OPINION OF ADVOCATE GENERAL

CRUZ VILLALÓN

delivered on 21 June 2012 (1)

Case C-587/10

Vogtländische Straßen-, Tief- und Rohrleitungsbau GmbH Rodewisch (VSTR)

v

Finanzamt Plauen

(Reference for a preliminary ruling
from the Bundesfinanzhof (Germany))

(Value-added tax – Intra-Community supply – Chain transactions – Refusal to exempt on grounds of failure to produce the VAT identification number of the person acquiring goods)

I – **Introduction**

1. In this case, the Bundesfinanzhof is referring to the Court of Justice a number of questions relating to the interpretation of Directive 77/388/EEC, (2) in the context of proceedings concerning the disputed legality of a decision of the German tax authorities by virtue of which a taxable supplier was refused the exemption in Article 28c(A)(a) of the directive in respect of intra-Community supplies.

2. The distinguishing factor in this case is that the supply in question forms part of a chain transaction consisting of two successive sales, with the goods being transported only once within the Community. The exemption was refused on the grounds that, rather than providing the VAT identification number of the United States undertaking which acquired the goods from it, the first supplier, a German undertaking, provided that of the purchaser in the second instance, a Finnish undertaking.

3. This case will allow the Court of Justice to develop its already substantial case-law on the exemption for intra-Community supplies and to clarify the extent of the powers given to the Member States by the introductory words of Article 28c(A) of the Sixth Directive to lay down the conditions needed for ensuring ‘the correct and straightforward application’ of the exemption and ‘preventing any evasion, avoidance or abuse’.

II – **Legal framework**

A – *European Union law: the Sixth VAT Directive*

4. By virtue of Article 4(1) of the Sixth Directive, a taxable person for VAT purposes is 'any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'. Paragraph 2 provides that 'the economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. ...'.

5. Article 22 of the Sixth Directive, in the version resulting from Article 28h, sets out a number of obligations of taxable persons under the internal system.

6. Thus, the first and third indents of Article 22(1)(c) provide that 'Member States shall take the measures necessary to identify by means of an individual number: – every taxable person, with the exception of those referred to in Article 28a(4), who within the territory of the country effects supplies of goods or of services giving him the right of deduction … – every taxable person who, within the territory of the country, effects intra-Community acquisitions of goods for the purposes of his operations relating to the economic activities referred to in Article 4(2) carried out abroad'.

7. Article 22(3)(a) provides as follows: 'Every taxable person shall issue an invoice … in respect of goods or services which he has supplied or rendered to another taxable person or to a non-taxable legal person. Every taxable person shall also issue an invoice ... in respect of goods supplied under the conditions laid down in Article 28c(A)'. Pursuant to Article 22(3)(b), the VAT identification number must be stated on the invoice.

8. Pursuant to Article 22(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'.

9. Title XVIa of the Sixth Directive, headed 'Transitional arrangements for the taxation of trade between Member States', was inserted by Directive 91/680 and contains Articles 28a to 28n.

10. The first subparagraph of Article 28a(1)(a) of the Sixth Directive provides that 'intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person …' shall also be subject to VAT.

11. By virtue of Article 28a(3), '"intra-Community acquisition of goods" means acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported'.

12. Article 28b(A)(1) provides that the place of an intra-Community acquisition of goods is deemed to be 'the place where the goods are at the time of dispatch or transport to the person acquiring them ends'. However, Article 28b(A)(2) specifies that '[w]ithout prejudice to paragraph 1, the place of the intra-Community acquisition of goods referred to in Article 28a(1)(a) shall, however, be deemed to be within the territory of the Member State which issued the value added tax identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that that acquisition has been subject to tax in accordance with paragraph 1. …'.

13. Article 28c(A)(a) provides that intra-Community supplies are to be exempt from the tax in accordance with the following:

‘Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Article 5, dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods. …’

B – *National legislation*

14. Pursuant to the first sentence of Paragraph 6a(1) of the Umsatzsteuergesetz (Law on turnover tax, ‘the UStG’), (3) there is an intra-Community supply – which is tax-exempt under Paragraph 4(1)(b) of the UStG – where the following conditions are fulfilled: ‘1. the trader or the person acquiring the goods transported or dispatched the object of the supply to another part of the Community; 2. the person acquiring the goods is: (a) a trader who acquired the object of the supply for his undertaking; (b) a legal person who is not a trader or who did not acquire the object of the supply for his undertaking; or (c) any other purchaser in the case of the supply of a new vehicle; and 3. the acquisition of the object of the supply is subject, as regards the person acquiring the goods, in another Member State to the provisions relating to turnover tax’. By virtue of Paragraph 6a(3) of the UStG, it is for the trader to prove that these conditions have been fulfilled.

15. Paragraph 17c(1) of the Umsatzsteuer-Durchfürungsverordnung (Regulation implementing the UstG; ‘the UstDV’), (4) provides that, in relation to intra-Community supplies in the area of application of the regulation, the trader must provide evidence in the accounts that the requirements for exemption from tax have been complied with, ‘including the VAT identification number of the person acquiring the goods’.

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

16. The applicant and appellant, Vogtländische Straßen-, Tief- und Rohrleitungsbau GmbH Rodewisch (‘VSTR’), is the parent company of a company incorporated in Germany under German law.

17. In November 1998 the latter company sold two stone-crushing machines to the US undertaking, Atlantic International Trading Co. (‘Atlantic’). Atlantic had a subsidiary in Portugal but was not registered in any Member State of the European Union for VAT purposes.

18. The seller requested Atlantic to provide its VAT identification number and the latter replied that it had sold the machines on to a company established in Finland and gave the seller the VAT identification number of the Finnish company. The German seller verified this information.

19. In terms of the transport of the machines, it should be noted that they were collected from the German undertaking’s premises by a transport company contracted by Atlantic on 14 December 1998 and taken first by road to Lübeck (Germany) and then, three days later, by sea to Finland.

20. The German seller issued Atlantic with an invoice without VAT bearing the VAT identification number of the Finnish undertaking.

21. In its VAT return for 1998, VSTR, the parent company of the seller, treated the supply of the machines as exempt. However, the German tax authority (the Finanzamt Plauen) took the view that the exemption did not apply in this case as Atlantic, being the person acquiring the goods, had not used a VAT identification number of the destination Member State or of any other Member State.

22. VSTR brought an action at first instance in respect of this decision and, when this was dismissed by the Finanzgericht, appealed against that judgment. In the appeal proceedings before the Bundesfinanzhof, VSTR argued that the grounds on which the German authority withheld the exemption were contrary to the Sixth Directive. The German authority, on the other hand, takes the view that Member States may specify, as Paragraph 17c(1) of the UstDV does, that application of the exemption in question is conditional on the person acquiring the goods having a VAT identification number in a Member State.

23. In the light of the uncertainties regarding the interpretation of the permissible requirements for the application of the exemption for intra-Community supplies referred to in the first subparagraph of Article 28cA(a) of the Sixth Directive, the Bundesfinanzhof has referred the following questions to the Court of Justice:

‘(1) Does Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes allow the Member States to accept an intra-Community supply as tax-exempt only where the taxable person provides evidence in the accounts of the VAT identification number of the person acquiring the goods?

(2) Is it relevant to the answer to that question:

– that the person acquiring the goods was a trader with its seat in a third State, which, although it dispatched the object of the supply in the course of a chain transaction from one Member State to another Member State, is not registered for VAT purposes in any Member State, and

– whether the taxable person has proved that the person acquiring the goods submitted a tax return concerning the intra-Community acquisition?’

IV – **Procedure before the Court of Justice**

24. The reference for a preliminary ruling was lodged at the Court Registry on 15 December 2010.

25. Written observations have been submitted by Italy, Germany, VSTR and the Commission.

26. At the hearing, held on 7 March 2012, the representatives of VSTR, the German Government and the Commission presented oral argument.

V – **Analysis of the questions referred**

A – *Preliminary question: identifying the intra-Community supply in a chain transaction*

27. The questions formulated by the Bundesfinanzhof relate to the application of the exemption for intra-Community supplies provided for in the first subparagraph of Article 28c(A)(a) of the Sixth

Directive.

28. This article lays down three conditions for a transaction to qualify as a VAT-exempt intra-Community supply: the right to dispose of the goods as owner must be transferred; the goods must physically move from one Member State to another; and the person acquiring the goods must be a taxable person (or a non-taxable legal person 'acting as such in a Member State other than that of the departure of the dispatch or transport of the goods').

29. The first of these conditions (the transfer from VSTR to Atlantis of the right to dispose of the goods) has never been in doubt and the Bundesfinanzhof's questions relate to the third condition (whether the person acquiring the goods is a taxable person).

30. It is, however, necessary to make a brief preliminary observation concerning the second condition (the intra-Community transportation), given that a distinguishing feature of this case is that the supply whose VAT status is at issue is part of a chain transaction comprising two successive sales – the first from a German company to a US company and the second from the US company to a Finnish company – with the goods being transported only once, within the Community, from Germany to Finland.

31. As was held in *EMAG Handel Eder*, in circumstances such as these, 'where two successive supplies of the same goods, effected for consideration between taxable persons acting as such, [give] rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax under the first subparagraph of Article 28c(A)(a) of the Sixth Directive'. (5)

32. It follows that in this case we must first of all establish to which of the two successive supplies of the goods the transport can be ascribed; in other words, which of them could, if the other conditions were met, be regarded as a VAT-exempt intra-Community supply.

33. The Sixth Directive does not regulate this point, but the judgment in *Euro Tyre Holding* held, in relation to such chain transaction situations, that the determination of the supply to which the intra-Community transport should be ascribed 'must be conducted in the light of an overall assessment of all the circumstances of the case'. (6) It is for the court in the main proceedings to assess these circumstances.

34. The Bundesfinanzhof seems to take it for granted that, in principle, the transport should be ascribed in this case to the first supply, in which the seller is the German undertaking VSTR and the person acquiring the goods is the US undertaking Atlantis, (7) and I do not think that this analysis is inconsistent with the case-law referred to above.

35. This case is similar to that arising in *Euro Tyre Holding*, since the first person acquiring the goods obtained the right to dispose of them in the State of the first supply (Germany), (8) and expressed to the seller his intention to transport them to another Member State, where the second supply would take place. (9) The only difference is that in the present case, Atlantis did not present its own VAT identification number, which was one of the factors to be taken into consideration in these circumstances, according to the *Euro Tyre Holding* judgment. (10) Notwithstanding the observations which I will be making (in the context of the first question referred) concerning the importance of this factor when determining whether a supply is an exempt intra-Community supply, I do not think that providing the identification number of the person acquiring the goods is essential, at this initial stage of the analysis, in order to ascribe the transport to a particular supply.

36. In *Euro Tyre Holding*, producing the identification number of the person acquiring the goods issued in the State of the second supply was treated as an objective indication that the person first

acquiring them intended, from the moment of acquisition, to sell them in the second State. (11) However, an indication of this kind is not necessarily essential in this case if the Bundesfinanzhof considers, on the basis of other objective evidence, (12) that it has been established that the second transfer of the right to dispose of the goods occurred in the State of destination, after the intra-Community transport, which should, in that case, be ascribed to the first supply.

B – *The first question referred*

37. In its first question, the Bundesfinanzhof asks the Court of Justice whether Member States can make the intra-Community supply exemption conditional on the supplier providing evidence in the accounts of the VAT identification number of the person acquiring the goods.

38. As indicated previously, the first subparagraph of Article 28c(A)(a) of the Sixth Directive provides that the application of this exemption is subject to the fulfilment of three conditions which, as the Court has consistently held, (13) are exhaustive, and do not, at least expressly, include any requirement relating to producing the VAT identification number of the person acquiring the goods.

39. In *Collée* the Court of Justice stated that 'a national measure which, in essence, makes the right of exemption in respect of an intra-Community supply subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied, goes further than is necessary to ensure the correct levying and collection of the tax'. An exemption from VAT must therefore be allowed if the substantive requirements are satisfied, even if the taxable person has 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'. (14)

40. The German Government asserts that the requirement that the seller produce the identification number of the person acquiring the goods in the Member State of destination does not constitute a further substantive requirement, separate from those set out in the first subparagraph of Article 28c(A)(a), but is an essential mechanism for evidencing the third of these requirements, which relates to the person acquiring the goods being a taxable person.

41. The German Government submits that the Member States are authorised to impose this evidential requirement by virtue of the introductory words of Article 28c(A) of the Sixth Directive, which state that the Member States shall grant this exemption 'subject to conditions which they shall lay down for the purpose of ensuring [its] correct and straightforward application … and preventing any evasion, avoidance or abuse'. A basis for Member State intervention could also be found in Article 22(8), which authorises them to 'impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion'. The German Government argues that the condition requiring that the person acquiring the goods be a taxable person 'acting as such' will be fulfilled only if a VAT identification number issued by the Member State of destination of the goods is produced.

42. As I shall be explaining, the Sixth Directive attributes a fundamental role to identification numbers in the context of intra-Community supplies, since they make fiscal supervision of these supplies far easier.

43. Nevertheless, I do not think that the first subparagraph of Article 28c(A)(a) of the Sixth Directive should be interpreted as meaning that an exempt intra-Community supply exists only where the VAT identification number of the person acquiring the goods has been produced. First, it is not necessary to be issued with an identification number in order to be a taxable person, and it is quite possible to demonstrate this by other means (1). Second, a failure to comply with the

requirement under the Sixth Directive to include a tax identification number cannot give rise to a change in the VAT system (2). Finally, such an interpretation would be an infringement of the principle of VAT neutrality, which is not permitted under the case-law (3).

1. It is not necessary to be issued with a tax identification number in order to be a taxable person. That status may be demonstrated by other objective evidence

44. The VAT identification number originated at the same time as the intra-Community VAT system, whose main aim, as we know, is to ensure that the tax is paid in the Member State of final consumption of the goods. In order to ensure that the system was correctly applied, it was necessary to identify certain taxable persons by means of an individual number which would indicate the Member State issuing it and the type of transactions being carried out by those taxable persons (Article 22(1)(c), (d) and (e) of the Sixth Directive). Thus, as the Commission has pointed out, the identification number is a brief indication of the VAT status of the taxable person, which aids fiscal supervision of intra-Community supplies.

45. To this end, Article 22 of the Sixth Directive requires taxable persons to include on their invoices details of the identification number under which they supplied the goods or services and of that used by their customer in the transaction (Article 22(3)(b)), as well as requiring them to submit a quarterly recapitulative statement ‘of the acquirers identified for value added tax purposes to whom he has supplied goods under the conditions provided for in Article 28c(A) (a) and (d), and of consignees identified for value added tax purposes in the transactions referred to in the fifth subparagraph’ (Article 22(6)(b)).

46. Fiscal supervision is also the reason behind the rule in Article 28b(2) of the Sixth Directive, which states that, unless the person acquiring the goods establishes that the intra-Community acquisition of goods referred to in Article 28a(1)(a) has been subject to VAT in ‘the place where the goods are at the time when dispatch or transport to the person acquiring them ends’ (Article 28b(1)), the acquisition shall be deemed to be ‘within the territory of the Member State which issued the value added tax identification number under which the person acquiring the goods made the acquisition’. (15)

47. However, both the requirements of Article 22 and the rule in Article 28b(2) of the Sixth Directive are mechanisms for fiscal supervision of a preventive kind, designed to prevent non-payment of VAT on the part of the person acquiring goods. It cannot be inferred from them that a person can become a taxable person only by obtaining an identification number, or that production of that number is the only way of demonstrating that a person acquiring goods acted as a taxable person. It follows that failure to satisfy this requirement cannot deprive sellers of the exemption to which they are entitled.

48. First, it should be recalled that Article 4(1) of the Sixth Directive does not specify any formalities or require a person to produce particular documents in order to have the status of a taxable person for VAT purposes, making that status conditional only upon the person carrying out ‘any economic activity specified in paragraph 2, whatever the purpose or results of that activity’. Thus, judging by the wording of this provision, the status of taxable person is something that should be regarded as pre-existing and purely factual and not something that is conditional on being issued with, or using, a VAT identification number.

49. This assertion is entirely compatible with the important role which, as we have seen, the Sixth Directive attributes to identification numbers in the context of intra-Community supplies. Admittedly, the requirements of Article 22 of the Sixth Directive make producing a VAT identification number the most usual – and even the most correct – method of demonstrating that a person is a taxable person, but that does not mean that the seller cannot rely on other ‘objective

matters' (16) as proof that the person acquiring the goods was acting as a taxable person. (17) This case is a good example of those undoubtedly exceptional circumstances where the seller can, without producing the identification number of the person acquiring the goods, demonstrate that the latter acted in the course of an economic activity, that the right to dispose of the goods was transferred to that person and that the goods were transported within the Community, thus providing sufficient information to enable the fiscal supervision of the transaction in the two Member States concerned.

50. It cannot, therefore, be categorically stated that failure to comply with the formal requirement to include the identification number of the person acquiring the goods on the invoice and in the recapitulative statements would prevent 'the production of conclusive evidence that the substantive requirements [for allowing the exemption] have been satisfied'. (18) Such a failure may sometimes give rise to sanctions but cannot give rise to a change in the VAT system.

2. A failure to comply with the requirement under Article 22 of the Sixth Directive to include a tax identification number cannot give rise to a change in the VAT system

51. In relation to the right to deduct VAT, the case-law has already established that a failure to comply with the formal requirements of Article 22 of the Sixth Directive cannot disallow this right where the substantive requirements for its creation are met.

52. In *Dankowski*, (19) a case relating to the right to deduct, the issue was that, although the invoices contained the identification number of the person providing the services, this number had been automatically allocated by the Polish tax authorities without the person providing the services submitting an application for registration for VAT purposes. The service provider had therefore failed to comply with the obligation to declare when his taxable activity was to commence (Article 22(1) of the Sixth Directive). In its judgment, the Court of Justice held that 'notwithstanding the importance of such registration if the VAT system is to operate properly, a failure on the part of a taxable person to meet that requirement cannot impinge on the right of deduction conferred on another taxable person by Article 17(2) of the Sixth Directive. Article 22(1) of the Sixth Directive provides only that there is an obligation on taxable persons to state when their activity commences, changes or ceases, but that provision in no way authorises Member States, in the event of such a declaration not being submitted, to defer the exercise of the right to deduct until the time at which taxable transactions actually begin to be carried out on a regular basis, or to deprive the taxable person of that right'. (20)

53. I believe that this judgment clearly reflects the idea that the formal requirements of Article 22 and the substantive conditions for allowing the right to deduct (or, in this case, allowing an exemption) operate on different levels, and a failure to comply with the former cannot therefore give rise to a change in the substantive VAT rules.

54. Furthermore, albeit that it is the supplier's obligation to give the VAT identification number of the person acquiring the goods, clearly the supplier can do so only if the latter provides him with the information. So, if the supplier acts in good faith and takes all reasonable measures within his power to ensure that the transaction in which he is engaged will not lead to his participation in tax evasion, it would not be logical to make the supplier suffer for an infringement caused by the acquirer's failure to cooperate and, ultimately, the latter's failure to satisfy the requirement to have a VAT identification number in the Member State of destination of the goods. This idea that one taxable person's failure to satisfy a formal requirement cannot fiscally disadvantage another taxable person (21) also underlies the judgments in *Dankowski* and *Euro Tyre Holding*.

3. The principle of neutrality only admits of exceptions in the case of evasion

55. Finally, to withhold the exemption from a supplier who does not produce the VAT identification number of the person acquiring the goods, even where objective aspects indicate that there was an intra-Community supply within the meaning of the Sixth Directive, carries the risk of double taxation and, in any event, involves a reallocation of the authority to tax, both of which are contrary to the principle of VAT neutrality.

56. As we know, that principle ensures that the tax is wholly neutral in respect of 'all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT'. (22) Consequently, when acting in the course of such activities, the trader must be entirely relieved of the VAT payable or paid, through the system of deducting input VAT. In the context of intra-Community transactions, this neutrality is ensured through the application of the principle of territoriality, under which VAT is levied by the Member State in which final consumption of the goods takes place. As indicated in the case-law, this mechanism makes it possible strictly to allocate revenues from VAT on intra-Community transactions and 'to delimit clearly the authority to tax of the Member States concerned'. (23)

57. If the supplier is refused the exemption on the grounds referred to above, and the VAT is collected in Germany, but the person acquiring the goods includes the transaction in the relevant VAT return in the Member State of destination (Finland), this would result in a double taxation scenario which is clearly contrary to the principle of neutrality. By virtue of Article 21 of Regulation (EC) No 1777/2005, (24) '[w]here an intra-Community acquisition of goods … has taken place, the Member State in which the dispatch or transport ends shall exercise its power of taxation irrespective of the VAT treatment applied to the transaction in the Member State in which the dispatch or transport began'. As indicated in my Opinion in the case of *R*, (25) any ultimate refund of VAT paid, in this case in Germany, would not serve to prevent double taxation, but only to remedy its effects once it has occurred and therefore seems insufficient to safeguard the principle of neutrality of the tax.

58. Furthermore, a failure to apply the exemption in the country of origin of the goods (Germany), would in any event mean that Germany would be collecting the VAT without any entitlement to a tax claim, since the logic of the system of intra-Community transactions is that it should be the country in which the goods are consumed (Finland) which receives the tax in its entirety. Thus, even in the absence of double taxation (in other words, even if Finland were not able to collect the VAT) the outcome would be a reallocation of the authority to levy the tax, which is contrary to the principle of neutrality.

59. In accordance with settled case-law, the measures which the Member States may adopt under Article 28c(A) of the Sixth Directive for the purpose of ensuring the correct and straightforward application of the intra-Community supply exemption and 'preventing any evasion, avoidance or abuse', must not go further than is necessary to attain such objectives or be used in such a way as to have the effect of undermining the neutrality of VAT. (26)

60. A measure which makes application of the exemption conditional on the supplier having produced the VAT identification number of the person acquiring the goods, would produce an effect contrary to the principle of neutrality, as described above, and would therefore contravene the provisions of the Sixth Directive.

61. Admittedly, the Court of Justice has recognised that this principle is not absolute and exceptions are possible where there is evasion or bad faith. More specifically, in *R* it stated that the principles of neutrality and of the protection of legitimate expectations 'cannot legitimately be invoked by a taxable person who has intentionally participated in tax evasion and who has jeopardised the operation of the common system of VAT'. (27) The judgment also states that the

principle of proportionality ‘does not preclude a supplier who participates in tax evasion from being obliged to pay the VAT subsequently on his intra-Community supply, inasmuch as his involvement in the evasion is a decisive factor to be taken into account in an assessment of the proportionality of a national measure’. (28)

62. The circumstances of *R* were, however, markedly different from those at issue here. In that case, Mr R, acting as a supplier in intra-Community transactions, issued false invoices in the name of fictitious purchasers, concealing the identity of the true purchasers so as to allow them to evade VAT in the Member State of destination. Thus, it was a clear case of tax evasion, unlike this case where the same circumstances do not appear to be present. If the national court whose task it is to assess the specific facts of this case concludes that, as the information supplied by the parties seems to suggest, VSTR merely included the identification number of the Finnish undertaking on the invoice, but did not conceal the fact that Atlantis was the person acquiring the goods, it would not be appropriate to apply the exception referred to in *R*, and, consequently, neither would it be appropriate to withhold the exemption.

63. Except in cases of tax evasion to which *R* relates, Member States cannot unilaterally derogate from the basic principles of the common system of VAT. The operative part of that judgment is expressly based on the existence of fraudulent conduct on the part of the supplier. The judgment states that, from a proportionality perspective, it is important that ‘his involvement in the evasion is a decisive factor’ (paragraph 53), going on to emphasise that participation in the evasion must have been intentional and must have jeopardised the operation of the common system of VAT.

64. In short, *R* introduced an exception to the principle of neutrality which cannot be extended beyond the circumstances pertaining in that case. To infringe the principle of neutrality for reasons which are purely preventive, where the supplier has been able to demonstrate that he did not act fraudulently, is not, in my view, a proportionate measure capable of justification by reference to the case-law.

4. Conclusion to the first question referred

65. In the light of the foregoing it can be concluded that the Sixth Directive does not make recognition of the status of taxable person – either in a general sense or for the purpose of determining whether the intra-Community supply exemption is applicable – conditional upon production of a VAT identification number, requiring only that an economic activity is carried out, which appears incontrovertible in this case. (29)

66. A failure on the part of the supplier in an intra-Community transaction to satisfy the requirement to provide the VAT identification number of the person acquiring the goods may give rise to sanctions and, if it were to be demonstrated that the former were involved in tax evasion, to withholding of the intra-Community supply exemption on the basis of the judgment in *R.* Both of these measures form part of a proportionate system for the prevention of tax evasion.

67. By contrast, it would be disproportionate if, in the absence of fraudulent conduct, any failure to satisfy formal requirements were to radically alter the dynamics of intra-Community supplies and unilaterally transfer the authority to tax to a Member State which has no entitlement to exercise it.

C – *The second question referred*

68. In its second question, the Bundesfinanzhof refers to two different factors, each of potential relevance to the reply to the first question.

1. The first part of the second question

69. The first part of the second question relates specifically to the possible relevance of the fact that the person acquiring the goods was a trader with its seat in a third State, which dispatched the object of the supply in the course of a chain transaction from one Member State to another Member State, but is not registered for VAT purposes in any Member State.

70. I take the view that this question can be answered only in the negative. As the Commission has correctly pointed out, none of the provisions relevant to this case make a distinction according to whether the person acquiring the goods is established in the territory of a Member State or in a third State.

71. The fact that the person acquiring the goods is a trader established in a third State and is not registered for VAT purposes is of no greater relevance than any other circumstance in which the person acquiring the goods has no VAT identification number, or simply has not produced it. The only relevant considerations for the purposes of this reply are the failure to produce the identification number, irrespective of the cause, and the existence or otherwise of fraudulent conduct.

2. The second part of the second question

72. Finally, the referring court asks whether the reply to the first question might be influenced by the fact that the taxable person has proved that the person acquiring the goods submitted a tax return concerning the intra-Community acquisition.

73. In my view, this question is only meaningful if, as is the case here, the conclusion is reached that it is not permissible to make the exemption for intra-Community supplies dependent on the taxable person providing evidence in the accounts of the VAT identification number of the person acquiring the goods.

74. On the basis of such a conclusion, the aim of this final question would be to clarify whether, in the alternative, it is permissible to make the exemption dependent on the supplier proving that the person acquiring the goods submitted a tax return concerning the intra-Community acquisition in the Member State of destination.

75. The order for reference bases this question on the ‘link’ which, according to settled case-law, must exist between an exempt intra-Community supply and a taxable, non-exempt intra-Community acquisition.

76. The case-law has indeed repeatedly stated that ‘the intra-Community supply of goods and their intra-Community acquisition are, in fact, one and the same financial transaction’ and ‘[t]hus, any intra-Community acquisition that is taxed in the Member State where the dispatch or intra-Community transport of goods ends under the first subparagraph of Article 28a(1)(a) of the Sixth Directive has, as a corollary, an exempted supply in the Member State in which that dispatch or transport began under the first subparagraph of Article 28c(A)(a) of that directive’. (30)

77. This means that the exempt supply and the taxable acquisition are linked, forming one unit for the purposes of allocating the authority to tax between the Member States and, hence, for the purposes of the principle of fiscal neutrality inherent in the common system of VAT. (31) I do not think, however, that as a consequence of that link it is permissible to go as far as to make it a requirement for granting the exemption for the supply that the supplier provide proof that the person acquiring the goods has included the acquisition in a tax return in the Member State of

destination. Such a requirement certainly does not appear in the Sixth Directive, and, for reasons identical to those put forward in relation to the identification number requirement, it would constitute a breach of the principle of neutrality, as well as being a disproportionate measure.

78. In relation to the principle of neutrality, it is worth reiterating that the fact that the supply and the acquisition are inextricably linked cannot determine how the Member States of origin and of destination of the goods respectively exercise their authority to tax.

79. This idea, as applied to the reverse situation, is enshrined in Article 21 of Regulation No 1777/2005, set out above, which provides that the Member State of destination of the goods 'shall exercise its power of taxation irrespective of the VAT treatment applied to the transaction in the Member State in which the dispatch or transport began'. This provision would indicate that the tax should be collected in the Member State of destination without the need to check whether the exemption was granted in the Member State of origin, but the *Teleos* judgment appears to suggest that the idea should also be extended to the opposite situation, stating that '[i]n the context of the transitional arrangements for intra-Community supplies and acquisitions, it is necessary, in order to ensure the proper collection of VAT, that the competent tax authorities check, independently of each other, whether the conditions for intra-Community acquisition and for the exemption of the corresponding supply are satisfied. Therefore, even if presentation by the purchaser of a tax return relating to an intra-Community acquisition may be evidence of the actual transfer of the goods out of the Member State of supply, such a return does not however constitute conclusive evidence for the purpose of proof of an exempt intra-Community supply of goods'. (32)

80. Admittedly, submitting a tax return in respect of the intra-Community acquisition in the Member State of destination would remove the original issue raised in this case, since doing so would almost certainly have resulted in the company acquiring the goods being issued with a VAT identification number in that Member State.

81. Nevertheless, neither a lack of evidence that the transaction was included in a tax return in the Member State of destination, nor a failure to produce the identification number of the person acquiring the goods can, in themselves, cause the exemption of the supply to be withheld. In particular, a requirement to prove that a tax return concerning the intra-Community acquisition has been submitted in the State of destination appears disproportionate.

82. It was held in *R* that the Member State of departure is, in principle, required to refuse to grant the exemption to the supplier in 'particular cases in which there are genuine reasons to assume that the intra-Community acquisition corresponding to the supply at issue might escape payment of the VAT in the destination Member State', (33) but, it will be recalled, this was in the context of tax evasion.

83. In conclusion, I take the view that it is not permissible to require that the supplier prove that the person acquiring the goods has submitted a tax return concerning the intra-Community acquisition in the destination Member State in order to obtain the exemption applicable to intra-Community supplies.

VI – **Conclusion**

84. I therefore propose that the Court give the following answer to the question referred by the Bundesfinanzhof (Germany):

(1) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes does not allow the Member States to accept an intra-Community supply as tax-exempt only where the taxable person provides evidence in the

accounts of the VAT identification number of the person acquiring the goods.

(2) For these purposes it is irrelevant that the person acquiring the goods was a trader with its seat in a third State, which, although it dispatched the object of the supply in the course of a chain transaction from one Member State to another Member State, is not registered for VAT purposes in any Member State.

Directive 77/388 does not allow the Member States to accept an intra-Community supply as tax-exempt only where the taxable person proves that the person acquiring the goods has submitted a tax return concerning the intra-Community acquisition in the destination Member State.

1 – Original language: Spanish.

2 – 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), in the version in force at the material time.

3 – BGB1. 1993 I, p. 565.

4 – BGB1. 1999 I, p. 1308.

5 – Case C-245/04 [2006] ECR I-3227, paragraph 45.

6 – Case C-430/09 [2010] ECR I-13335, paragraph 44.

7 – And there is no indication in the case file that the Finanzgericht, which heard the case at first instance, took a different view on this point.

8 – *Euro Tyre Holding*, paragraph 32.

9 – *Euro Tyre Holding*, paragraph 33.

10 – *Euro Tyre Holding*, paragraph 45: ‘In circumstances such as those at issue in the main proceedings, in which the first person acquiring the goods, having obtained the right to dispose of the goods as owner in the Member State of the first supply, expresses his intention to transport those goods to another Member State and presents his value added tax identification number attributed by that other State, the intra-Community transport should be ascribed to the first supply, on condition that the right to dispose of the goods as owner has been transferred to the second person acquiring the goods in the Member State of destination of the intra-Community transport.’ See also paragraph 35.

11 – In this regard, see *Euro Tyre Holding*, paragraphs 33 to 39.

12 – *Euro Tyre Holding*, paragraph 34 and case-law referred to therein.

13 – See, for example, Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraph 70.

14 – Case C-146/05 [2007] ECR I 7861, paragraphs 29 and 31.

15 – The final element of this system is a mechanism for the avoidance of double taxation, contained in the second subparagraph of Article 28b(2).

16 – Within the meaning laid down in *Teleos*, paragraph 40.

17 – Such proof is also mentioned in Article 18(1) of Council Implementing Regulation (EU) No

282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1), pursuant to which, '[u]nless he has information to the contrary, the supplier may regard a customer established within the Community as a taxable person: (a) where the customer has communicated his individual VAT identification number to him …; (b) where the customer has not yet received an individual VAT identification number, but informs the supplier that he has applied for it and the supplier obtains any other proof …'.

18 – *Collée*, paragraph 31.

19 – Case C-438/09 [2010] ECR I-14009.

20 – *Dankowski*, paragraphs 33 and 34, and the case-law referred to therein.

21 – *Dankowski*, paragraph 36, states that 'any failure by the service provider to meet the requirement stated in Article 22(1) of the Sixth Directive cannot call in question the right of deduction to which the recipient of those services is entitled'. In the same vein, see *Euro Tyre Holding*, paragraphs 37 and 38.

22 – See, by way of example, Case C-268/83 *Rompelman* [1985] ECR 655, paragraph 19.

23 – *EMAG Handel Eder*, paragraph 40.

24 – Council Regulation of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax (OJ 2005 L 288 p. 1).

25 – Opinion delivered on 29 June 2010 in Case C-285/09 [2010] ECR I-12605, point 64. The judgment in Case C-285/09 was delivered on 7 December 2010.

26 – See, by way of example, *Collée*, paragraph 26.

27 – *R*, paragraph 54.

28 – *R*, paragraph 53.

29 – Given the nature of the goods sold (two stone-crushing machines), it is to be assumed that these were not intended for 'personal consumption', which would have negated the existence of an 'economic activity' within the meaning of the directive.

30 – *EMAG Handel Eder*, paragraph 29, and *Teleos*, paragraphs 23 and 24.

31 – See, in this regard, *Teleos*, paragraph 25.

32 – Paragraph 71.

33 – Paragraph 52.