present case, to avail itself of those provisions for abusive or fraudulent ends, that is to say, whether the activities at issue are, in the light of the subjective and objective criteria which the Court has formulated in that regard in its case-law, (6) to be regarded as being tantamount to abusive practices. (7)

32. It should, finally, also be noted by way of a preliminary point that the questions referred in the present case appear to start from the premiss that, first, the output supplies under the leasing transactions in question qualify as supplies of services within the meaning of Article 6(1) of the Sixth Directive with the result, second, that, for the purposes of Article 9(1) of the Sixth Directive, Germany, where RBSD as the supplier of the services is established, is to be regarded as the place of supply.

33. As those issues have not been raised by the questions referred in these proceedings and fall, in the final analysis, to be determined by the referring court on the basis of the facts of the case, (8) I shall also examine the questions referred on the assumption that the leasing supplies at issue are services which have been supplied in Germany.

B – *The first question*

34. By its first question, the referring court wishes to know, in essence, whether Article 17(3)(a)

of the Sixth Directive must be interpreted as meaning that a Member State may deny to a taxable person deduction or refund of input VAT paid on cars purchased in that Member State ('the Member State of refund') in a situation where those cars are used for the purposes of leasing transactions carried out in another Member State ('the Member State of the output transaction') which, because of a difference in implementation, have not been subject to output VAT either in the Member State of the input transaction or in the Member State of the output transaction.

1. Main positions of the parties

35. In the present proceedings, written observations have been submitted by RBSD, the Danish, Italian and United Kingdom Governments, Ireland and the European Commission. With the exception of the Danish Government, all those parties, as well as the German Government, were represented at the hearing on 17 June 2010.

36. The Danish, Italian and United Kingdom Governments and Ireland take the view that, on a proper construction of Article 17(3)(a) of the Sixth Directive, a taxable person in a situation such as that in the present case does not have a right to deduct VAT and that the first question referred should accordingly be answered in the affirmative.

37. According to their line of argument, which I shall not rehearse in detail here, it would be contrary to the scheme of the VAT system and, in particular, to the purpose of the right to deduct provided for under Article 17 of the Sixth Directive, which is to ensure complete fiscal neutrality, to allow a taxable person to deduct input VAT in respect of a transaction which did not give rise to corresponding output VAT. According to both the wording of Article 17 and the requirements of the principle of fiscal neutrality as explained in the case-law of the Court, only taxable transactions can, as a rule, give rise to an entitlement to deduction. Thus, in the present case, RBSD could claim deduction of VAT paid on the purchase of the cars only if it had actually accounted for VAT in Germany in respect of the leasing transactions.

38. The German Government, while not specifically replying to the first question referred, submits that, contrary to the submission of the Commission, it has not incorrectly transposed or applied the Sixth Directive, in particular Article 5(4)(b) thereof. It agrees, however, that in the present case the United Kingdom tax authorities should be entitled to refuse the deduction at issue.

39. By contrast, according to RBSD and the Commission, Article 17(3)(a) of the Sixth Directive does not entitle the tax authorities of a Member State to refuse deduction in a situation such as that at issue in this case. The first question referred should therefore be answered in the negative.

40. The Commission points out, more particularly, that, on a proper construction of Article 5 of the Sixth Directive, the leasing transactions carried out by RBSD should have been classified, by the German taxation authorities, as supplies of services and should, as a consequence, have been taxed in Germany. However, neither the incorrect treatment of that matter in Germany nor the fact that the outcome is, admittedly, unsatisfactory and contrary to the scheme of the VAT legislation and the principle of fiscal neutrality can override the fact that Article 17(3)(a) of the Sixth Directive does not, by reason of its history and wording, allow for an interpretation by virtue of which the tax authorities could refuse deduction in circumstances such as those at issue.

41. Sharing the view of the Commission, RBSD emphasises that if indeed Germany has incorrectly implemented the Sixth Directive or if, in any event, there is a divergence in implementation of that directive between the United Kingdom and Germany a taxpayer is entitled to take advantage of it and the United Kingdom authorities have no right to refuse deduction on the basis that harmonisation of VAT throughout the European Union is not yet complete. In its

submission, the principle of fiscal neutrality is not absolute and does not necessarily require actual payment of output tax as a prerequisite for the deduction of input tax.

2. Appraisal

42. Under Article 17(3)(a) of the Sixth Directive, every person subject to VAT within the meaning of Article 4(1) of that directive has the right to deduct, or obtain a refund of, VAT in so far as the goods and services for which that input VAT has been paid are used in connection with economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if those activities had taken place in the territory of the Member State. (9)

43. It should thus be stressed that, as emerges unequivocally from the wording of that provision, whether there is a right to deduct input VAT paid for supplies which are used for the purposes of transactions carried out in another Member State is to be determined by reference to the Member State of the input transactions in question, not by reference to the other Member State where the output transactions in question are carried out.

44. The right to deduct input VAT in respect of foreign output transactions is thus, under Article 17(3)(a) of the Sixth Directive, made dependent on whether that right to deduct would exist if the corresponding output transactions were effected within the Member State of refund. (10)

45. In this case, it is common ground that the leasing supplies at issue are to be regarded as economic activities which would give rise to the right to deduction in the United Kingdom of the input VAT at issue if they had been effected in its territory.

46. I therefore take the view that Article 17(3)(a) of the Sixth Directive confers entitlement to deduction of input VAT in the circumstances of the present case.

47. However, the problems raised in this context by the questions referred stem apparently from the fact that the leasing transactions at issue have, as is undisputed, not been subject to output taxation in Germany in whose territory those transactions are deemed to have been carried out, with the result that, in fact, no output VAT at all has been paid in the present case by the supplier claiming deduction.

48. In that regard, the present preliminary ruling proceedings are not the place to determine whether, as the Commission contends, the difference in the qualification of the place of taxation of the leasing supplies at issue is indeed the result of Germany’s having incorrectly transposed or misapplied the Sixth Directive, in particular Article 5 thereof on the definition of supply of goods or, as the case may be, the result of a misapplication of the directive on the part of the United Kingdom tax authorities. It is sufficient to note that a divergence in the application of the Sixth Directive lies at the root of the present case.

49. As the German Government has correctly observed, the problem of discrepancies with which we are confronted in the present case is in any event a more general issue in the context of intra-Community transactions and is not limited to the case where a Member State actually misapplies the Sixth Directive. In addition to that case, there may be instances of a given transaction being treated by one Member State as subject to VAT while the same transaction would not give rise to a charge to VAT in another Member State.

50. This situation arises because the Sixth Directive and the directives preceding it have not brought about complete harmonisation of all aspects of VAT taxation and because the Community system of VAT thus established expressly allows the Member States some latitude on certain

matters with regard to implementation of the directive, for example, by providing for certain options in VAT taxation of which Member States can avail themselves. (11) Such options are, for instance, provided by Article 13C and Article 28(3) of the Sixth Directive in respect of tax exemptions. (12)

51. That being said, in such a situation, where the output transaction is treated as not giving rise to taxation in the Member State in which it is carried out, can there nevertheless be entitlement to deduction under Article 17(3)(a) of the Sixth Directive, that is, despite the absence of output tax?

52. In that regard, it must be noted, on the one hand, that according to the system of deduction set up under the Sixth Directive and the principle of fiscal neutrality which that system enshrines, the right to deduct input tax is, as a rule, linked to the collection of output tax. (13)

53. More particularly, the Court has repeatedly stated in this context that the right to deduct, which is laid down in Article 17(2) of that directive and relates to the input tax on the goods and services used by the taxable person for the purposes of his taxable transactions, is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, provided that they are themselves subject in principle to VAT. (14)

54. According to settled case-law, moreover, the principle of fiscal neutrality, and, in particular, the right to deduct, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT established by the relevant European Union legislation. (15)

55. It is therefore true that, as most of the parties to the present proceedings have submitted, allowing deduction of input tax under Article 17(3)(a) of the Sixth Directive in the absence of the payment of corresponding output tax is prima facie at odds with the system of VAT set up under the Sixth Directive, in particular the system of deduction, and with the principle of fiscal neutrality which that system enshrines.

56. On the other hand, it must be conceded, as RBSD has pointed out, that the Sixth Directive expressly provides, in Article 17(3) of which the provision under examination forms part, for exceptions to the rule that only taxable transactions may give rise to the right to deduct input VAT. Thus, Article 17(3)(b) and (c) provide for the deduction of VAT on goods or services used for exempt transactions. (16)

57. The Sixth Directive allows therefore for certain derogations from and limitations to the general scheme of the system of deduction and the principle of fiscal neutrality observance of which that system is intended to ensure. (17)

58. Against that background, it seems to me that, in the first place, Article 17(3)(a) of the Sixth Directive cannot be interpreted in such a way that the right to deduction is made conditional upon whether the output transaction actually gives rise to payment of VAT in the Member State where the transaction took place without depriving the provision of its purpose as such an interpretation would run counter to its clear wording which makes deduction dependent on eligibility for deduction in the Member State of refund.

59. In the second place, it is, to my mind, inherent in that rule, which determines the right to deduction by reference to a hypothetical tax treatment (in the Member State of refund) instead of by reference to the actual tax treatment of the output transaction (in the Member State where that transaction occurred), that, in so far as the VAT system established under the Sixth Directive still allows for certain differences in taxation between the Member States, cases such as those at issue

may arise where Article 17(3)(a) of the Sixth Directive grants entitlement to deduction despite the fact that no output VAT has actually been paid on the transaction in question.

60. In other words, in adopting that provision, the Community legislature has accepted the risk that, in so far as Article 17(3)(a) of the Sixth Directive allows, in those particular circumstances, for deduction of input VAT in the absence of output VAT, that provision entails a derogation from the deduction system as provided for, in particular, under Article 17(2) of the Sixth Directive and, accordingly, from the principle of fiscal neutrality.

61. I therefore agree, in essence, with the Commission that it would be for the legislature to remedy the legal situation at issue, which constitutes, no doubt, an anomaly or derogation in the Community system of VAT as pointed out above. As that derogation permitting deduction is, in the current state of harmonisation of the VAT system, inherent in Article 17(3)(a) of the Sixth Directive as it stands, it cannot be rendered inapplicable by reference to the usual scheme of the system of deduction set up under that directive and the principle of fiscal neutrality. (18)

62. Finally, I agree with the Commission that *Debouche* does not provide conclusive support to the interpretation, contrary to that adopted in this Opinion, advocated by the governments which have submitted observations in these proceedings, for the very reason that – apart from a number of factual differences between that case and this one, such as that concerning the lack of a certificate establishing the quality of a taxable person – *Debouche* did not turn on Article 17(3)(a) of the Sixth Directive which shifts the point of reference in determining the right to deduction to the Member State of refund and thus specifically brings about the legal situation at issue in the present case. (19)

63. In the light of all the foregoing considerations, I propose therefore that the answer to the first question referred should be that Article 17(3)(a) of the Sixth Directive does not entitle the tax authorities of a Member State to refuse to allow a taxable person to deduct input VAT paid on goods used for the purposes of leasing supplies provided in another Member State for the sole reason that those supplies have not actually given rise to the payment of output VAT in the latter State.

C – *The second, third and fourth questions*

64. By its second, third and fourth questions, which it is appropriate to examine together, the referring court essentially seeks to ascertain whether the right to deduction may in circumstances such as those of the present case be refused to a taxable person on the basis of the principle of prohibiting abusive practices as set out by the Court in its decision in *Halifax*. (20)

1. Main positions of the parties

65. Given that they have, in response to the first question referred, contended that under Article 17(3)(a) of the Sixth Directive a taxable person in a situation such as that of RBSD has no right to deduct VAT, most of the governments which have submitted observations take the view that it is not necessary to consider the present case also in the light of the principle prohibiting abusive practices.

66. However, in the event that the Court should not follow the interpretation they advocate, the Danish, German, Italian and United Kingdom Governments and Ireland concur that the principle prohibiting abusive practices is applicable in the present case. They agree, in essence, that the transactions, in view of their artificiality and their aim of obtaining a tax advantage, are liable to infringe that principle, whilst it falls in the final analysis, as some of those governments have pointed out, to the referring court to establish whether all the requirements for an ‘abusive practice’

as defined by the Court in *Halifax* (21) are in fact satisfied.

67. The Commission takes the view that where there is a genuine commercial transaction between parties operating at arm's length, the fact that services are provided by a company established in another Member State and the fact that the terms of the agreement are drafted in such a way as to benefit from a favourable interpretation of Community VAT legislation by the tax authorities of a Member State cannot be regarded as constituting an abuse of law. It points out that if the national court finds that RBSD does indeed provide the services in issue from a real establishment in Germany, then there is a genuine economic activity being carried out and it would accordingly be difficult to conclude that the essential aim of the transactions is to procure a tax advantage.

68. Concurring, in essence, with the view taken by the Commission, RBSD maintains that it is not necessary for the referring court to consider the application of the principle prohibiting abusive practices. It denies that the transactions at issue are artificial and emphasises that they were carried out in the context of normal commercial operations and not solely for the purpose of wrongfully obtaining tax advantages. The essential aim of the transactions was the leasing of cars for commercial profit and not the mere attainment of a tax advantage.

2. Appraisal

69. First of all, it should be noted, particularly in view of the second question referred, that it is – so far as may be necessary – for the national court to take account of the principle prohibiting abusive practices in adjudicating on the present case, since that principle applies to the sphere of VAT and precludes in that context, in particular, any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice. (22)

70. Next, it should be recalled that the principle prohibiting the abuse of rights is, pursuant to settled case-law, intended to ensure, particularly in the field of VAT, that Community legislation is not extended to cover abusive practices by economic operators, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law. (23)

71. The purpose and effect of that principle are therefore to prohibit wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage. (24)

72. The criteria relevant for finding an abusive practice in the sphere of VAT, from which there is no reason to depart in the present case, were defined by the Court in *Halifax* as follows: (25)

– the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions;

– it is apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.

73. In that regard, it is important to note, in view of the formulation of the third and fourth questions referred, that it is, under the division of functions provided for by Article 234 EC (now Article 267 TFEU), for the national court to apply those criteria to the particular circumstances of the case before it and to verify whether action constituting such an abusive practice has taken place in that case. (26)

74. However, the following considerations may, in view of the specific features of the case at issue, provide the national court with some further guidance regarding the application of the abovementioned criteria. (27)

75. As regards the first criterion, which is the object of the third question referred, the fact that allowing deduction of input tax in this case appears, in principle, to be at odds with the objectives of the Sixth Directive and, in particular, with the principle of fiscal neutrality cannot, in my view, in itself lead to a finding that that deduction would be contrary to the purpose of Article 17(3)(a) of the Sixth Directive, in so far as that provision, as I have pointed out above, (28) will, by reason of the terms in which it is cast, involve derogations from the VAT system set up under that directive, in particular the system of deduction, and the principle of fiscal neutrality.

76. In other words, where a taxable person makes use of an ‘anomaly’ or inconsistency in the VAT system such as that at issue, which is, however, due to that system itself or, more particularly, caused by differences in the application of that system in the Member States concerned, not every ‘use’ made of that possibility by a taxable person may automatically be deemed to be constitutive of an ‘abuse’.

77. Next, as regards the second criterion, alluded to by the fourth question referred, the national court needs to bear in mind in the assessment which it must carry out, first, that, as the Court has repeatedly stated, a taxpayer’s choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system. Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, taxpayers may choose to structure their business so as to limit their tax liability. (29)

78. It follows in my view that in the present case the fact that a foreign subsidiary has been chosen to carry out a transaction instead of a supplier in the country concerned, with the effect that a tax advantage accrues, cannot in itself lead to a finding that the essential aim of the leasing transactions at issue is merely to obtain a tax advantage.

79. Rather, in assessing whether the essential aim of the transactions concerned is to obtain a tax advantage, the national court may consider whether the arrangements for the carrying-out of the leasing supplies at issue appear wholly artificial in that they may not be explained by some reason other than the mere attainment of tax advantages, such as economic objectives arising from, for example, marketing, organisation or cost efficiencies. In assessing the artificiality of the transactions at issue, the national court may, furthermore, take account of the links of a legal, economic and/or personal nature between the operators involved. (30)

80. In the light of the foregoing, I therefore propose that the answer to the second, third and fourth questions should be that it is for the national court to determine, in light of the criteria formulated by the Court in *Halifax* (31) and the indications I have given in this context above, whether, for the purposes of the application of Article 17(3)(a) of the Sixth Directive, transactions such as those at issue in the main proceedings can be considered to constitute an abusive practice under the Sixth Directive, with the result that the national tax authorities may refuse a taxable person the deduction of input VAT paid in respect of those transactions.

V – **Conclusion**

81. I propose, therefore, that the Court answer the questions referred as follows:

(1) Article 17(3)(a) 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 does not entitle the tax authorities of a Member State to refuse to allow a taxable person to deduct input value added tax paid on goods used for the purposes of leasing supplies provided in another Member State for the sole reason that those supplies have not actually given rise to the payment of output value added tax in the latter State.

(2) It is for the national court to determine, in light of the criteria formulated by the Court in Case C?255/02 *Halifax and Others* ?2006? ECR I?1609*,* whether, for the purposes of the application of Article 17(3)(a) of the Sixth Directive, transactions such as those at issue in the main proceedings can be considered to constitute an abusive practice under the Sixth Directive, with the result that the national tax authorities may refuse a taxable person the deduction of input value added tax paid in respect of those transactions.

In that regard, although allowing deduction of input tax in a situation such as that of the present case is – in so far as no output tax has been levied – in principle inconsistent with the system of deduction set up under the Sixth Directive and, in particular, with the principle of fiscal neutrality, that cannot in itself lead to a finding that that deduction would be contrary to the purpose of Article 17(3)(a) of the Sixth Directive. Furthermore, the fact that a foreign subsidiary is chosen to carry out a transaction instead of a supplier in the country concerned, with the effect that a tax advantage accrues, cannot in itself lead to a finding that the essential aim of the transaction at issue is merely to obtain a tax advantage.

1 – Original language: English.

2 – OJ 1977 L 145, p. 1; the version of the Sixth Directive which is relevant in the present case and to which this Opinion refers is that resulting from the amendments made by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18).

3 – Case C?255/02 ?2006? ECR I?1609 (‘*Halifax*’).

4 – See point 19 above.

5 – See point 14 above.

6 – See, in particular, below at point 72.

7 – See, in this context, Case C?110/99 *Emsland-Stärke* ?2000? ECR I?11569, in particular paragraph 46 in combination with paragraphs 51 and 52, and *Halifax*, cited in footnote 3,

paragraphs 68, 69 and 74.

8 – See, to that effect, Case C?63/04 *Centralan Property* ?2005? ECR I?11087, paragraph 63.

9 – See Case C?377/08 *EGN* ?2009? ECR I?5685, paragraph 23.

10 – See, to that effect, *EGN*, cited in footnote 9, paragraph 34; see also the Opinion of Advocate General Kokott in Case C?401/05 *VDP Dental Laboratory* ?2006? ECR I?12121, point 32.

11 – See, to that effect, Case C?240/05 *Eurodental* ?2006? ECR I?11479, paragraph 51; Case C?165/88 *ORO Amsterdam Beheer and Concerto* ?1989? ECR 4081, paragraph 21; Case C?72/05 *Wollny* ?2006? ECR I?8297, paragraph 28; and Joined Cases C?487/01 and C?7/02 *Gemeente Leusden and Holin Groep* ?2004? ECR I?5337, paragraph 48.

12 – See, in this context, for example Case C?302/93 *Debouche* ?1996? ECR I?4495, paragraph 3.

13 – See, to that effect, for example *Wollny*, cited in footnote 11, paragraph 20, and Case C?184/04 *Uudenkaupungin kaupunki* ?2006? ECR I?3039, paragraph 24.

14 – See, inter alia, Case C?174/08 *NCC Construction Danmark* ?2009? ECR I?0000, paragraph 27; Case C?435/05 *Investrand* ?2007? ECR I?1315, paragraph 22; and Case C?408/98 *Abbey National* [2001] ECR I?1361, paragraph 24.

15 – See Case C?25/07 *Sosnowska* [2008] ECR I?5129, paragraphs 14 and 15, and Case C?74/08 *PARAT Automotive Cabrio* [2009] ECR I?3459, paragraph 15.

16 – See, to that effect, for example Case C?4/94 *BLP* ?1995? ECR I?983, paragraphs 22 and 23, and *Eurodental*, cited in footnote 11, paragraphs 33 to 36.

17 – See, to that effect, also *PARAT Automotive Cabrio*, cited in footnote 15, paragraph 18.

18 – See also in this context the Opinion of Advocate General Bot in *NCC Construction Danmark*, cited in footnote 14, point 86: '?The right to deduct? does not transcend the legislation. … The principle of neutrality and the right to deduct cannot therefore preclude or render inapplicable a provision of national law which transposes such a derogating provision of the Sixth Directive.'

19 – *Debouche*, cited in footnote 12, in particular paragraphs 12 to 17.

20 – Cited in footnote 3.

21 – Cited in footnote 3.

22 – See, in that regard, *Halifax*, cited in footnote 3, paragraph 70, and Case C?223/03 *University of Huddersfield* ?2006? ECR I?1751, paragraph 52.

23 – See Case C?162/07 *Ampliscientifica and Amplifin* ?2008? ECR I?4019, paragraph 27, and *Halifax*, cited in footnote 3, paragraphs 69 and 70.

24 – See, to that effect, *Ampliscientifica and Amplifin*, cited in footnote 23, paragraph 28, and Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraph 55.

25 – See *Halifax*, cited in footnote 3, paragraphs 74 and 75; see also Case C?425/06 *Part Service* ?2008? ECR I?897, paragraphs 42 and 58.

26 – See, to that effect, *Halifax*, cited in footnote 3, paragraph 76, and *Part Service*, cited in footnote 25, paragraph 63.

27 – See *Halifax*, cited in footnote 3, paragraph 77, and *Part Service*, cited in footnote 25, paragraph 56.

28 – See above points 58 to 60.

29 – See, to that effect, *Halifax*, cited in footnote 3, paragraph 73; *BLP*, cited in footnote 16, paragraph 26; and *Part Service*, cited in footnote 25, paragraph 47.

30 – See, in this context, *Halifax*, cited in footnote 3, paragraphs 75 and 81, and *Part Service*, cited in footnote 25, paragraph 62.

31 – Cited in footnote 3.