OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 24 May 2012 (1)

Case C-160/11

Bawaria Motors Sp. z o. o.

v

Minister Finansów

(Reference for a preliminary ruling from the Naczelny S?d Administracyjny (Poland))

(Directive 2006/112/EC — VAT — Special arrangements for taxable dealers — Sale of second-hand vehicles to a final consumer — Application of the profit margin scheme where the dealer purchased the vehicle exempt from tax from a person who had himself exercised a right to deduct part of the input tax)

1. By this reference for a preliminary ruling, the Court is asked to clarify whether the special 'profit margin scheme' — arrangements under which value added tax ('VAT') is imposed only on a taxable dealer's margin, (2) specifically in the context of the resale of second-hand passenger vehicles, governed by Article 311 et seq. of Council Directive 2006/112/EC (3) — is applicable in a situation where the taxable dealer bought those vehicles from taxable persons who, upon acquiring the vehicles, had exercised a partial right of deduction in respect of the input tax on the purchase of those goods.

I – **Legal framework**

2. I shall set out the relevant provisions of the EU legal framework below, in the context of my assessment. As regards the national legal framework, Article 43(1)(2) of the Polish Law on VAT, (4) in the version applicable to the case in the main proceedings, provides that 'the supply of second-hand goods shall be exempt from tax, provided that in respect of those goods the person effecting their supply did not have the right to reduce the amount of tax due by the amount of input tax'.

3. Until 31 December 2010, Article 86(3) of the Law on VAT provided that: ‘in the case of the purchase of passenger vehicles and other motor vehicles with a total authorised weight not exceeding 3.5 tonnes, the amount of input tax shall correspond to 60% [*until 22 August 2005: 50%, subject to slightly different conditions applied in accordance with a formula*] of the amount of tax set out in the invoice or of the amount of tax due on the intra-Community acquisition of goods or of the amount of tax due on the supply of goods purchased by the taxable person, but not more than PLN 6 000) [*until 22 August 2005: PLN 5 000, subject to slightly different conditions applied in accordance with a formula*].’

4. Article 120 of the Law on VAT provides that:

‘1. …

(4) For the purposes of this Chapter, “second-hand goods” shall mean tangible movable property that is suitable for further use as it is or after repair, other than the goods referred to in paragraphs 1 to 3 [*those paragraphs concern works of art, collectors’ items and antiques and do not apply in the case under consideration*] and goods other than precious metals or precious stones ...

…

4. In the case of a taxable person effecting transactions consisting in the supply of used goods, works of art, collectors’ items or antiques acquired previously by that taxable person for the purposes of the activity carried out or imported for the purpose of resale, the taxable amount shall be the margin constituting the difference between the total amount which the acquirer of the goods is to pay and the amount of the acquisition, minus the amount of tax.

…

10. Paragraphs 4 and 5 shall concern supplies of second-hand goods, works of art, collectors’ items or antiques which the taxable person has acquired from:

(1) a natural person, a legal person or an organisational unit without legal personality which is not a taxable person under Article 15 or which is not a taxable person for the purposes of [VAT];

(2) taxable persons as referred to in Article 15, where the supply of those goods was exempt from tax under Article 43(1)(2) or Article 113;

(3) taxable persons, where the supply of those goods was taxed under paragraphs 4 and 5;

(4) taxable persons for the purposes of [VAT], where the supply of those goods was exempt from tax under rules corresponding to the regulations laid down in Article 43(1)(2) or Article 113;

(5) taxable persons for the purposes of [VAT], where [VAT] is imposed on the supply of those goods under rules corresponding to the regulations laid down in paragraphs 4 and 5 and the acquirer holds documents confirming unequivocally that the goods were acquired under those rules.’

5. Paragraph 13(1)(5) of the Decree implementing the Law on VAT (5) provided that: ‘[t]he supply of passenger vehicles and other motor vehicles by taxable persons who, upon the acquisition thereof, had the right to deduct input tax as referred to in Article 86(3) of the Law shall be exempt from tax where those passenger vehicles or motor vehicles are second-hand goods within the meaning of Article 43(2) of the Law on VAT’.

II – **Facts and the question referred**

6. Bawaria Motors Spó?ka z o. o. (‘Bawaria’) is an active taxable person under Article 15 of the Law on VAT and carries on an economic activity consisting in the operation of a car showroom in connection with which it acquires and subsequently sells passenger vehicles, both new and second-hand. As part of its activities, it also acquires second-hand passenger vehicles from economic operators which issue Bawaria with VAT invoices at an ‘exempt’ rate and refer to Article 43(1)(2) of the Law on VAT (sale of second-hand goods). Bawaria resells those second-hand passenger vehicles and in so doing makes use of the profit margin scheme set out in Article 120 of the Law on VAT.

7. In the course of Bawaria’s activities, situations also arise in which it purchases second-hand passenger vehicles from economic operators who, on acquisition, have deducted input tax within the statutory limits. (6) In such a situation, those operators issue Bawaria with a VAT invoice at the ‘exempt’ rate and refer to Paragraph 13(1)(5) of ‘the Decree implementing the Law on VAT’ as the basis for exempting that supply from VAT. On the view that it is entitled, in such a case, to apply the profit margin scheme, Bawaria asked the Polish Minister for Finance on 9 February 2009 to issue a written interpretation of the relevant provisions.

8. In the individual interpretation of 20 February 2009, the Minister for Finance found Bawaria’s view to be incorrect. In the grounds for his decision, he concluded essentially that the profit margin scheme is applicable only in situations where the taxable dealer acquired the second-hand good from a taxable person who did not have a right to deduct input tax on the purchase of that good and who accordingly incorporated that tax in his sale price.

9. Bawaria brought an action against the above interpretation before the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw), claiming that it infringes Article 120(4) and (10) of the Law on VAT by dint of misinterpretation in that it excludes the possibility of taxing under the profit margin scheme the supply of second-hand goods acquired with benefit of the exemption under Paragraph 13(1)(5) of the Decree implementing the Law on VAT.

10. By judgment of 10 November 2009, the Wojewódzki S?d Administracyjny annulled the contested interpretation. It found that the essential problem in the case was Paragraph 13(1)(5) of the Decree implementing the Law on VAT, which introduced a tax exemption not provided for under EU law and distorted the clear and logical profit margin scheme — and not only the scheme under EU law but also the scheme under the national provisions concerning taxation of the margin alone. Guided by the need to preserve the coherence of the system of tax on goods and services and the principle of the primacy of EU law, the Wojewódzki S?d Administracyjny considered that Paragraph 13(1)(5) of the Decree implementing the Law on VAT does not exempt a taxable person from VAT on the supply of a second-hand vehicle where, on acquisition, he was not entitled to deduct input tax in full: the exemption concerns only the part of the tax due which was *de facto* paid by that taxable person in accordance with the limits laid down in Article 86(3) of the Law on VAT. Accordingly, the exemption does not cover the amount of PLN 6 000 (or 60% of the amount of tax stated in the invoice) since the taxable person effectively relinquished that amount on purchasing the vehicle. This leads to the conclusion that Bawaria may apply the profit margin

scheme but only provided it is limited to what the person effecting the supply could not deduct earlier.

11. However, Bawaria lodged an appeal in cassation against the above judgment before the referring court — the Naczelny S?d Administracyjny (Supreme Administrative Court) — claiming essentially infringement of the provisions of substantive law by dint of misinterpretation and misapplication thereof, that is to say, infringement of Article 120(4) and (10) of the Law on VAT, read in conjunction with Paragraph 13(1)(5) of the Decree implementing the Law on VAT and with Article 91(4) to (6) of the Law on VAT, in that it excludes the possibility of fully taxing, within the profit margin scheme, the supply of second-hand goods acquired with benefit of the exemption under Paragraph 13(1)(5) of the Decree implementing the Law on VAT.

12. In fact, the Minister for Finance also lodged an appeal in cassation, pleading that the judgment under appeal had been handed down in breach of the law, that is to say, in breach of Article 43(1)(2) of the Law on VAT and Paragraph 13(1)(5) of the Decree implementing the Law on VAT. He maintains that the judgment under appeal is based on the assumption that, where a passenger vehicle acquired from an operator who deducted input tax on the acquisition thereof is supplied, there is no legal basis for taxing the supply of the vehicle under the general rules. The Minister for Finance also maintained the opinion expressed in the individual interpretation of 20 February 2009: where a passenger vehicle is acquired from an operator who deducted input tax in part on the acquisition thereof and on the sale thereof made use of the exemption under Paragraph 13(1)(5) of the Decree implementing the Law on VAT, the company will, on the supply of that vehicle, have no right to determine the taxable amount using the margin method since the conditions laid down in Article 120(10) of the Law on VAT will not be satisfied and in that situation it is necessary to tax the transaction under the general rules.

13. According to the referring court, there is no doubt that, in introducing Paragraph 13(1)(5) of the Decree implementing the Law on VAT, the Polish legislature introduced a tax exemption not provided for in EU law. The referring court considers that the relevant provisions give rise to justified uncertainty as to whether, where the supplier has made a partial VAT deduction, his contractor — the taxable dealer — may make use of the special ‘margin’ scheme, being as it is that one of the conditions for applying that scheme is that it must not have been possible in relation to those goods to reduce the amount of output tax by the amount of input tax on the purchase thereof.

14. Emphasising that the objective of the arrangements for taxing second-hand goods is to prevent double taxation and distortion of competition as between taxable persons, the referring court observes that, from the point of view of the taxable dealer, there is no difference between, on the one hand, a supply effected by a taxable person for the purposes of VAT, or by a non-taxable person for the purposes of VAT, where the person had no possibility at all of deducting input tax, and, on the other, a supply effected by a taxable person for the purposes of VAT who had such a possibility in part — because, under the provisions of national tax law, they are all exempt when selling second-hand passenger vehicles.

15. The referring court adds that, with the introduction of Paragraph 13(1)(5) of the Decree implementing the Law on VAT, the Polish legislature effectively put an end to the multi-stage application of VAT. By dint of that amendment, a commercial taxable dealer has lost both the right to reduce the tax due by deducting the input tax, because his supplier is exempt from it, and the right to apply the special margin taxation scheme, because his supplier made a partial deduction upon purchasing the passenger vehicle. Moreover, this ultimately leads to double taxation in so far as the supplier has not made a tax deduction (above the thresholds of 50% and PLN 5 000 or 60% and PLN 6 000).

16. Against that background, the referring court decided to stay the proceedings and to refer the following question to the Court:

‘Are the provisions of Articles 313(1) and 314 of [the VAT Directive], read in conjunction with Articles 136 and 315 thereof, to be interpreted as permitting the application of the special “margin” scheme for taxable dealers in relation to supplies of second-hand goods also where they resell the purchased passenger vehicles and other motor vehicles to which the tax exemption for the supply of passenger vehicles and other vehicles by taxable persons who only have a partial right to deduct input tax on the purchase thereof, as laid down in Article 86(3) of the [Law on VAT], was applied pursuant to the Polish national provisions laid down in Paragraph 13(1)(5) of the [Decree implementing the Law on VAT], where those passenger vehicles and motor vehicles were second-hand goods within the meaning of Article 43(2) of the Law on VAT and Article 311(1)(1) of [the VAT Directive]?’

III – **Appraisal**

17. Written and oral observations have been submitted by Bawaria, by the Polish Government and by the Commission.

18. Bawaria contends that a taxable dealer may apply the profit margin scheme in the context of a resale of second-hand vehicles which, when purchased, were covered by the VAT exemption provided for under the Polish Law on VAT in relation to sales of goods carried out by taxable persons who had only a partial right to deduct input tax on the purchase of those goods.

19. Bawaria submits that the conditions for applying Article 314 of the VAT Directive are fulfilled in the present case: its supplies concern second-hand goods; the purchase of those goods from another taxable person was exempt from VAT; and that other taxable person did not, in the light of Article 86(3) of the Law on VAT, have a full right of deduction in respect of the input tax on the purchase of the goods.

20. According to Bawaria, the interpretation of Articles 311 to 315 of the VAT Directive must take account of the objectives of that directive, that is, the prevention of double taxation and of distortion of competition, universality of VAT and fiscal neutrality.

21. First, however, when combined with the obligation to apply the normal VAT scheme, the fact that the exemption provided for under Paragraph 13(1)(5) of the Decree implementing the Law on VAT results in Bawaria losing the right to deduct the fraction of the tax which its own supplier could not deduct — and which, moreover, that supplier incorporated in his sale price — results in double taxation.

22. Secondly, according to Bawaria, the fact that the same transaction — the resale of a given second-hand vehicle — is subject to differing treatment depending on whether the supplier was completely deprived of any right of deduction or whether he had a partial right of deduction gives

rise to a breach of the principle of fiscal neutrality, in so far as in both the first and the second case the exemption which that supplier enjoyed deprived Bawaria, as the taxable dealer, of any right of deduction.

23. Thirdly, the refusal to apply the profit margin scheme to Bawaria in circumstances such as those at issue results in a significant distortion of competition vis-à-vis those to whom that scheme is applied, whereas the value added to the second-hand good between its purchase and resale is identical in all cases. In a free market economy, Bawaria would not be able to pass on to the sale price for the final consumer the increase in VAT engendered by application of the normal VAT scheme and would accordingly be obliged to adapt its price to that of the market (that is to say, the price used by the taxable dealers to whom the profit margin scheme is applied) and, moreover, to sell at a loss when its competitors are making a profit, while at the same time being obliged to pay to the State an amount of VAT which is substantially higher than that paid by those competitors.

24. The Polish Government and the Commission, on the other hand, are essentially of the opinion that the profit margin scheme is not applicable in the case before the referring court.

Assessment

25. The referring court is asking, in essence, whether the taxable dealer (Bawaria) — who buys second-hand passenger vehicles from taxable persons, who in turn, upon acquisition, have exercised a partial right of deduction in respect of the input tax — is entitled to apply the special profit margin scheme when reselling those vehicles to the final consumer.

26. It is appropriate to start by considering the relevant provisions.

27. The profit margin scheme is governed by Title XII (‘Special schemes’) of the VAT Directive and, specifically, by Subsection 1 (‘Margin scheme’) of Section 2 (‘Special arrangements for taxable dealers’) of Chapter 4 (‘Special arrangements for second-hand goods, works of art, collectors’ items and antiques’) of that Title, that is to say, by Articles 312 to 325 of the directive.

28. In particular, under Article 314 of the VAT Directive, the profit margin scheme concerns only supplies of second-hand goods which taxable dealers (such as Bawaria) acquire from any of the following persons: (a) a non-taxable person; (b) another taxable person, in so far as the supply of goods by that other taxable person is exempt pursuant to Article 136; (c) another taxable person, in so far as the supply of goods by that other taxable person is covered by the exemption for small enterprises provided for in Articles 282 to 292 and involves capital goods; and (d) another taxable dealer, in so far as VAT has been applied to the supply of goods by that other taxable dealer in accordance with the margin scheme.

29. It should be pointed out that Article 314 of the VAT Directive lists — exhaustively, to my mind — the taxable persons carrying out supplies of goods to which the profit margin scheme may be applied by the taxable dealer at the next marketing stage.

30. It is clear that the feature common to the cases listed in Article 314 is the fact that the person supplying the second-hand vehicle to the taxable dealer has borne the total VAT burden. In other words, that person has had no right to deduct input tax on the purchase of the vehicle.

31. Accordingly, as we shall see below and contrary to what Bawaria would seem to suggest, the situation in the case under consideration is clearly not envisaged by Article 314 of the VAT Directive; nor may it be considered to be covered by that provision.

32. Indeed, first, it follows from the order for reference that the case under consideration does

not fall within the scope of point (a) of Article 314 of the VAT Directive. The person supplying the second-hand good to Bawaria is, itself, a taxable person.

33. Secondly, it is also clear from the order for reference that the case under consideration is not covered by point (c) of Article 314 in so far as the supply of the second-hand good to Bawaria did not fall within the exemption for small enterprises provided for in Articles 282 to 292 and involve capital goods. Instead, it was exempted on the basis of a particular provision of Polish law: Paragraph 13(1)(5) of the Decree implementing the Law on VAT.

34. Nor, thirdly, does the case under consideration fall under point (d) of Article 314 of the VAT Directive. The taxable persons supplying the second-hand good to Bawaria established VAT invoices with the ‘exempt’ rate and did not supply those goods under the profit margin scheme.

35. Lastly, it follows that the only remaining point of Article 314 for us to consider is point (b). This concerns supplies of goods by taxable persons who are exempt pursuant to Article 136 of the VAT Directive.

36. A reading of Article 136 shows that that provision, in turn, provides for the exemption of two types of transaction.

37. Under point (a), Article 136 provides that Member States are to exempt: the supply of goods used solely for an activity exempted under Article 132 (transaction in the public interest), Article 135 (other exempted transactions, such as financial services), Article 371 (for instance, admission to sporting events or the supply of telecommunications services or goods by public postal services), Articles 375, 376 or 377, Article 378(2), Article 379(2) or Articles 380 to 390 (exemptions granted to certain Member States), if those goods have not given rise to deductibility. However, suffice it to say that none of those categories of exemption are applicable to the case under consideration.

38. Under point (b), Article 136 provides that Member States are to exempt the supply of goods on the acquisition or application of which VAT was not deductible, pursuant to Article 176. Article 176 of the VAT Directive lays down the ‘standstill’ clause. Under that clause, where the Council has not yet adopted one of the measures referred to in that provision, the Member States may retain any legislation regarding exclusions from the right to deduct VAT existing at 1 January 1979 or, in the case of the Member States which acceded to the European Union after that date, on the date of their accession. In the case of Poland, the date of accession was 1 May 2004. It may be added in this respect that the Court has already confirmed that interpretation of Article 176 of the VAT Directive. (7)

39. It is clear that the statutory limitation of the right to deduct VAT laid down by the Polish legislature in Article 86(3) of the Law on VAT constitutes, at the same time, a partial exclusion from the right to deduct: it is limited to 60% of the amount of tax stated in the invoice and a maximum of PLN 6 000.

40. Until 1 May 2004, in fact, pursuant to Article 25(1)(2) of the 1993 Law on VAT and Excise Duties, (8) the purchase by a taxable person of second-hand vehicles with a maximum load of 500 kg was not covered by the right to deduct VAT: that is to say, a total exclusion was in force. However, as of 1 May 2004, Article 86(3) of the 2004 Law on VAT provided for a partial deduction — that is, first 50% and, then, 60% in the version in force on 22 August 2005, but no more than PLN 6 000. I would point out that this, in and of itself, makes sense in so far as the goods in question are ‘dual goods’: passenger vehicles with not only a business use but also a private use. (9)

41. As the Commission rightly pointed out, in the light of the Court's case-law, (10) Article 86(3) of the Law on VAT did not, in the case of passenger vehicle purchases, extend the measures limiting the right to deduct as laid down by the Polish legislation before 1 May 2004. As a consequence, the conditions for application of the 'standstill' clause are satisfied and the Polish legislation may continue to be applied after 1 May 2004.

42. It is worth noting that Article 136 of the VAT Directive does not encompass situations in which a taxable person exercised a 'partial' right to deduct input tax. (11) As we have seen in point 38 above, Article 136 of the VAT Directive allows Member States to exempt the supply of goods on the acquisition of which VAT was not deductible pursuant to Article 176 of the VAT Directive.

43. In so far as it forms part of arrangements derogating from the general VAT scheme, it is clear to my mind that Article 136 — and, in particular, the terms 'the supply of goods on the acquisition … of which VAT *was not deductible*' (12) — must be interpreted strictly.

44. That approach has been confirmed by the case-law. The Court has already had occasion to emphasise in *Jyske Finans* (13) — which dealt with the issue of taxation on the secondary market of second-hand vehicle sales — that 'the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive [(14)] [in particular, Article 13B(c) — now Article 136 of the VAT Directive] are to be interpreted strictly, since these exemptions constitute exceptions to the general principle, in accordance with Article 2 of that directive, that VAT is to be levied on all goods or services supplied for consideration by a taxable person acting as such'. (15)

45. Furthermore, the Court also held in *Jyske Finans* (16) that 'it is true that the arrangements for the taxation of the profit margin made by the taxable dealer on the supply of second-hand goods ... constitute a special arrangement for VAT — derogating from the general scheme of the Sixth Directive — which, like the other special arrangements provided for in Articles 24, 25 and 26 of that directive, must be applied only to the extent necessary to achieve their objective'. Indeed, I consider that, in so far as the above arrangements for the taxation of the profit margin constitute a derogation, it is arguable that they should only be applicable in cases where this is expressly envisaged under the VAT system established by the VAT Directive (see Article 131 et seq. thereof).

46. Next, it was in that same judgment (17) that the Court stressed that 'the exemption provided for by Article 13B(c) of the Sixth Directive ... can apply only to supplies of goods on the acquisition of which VAT did not become deductible in accordance with national legislation'.

47. In response to Bawaria's arguments in the present case, suffice it to point out that, in the same paragraph in *Jyske Finans*, (18) the Court stressed that 'the terms of [Article 13B(c) of the Sixth Directive] are not capable, in that regard, of any other interpretation which would allow a taxable person, who could not take advantage of such an exemption, to avoid double taxation'.

48. It follows that Article 136 of the VAT Directive, which is referred to by Article 314(b) of that directive, may not be construed as extending to cover the circumstances of the case before the referring court, in which the taxable person in question had only a 'partial' right to deduct input tax — but a right to deduct nonetheless. Article 136 concerns only supplies of goods the purchase of which was *completely* excluded, under national law, from any right of deduction.

49. Accordingly, I consider that, in the case under consideration, the limitation placed on the right of deduction by Article 86(3) of the Law on VAT — while, admittedly, covered by the standstill clause under Article 176 of the VAT Directive, (19) which is referred to by Article 136(b) of that directive — nevertheless does not amount, as required, to the exclusion, in the strict sense, of the

right of deduction, in so far as it provides, on the contrary, for a *partial* right of deduction.

50. The profit margin scheme, which consists in applying the VAT solely on the difference between the sale price of a second-hand good, as fixed by a taxable dealer, and the purchase price, is a special scheme which makes it possible to prevent second-hand goods, on their reintroduction into commercial channels, from being taxed a second time — that is, it helps avoid double taxation — without the tax still included in their price being taken into account. (20)

51. When these second-hand goods are reintroduced into commercial channels subject to VAT, the special profit margin scheme is applicable only to cases where they were reintroduced by a non-taxable person (final customer) or, if they were reintroduced by a taxable person, only where this was done at a time when this reintroduction was completely exempt from VAT.

52. It follows that whenever a taxable dealer has exercised a right to deduct input tax, albeit merely a partial such right, the profit margin scheme should not be applied.

53. It may be pointed out in this respect that, admittedly, the objective of the profit margin scheme is to avoid situations where second-hand goods are exposed to double taxation on being reintroduced into commercial channels, as a result of failure to take into account the tax still incorporated in their price. However, suffice it to say that, in the case under consideration, it is incumbent on the Polish Republic to take the measures necessary to prevent the double taxation of taxable dealers such as Bawaria, a situation which arises owing to the combination of (i) application of the normal VAT scheme and (ii) the fact that Bawaria is prohibited from deducting the tax included in the price of a second-hand vehicle bought from a supplier who had benefited from the exemption which is provided for in Paragraph 13(1)(5) of the Decree implementing the Law on VAT (21) and which is, arguably, not entirely consistent with the VAT Directive.

54. Indeed, that exemption finds no support in the provisions of the VAT Directive which, in Article 131 et seq., sets out an exhaustive list of the activities exempted from VAT.

55. As a general remark, I consider (as does the Commission) that what is necessary is to provide a system which is appropriate for the operation of companies which use vehicles but not on a full-time basis for requirements of the taxable activity. However, I would say that Member States are not empowered to provide for solutions which are not envisaged by the VAT Directive in order to alleviate difficulties encountered by companies in their day-to-day operations.

56. I also consider that application of the profit margin scheme in the case under consideration would, in any event, be contrary to the principles underlying the VAT Directive and therefore be unjustified.

57. The importance of avoiding double taxation is the reason why it is a common feature of the relevant provisions that the VAT burden must have been borne in full. That is obviously conditional on the supplier having absolutely no right of deduction in a case such as this — which means that the VAT needs still to be contained in total.

58. If the profit margin scheme were applied in a situation such as that of Bawaria then the result would be a lack of taxation on the part where deduction was applied. That would be contrary to the principle of the universality of VAT, in so far as the turnover of the taxable dealer would not be taxed in full, whereas the supplier who supplied him the second-hand goods would have been able to exercise a partial right to deduction of the tax. It may be added that, at the same time, it would also be contrary to the principle of preserving competition.

59. The principle of the universality of VAT is enshrined in Article 1 of the VAT Directive. That

provision provides inter alia that ‘on each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components’. The universality of imposing VAT is manifest both at the personal level (every transaction is taxed independently of the person who carries it out — as long as that transaction is effected in the context of an economic activity in the sense of the VAT Directive) and at the material level (each supply of goods is, in principle, taxed).

60. The case under consideration demonstrates, therefore, precisely why it is necessary that a derogation from the rule of the universality of VAT must be treated as wholly and exclusively exceptional and that any such derogation must be based on the provisions of the VAT Directive.

61. Bawaria, however, seeks to rely on the ‘adjustment’ scheme provided for under Articles 187 to 189 of the VAT Directive — which, it argues, should not be eluded by a supplier who, while able to deduct part of the input tax on the purchase, sells the second-hand good to the taxable dealer free of VAT, and which is meant to help avert the risk of a reduction of tax income in such a case.

62. That argument cannot succeed.

63. As the Commission pointed out at the hearing, that approach would lead to the repeated taxation of car buyers where VAT was not deducted — in relation, moreover, to use which is not taxable. As the Polish Government rightly noted, the approach argued for by Bawaria would only bring about a reduction of input tax and — importantly — the fact remains that it would still not eliminate some double taxation. To my way of thinking, the profit margin scheme is manifestly not an appropriate means of remedying the fact that certain provisions of Polish law (Paragraph 13(1)(5) of the Decree implementing the Law on VAT) are not entirely consistent with the VAT Directive. (22) Indeed, to my mind, it is clear that, in Bawaria’s case, it is the normal provisions which should be applied instead.

64. It is also clear that, if the exemption under Paragraph 13(1)(5) of the Decree implementing the Law on VAT were eliminated, the invoice in question would show the input tax, making it possible for a taxable dealer (reseller) such as Bawaria to deduct the VAT: in that way, the problem in the main proceedings would appear to be eliminated.

65. While it would appear that in the case of Bawaria we are dealing with a double taxation situation, which would normally be incompatible with the principles underlying VAT, the fact remains that the case under consideration concerns a particular good: second-hand vehicles which were used not only for business but also for private use. It is obvious that, in so far as the vehicle was used privately, VAT may not be deducted.

66. In view of all the foregoing considerations, I consider that, upon a proper construction of the VAT Directive, it clearly follows that, where a taxable dealer is supplied with second-hand vehicles by a taxable person who, on the acquisition of those vehicles, exercised a partial right of deduction, pursuant to Article 86(3) of the Law on VAT, the condition laid down in Article 314(b) of the VAT Directive is not fulfilled. In consequence, the taxable dealer is not entitled to apply the special profit margin scheme.

IV – **Conclusion**

67. In the light of the above considerations, I suggest that the Court give the following answer to the question referred by the Naczelny S?d Administracyjny:

Articles 313(1) and 314 of Council Directive 2006/112/EC of 28 November 2006 on the common

system of value added tax, read in conjunction with Articles 136 and 315 of that directive, must be interpreted as precluding application of the special margin scheme for taxable dealers in relation to the resale of second-hand passenger vehicles and other motor vehicles purchased from taxable persons who, upon the acquisition of those vehicles, exercised a right to deduct part of the input tax on the purchase, in accordance with Article 86(3) of the Polish Law on VAT.

1 – Original language: English.

2 – That is to say, the difference between the sale price and the purchase price.

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

4 – Ustawa o podatku od towarów i us?ug (Law on the tax on goods and services) of 11 March 2004 (*Dziennik Ustaw* No 54, item 535, as amended; 'the Law on VAT').

5 – Decree of the Minister for Finance of 28 November 2008 on the implementation of certain provisions of the Law on the tax on goods and services (*Dziennik Ustaw* No 212, item 1336).

6 – Laid down in Article 86(3) of the Law on VAT (50% or 60%, but no more than PLN 5 000 or PLN 6 000).

7 – See, for instance, Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 23; Case C-371/07 *Danfoss and AstraZeneca* [2008] ECR I-9549, paragraphs 28 to 29; Joined Cases C-538/08 and C-33/09 *X Holding and Oracle Nederland* [2010] ECR I-3129, paragraph 38; and Case C-395/09 *Oasis East* [2010] ECR I-8811, paragraphs 19 to 20. In Case C-414/07 *Magoora* [2008] ECR I-10921, which also concerned Poland, the Court held essentially that the 'standstill' clause is not intended to allow a new Member State to amend its domestic legislation in such a way as to be inconsistent with the objective of the VAT Directive. In any event, the VAT Directive precludes a Member State from subsequently amending legislation which entered into force on that date in such a way as to widen those restrictions as compared with their scope prior to that date.

8 – Law of 8 January 1993 on the tax on goods and services and on excise duties, *Dziennik Ustaw* No 11, item 50.

9 – At the hearing, in fact, the Commission pointed out that Bawaria's situation in the case under consideration constitutes a 'typical situation of resellers of used cars in Poland'.

10 – See, for instance, *Magoora*, cited in footnote 7, and the judgment of the Naczelny S?d Administracyjny of 9 June 2010, I FSK 960/09.

11 – Indeed, the referring court recognised this in the order for reference, when it rightly pointed out that, in principle, EU law does not allow the partial deduction of VAT by the acquirer of the goods or services, even in relation to fixed assets (capital goods). This also means that there are no EU rules on the possibility or otherwise of exempting such goods or services from VAT or on the special profit margin scheme applied by taxable dealers.

12 – Emphasis added.

13 – Cited in footnote 7, paragraph 21.

14 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) as amended by Council Directive 94/5/EC of 14 February 1994

(OJ 1994 L 60, p. 16) (‘the Sixth Directive’).

15 – See, inter alia, Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraph 36; Case C-428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527, paragraph 29; and Case C-270/09 *MacDonald Resorts* [2010] ECR I-13179, paragraph 45 and the case-law cited. See also Case C-175/09 *Axa UK* [2010] ECR I-10701, paragraph 25 and the case-law cited.

16 – Cited in footnote 7; see paragraph 35, relating to the application of the arrangements provided for in Article 26 and Article 25 of the Sixth Directive; see also Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 34, and Case C-321/02 *Harbs* [2004] ECR I-7101, paragraph 27.

17 – *Jyske Finans*, cited in footnote 7, paragraph 24.

18 – Idem.

19 – See, to that effect, *Magoora*, cited in footnote 7; *X Holding*, cited in footnote 7, paragraphs 59 to 61; and *Oasis East*, cited in footnote 7, paragraphs 19 and 20.

20 – Cf. Case C-131/91 *‘K’Line Air Service Europe* [1992] ECR I-4513, paragraph 19.

21 – Even the referring court, in its analysis in the order for reference, recognises at the outset that ‘there is no doubt that, in Paragraph 13(1)(5) of the Decree implementing the Law on VAT, the Polish legislature introduced a tax exemption not provided for under [EU] law’.

22 – See also point 54 above.