OPINION OF ADVOCATE GENERAL

CRUZ VILLALÓN

delivered on 11 June 2013 (1)

**Joined Cases C?618/11, C?637/11 and C?659/11**

**TVI Televisão Independente SA**

**v**

**Fazenda Pública**

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal))

(Taxation – VAT – Sixth Council Directive 77/388/EEC – Article 11(A)(2)(a) and (3)(c) – Council Directive 2006/112/EC – Articles 78(a) and 79(c) – Taxable amount – Inclusion of taxes in the taxable amount – Screening tax – 'Fiscal substitution')

1. With this request for a preliminary ruling the Supremo Tribunal Administrativo (Portugal) asks whether a 'screening tax' imposed on the screening and broadcasting of advertising charged to the advertisers but paid to the State by the service providers ('fiscal substitute') has to be included in the taxable amount for the purposes of calculating the value added tax (VAT), i.e. whether Article 11(A)(2)(a) or Article 11(A)(3)(c) of the Sixth Council Directive (2) applies. The cases are particular because of two circumstances.

2. The first of these, which has not been treated by the Court of Justice of the European Union so far, concerns the impact the existence of a 'third party' in the fiscal relationship between State and advertisers should have, where that 'third party' is legally obliged to pay the tax in question to the State ('fiscal substitute'), even though the tax is 'a charge of' the advertiser.

3. The second circumstance, which makes these cases particular, is that the referring court has not provided the Court with much specific information about the nature and scope of the mechanism of 'fiscal substitution', in particular in the precise context of the legal regime of the screening tax. Neither have the participants to the proceedings reached any agreement in that respect.

4. In these circumstances I propose an answer to the Court which depends directly on the understanding of the mechanism of ‘fiscal substitution’ that the national judge adopts. In particular, I will propose that the criterion of the fiscal public law relationship is essential. If, with respect to the legal obligations involved, the decisive fiscal relationship is the one between the ‘fiscal substitute’ (the service provider) and the State, the cases at hand should be assumed to trigger the application of Article 11(A)(2)(a) of the Sixth Directive. If, however, the decisive fiscal public law relationship is between the service recipient and the State, Article 11(A)(3)(c) of the Sixth Council Directive should be applied.

## I – **Legal framework**

### A – *EU law*

5. The present cases concern the collection of VAT at three different moments of time: February 2004 (Case C?637/11), October 2004 (Case C?618/11) and January 2007 (Case C?659/11).

6. During the time of the events giving rise to Cases C?637/11 and C?618/11 the Sixth Directive was in force. On 1 January 2007 it was repealed and replaced by Council Directive 2006/112/EC (3) under Articles 411(1), 413 of the latter. The events of Case C?659/11 are thus governed by the provisions of Directive 2006/112. Despite some variance in the exact wording, the provisions of Directive 2006/112 relevant to this case are identical to the pertinent provision of the Sixth Directive.

7. Article 2(1) of the Sixth Directive (Article 2(1)(c) of Directive 2006/112) subjects to VAT the supply of services effected for consideration within the territory of the country by a taxable person acting as such. With regard to the taxable amount, Article 11(A) of the Sixth Directive provides as follows:

‘1. The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies; …

2. The taxable amount shall include:

(a) taxes, duties, levies and charges, excluding the value added tax itself; …

3. The taxable amount shall not include: …

(c) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account. The taxable person must furnish proof of the actual amount of this expenditure and may not deduct any tax which may have been charged on these transactions.’

8. The equivalent provisions to Article 11(A)(1)(a), (2)(a), (3)(c) of the Sixth Directive are Articles 73, 78(a), 79(c) of Directive 2006/112 respectively.

### B – *National law* (4)

1. Código do imposto sobre o valor acrescentado and lei geral tributária

9. The VAT in Portugal is governed by the Código do imposto sobre o valor acrescentado (VAT Code, hereinafter: CIVA), approved by Decree-Law 394-B/84 of 26 December 1984 and modified several times since.

10. According to Article 16(1) of the CIVA the taxable amount for the supply of services is 'the value of the consideration obtained or to be obtained from the purchaser, the recipient or a third party'. The taxable amount includes, under Article 16(5)(a) of the CIVA, 'taxes, duties, levies and other impositions, excluding the value added tax itself'. Finally Article 16(6)(c) of the CIVA excludes the following position from the taxable amount: 'amounts paid in the name and on behalf of the purchaser of the goods or the recipient of the services, and booked by the taxable person in appropriate third-party accounts'.

11. Article 18(3) of the lei geral tributaria (General Tax Law, 'LGT') provides that '[t]he taxable person is the natural or legal person, the estate or the factual or legal organisation that, under the law, is bound to comply with the tax obligation, whether it be as direct taxpayer, substitute or responsible entity.

12. Article 20 of the LGT on fiscal substitution states:

'1. Fiscal substitution occurs when, by legal imposition, the tax obligation is required from a person other than the taxpayer.

2. Fiscal substitution is put into effect through the mechanism of withholding tax.'

13. Article 28 of the LGT governs liability in cases of fiscal substitution and provides:

'1. In cases of fiscal substitution, the entity obliged to withhold is liable for amounts withheld and not delivered to the State, while the substituted is relieved of any responsibility as to its payment, without prejudice to the following paragraphs.

2. When withholding is made purely as payment on account of tax finally due, the original liability for tax not withheld falls on the substituted and the secondary liability on the substitute, who is also subject to compensatory interest from the deadline for delivery until the deadline for the submission of the tax return by the original responsible or until the date of the delivery of the tax withheld, if earlier.

3. In the other cases, the substituted is only secondarily responsible for the payment of the difference between the amounts that should have been deduced and those that actually were.'

2. The screening tax

14. Article 28 of the Law 42/2004 (Lei de Arte Cinematográfica e do Audiovisual, Law on Cinematographic and Audiovisual Arts) of 18 August 2004 provides:

'1. Commercial advertising screened in cinemas and disseminated by television, that is commercials, sponsoring, telesales, teletext, product placement as well as advertising included in electronic programming guides, regardless of the broadcasting platform, is subject to a screening tax, which is a charge of the advertiser, amounting to 4% of the price paid.

2. The assessment, charging and monitoring of the amounts to collect by way of the screening tax are defined in a separate legal document.'

15. The details of the screening tax are regulated by Decree-Law 227/2006 of 15 November 2006.

16. Article 50 of Decree-Law 227/2006 provides:

'1. Commercial advertising screened in cinemas, disseminated by television or included in electronic programming guides, regardless of the broadcasting platform, is subject to a screening tax, which is due from the advertisers and constitutes revenue of ICAM [Instituto do Cinema, Audiovisual e Multimédia] and of CP-MC [Cinemateca Portuguesa – Museu do Cinema]. …

3. The contribution referred to in the previous paragraphs is charged, by way of fiscal substitution, by the companies with concessions to operate the advertising slots in cinemas, by operators or distributors of television that offer teletext services or electronic programming guides.'

17. The screening tax has to be delivered to the State by the 10th of the month after it has been charged (Article 52 of Decree-Law 227/2006).

18. Article 51 of Decree-Law 227/2006 on the amount of the tax states:

'The screening tax amounts to 4% of the price of the screening or dissemination of the advertising or of its inclusion in electronic programming guides, of which 3.2% constitutes income of ICAM and 0.8% income of CP-MC.' (5)

## II – **Facts and the main proceedings**

19. In the course of its activities in the television market TVI provides commercial advertising services to various advertisers. The invoices it issued for these services included the screening tax of 4% of the price of the services. TVI applied the VAT to the total amount invoiced. It thus included the screening tax in the taxable amount. The VAT was paid and included in the respective periodic declaration accordingly.

20. TVI paid the screening tax. On its part, it received the payment of the tax billed to its clients either before or after paying the screening tax itself. TVI has claimed that it must inform the State as to the content of the screenings, the identity of the advertisers, the amount on which the tax is charged and the tax contributions charged in respect of each advertiser. Portugal claims that this information is not provided to the State.

21. As a result of collecting the screening tax, accounting entries were made by TVI in favour of ICAM and CP-MC by way of third-party suspense accounts. According to TVI these accounts were established with regard to each client and for the benefit of ICAM and CP-MC. Portugal states that the accounts are not kept in the name of the clients, but of ICAM and CP-MC.

22. Doubting whether the screening tax should really be included in the taxable amount, TVI challenged tax returns concerning advertising services provided to various advertisers in the months of February 2004 (Case C?637/11), October 2004 (Case C?618/11) and January 2007 (Case C?659/11). The challenge in Case C?659/11 was dismissed by the head of the administrative justice unit of the Direcção de Finanças de Lisboa. The authorities did not respond to the other two challenges and thus dismissed them by implied decision.

23. TVI appealed both the explicit and the two implied decisions to the Tribunal Administrativo e

Fiscal de Sintra. All three appeals were rejected. (6) The Tribunal held that the amount of the screening tax has to be included in the taxable amount under Article 16(1) and (5)(a) of the CIVA, as TVI itself became the debtor of the tax upon charging it to the advertisers and in so far as it received the amounts charged. The taxes also were considered to have a direct link with the supply of the services as they are inherent in the services supplied.

24. The three judgments were appealed to the Supremo Tribunal Administrativo (Secção de Contencioso Tributário, Division for Fiscal Matters). (7)

25. In all three cases TVI pleaded again that the screening tax must be excluded from the taxable amount for calculating the VAT, citing identical reasons in the three cases. TVI argued, among others, that Article 16(6)(c) of the CIVA and Article 11(A)(3)(c) of the Sixth Directive should be applied, as the advertisers and not TVI were the real taxpayers and TVI was only standing in for them under Portuguese law ('fiscal substitution'). Furthermore, the screening tax should be excluded from the taxable amount under Article 16(1) of the CIVA and Article 11(A)(1)(a) of the Sixth Directive, as it does not constitute consideration for the services provided by TVI and lacks a direct link to them. Also, according to TVI the event giving rise to the screening tax is the screening of the advertisement and thus different from the one giving rise to the VAT, namely the supply of various services including the screening.

## III – **Questions referred for a preliminary ruling and procedure before the Court of Justice**

26. Against this backdrop, the Secção de Contencioso Tributário of the Supremo Tribunal Administrativo decided on 12 October 2011 (Case C?618/11), 2 November 2011 (Case C?637/11) and 16 November 2011 (Case C?659/11) respectively to stay the proceedings and put the following – in all three cases identical – questions to the Court:

'(1) Is Article 16(1) of the CIVA, as interpreted in the judgment under appeal (to the effect that the commercial advertising screening tax is inherent in the supply of advertising services, so that it should be included in the taxable amount of the supply of services for the purposes of VAT), compatible with Article 11(A)(1)(a) of [the Sixth Directive] (now Article 73 of [Directive 2006/112]) and, in particular, with the concept of "consideration which has been or is to be obtained by the supplier … for such supplies"?

(2) Is Article 16(6)(c) of the CIVA, as interpreted in the judgment under appeal (to the effect that the commercial advertising screening tax does not constitute an amount paid in the name and on behalf of the customer of the services, even though it is accounted for in third party suspense accounts and is intended to be paid to public bodies, so that it is not excluded from the taxable amount for the purposes of VAT), compatible with Article 11(A)(3)(c) of [the Sixth Directive] (now Article 79(c) of [Directive 2006/112]) and, in particular, with the concept of "amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account"?'

27. The three cases were joined by order of the President of the Court dated 18 January 2012.

28. Written observations were submitted by TVI, Greece, Portugal (8) and the Commission.

29. At the hearing on 31 January 2013 TVI, Greece, Portugal and the Commission made observations.

## IV – **Assessment**

A – *Admissibility*

30. Portugal argues that the questions referred to the Court are inadmissible. In all three cases it considers the description of the legal framework to be insufficient. This could prevent governments of Member States from submitting observations in an area of vital interest to them. As to EU law, Article 11(A)(2)(a) of the Sixth Directive or its equivalent Article 78(a) of Directive 2006/112 are not mentioned. As to national law Article 16(5)(a) of the CIVA escaped the attention of the referring court. Furthermore the court did not, according to Portugal, describe the regime of the screening tax in sufficient detail, and omitted entirely the pertinent provisions of the LGT.

31. As to Cases C?618/11 and C?637/11 Portugal additionally points out that they concern events that took place before the Decree-Law 227/2006 came into force. According to Portugal, the current screening tax could not come into operation without that decree-law and so it was not applied until 22 November 2006. The tax in force before that period was, again according to the Portuguese submission, subject to a different legal regime. None of this being mentioned in the requests, Portugal argues that they lack the necessary descriptions to enable the Court to respond usefully. The questions referred thus, according to Portugal, end up being hypothetical. At the hearing, the Commission claimed, however, that despite several legislative amendments the essence of the screening tax has not changed since 1971. With respect to Case C?659/11 Portugal points out that it should be based on Directive 2006/112 and should be reformulated accordingly.

32. I am unconvinced by Portugal's arguments. It is certainly true that ever since its judgment in *Telemarsicabruzzo and Others* (9) the Court has refused to rule on questions where it does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (10) That information is also required to permit the governments of Member States and other interested parties to submit statements pursuant to Article 23 of the Statute of the Court. (11) Portugal is correct to state that the referring court failed to mention several pertinent provisions and could have described the measure at issue in the case more in-depth. However, bearing in mind the relationship of cooperation between the Court of Justice of the European Union and the referring court, the latter does not have to resolve every doubt about the interpretation of the national law applicable in the case, but rather has to enable the Court to give a useful answer to the questions referred. The request provides the Court with the essential information to do so.

33. As to the concern that in two of the cases the referring court applied national law that was not yet in force, rendering the questions submitted hypothetical, suffice it to say that it is, according to the settled case-law of the Court, in principle for the national courts, before which the proceedings are pending, to determine the relevance of the questions which they refer to the Court. (12) Only where it is 'quite obvious' (13) that the interpretation of a rule of EU law is irrelevant to the case at hand will the Court disagree with the referring court's assessment. It is not for the Court to question the application of national law by the referring court.

34. However, the Portuguese Government is correct in pointing out that in Case C?659/11 Directive 2006/112 applies and that the referring court failed to mention Article 11(A)(2)(a) of the Sixth Directive and its equivalent under Directive 2006/112. The questions must be reformulated accordingly. (14) The Court is not precluded from providing the referring court with all the elements for the interpretation of EU law that may be of assistance in adjudicating the pending case, whether or not the referring court explicitly mentioned them. (15)

B – *Substantive analysis*

35. The national court essentially asks whether Article 11(A)(1)(a), (2)(a) and (3)(c) of the Sixth Directive as well as Articles 73, 78(a) and 79(c) of Directive 2006/112 (16) have to be read to impose, for purposes of the calculation of the VAT on advertising services, the inclusion in or exclusion from – as the case may be – the taxable amount of a tax such as the Portuguese screening tax benefiting the arts, which is due by the advertisers, but paid by the television operators by way of fiscal substitution and entered in third party suspense accounts.

36. Considered by itself and as a starting point, the screening tax appears to explicitly fall on the advertisers under the law, seemingly suggesting that it is not one of the taxes considered in Article 11(A)(2)(a) of the Sixth Directive, but rather an amount received by the service providers from their customers as repayment for expenses in the broad sense of Article 11(A)(3)(c) of the Sixth Directive. Going into more detail, if the screening tax *could* be paid directly by the advertisers to the State, i.e., if the advertisers had the power to choose between paying the tax themselves or charging a third party, namely the service provider, with payment, the rationale of *De Danske Bilimportører* (17) would appear to apply and the screening tax would have to be considered as outside of the scope of Article 11(A)(2)(a) of the Sixth Directive.

37. The problem is that under Portuguese law it seems to be excluded that the advertiser *can* fulfil directly what appears to be its own fiscal obligation. The reason for this is that the person legally bound to pay the tax to the State is a ‘third party’, the so-called ‘fiscal substitute’, no other than the service provider, who also has to pay the VAT. The existence of the fiscal substitute in the precise context of the screening tax is, as I have already stated, at the origin of the perplexities of the cases at hand. I will begin my comments with the positions of the participants and an overview of the case-law. At the end I will propose a criterion that can provide orientation for the correct interpretation of EU law by the national judge.

38. TVI argues that on the basis of EU law the screening tax must be excluded from the taxable amount. All other participants of the proceedings favour the inclusion of the screening tax.

39. In principle, the taxable amount for services rendered is the consideration obtained or to be obtained for those services (Article 11(A)(1)(a) of the Sixth Directive). However, Article 11(A)(2)(a) of the Sixth Directive considers some items as part of the taxable amount as a matter of law, whether they represent any added value and financial consideration in the sense of being a part of the voluntary transaction or not. (18) Article 11(A)(3)(c) equally explicitly excludes other items from the taxable amount. According to the settled case-law of the Court Article 11(A)(2)(a), (3)(c) must be examined first. (19)

40. According to established case-law, in order to determine whether a tax such as the screening tax must be included in the taxable amount it thus must be ascertained, first, whether the tax falls within the definition of ‘taxes, duties, levies and charges’ under Article 11(A)(2)(a) of the Sixth Directive and then, secondly, whether the exception under Article 11(A)(3)(c) applies. (20)

41. To establish that a tax falls under Article 11(A)(2)(a) of the Sixth Directive the Court has consistently demanded that the tax be ‘directly linked’ to the supply of the goods at issue. (21) The same indubitably applies to services. I agree with Advocate General Kokott’s statement in *De Danske Bilimportører* that this requirement flows from a reading of the provision in context with Article 11(A)(1)(a) of the Sixth Directive: the inclusion of the items named in Article 11(A)(2)(a) of the Sixth Directive is justified if they are so closely connected to the supply of the goods or services that they have been incorporated in their value. (22)

42. To establish a direct link between the tax and the supply of the services the Court has

examined whether the chargeable event is linked to the provision of the services (23) and whether the provider of the services has paid the tax in its own name and on its own account. (24)

43. As to the chargeable event, TVI alleges that the chargeable event of the screening tax is different from that of the VAT. The chargeable event of the screening tax is, according to TVI, the dissemination of the advertisement, or even more precisely, as TVI put it at the hearing, the reception by the advertiser of dissemination services. TVI's services as the chargeable event of the VAT, on the other hand, include a number of activities in addition to the dissemination, such as analysis, content verification, preparation of the images etc. Furthermore, according to TVI, there is also no link between the supply of the services and the screening tax because the latter is imposed for a purpose that is not connected to the services – benefiting the arts – rather than constituting consideration for the services.

44. In contrast, Portugal regards the screening tax not only as part of the consideration for the services, it also considers the chargeable event to be directly linked with the provision of dissemination services. The Commission agrees with this last argument.

45. It seems to me that the chargeable event of the screening tax is sufficiently related to that of the VAT. The screening tax is imposed on the dissemination of the advertisements. TVI offers that service and charges for it, adding VAT to the price for the service. The fact that TVI also offers additional services equally subject to VAT does not remove the direct link that exists between the dissemination services it offers and the screening tax. The fact that the tax benefits ICAM and CP-MC, which are unrelated to the services, is irrelevant in the context of Article 11(A)(2)(a) of the Sixth Directive.

46. As a second step the Court has to analyse whether the provider of the services has paid the tax in its own name and on its own account. This test that the Court applies under Article 11(A)(2)(a) of the Sixth Directive effectively conflates the analysis under Article 11(A)(3)(c) of the Sixth Directive with the one under Article 11(A)(2)(a) of the Sixth Directive. If the service provider pays the tax in its own name and on its own account, the tax must be included in the taxable amount. If instead it pays the tax in the name and for the account of its customer and enters the amount in its books in a suspense account, the amount received from the customer as a mere repayment for its expenses is not part of the taxable amount. (25)

47. The problem in the cases at hand is, as I have said, to identify the legal effects of the peculiar Portuguese mechanism of 'fiscal substitution', under which the law states both that the screening tax is owed by the advertisers and that it is actually paid by the providers of dissemination services such as TVI.

48. According to the submissions made before the Court, the Portuguese LGT describes 'fiscal substitution' in its Articles 18(3) and 20, under which the person paying the tax as a substitute (in the cases at hand TVI) is regarded as the taxpayer. Article 28 of the LGT governs the responsibility of the parties involved in this relationship. However, Article 20 of the LGT also seems to indicate that those rules were conceived for a withholding tax. To what extent the rules are of any help in the cases at hand is unclear.

49. The participants to the proceedings disagree about the consequences of the 'fiscal substitution' with respect to the screening tax. TVI regards the mechanism as a mere instrument of simplification of the tax administration for reasons of efficiency. Even though TVI pays the tax, it pays a tax that is – from TVI's point of view – owed by the advertisers, collecting the amounts due from them, duly entering them into suspense accounts, paying them to the State and informing the State about the identity of the advertisers. According to TVI, if it paid the screening tax, but its client then failed to pay that same tax invoiced to it by TVI, TVI could recover the amount it paid

from the State. It also claimed at the hearing that if TVI became insolvent, the State could, in the alternative, demand payment of the screening tax from the advertisers. Hence, according to its own view, TVI pays the screening tax in the name and for the account of its customers, entering the amounts received in its books in a suspense account.

50. For Portugal, on the other hand, it is TVI that owes the screening tax. Portugal finds confirmation for this statement in the fact that TVI has to pay the screening tax within a time limit prescribed by the law whether or not the advertisers have paid for the services and the screening tax invoiced to them. According to Portugal, only TVI has to declare the tax and fulfil the ancillary obligations of a taxpayer under Portuguese laws, amongst which is providing certain information. At the hearing Portugal added that the authorities can obtain the screening tax only from TVI, and can never demand it from the advertisers, not even in the case of the insolvency of TVI. Furthermore, TVI, according to Portugal, did not enter the amounts in suspense accounts in the name of its clients, but of ICAM and CP-MC, which Portugal regards as insufficient.

51. The Commission equally regards the obligation of the fiscal substitute TVI to pay the screening tax as its own obligation. According to the Commission, only TVI is liable for the taxes and has to pay them whether or not the advertiser will reimburse the amount. The Commission also agrees with Portugal that there is no direct relationship between the advertisers and the tax authorities.

52. The above points show that there is no agreement on the consequences of the ‘fiscal substitution’ in case of the screening tax. The referring court has not taken a position in that respect. The Court has no competence to resolve this issue of national law. However, the Court is competent to provide the referring Court with relevant criteria for the interpretation of the notion of ‘in the name and for the account of’. As Advocate General Kokott pointed out in *De Danske Bilimportører,* that notion is one of EU law rather than a reference to national provisions on agency and mandate. (26)

53. Under what conditions can the national judge assume that the screening tax is a tax in the sense of Article 11(A)(2)(a) of the Sixth Directive? In my opinion it would be necessary that the national judge comes to the conclusion that the screening tax gives rise to a fiscal relationship of public law character that is essentially limited to the relationship that the national law creates between the State and the fiscal substitute. In other words – and in order to give some guidance to the national judge – it would, for instance, be required that, in line with some of the statements made by the majority of the participants to these proceedings, the State can demand the screening tax only from the fiscal substitute, that the fiscal substitute is ‘autonomously’ responsible for the payment of the screening tax. That would also imply, among other things, that any ensuing claim of the fiscal substitute for repayment of the amount of the screening tax against the advertiser would be of a private law character.

54. If the national judge determines this to be the case, it should, in my opinion, not be difficult to conclude that the screening tax was paid by the fiscal substitute in its own name and on its own account and, ultimately, that the tax is directly linked to the supply of the service. Article 11(A)(2)(a) of the Sixth Directive would apply and the screening tax would hence have to be included in the taxable amount.

55. If, however, the national judge on the contrary comes to the conclusion that the decisive fiscal relationship of public law character essentially links the advertiser and the State, i.e., for instance, that under certain circumstances the State can claim the screening tax directly from the advertiser or, again put differently, that the presence of the fiscal substitute is not indispensable at every moment and under every circumstance, Article 11(A)(2)(a) of the Sixth Directive cannot be considered applicable. In that case one would rather have to conclude that the tax is not paid by

the service provider in its own name and on its own account and hence not directly linked to the service. The tax would, instead, in substance be paid in the name and for the account of the substituted, i.e. the advertiser, and, given that the referring court has stated that the amount is accounted for in third party suspense accounts, fall under Article 11(A)(3)(c) of the Sixth Directive.

## V – **Conclusion**

56. In the light of the foregoing considerations, I am of the opinion that the Court should answer the questions referred to it as follows:

– Article 11(A)(1)(a), (2)(a) and (3)(c) 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 as well as Articles 73, 78(a), 79(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax have to be read to impose, for purposes of the calculation of the VAT on advertising services, the inclusion in the taxable amount of a tax such as the Portuguese screening tax benefiting the arts, which is due by the advertisers, but paid by the television operators by way of fiscal substitution and entered in third party suspense accounts if the decisive fiscal relationship of public law character is between the tax authorities and the television operators.

– If, with regard to said tax, the decisive fiscal relationship of public law character runs between the advertisers and the tax authorities, Article 11(A)(1)(a), (2)(a) and (3)(c) of Directive 77/388 as well as Articles 73, 78(a) and 79(c) of Directive 2006/112 must be interpreted as prohibiting the inclusion of said tax in the taxable amount.

– It is for the national judge to determine which of these two understandings of the nature of fiscal substitution in the precise context of the screening tax is the correct one according to national law.

1 – Original language: English.

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 (‘Sixth Directive’) as amended, OJ 1977 L 145, p. 1.

3 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘Directive 2006/112’) as amended, OJ 2006 L 347, p. 1.

4 – The details of the presentation of the national law are based on the observations submitted by the Commission. The text of the lei geral tributária, referred to, but not quoted verbatim by the participants, relies on the online ‘portal das finanças’ of the ‘autoridade tributária e aduaneira’.

5 – At the hearing, Portugal noted that a new law on the screening tax excluding it from the taxable amount for the imposition of the VAT would enter into force on 23 February 2013.

6 – The judgments are dated 29 November 2010 (C?618/11), 21 October 2010 (C?637/11) and 16 September 2010 (C?659/11).

7 – In Case C?659/11 the appeal was first brought before the Tribunal Central Administrativo Sul, which, however, on 3 May 2011 held that it was not competent to hear the case.

8 – In particular, Portugal has requested a limitation of the temporal effects of the judgment in case that the screening tax does not have to be included in the taxable amount.

9 – Joined Cases C?320/90 to C?322/90 [1993] ECR I?393, paragraph 6.

10 – Case C?379/98 *PreussenElektra* [2001] ECR I?2099, paragraph 39.

11 – Case C?458/93 *Saddik* [1995] ECR I?511, paragraph 13.

12 – Case 83/78 *Redmond* [1978] ECR 2347, paragraph 25, and Case C?134/94 *Esso Española* [1995] ECR I?4223, paragraph 9.

13 – Case 126/80 *Salonia* [1981] ECR 1563, paragraph 6.

14 – See Case C?62/00 *Marks & Spencer* [2002] ECR I?6325, paragraph 32.

15 – Case C?321/03 *Dyson* [2007] ECR I?687, paragraph 24.

16 – For ease of reference, in the following I will refer to the provisions of the Sixth Directive exclusively. The references should be read to include the equivalent provisions of Directive 2006/112. Equally, the jurisprudence as to one of the directive informs the interpretation of the other.

17 – Case C?98/05 [2006] ECR I?4945.

18 – *De Danske Bilimportører*, cited above in footnote 17, paragraph 17, and Case C?106/10 *Lidl & Companhia* [2011] ECR I?7235, paragraph 33.

19 – Case C?126/88 *Boots Company* [1990] ECR I?1235, paragraphs 15 and 16; Case C?380/99 *Bertelsmann* [2001] ECR I?5163, paragraph 15; and Opinion of Advocate General Kokott in *De Danske Bilimportører*, cited above in footnote 17, point 15.

20 – *Lidl & Companhia*, cited above in footnote 18, paragraph 32.

21 – *De Danske Bilimportører*, cited above in footnote 17, paragraph 17; judgment of 20 May 2010 in Case C?228/09 *Commission* v *Poland*, paragraph 30; judgment of 22 December 2010 in Case C?433/09 *Commission* v *Austria*, paragraph 34; and *Lidl & Companhia*, cited above in footnote 18, paragraph 33. The case-law goes back to Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraphs 15 and 16.

22 – Opinion of Advocate General Kokott *De Danske Bilimportører*, cited above in footnote 17, point 17.

23 – *De Danske Bilimportører*, cited above in footnote 17, paragraph 18, *Commission* v *Poland*, cited above in footnote 21, paragraphs 31 to 50.

24– *Commission* v *Poland*, cited above in footnote 21, paragraph 40, and *Lidl & Companhia*, cited above in footnote 18, paragraph 34.

25 – Opinion of Advocate General Kokott in *De Danske Bilimportører*, cited above in footnote 17, points 18 and 19.

26 – Opinion of Advocate General Kokott in *De Danske Bilimportører*, cited above in footnote 17, points 40 and 41.