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Opinion of Mr Advocate General Jacobs delivered on 24 March 1993. - Maurizio Balocchi v Ministero delle Finanze dello Stato. - Reference for a preliminary ruling: Tribunale di Genova - Italy. - Sixth directive VAT - Payment of the net amount of VAT - Interim payment due on that amount. - Case C-10/92.

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Opinion of the Advocate-General

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My Lords,

1. In these proceedings the President of the Tribunale di Genova seeks a preliminary ruling on the interpretation of certain provisions of the Sixth Directive on value added tax (Council Directive 77/388/EEC; OJ 1977 L 145, p. 1). The central issue is whether national legislation requiring traders to make interim payments of tax before the end of the relevant tax period is compatible with the Sixth Directive.

The background to the case

2. The applicant in the main proceedings, Mr M. Balocchi, is engaged in business in Italy as an administrator of real property. He is a registered trader for the purposes of value added tax (VAT). The Italian VAT legislation provides for tax periods of one calendar year (1 January to 31 December). Traders must present an annual return in respect of each tax period by 5 March of the following year. The annual return is of a recapitulative nature: in the course of the year traders must, on a monthly or quarterly basis, calculate the amount of VAT due and pay that amount to the tax authorities; when the trader submits his annual return he pays the amount of VAT outstanding in respect of the whole year' s trading (or, where appropriate, recovers the amount due to him). It is the trader' s turnover which determines whether he must make monthly or quarterly payments of VAT. The basic rule is laid down in Article 27 of Presidential Decree No 633/72 (as amended), according to which the trader must, by the 20th of each month, calculate and pay the amount of VAT due on the basis of the entries made in his VAT register in the previous month.(1) However, Article 33 of Decree No 633/72 makes simplified arrangements for small traders. It provides, so far as material, that traders whose business consists in the provision of services and whose annual turnover in the previous year did not exceed LIT 360 million must make periodic payments by the fifth day of the second month after each of the first three quarters of the year. The VAT due in respect of the final quarter of the year is in principle paid at the time of the annual return in March of the following year. However, as from 1991 that situation was substantially altered by Article 6(2) of Law No 405/90 of 29 December 1990, which provided as follows:

"As from 1991 traders who are required to pay the tax in accordance with Article 27 of Presidential Decree No 633/72 of 26 October 1972 [i.e. traders who are required to make monthly payments] shall pay by 20 December, by way of account on the payment relating to that month, an amount equal to 65%(2) of the payment which they made or should have made for the month of December in the previous year or, if less, an amount equal to 65% of the payment to be made for the month of December of the current year. Credit shall be given for the payment on account when the tax for December is paid. By the same date the traders referred to in Article 33 of Presidential Decree No 633/72 of 26 October 1972 [i.e. traders who are required to make quarterly payments] shall pay, by way of account on the payment to be made at the time of the annual return, an amount equal to 65% of the payment which they made or should have made at the time of the previous year' s annual return or, if less, an amount equal to 65% of the payment to be made at the time of the return relating to the current year; ..."

Article 6(5) of Law No 405/90 provides that:

"Anyone who fails, in whole or in part, to make the payments referred to in paragraph (2) shall be subject to a surcharge of 20% of the amount not paid or of the underpayment."

3. Since Mr Balocchi' s turnover in 1990 did not exceed LIT 360 million he was required to make quarterly payments of VAT in 1991, pursuant to Article 33 of Decree No 633/72. By 20 December 1991 he was required to make the payment on account referred to in the third sentence of Article 6(2) of Law No 405/90. Mr Balocchi considered that the requirement to make such a payment before the end of the quarter was contrary to Articles 10 and 11 of the Sixth Directive. With a view to obtaining a declaration to that effect he brought proceedings against the Italian Ministry of Finance before the Tribunale di Genova. Those proceedings were commenced on 16 December 1991 (i.e. four days before the payment on account was to be made). He also applied for an interim order suspending the obligation to make the payment on account. The President of the Tribunale di Genova granted the suspension and referred the following questions to the Court of Justice for a preliminary ruling:

"1. Have the provisions of Articles 10 and 11 of Council Directive 77/388/EEC of 17 May 1977 harmonized the concepts of the chargeable event and the moment when tax becomes chargeable and, if so, do those provisions confer rights on individuals which they can invoke in proceedings before national courts?

2. If the first question is answered in the affirmative, what constitutes the 'chargeable event' and the moment when the tax becomes chargeable, and do Articles 10 and 11 of that Directive, as interpreted by the Court of Justice, preclude a national provision (namely Article 6 of Law No 405/90) which requires the supplier of services to pay VAT in respect of services not yet supplied and in respect of consideration not received?"

The relevant Community legislation

4. The order for reference refers to Articles 10 and 11 of the Sixth Directive. The former provision defines the concept of the "chargeable event" and states when the tax becomes chargeable. It provides, so far as material:

"1. (a) 'Chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes 'chargeable' when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. ..."

5. Article 11 of the Sixth Directive, which defines the taxable amount (i.e. the amount on which VAT is chargeable), does not seem to be directly relevant in these proceedings. I shall make no further mention of it.

6. On the other hand, paragraphs (4) and (5) of Article 22 of the Sixth Directive, which are not cited in the order for reference, do appear to be relevant. They provide as follows:

"4. Every taxable person shall submit a return within an interval to be determined by each Member State. This interval may not exceed two months following the end of each tax period. The tax period may be fixed by Member States as a month, two months, or a quarter. However, Member States may fix different periods provided that these do not exceed a year.

The return must set out all the information needed to calculate the tax that has become chargeable and the deductions to be made, including, where appropriate, and in so far as it seems necessary for the establishment of the tax basis, the total amount of the transactions relative to such tax and deductions, and the total amount of the exempted supplies.

5. Every taxable person shall pay the net amount of the value added tax when submitting the return. The Member States may, however, fix a different date for the payment of the amount or may demand an interim payment."

7. For reasons which should become apparent later, certain provisions of Articles 17 and 18 are also relevant. Those articles entitle the trader, subject to certain conditions, to deduct from the amount of VAT due in a given period the amount of VAT charged to the trader by other taxable persons in respect of supplies made to the trader in the same period. In particular, Article 17(1) provides:

"The right to deduct shall arise at the time when the deductible tax becomes chargeable."

And Article 18(2) provides:

"The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen ... ."

Mr Balocchi' s contention

8. Mr Balocchi' s argument is very simple. He contends that, if he had been obliged to make a payment on account on 20 December 1991, in accordance with Article 6(2) of Law No 405/90, he might have been required to pay VAT in respect of transactions which had not yet taken place. In particular, that would be the case if a disproportionately large percentage of his turnover were realized in the last 11 days of the year or if his turnover were significantly lower in 1991 than in the previous year. Although in the latter eventuality the Italian legislation allowed him to compute the payment on account by reference to his actual VAT liability in the current year, it was impossible for him to determine on 20 December 1991 whether that would produce a lower figure than a computation based on the previous year' s trading, since he could not know what volume of transactions he would realize in the final 11 days of the year. Thus, in order to be certain of not incurring the 20% surcharge provided for in Article 6(5) of Law No 405/90, he would have had to calculate the payment on account by reference to the previous year' s results.

9. Mr Balocchi contends that, in so far as the contested Italian legislation requires traders to account for VAT on transactions which have not yet taken place, it is contrary to the provisions of the Sixth Directive. In particular, it is contrary to Article 10(1)(b) and (2), under which the tax becomes chargeable (meaning that the tax authority becomes entitled to claim it from the person liable) at the moment "when the goods are delivered or the services are performed".

10. Mr Balocchi observes that in his field of business an exceptionally large proportion of turnover tends to be realized in the last days of the year but that much of his business is of an aleatory nature and his final turnover is unpredictable. He mentions several more categories of trader whose turnover is affected by seasonal and climatic factors, e.g. hotel proprietors in ski resorts.

11. According to Mr Balocchi, Article 22(5) of the Sixth Directive, which allows Member States to demand an interim payment, cannot override the clear rule laid down in Article 10(2) that VAT is chargeable when the transaction in question is carried out. Mr Balocchi finds confirmation of that view in the Court' s judgment in Case 42/83 Dansk Denkavit v Ministeriet vor Skatter og Afgifter [1984] ECR 2649, where the Court spoke (in paragraph 19) of the Member States' legislative power "to fix the periods within which the tax must be paid following the chargeable event". According to Mr Balocchi, Article 22(5) allows Member States to demand a payment on account but not an advance.

12. Mr Balocchi' s position is supported by the Commission, which argues that Article 10 of the Sixth Directive lays down a clear rule to the effect that the tax becomes chargeable upon completion of the specific transactions that give rise to taxation. The Commission, like Mr Balocchi, also draws a distinction between a payment on account and an advance. Article 22(5) of the Sixth Directive permits the former but not the latter. It authorizes Member States to demand payment of part of a tax debt that has actually arisen, pending the definitive quantification of the debt at some later moment. In addition the Commission goes to some length to demonstrate that the relevant provisions of the Sixth Directive are sufficiently clear, precise and unconditional to produce direct effect.

The position of the Italian Government

13. The Italian Government queries the admissibility of the request for a preliminary ruling. It does so on two grounds: first, the proceedings should have been commenced before a specialist tax tribunal and not before the Tribunale di Genova, which as an ordinary civil court has no jurisdiction; secondly, the decision to request a preliminary ruling was taken in ex parte proceedings in which the Italian tax authorities were given no opportunity to put forward their point of view.

14. As to the substance, the Italian Government argues that the taxpayer is not obliged by the contested Italian legislation to pay VAT on transactions that have not yet taken place. It points out that the taxpayer has a choice between paying 65% of the amount due the previous year or 65% of the amount due in the current year: if on 20 December he finds that his turnover has fallen in comparison with the previous year he may opt to base the interim payment on the current year' s trading; if, on the other hand, his turnover has risen, he may base the interim payment on the lower turnover of the previous year. The Italian Government also points out that the Italian legislation gives traders over two months (from 2 January to 5 March) to make the annual VAT return in respect of the previous year' s trading. Traders who are in credit submit their returns as early as possible, while traders who owe tax to the authorities wait till the last day. The Italian Government points out that Article 22(4), first subparagraph, of the Sixth Directive provides that the interval within which returns must be submitted is to be determined by Member States but must not exceed two months from the end of each tax period. The Italian legislation grants traders a slightly longer period. Although the argument on this point is not entirely clear, the implication is that the contested legislation simply offsets the excessive generosity of the rule that annual returns do not have to be submitted until 5 March. Finally, the Italian Government contends that the requirements imposed by the contested legislation are entirely consistent with Article 22(5) of the Sixth Directive.

15. I should mention also a point stressed at the hearing by the representative of the Italian Government: the Italian legislation provides only for a 12-month tax period and an annual VAT return; although traders are required to make monthly or quarterly payments of tax, depending on their turnover, they do not submit a return, within the meaning of Article 22(4) of the Sixth Directive, when making those payments and the periods to which the payments relate are not separate tax periods within the meaning of Article 22(4). Strictly speaking, that is no doubt correct, since traders are not required to supply the detailed information set out in Article 22(4) when making monthly or quarterly payments under Articles 27 and 33 of Decree No 633/72. The point is however largely academic: under the last-mentioned provisions the trader is required to calculate and pay the precise amount of tax due in respect of the previous month or quarter; if he pays less than the amount due, he incurs a penalty of two to four times the amount not paid (see Article 44, second paragraph, of Decree No 633/72). In effect the Italian system comes very close to a system of monthly or quarterly returns, with the difference that a balancing exercise is performed every 12 months.

Admissibility

16. I do not think that the request for a preliminary ruling can be regarded as inadmissible. There is no doubt that a reference for a preliminary ruling may be made in ex parte proceedings: Case 70/77 Simmenthal v Amministrazione delle Finanze dello Stato [1978] ECR 1453, at paragraphs 8 to 11.

17. In that case the Court observed that it may "prove to be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard". However, the Court went on to hold that it is for the national court alone to decide whether it is necessary to hear the defendant before making an order for reference.

18. It may be sufficient to refer to that case-law, though it is worth stressing once again that it would in general be better if a reference were made only after both sides had been heard. That might enable the issues to be identified more clearly in the order for reference, on which alone the written observations of Member States and the Commission have to be based. In the present case it might have been expected that, if the Italian Finance Ministry had been heard, the order for reference would have mentioned Article 22 of the Sixth Directive, which is undoubtedly relevant.

19. As to whether the Tribunale di Genova has jurisdiction in tax cases, that is clearly a question of national law and as such must be determined according to the procedures available under national law. It is not open to the Court of Justice to question a determination made by the President of the Tribunale di Genova regarding the jurisdiction of his own court. If that determination is wrong, it must be challenged through the procedures available under national law. In Case 65/81 Reina v Landeskreditbank Baden-Wuerttemberg [1982] ECR 33, in which the admissibility of a reference was challenged on the ground that the referring court was not properly constituted, the Court stated as follows (at paragraph 7):

"... it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organization of the courts and their procedure. The Court is therefore bound by a decision of a court or tribunal of a Member State referring a matter to it, in so far as that decision has not been rescinded on the basis of a means of redress provided for by national law."

The effect of the contested Italian legislation

20. There is some doubt about the precise effect of the contested Italian legislation on traders who are required to make quarterly payments of VAT under Article 33 of Decree No 633/72. The meaning of the first sentence of Article 6(2) of Law No 405/90 is clear: traders who are required to make monthly payments under Article 27 of that Decree must make an interim payment on 20 December equal to 65% of the tax for which they were liable the previous December (or 65% of the tax for which they will ultimately become liable in the current month of December, if the latter amount is lower). The figure of 65% may have been chosen because it corresponds almost exactly to the proportion of the month that has elapsed on the date in question (20/31 = 64.5%). As regards traders who make quarterly payments, the situation is less clear. The third sentence of Article 6(2) of Law No 405/90 requires such traders to make an interim payment equal to 65% of the tax which they paid or should have paid at the time of their annual return the previous year (or, if less, 65% of the amount to be paid at the time of the current year' s return). The main item to be accounted for at the time of the annual return by traders who make quarterly payments under Article 33 of Decree No 633/72 is the tax in respect of the last quarter of the previous year. In addition, any other sums outstanding in respect of the previous year are payable at the time of the annual return. However, since the introduction of the contested legislation the payment made at the time of the annual return will be reduced by the amount of the interim payment made on 20 December. (Presumably, when the third sentence of Article 6(2) of Law No 405/90 refers to 65% of the amount payable at the time of the annual return it means 65% of the amount normally payable at the time of the annual return, with no reduction in respect of any interim payment made on 20 December of the previous year.)

21. In any event, it is clear from Mr Balocchi' s written observations (pp. 8 and 9) and from copies of his tax returns annexed to his observations that the effect of the contested legislation, in its first year of operation, was that he was required to make an interim payment on 20 December 1991 *equal to 65% of the tax payable in respect of the last quarter of 1990 (or 65% of the tax which he anticipated having to pay in respect of the last quarter of 1991). It may be noted that in the case of traders who make quarterly payments the arithmetical relationship observed above, between the amount of the interim payment and the proportion of the tax period that has elapsed at the time when it is made, ceases to apply: the last quarter of the year contains 92 days, so by 20 December no less than 88% of the period has elapsed (81/92 = 88%).*

22. Regardless of the precise meaning of the contested Italian provisions, there does not appear to be any doubt, notwithstanding the arguments of the Italian Government, that they may in certain circumstances have the result that a trader is compelled to pay an amount that exceeds his actual VAT liability at the time in question. That may, for example, occur if a trader' s turnover decreases in comparison with the previous year and he makes an interim payment equal to 65% of the tax payable in the corresponding period of the previous year. Although in such a case the interim payment should in principle be based on the lower turnover of the current year, that solution is illusory because, in view of the vicissitudinous nature of trade, there is normally no means of determining on 20 December what the trader' s final VAT liability will be at the end of the year (unless of course he closes his business from 20 to 31 December). Even if, on 20 December, trade appears to have fallen, the prudent trader will calculate the interim payment by reference to the previous year' s results; otherwise, if he based the interim payment on his anticipated results in the current year, he would risk incurring a 20% surcharge under Article 6(5) of Law No 405/90 if trade suddenly improved and his VAT liability in the current period exceeded his liability in the corresponding period of the previous year. Although at the hearing the agent for the Italian Government stated that the Italian VAT legislation allows the authorities to refrain from collecting the surcharge in the event of a bona fide mistake, there does not seem to be any legal requirement that the authorities must exercise their discretion in the trader' s favour.

23. Another situation in which the trader may, as a result of the contested legislation, have to pay an amount that exceeds his actual VAT liability at the time in question arises when an exceptionally large proportion of the trader' s turnover is realized in the last 11 days of the year. The example given by Mr Balocchi of a hotel in a skiing resort is apposite. If no snow falls in the first half of December, trade may be very slack; but if abundant snow falls in the middle of the month, the hotel may operate at full capacity in the holiday period at the end of the year. The proprietor of the hotel may, by 20 December, be able to calculate with a reasonable degree of accuracy his VAT liability for the last month or quarter of the year (if the hotel is fully booked) and may make the interim payment on that basis, in which case he is likely to pay an amount that exceeds his actual VAT liability on 20 December.

24. The question that falls to be answered then is whether and within what limits it is consistent with the relevant provisions of the Sixth Directive to require traders to make an interim payment of VAT that may exceed their actual VAT liability at the time of the payment, bearing in mind of course that they will be able to recover any overpayment when they submit their annual return. Before attempting to answer that question I shall first consider the arguments put forward at the hearing on behalf of the United Kingdom in defence of its own recently introduced legislation which also requires traders to make interim payments of VAT in certain circumstances.

The United Kingdom' s scheme of interim payments

25. The United Kingdom explains that it did not submit written observation because it did not appreciate from the terms of the order for reference that the questions referred by the Italian court might have implications for the validity of legislation recently introduced in the United Kingdom. It was however represented at the hearing and the Court was given a full account of the United Kingdom' s arrangements for the collection of VAT. Although the validity of the United Kingdom' s legislation is not of course directly in issue in these proceedings, it is worth examining that legislation in some detail because of the light that it throws on the issues raised in this case.

26. The United Kingdom' s VAT legislation provides in principle for quarterly returns and quarterly payments. Returns must be submitted and VAT must be paid within one month after the end of each three-month period. In 1991 the United Kingdom Government announced proposals for requiring very large taxpayers to make monthly returns. Those proposals provoked much opposition from the traders concerned, in particular because of the additional administrative burden entailed by monthly returns. The Government therefore decided to retain the system of quarterly returns and to require very large taxpayers to make monthly payments on account.

27. The necessary changes were made by the Value Added Tax (Payments on Account) (No 2) Order 1992. For each of the first two months of the quarter the taxpayer makes a payment on account. The quarterly return is then made in the usual way and the balance of the VAT due for the quarter is paid at that time. Each payment on account falls to be made a month in arrears. Thus, if the quarterly tax period runs from 1 January to 31 March, the first payment on account is made at the end of February, the second payment on account at the end of March, and then the balance due in respect of the whole quarter is paid at the end of April.

28. The payments on account are calculated by reference to the total VAT payable by the trader in a period of one year ending six months before the beginning of the quarter to which they relate. Each payment on account is equal to one-twelfth of the total VAT payable in that reference period. Where a change of circumstances significantly affects the trader' s VAT liability and he can show that the amount of tax payable in the current year will be less than 80% of the amount payable in the reference year, the payments on account will be reduced accordingly. Moreover, if the trader finds that the arrangements described above do not suit his type of business, he may opt for a system of monthly returns, in which case he will not be required to make payments on account.

29. Counsel for the United Kingdom submitted at the hearing that the United Kingdom' s scheme of payments on account is compatible with the Sixth Directive, in particular because Article 22(5) thereof specifically authorizes interim payments. In the United Kingdom' s view, the whole purpose of Article 22(5) is to allow an estimate of the trader' s VAT liability to be claimed without requiring the complex calculations that must take place at the end of the tax period; that purpose would be defeated, so it is argued, if interim payments could only be demanded once the trader' s exact VAT liability had been determined.

30. For the sake of completeness it may be noted that, according to information supplied by the Commission in response to a question from the Court, three other Member States - namely, Belgium, France and Luxembourg - provide in certain circumstances for interim payments based on the amount of tax payable in previous periods.

The legality of interim payments under the Sixth Directive

31. Article 10(2) of the Sixth Directive provides that "the tax shall become chargeable when the goods are delivered or the services are performed". According to Article 10(1)(b), the expression "chargeable" means that "the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred". Mr Balocchi and the Commission infer from those provisions that, notwithstanding the wording of Article 22(5), traders may in no circumstances be required to make a payment on *account which results in their having to account for VAT on a transaction that has not yet taken place. Although the wording of Article 10, at least on a superficial reading, appears to lend support to that view, the approach adopted by Mr Balocchi and the Commission is in my opinion mistaken. That approach is founded on the assumption that the trader accounts for VAT separately in respect of each specific supply that he makes. The reality is of course very different: the determination of a trader' s VAT liability presupposes a complex accounting operation in which it is necessary (a) to identify the taxable supplies made in a particular tax period and to aggregate the corresponding amount of VAT charged to the trader' s customers (output tax), (b) to identify the taxable supplies made to the trader by other taxable persons in the same period and to aggregate the corresponding amount of VAT charged to the trader by his suppliers (input tax) and (c) to deduct the input tax from the output tax, the difference between the two being the amount which the trader must pay to the tax authorities in respect of the period in question (or which he is entitled to recover from the tax authorities if the input tax exceeds the output tax).*

32. Thus, the function of Article 10 of the Sixth Directive is clearly not to determine the moment at which the tax chargeable on a specific transaction must be paid to the tax authorities. Article 10 deals with the date when the tax debt arises, not the date when the tax is payable. Its basic function is to determine which transactions are to be taken into account in respect of each tax period.

33. It follows that legislation of the type in question cannot be contrary to the Sixth Directive solely for the reasons given by Mr Balocchi and the Commission. That is not, however, the end of the matter. It is clear from the scheme of the Directive that VAT is in principle payable in arrears. That principle may be inferred from Article 22(4) and (5), in conjunction with Articles 10, 17 and 18. Thus the general rule is that the trader pays the tax when he submits the return (Article 22(5)). The return is submitted after the end of the tax period, within an interval which is determined by each Member State but which may not exceed two months (Article 22(4), first subparagraph). The return must set out all the information needed to calculate the tax that has become chargeable and the deductions to be made (Article 22(4), second subparagraph). The tax that has become chargeable is the tax payable by the trader' s customers in respect of goods delivered or services performed during the tax period in question (Article 10(2)). The deductions to be made are those relating to tax payable by the trader in respect of supplies received by him from other taxable persons during the tax period in question (Articles 17(1) and 18(2)). Thus it is clear that, as a general rule, each trader pays VAT on the basis of his trading results in a tax period that has fully expired at the time of payment. National legislation which runs counter to that general rule by requiring traders to discharge part of their VAT liability in respect of a particular tax period before the end of that period will only be lawful if it falls within the scope of the final part of the second sentence of Article 22(5), which authorizes Member States to "demand an interim payment".

34. I have no doubt that that provision allows Member States, subject to certain limits which I shall attempt to define, to make a provisional assessment of a trader' s VAT liability before the end of a tax period, when it is not yet possible to make a definitive calculation of his actual liability, and to demand a payment on account accordingly. As the Italian Government pointed out at the hearing, in the field of VAT the trader acts as a sort of tax-collector on behalf of the State. Because traders account for VAT in arrears under the system established by the Sixth Directive, very substantial sums of public money may accumulate in their hands in the course of a tax period (in particular, if the Member State fixes a relatively long tax period, as it is entitled to do under Article 22(4)). There is every justification for requiring traders, particularly those with a high turnover, to pay a part of that money to the tax authorities before their exact liability can be established at the end of the tax period. That, in my view, explains why Article 22(5) authorizes Member States to demand interim payments.

35. That interpretation is confirmed by the wording of Article 22(5). Thus, the first sentence of that provision lays down the basic rule that VAT is paid when the return is submitted. The second *sentence qualifies that rule by providing that "The Member States may, however, fix a different date for the payment of the amount ...". That must mean a date after the date fixed for submitting the return, since it is the return which allows the amount to be quantified. But the second sentence of Article 22(5) then adds the words "... or may demand an interim payment". Those words appear to open up the additional possibility, for the Member States, of demanding a payment before the return is submitted. Such a payment would be "interim" or provisional in the sense that the definitive amount of tax due would not be known until the return was submitted. The payment would therefore have to be based on an estimate.*

36. It might be argued that the option of demanding an interim payment applies only between the end of the tax period and the date when the return must be submitted and that Article 22(5) does not in any circumstances allow an interim payment to be demanded before the end of the tax period. In my view, such an interpretation would be unnecessarily restrictive. In the first place, there is much less need for an interim payment after the end of the tax period. By that stage or very soon after, all the information about the trader' s input tax and output tax in the relevant period should be available and his actual liability can be calculated. It would be very strange if interim payments could not be demanded until a point in time when the objective justification for interim payments is greatly diminished. Secondly, if the interim payment is based on the trader' s estimated tax liability, the mere fact that it is not demanded until after the end of the period in respect of which it is paid does not guarantee that it will not exceed the trader' s actual liability at the time in question. Thirdly, since the real justification for interim payments is to prevent large sums of public money from accumulating in private hands, particularly where long tax periods are fixed, the whole purpose of interim payments would be defeated if they could only be demanded at the end of the tax period.

37. Once it is accepted that interim payments may be based on a trader' s estimated tax liability, it is difficult to think of a more appropriate method of estimation than one based on the trader' s actual liability in the previous year. That such a method is within the contemplation of Article 22(5) is strongly suggested by the use of the expression "acomptes provisionnels" in the French version, which appears to be a term of art in French tax law; it refers to a provisional payment of tax, the amount of which is calculated by reference to the taxpayer' s liability in the previous tax year (see Manuel de droit fiscal, by G Gest and G Tixier, 4th edition, Paris, 1986, p. 300; see also P Robert' s dictionary, which defines acompte provisionnel as a payment on account "défini par rapport aux impôts de l' année précédente, et payé d' avance").

38. Whatever method of estimation is used, it is of course possible, as a result of the vicissitudes of trade, that an interim payment based on estimated tax liability will exceed the trader' s actual liability at the time of the payment. In order to prevent too great an incursion into the general rule that VAT is payable in arrears, it is therefore necessary to place certain limits on the Member States' power, under Article 22(5), to demand an interim payment based on an estimate of the trader' s tax liability. In my view, national legislation under which interim payments may be demanded must be arranged in such a way that traders are not compelled to make interim payments which are likely to exceed substantially their actual tax liability at the time when the payments are made. By "actual tax liability" I mean the amount of tax that would be found to be owing if account were taken, at the time when the interim payment is made, of all the output tax that has become chargeable and all the input tax that has become deductible.

39. For reasons which I have explained above (in paragraphs 22 and 23), it seems inevitable that the contested Italian legislation will in certain situations - situations which, moreover, are not necessarily unusual or atypical - result in traders having to make an interim payment which exceeds, perhaps substantially, their actual VAT liability at the time in question.

40. Consider for example the situation of a trader who makes monthly payments of VAT under Article 27 of Decree No 633/72. On 20 December, when 64.5% of the month has passed, he must *make an interim payment equal to 65% of the tax payable in the corresponding month of the previous year. Even a slight fall in his turnover may result in an interim payment which exceeds his VAT liability on 20 December. The same result may ensue if a disproportionately large amount of his turnover is realized in the last 11 days of the month. In the case of a trader who makes quarterly payments of VAT under Article 33 of Decree No 633/72 it is perhaps marginally less probable, but by no means impossible, that the interim payment will exceed the trader' s actual liability at the time in question. If the interim payment exceeded actual liability by a small amount, that might not be objectionable; however, there is no mechanism in the contested Italian legislation for limiting the potential disparity between the interim payment and the trader' s actual liability, a disparity which could easily be substantial. I do not see how national legislation which is apt to produce results that are contrary to the basic scheme of the Sixth Directive can be permissible under Article 22(5) of the Directive.*

41. Nor do I see how the contested legislation can be rendered compatible with the Sixth Directive by the fact that the trader is allowed to base the interim payment on his actual trading results in the tax period in question. As I have already observed, the choice offered to the trader is illusory because in most cases he cannot know on 20 December what his actual VAT liability will be at the end of the year and cannot therefore know whether he will incur a 20% surcharge if he underestimates his actual liability.

42. At the hearing it was contended on behalf of the Italian Government that Article 48, last paragraph, of Decree No 633/72 allows the authorities to waive the surcharge if the trader makes a bona fide mistake in his calculations. That provision, which provides that the tax courts may waive pecuniary penalties where an infringement is justified on account of uncertainty about the meaning or scope of the provisions in question, is discretionary and does not in my view offer a sufficient guarantee that the trader who acts in good faith will not incur a surcharge. In any event, the wording of the provision does not seem to apply to the case of a trader who underestimates his VAT liability as a result of uncertainty about his future volume of trade; on the contrary, it seems to be concerned - rather surprisingly perhaps - with mistakes due to uncertainty about the meaning of the Italian VAT legislation.

43. Before concluding, I will comment briefly on the United Kingdom' s legislation, even though it is not in issue in these proceedings, since the points on which it differs from the Italian legislation serve to illustrate the respects in which the latter seems incompatible with the Sixth Directive. The following differences may be noted.

44. First, under the United Kingdom' s legislation it is considerably less likely that the interim payments will exceed the trader' s actual VAT liability at the time when they are made. Here it must be remembered that the first interim payment is collected when two-thirds of the quarter have elapsed and is equal to one-twelfth of the trader' s actual liability in the previous year. The second interim payment, equal to the same amount, is collected at the end of the quarter. The interim payment is only likely to exceed the trader' s actual liability at the time in question if his turnover has fallen very substantially or if it fluctuates greatly as a result of seasonal factors (if for example the business closes down in winter).

45. Secondly, if the trader can satisfy the authorities that his VAT liability in the current year will be less than 80% of the amount payable in the 12-month reference period, the interim payment will be reduced accordingly.

46. Thirdly, a trader who finds that interim payments work to his disadvantage has the option of switching from quarterly returns to monthly returns, in which case he will not be required to make interim payments at all.

47. Fourthly, the United Kingdom' s scheme only applies to large traders who make quarterly returns. The justification for demanding interim payments is particularly great in the case of such *traders, since they would otherwise retain very large sums of public money for relatively long periods. The contested Italian legislation, by contrast, applies even to traders whose turnover is acknowledged to be low (such as Mr Balocchi) and to traders who are required to make monthly payments of VAT based on their actual liability. The justification for demanding interim payments from small traders and from traders who discharge their actual VAT liability every month by the 20th of the following month is by no means apparent.*

48. In this regard it would be pointless for the Italian Government to argue that its legislation provides only for annual returns. As I pointed out above (see paragraph 15), the Italian system is barely distinguishable in effect from a system of monthly and quarterly returns. Strictly speaking of course, on the view put forward by the Italian Government, only the payment made in March at the time of the annual return falls within the first sentence of Article 22(5) of the Directive; the monthly and quarterly payments required under Articles 27 and 33 of Decree No 633/72 are themselves interim payments under the second sentence of Article 22(5), in which case the interim payment provided for in Article 6(2) of Law No 405/90 amounts, as the Commission has contended, to an acconto sull' acconto (an interim payment of an interim payment). The justification for such a practice is extremely dubious.

49. Disregarding this peculiarity, I reach the conclusion that legislation of the kind in question, insofar as it requires a trader to make an interim payment which is likely to exceed substantially his actual tax liability at the time when the interim payment is made, is incompatible with the Sixth Directive.

Direct effect

50. As the Commission points out, it has been established since the Court' s judgment in Case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53 (see in particular paragraphs 29 and 30) that, although the Member States enjoy a relatively wide latitude as regards the implementation of certain provisions of the Sixth Directive, individuals may none the less invoke, before national courts, provisions of the Directive that are sufficiently clear, precise and unconditional. It seems to me that those criteria are satisfied by the relevant provisions of Articles 10, 17, 18 and 22 of the Directive in so far as their combined effect is to establish the principle that VAT is not payable in advance and that interim payments cannot be demanded in an amount which is likely to exceed substantially the trader' s actual tax liability at the time in question.

Conclusion

51. Accordingly, I am of the opinion that the questions submitted by the President of the Tribunale di Genova should be answered as follows:

Provisions of national law requiring a trader to make an interim payment of value added tax which is likely to exceed substantially his actual tax liability at the time when the interim payment is made are incompatible with the provisions of the Sixth Directive on value added tax (Council Directive 77/388/EEC). Traders who are required to make such interim payments may invoke the relevant provisions of the Sixth Directive in proceedings before national courts.

(*) Original language: English.

(1) - However, traders who entrust their book-keeping to other persons may calculate the monthly payment by reference to entries made in the VAT register in the previous month but one: see Article 27, first paragraph, second sentence, of Decree No 633/72. That sentence was added to Article 27 by Article 1(5)(c) of Decree-Law No 151 of 13 May 1991.

(2) - By virtue of Article 1(6) of Decree-Law No 151 of 13 May 1991, the amount is raised to 70% in the case of traders who take advantage of the provision referred to in footnote 1, above.