OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 28 June 2011 (1)

Case C?218/10

ADV Allround Vermittlungs AG, in liquidation

v

Finanzamt Hamburg-Bergedorf

(Reference for a preliminary ruling from the Finanzgericht Hamburg (Germany))

(Sixth VAT Directive — Interpretation of Article 9(2)(e) — Supply of staff — Supply of drivers not in the employ of the supplier — Place where the services are supplied — Refund)

I – **Introduction**

1. By order of 20 April 2010, received at the Court on 6 May 2010, the Finanzgericht Hamburg (Finance Court Hamburg) (Germany) referred questions to the Court of Justice under Article 267 TFEU 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 ADV Allround Vermittlungs AG, in liquidation, ('ADV Allround') and the Finanzamt Hamburg-Bergedorf (Tax Office, Hamburg-Bergedorf) concerning the liability to value added tax ('VAT'), for the year 2005, by virtue of the place of performance of supplies of self-employed lorry drivers to customers located abroad.

3. By its questions, the referring court essentially wishes to ascertain, in the first place, whether Article 9(2)(e) of the Sixth Directive must be interpreted as meaning that the term 'supply of staff' also covers the supply of self-employed persons not in the employ of the trader providing the service.

4. In the second place, it wishes to know whether, according to the provisions of the Sixth Directive, national procedural law is required to ensure that one and the same transaction consisting, in this case, in the supply of services, is assessed for purposes of levying VAT in the same way in relation to the taxable person providing the service and the taxable person receiving it and it seeks guidance on the period within which the latter person may deduct the input tax levied on the service received.

II – **Legal framework**

A – *The Sixth Directive*

5. Article 9 of the Sixth Directive, entitled ‘Supply of Services’, provides, in so far as is relevant, 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.

2. However:

…

(e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

…

– the supply of staff,

…’

6. 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*

7. Paragraph 3a, concerning the place of performance of other services, of the Umsatzsteuergesetz in the version in force until 31 December 2009 (Law on Turnover Tax) ('the UStG') provides, so far as is relevant, as follows:

(1), first sentence:

'Subject to Paragraphs 3b and 3f, other services shall be performed at the place from which the trader conducts his business.

…'

(3), first sentence:

'If the recipient of one of the other services referred to in (4) is a trader, the other service shall, in derogation from (1), be performed at the place where the recipient conducts his business.

…'

'(4) ... Other services within the meaning of (3) are: … (7) the supply of staff.

…'

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

8. According to the order for reference, ADV Allround's business consisted in 2005, the year at issue, in the supply of self-employed lorry drivers to haulage contractors in Germany and abroad, in particular in Italy (South Tyrol).

9. To that end, written contracts, known as 'agency agreements', were concluded with the drivers. Haulage contractors commissioned the service by telephoning ADV Allround whenever they required a driver.

10. The drivers charged ADV Allround for their work, which consisted in driving the lorries provided by the haulage contractors, while ADV Allround charged the latter for the supply of the drivers, applying a price differential of between 8% (long-term jobs) and 20% (one-off jobs).

11. ADV Allround did not initially add turnover tax when invoicing clients located outside Germany such as the Italian haulage contractors in the present case, assuming that the service in question constituted a 'supply of staff' within the meaning of Paragraph 3a(4)(7) of the UStG and that the place of supply and, consequently, of taxation was therefore Italy where the recipients of that service were established.

12. In an audit report of 3 July 2006 following a special audit of the turnover tax paid by ADV Allround in the first to third quarters of 2005, the Tax Office Hamburg-Bergedorf expressed the view that 'supply of staff' within the meaning of the aforementioned provision covered only the making available of a company's own workers (labour leasing) and that, accordingly, the place of performance was the place from which ADV Allround conducted its business, that is to say, Germany.

13. As a result, ADV Allround started to add turnover tax at the then rate of 16% when invoicing Italian customers also. In addition, it drew up amended invoices showing turnover tax in respect of all the services it had supplied in 2005, assuming that the turnover tax would be refunded to the Italian customers and that, apart from the additional administration connected with the refund

process, the treatment of the transaction as taxable in Germany would still be economically neutral.

14. The Bundeszentralamt für Steuern (Federal Central Tax Office), however, which is responsible for applications for input tax refunds, took a different view from that of the Tax Office Hamburg-Bergedorf, holding that the notion of 'supply of staff' in Paragraph 3a(4)(7) of the UStG covered supplies of drivers such as those at issue here. According to that view, those transactions were therefore not taxable in Germany, turnover tax had been incorrectly entered on the amended invoices and that incorrectly entered turnover tax could not be refunded. Any applications which individual customers had made for turnover tax refunds were turned down.

15. As a consequence, the Italian customers refused to keep paying ADV Allround the turnover tax added to its invoices. With prices higher at the time by 16%, ADV Allround could not continue to trade on the market because customers had no way of obtaining an input tax refund and, as a result, had to bear the tax as a real charge. Its margin being between 8% and 20%, it ceased trading and is now in liquidation.

16. The Finanzgericht Hamburg, before which the case has been brought, states, first, that there is uncertainty as to whether the term 'supply of staff', which is used both in Article 9(2)(e) of the Sixth Directive and in Paragraph 3a(4)(7) of the UStG implementing that provision in German law, refers only to persons in a relationship of dependent employment, that is to say employees, or also covers self-employed persons such as the lorry drivers in the present case. It indicates, however, that the difficulties in practice in distinguishing employed from self-employed persons and in providing the recipient of services with appropriate evidence to that effect may, in the light of the objective of the Sixth Directive of facilitating the supply of services within the European internal market, militate in favour of an inclusion of the supply of self-employed persons in the notion of 'supply of staff'.

17. Second, as taxability and liability to tax on the one hand, and the entitlement to deduct input tax, on the other, are, in its view, to be regarded as being materially linked, the referring court raises the question whether and how that correlation in substantive law is to be reflected in procedural law, in particular whether that link between taxability and deduction in respect of the same transaction means that decisions which are contradictory as to substance must be prevented and, if so, how this is to be achieved.

18. It notes, third, that the Court has not yet given a ruling on the period provided for under German law of only six months from the end of the calendar year in which the right to a refund arose, within which the recipient of a service may apply for a deduction. It is not clear whether, according to the Sixth Directive and in the light of the principles of legal certainty and effectiveness, that period may expire before a decision on taxability and liability to tax binding on the service provider has been adopted.

19. Against that background, the Finanzgericht Hamburg stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is the sixth indent of Article 9(2)(e) 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 ("Directive 77/388") [subsequently, Article 56(1)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in the version in force until 31 December 2009 ("Directive 2006/112")] to be interpreted as meaning that "supply of staff" also includes the supply of self-employed persons not in the employ of the trader providing the service?

(2) Are Articles 17(1), 17(2)(a), 17(3)(a) and 18(1)(a) of Directive 77/388 [now Articles 167, 168(a), 169(a) and 178(a) of Directive 2006/112] to be interpreted as meaning that provision must be made in national procedural law to ensure that the taxability and liability to tax of one and the same service are assessed in the same way in relation to the trader providing the service and the trader receiving it, even where the two traders fall within the jurisdiction of different tax authorities?

Only if the answer to Question 2 is in the affirmative:

(3) Are Articles 17(1), 17(2)(a), 17(3)(a) and 18(1)(a) of Directive 77/388 [now Articles 167, 168(a), 169(a) and 178(a) of Directive 2006/112] to be interpreted as meaning that the period within which the recipient of a service may apply for a deduction of the input tax connected with the service received must not expire before a decision on taxability and liability to tax which is binding on the trader providing the service has been adopted?'

IV – **Legal analysis**

A – *The first question*

20. By its first question, the referring court wishes to know, in essence, whether Article 9(2)(e) of the Sixth Directive must be interpreted as meaning that the term 'supply of staff' also covers the supply of self-employed persons not in the employ of the provider of that service.

1. Main position of the parties

21. In the present proceedings, written observations have been submitted by the German Government and the European Commission. In addition to those parties, ADV Allround was represented at the hearing on 30 March 2011.

22. The German Government and the Commission take the view that the notion of 'supply of staff' referred to in Article 9(2)(e) of the Sixth Directive does not include the supply of self-employed persons not in the employ of the trader providing the service and that the first question should therefore be answered in the negative.

23. Those parties argue, in essence, that the term 'staff' appears usually to refer, rather, to workers who are in the employ of the service provider. That interpretation is borne out by the fact that that term is used in a similar sense in Articles 5(6), 6(2) and 13(A)(k) of the Sixth Directive, which must be construed in a uniform manner, as well as in other areas of European Union ('EU') law. Furthermore, the system and purpose of Article 9 of the Sixth Directive would be compromised if the notion of 'supply of staff' were to be understood as including the supply of self-employed persons.

24. By contrast, ADV Allround suggests that the first question be answered in the affirmative. The view that Article 9(2)(e) of the Sixth Directive also refers to the supply of self-employed persons is, in its view, usually corroborated in particular by considerations of legal certainty and practicability. It disputes that that interpretation may open the door to manipulation and tax evasion by the provider of the service.

2. Appraisal

25. I must say, at the outset, that a purely literal interpretation of Article 9(2)(e) of the Sixth Directive does not appear to me to be conclusive as to whether the 'supply of staff' referred to in that provision includes the supply of self-employed persons which is at issue in the present case.

26. In that regard it must be noted, first, that, at least in some language versions, Article 9(2)(e) of the Sixth Directive uses the more general term ‘staff’ or corresponding terms (for example, ‘Personal’ in the German, ‘personnel’ in the French and ‘personal’ in the Spanish wordings) instead of a more specific term like ‘worker’ or ‘employee’, and that that general term does not, therefore, necessarily refer to persons in a relationship of dependent employment.

27. Secondly, what is more, contrary to the view on which both the Commission and the German Government appear to base their argument, it is by no means conclusively established that the term ‘staff’ refers to the relationship between the supplier and the persons supplied rather than to the relationship between those persons and the recipient of that service. In other words, ‘supply of staff’ in Article 9(2)(e) of the Sixth Directive does not necessarily describe a service whereby a taxable person makes available his own staff to another person, but the main characteristic of such a service may well lie in the fact that that other person is supplied with staff or manpower, regardless of the nature of the contractual relationship between the provider of that service and the persons supplied.

28. It should also be noted that the term ‘staff’ in Article 9(2)(e) of the Sixth Directive does not necessarily have the same meaning as it does when used in other provisions of that directive, or still less in other pieces of EU legislation, as account must be taken of the specific context of each provision in which that term is used.

29. Thus, the provisions of Article 5(6) and Article 6(2) of the Sixth Directive, which contain the word ‘staff’ and are cited by the Commission in that regard, are designed to ensure that taxable persons who apply goods or services for their private use or of their staff are treated equally with final consumers, (3) whereas Article 9(2) of the Sixth Directive forms part of rules with a very different object, namely that of determining the place where a service is deemed to be supplied.

30. It must therefore be considered, further, whether Article 9(2)(e) of the Sixth Directive is, having regard to the context of that provision and the objects of the rules of which it forms part, (4) to be interpreted as meaning that a supply of self-employed persons such as that at issue in the present case also constitutes a ‘supply of staff’ which is to be taxed in the country where the recipient of the service is established.

31. It should be recalled, first of all, that Article 9 of the Sixth Directive contains rules for determining the place where services are deemed to be supplied for tax purposes, the purpose of which is to avoid conflicts concerning jurisdiction which may result in double taxation or, secondly, non-taxation. (5)

32. In that regard, Article 9(1) lays down a general rule on the matter, according to which the service is deemed to be supplied at the place where the supplier is established. (6)

33. It should be noted that that rule in itself constitutes a derogation from the strict principle of territoriality and is, as the Court has said, a fiction, in that — for the sake of simplification (7) — the service is deemed to be supplied at the place of business or establishment of the supplier regardless of the place where the service may in fact be carried out. (8)

34. However, for specific services where the rule that the services are supplied at the place of business or establishment of the supplier has been deemed inappropriate by the legislature, Article 9(2) of the Sixth Directive sets out a number of specific cases where services are deemed to be supplied at the place of establishment of the customer. (9)

35. As regards the relationship between Article 9(1) and (2) of the Sixth Directive, it should,

moreover, be recalled that the Court has consistently held that Article 9(1) in no way takes precedence over Article 9(2), which means that the latter provision does not constitute an exception which must be narrowly construed. (10)

36. Rather, in every situation, such as that in this case, where self-employed lorry drivers are supplied to taxable persons located abroad, it must be considered whether that situation falls within one of the cases mentioned in Article 9(2) of the Sixth Directive, that is to say, in the circumstances of the present case, within the 'supply of staff' referred to in Article 9(2)(e) of that directive. If not, it falls within the scope of Article 9(1) of the Sixth Directive. (11)

37. In that regard it should be observed, in the first place, that the overall purpose of Article 9(2) of the Sixth Directive is, according to recital 7 in the preamble to the Sixth Directive, to establish a special system for services provided between taxable persons, where the cost of the services is included in the price of the goods. (12)

38. As to that more general objective, the costs of the supply of staff, in this case the supply of lorry drivers, are included in the price of goods or services produced by the recipient, (13) whether the staff supplied are in the employ of their supplier or, as here, the supply is of self-employed persons who are linked to the supplier merely by an agency agreement.

39. In the second place, by the same token, although the Sixth Directive is itself silent as to the particular purpose of the inclusion specifically of the supply of staff in the categories of services referred to under Article 9(2) of that directive, the fact remains that the legislature has apparently deemed it inappropriate to consider such services, according to the general rule of Article 9(1) of the Sixth Directive, to be supplied for purposes of taxation at the place of business or establishment of the supplier. (14) Rather, the legislature considered the place of business or establishment of the recipient of supplies of staff, under whose direction and control the persons made available are doing their work, to be the predominant place of attachment and therefore of reference for establishing territorial jurisdiction for tax purposes over such services.

40. In view of those considerations, too, there appears to be no objective reason — nor has any been put forward by the Commission or the German Government — why a distinction should be made, for the purpose of determining the place of taxation, between supplies of staff according to whether the persons supplied are in the employ of the supplier or not and why that feature should thus constitute a characteristic of the service of 'supply of staff' under Article 9(2)(e) of the Sixth Directive.

41. It could, on the contrary, be argued that if it is considered necessary to depart from the general rule laid down in Article 9(1) of the Sixth Directive and to deem the staff to be supplied at the place of business or establishment of the recipient in the case of staff remaining in the employ of the supplier, then the view that that is the place of taxation appears to be all the more justified where the persons supplied are not in the employ of the supplier and thus less closely attached to him and his place of business or establishment.

42. Such an interpretation is, moreover, as ADV Allround has correctly observed, more in line with the objective pursued by Article 9 of the Sixth Directive of ensuring a rational delimitation of taxation powers, in that it serves better the interests of simplicity of administration, avoids practical problems and enhances legal certainty in the implementation of the conflict of law rules laid down by that article, (15) compared with a situation where the place of taxation in cases of the making available of a workforce would have to be determined according to whether the persons supplied are in the employ of the supplier or self-employed despite the fact that those services both serve the same purpose.

43. Finally, the argument of the German Government to the effect that to include self-employed drivers in the definition of ‘supply of staff’ in Article 9(2)(e) of the Sixth Directive could enable self-employed persons to manipulate or choose the place of taxation for one and the same service, such as the driving services at issue, depending on whether they provide the service through an agent or not, cannot be upheld.

44. For purposes, inter alia, of the application of the rules on the place of taxation laid down by the Sixth Directive, each transaction must be defined and classified objectively, account being taken of all its characteristics and the circumstances in which it takes place. (16)

45. Thus, in a context such as that in the main proceedings, it needs to be determined whether the main characteristic or purpose of the service at issue lies in the making available of manpower, in this case lorry drivers, to a taxable person, so that the transaction is to be characterised as supply of staff, or directly in the carrying-out of transport services by the supplier, the employees or self-employed subcontractors thus being supplied as part of the provision of that service. In addition, typically in such circumstances, several distinct transactions are involved which need to be examined separately for taxation purposes, such as, for example, the service provided by the self-employed lorry drivers to the agent or supplier of staff in the framework of the agency agreement, the service provided by that agent to haulage contractors abroad and, finally, the transport services possibly provided by those haulage contractors to their customers.

46. It follows from all the foregoing considerations that the answer to the first question referred should be that Article 9(2)(e) of the Sixth Directive must be interpreted as meaning that ‘supply of staff’ also includes the supply of self-employed persons not in the employ of the provider of that service.

B – *The second question*

47. By its second question, the referring court essentially seeks to ascertain whether or to what extent the Sixth Directive, in particular its provisions on the right to deduct, require that provision must be made in national procedural law to ensure that the taxability and liability to tax of one and the same service are assessed in the same way in relation to the trader providing the service and the trader receiving it, even where the two traders fall within the jurisdiction of different tax authorities, and that conflicting decisions in that regard are thus avoided or eliminated.

1. Main positions of the parties

48. The Commission maintains that national procedural law must guarantee that, for the purposes of levying VAT, one and the same transaction is assessed uniformly as regards the person supplying the service concerned and the person receiving it.

49. It points out that the procedural autonomy of the Member States may not go so far as to encroach upon the basic right to deduction and refund of VAT, which is designed to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities and thus to ensure complete neutrality of taxation of all economic activities.

50. According to the Commission, the Member States are, pursuant to their obligation of loyal cooperation, obliged to avoid situations in which diverging views of different tax authorities may prevent taxable persons from deducting all the VAT charged or from having it refunded. To that end it is necessary to coordinate the different tax authorities and jurisdictions which may be competent under national law.

51. ADV Allround in essence concurs with the Commission, referring, above all, to the principles of neutrality of VAT and legal certainty. In particular, it considers that other tax authorities affected should be able to be joined as parties to the proceedings before the national court.

52. The German Government disputes that, taking the view that EU law does not require any specific measure to be adopted in national procedural law in order to ensure that the taxability and liability to tax of one and the same service are assessed in the same way in relation to the trader providing the service and the trader receiving it, even where different tax authorities may have jurisdiction in respect of the taxable persons concerned.

53. It emphasises that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, subject to the principles of equivalence and effectiveness which are, however, not infringed in the present context.

54. It points out that it is never possible to completely prevent diverging decisions from being taken by tax authorities or tribunals, either within one and the same Member State, or as regards authorities and courts of different Member States. Such divergences constitute in fact a classic problem of organisation, which is to be resolved via the hierarchical structure of both the tax administration and the tax judiciary.

55. Finally, the German Government explains that coordination of tax authorities and/or courts in order to ensure uniformity as envisaged by the Commission would be impossible to implement in practice and refers in that regard to numerous practical and legal problems which such coordination may raise, in particular in view of the principle of legal certainty and the force of res judicata of administrative and judicial decisions.

2. Appraisal

56. It should be recalled at the outset that it follows from settled case-law of the Court that, in the absence of EU rules governing the matter, it is, in principle, for the domestic legal system of each Member State to designate the courts and tribunals, as well as the administrative authorities, having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. (17)

57. Those procedural rules must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness). (18)

58. In that regard it should be noted, first of all, that the domestic allocation of jurisdiction in VAT matters according to which different tax authorities are competent as regards the liability to output VAT of the supplier of the service, on the one hand, and the application for refund of input VAT by the recipients of the service, on the other, has not been called into question as such in the present case.

59. Rather, the question of the referring court originates in the fact that the authorities concerned have, in those administrative proceedings, adopted diverging interpretations of the rules on the place of taxation of the Sixth Directive and thus on the liability to tax of the taxable person supplying the service, with the consequence that, although the transaction at issue was considered to be taxable in Germany by one tax authority, the refund of the input VAT paid with

regard to that transaction was rejected by the other.

60. Against that background and in view of the material link between deduction of input VAT and the collection of output VAT, (19) the referring court is, in essence, asking whether, according to EU law, particular procedural measures must be adopted in domestic law in order to ensure a uniform interpretation and application of the rules on the place of taxation and liability to tax in tax proceedings, such as those in this case, if they relate to the same transaction. In this respect, although this is not entirely clear from the wording of the second question, the referring court appears to contemplate primarily the procedural rules governing judicial proceedings such as the action in the main proceedings.

61. In that regard it must be noted that it is indeed incumbent in general upon national courts as well as administrative authorities to ensure, within their respective sphere of competence, that the directly applicable rules of EU law are applied in full. (20)

62. It is also clear from settled case-law — and is, in fact, a requirement that is inherent in the primacy of EU law — that that law should be interpreted and applied correctly and uniformly across the Union. (21)

63. In procedural terms, that uniform application and interpretation of EU law, in the otherwise decentralised system of its enforcement, is generally ensured by the procedure for referring a question on the interpretation or validity of a provision of EU law pursuant to Article 267 TFEU, which establishes a mechanism of judicial cooperation between the national courts and the Court of Justice. (22)

64. Under that system, national courts or tribunals against whose decisions there is a judicial remedy under national law may refer a question on interpretation to the Court for a preliminary ruling, whereas only courts or tribunals against whose decisions there is no judicial remedy are, where a relevant question of EU law is raised before them, in principle under an obligation to refer such questions to the Court. (23)

65. That obligation is intended, in particular, to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in a Member State. (24)

66. By contrast, that system of judicial cooperation set up under Article 267 TFEU obviously does not purport to bring about uniform interpretation and application of EU law in all individual cases and at all levels of jurisdiction, still less to prevent any divergences in that respect between national authorities, be it within one Member State or between several Member States.

67. Rather, uniformity in the application and interpretation of rights conferred under EU law is to be ensured in each of the Member States seen as a whole through its respective judicial system and, in the final instance, by way of a preliminary reference to the Court of Justice.

68. Beyond that, that is, provided that a Member State ensures effective judicial protection against decisions of administrative authorities, there is no obligation to coordinate administrative proceedings so that in every case a uniform position as regards provisions of EU law is adopted by the authorities concerned.

69. In the present case it must be noted in that regard that the Commission has maintained that it is necessary to coordinate the different tax authorities and jurisdictions which may be competent under national law in order to ensure uniform decisions concerning one and the same transaction, without, however, specifying in any way how that aim is to be achieved by procedural rules in practice in cases involving two different administrative procedures before different tax authorities

initiated by different parties and having, despite the fact that they refer to the same service provided, a different main object.

70. Next, it should be noted that, apart from the difficulties in achieving such coordination, it does not follow from *Genius*, (25) cited by the referring court in this context, that either the supplier or the recipient of a given service subject to VAT has a particular right to have that transaction classified in the same way as by his own authority, as regards the place of taxation and liability to tax, in the proceedings initiated by the other taxable person before a different tax authority. In that case, the Court merely held that the right to deduct may be exercised only in respect of taxes actually due, that is to say, the taxes relating to a transaction subject to VAT or paid in so far as they were due and that that right does therefore not apply to tax which is due solely because it is mentioned on the invoice. (26)

71. Furthermore, importance is to be attached to the fact that the recipients of the service in the present case have not appealed against the administrative decision of the Bundeszentralamt für Steuern by which it turned down the applications for refund of input VAT. As regards the principle of effectiveness cited by the referring court, (27) it is therefore not apparent that the procedural rules governing the refund of turnover tax as such make it in practice impossible or excessively difficult to exercise rights conferred by EU law, such as the right of the recipients of the service at issue to deduct input VAT.

72. Finally, as far as the procedural rules governing judicial proceedings such as those before the referring court are concerned, it appears from the order for reference as well as from the submissions of the German Government that the administrative decisions of the Bundeszentralamt für Steuern on the applications for refund by the recipients of the service have become definitive as regards that authority and those recipients. Thus, any attempt to extend the binding force of the decision to be adopted by the referring court — either by joining the Bundeszentralamt für Steuern and/or the recipients of the service in the proceedings or otherwise — on the place of taxation and liability to tax of the service concerned to those recipients of the service would be contrary to the force of res judicata attaching to the aforementioned administrative decisions of the Bundeszentralamt für Steuern.

73. In that regard it should be recalled that the Court has repeatedly underlined the importance, both for the EU legal order and for the national legal systems, of rules conferring finality on judicial or administrative decisions, in that they contribute to legal certainty, which is a fundamental principle of EU law. (28)

74. It is true that the Court has in certain circumstances held that rules of national law conferring finality on decisions can be called into question in the light of the force and the effect of EU law. This applies, however, only exceptionally and in accordance with very narrow conditions, (29) which are not met in several respects in the circumstances of the present case.

75. From that point of view, national procedural law cannot be required under EU law to provide that the decision on the place of taxation and liability to tax to be adopted by a national court with regard to the provider of the service can in circumstances such as those of the present case be extended also to the recipients of that service.

76. In the light of all the foregoing considerations, the answer to the second question referred should be that the Sixth Directive, in particular its provisions on the right to deduct, do not require that particular provision must be made in national procedural law to ensure that, in circumstances such as those of the present case, the taxability and liability to tax of one and the same service are assessed in the same way in relation to the trader providing the service and the trader receiving it, even where the two traders fall within the jurisdiction of different tax authorities.

C – *The third question*

77. In view of the answer given to the second question it is not necessary to examine the third question referred.

V – **Conclusion**

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

– Article 9(2)(e) 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 must be interpreted as meaning that ‘supply of staff’ also includes the supply of self-employed persons not in the employ of the provider of that service;

– the Sixth Directive, and its provisions on the right to deduct in particular, do not require that particular provision must be made in national procedural law to ensure that, in circumstances such as those of the present case, the taxability and liability to tax of one and the same service are assessed in the same way in relation to the trader providing the service and the trader receiving it, even where the two traders fall within the jurisdiction of different tax authorities.

1 – Original language: English.

2 – OJ 1977 L 145, p. 1, in the relevant version as last amended by Council Directive 2004/66/EC of 26 April 2004 (OJ 2004 L 168, p. 35).

3 – See, to that effect, Case C?20/91 *de Jong* [1992] ECR I?2847, paragraph 15, and Case C?258/95 *Fillibeck* [1997] ECR I?5577, paragraph 25.

4 – See, inter alia, Case C?114/05 *Gillan Beach* [2006] ECR I?2427, paragraph 21, and Case C?17/03 *VEMW and Others* [2005] ECR I?4983, paragraph 41.

5 – See, to that effect, Case C?438/01 *Design Concept* [2003] ECR I?5617, paragraph 22, and Case C?327/94 *Dudda* [1996] ECR I?4595, paragraph 20.

6 – See in that regard Case C?452/03 *RAL (Channel Islands) and Others* [2005] ECR I?3947, paragraph 23.

7 – See, to that effect, Case 51/88 *Hamann* [1989] ECR 767, paragraph 17.

8 – See Case 283/84 *Trans Tirreno Express* [1986] ECR 231, paragraph 15.

9 – See, inter alia, *Trans Tirreno Express*, cited in footnote 8, paragraph 16, and *RAL (Channel Islands) and Others*, cited in footnote 6, paragraph 23.

10 – See to that effect, inter alia, Case C?108/00 *SPI* [2001] ECR I?2361, paragraphs 16 and 17; Case C?166/05 *Heger* [2006] ECR I?7749, paragraph 17; and Case C?291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet* [2008] ECR I?8255, paragraph 25.

11 – See also, inter alia, Case C?401/06 *Commission* v *Germany* [2007] ECR I?10609, paragraph 30.

12 – See *Gillan Beach*, cited in footnote 4, paragraph 17.

13 – Despite the wording of recital 7 referring only to the recipient of the services producing goods, its rationale must be taken also to apply to situations where the recipient of the services is itself a supplier of services: see to that effect Case C?68/92 *Commission* v *France* [1993] ECR I?5881, paragraph 15, and Opinion of Advocate General Jacobs in *Design Concept*, cited in footnote 5, point 23.

14 – Cf. in this context point 34 above and Case C?116/96 *Reisebüro Binder* [1997] ECR I?6103, paragraph 13.

15 – See in that regard *Reisebüro Binder*, cited in footnote 14, paragraph 12, and *Kollektivavtalsstiftelsen TRR Trygghetsrådet*, cited in footnote 10, paragraphs 30 to 33.

16 – See to that effect, inter alia, Case C?270/09 *Macdonald Resorts Limited* [2010] ECR I?13179, paragraph 46; *SPI*, cited in footnote 10, paragraph 20; and Case C?108/99 *Cantor Fitzgerald International* [2001] ECR I?7257, paragraph 33.

17 – See, to that effect, inter alia, Case C?472/08 *Alstom Power Hydro* [2010] ECR I?623, paragraph 17; Case C?228/96 *Aprile* [1998] ECR I?7141, paragraph 18; and Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 17.

18 – See, inter alia, Joined Cases C?317/08 to C?320/08 *Alassini* [2010] ECR I?2213, paragraph 48, and Case C?240/09 *Lesoochranárske zoskupenie* [2011] ECR I?1255, paragraph 48.

19 – See to that effect, inter alia, Case C?277/09 *RBS Deutschland Holdings* [2010] ECR I?13805, paragraph 35.

20 – See to that effect, inter alia, Case C?409/06 *Winner Wetten* [2010] ECR I?8015, paragraph 55; Case C?453/00 *Kühne & Heitz* [2004] ECR I?837, paragraph 20; Case C?72/95 *Kraaijeveld and Others* [1996] ECR I?5403, paragraphs 55 to 61; and Case 103/88 *Costanzo* [1989] ECR 1839, paragraph 33.

21 – See to that effect, inter alia, *Winner Wetten*, cited in footnote 20, paragraph 61; Case C?195/06 *Österreichischer Rundfunk* [2007] ECR I?8817, paragraph 24; Case C?461/03 *Gaston Schul Douane-expediteur* [2005] ECR I?10513, paragraph 21; and Case C?495/03 *Intermodal Transports* [2005] ECR I?8151, paragraphs 33 and 38.

22 – The Court emphasised the fact that Article 267 TFEU sets up a cooperation procedure exclusively as between courts in *Intermodal Transports*, cited in footnote 21, paragraph 38.

23 – See *Intermodal Transports*, cited in footnote 21, paragraphs 28 to 31.

24 – See, in particular, Case C?99/00 *Lyckeskog* [2002] ECR I?4839, paragraph 14, and C?393/98 *Gomes Valente* [2001] ECR I?1327, paragraph 17.

25 – Case C?342/87 [1989] ECR 4227.

26 – Idem; see, to that effect, paragraphs 13 and 19.

27 – See above point 57.

28 – See to that effect, inter alia, Case C?234/04 *Kapferer* [2006] ECR I?2585, paragraph 20, and *Kühne & Heitz*, cited in footnote 20, paragraph 24.

29 – See paragraphs 26 and 27 of *Kühne & Heitz*, cited in footnote 20: first, the administrative body must, under national law, have the power to reopen that decision; secondly, the administrative decision in question must have become final as a result of a judgment of a national court ruling at final instance; thirdly, that judgment must, in the light of a decision given by the Court of Justice subsequent to it, be based on a misinterpretation of EU law which was adopted without a question being referred to the Court for a preliminary ruling in the circumstances set out in the third paragraph of Article 267 TFEU; fourthly, the person concerned must have complained to the administrative body immediately after becoming aware of that decision of the Court.