OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 14 March 1989 *

Mr President,
Members of the Court

An adjustment of the taxable amount for the purposes of turnover tax was imposed on Genius Holding BV, the plaintiff in the main proceedings (called 'Genius BV' at the material time), by the Inspector of Taxes for the period from 1 July to 31 December 1982. Later confirmed by a judgment of 28 May 1985 of the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam), that decision was adopted on the ground that the plaintiff wrongly deducted tax invoiced to it by one of its subcontractors because the tax in question had been charged in error and could not therefore be deducted. The plaintiff in the main proceedings therefore brought an appeal before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which concluded that the appeal raised questions the answer to which required an interpretation of the opening words of Articles 17(2), 17(2)(a), 18(1), 21(1) and 22(3) and (8) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Directive 77/388/EEC, Official Journal L 145, 13.6.1977, p. 1, hereinafter referred to as 'the Sixth Directive').

* Original language: French.

First question

2. The Hoge Raad formulated its first question in the following terms:

'Does the right to deduct provided for in the Sixth Directive apply to the tax which is *due* solely because it is mentioned on the invoice?'

3. According to Article 21(1)(c) of the Sixth Directive,

'any person who mentions the value-added tax on an invoice or other document serving as invoice'

is liable to pay value-added tax.

4. The German and Spanish Governments argue essentially that Article 21(1)(c) was inserted only in order to prevent fraud. Even if any amount appearing on an invoice had to be paid to the Treasury by the person who drew up the invoice, that amount would not give rise to a right to deduct unless it corresponded to tax actually due under the legislation.

5. The German Government argues in particular that a deduction made by reason of undue payment of turnover tax is incompatible with Article 17(2)(a). That provision reads as follows:

'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay

(a) value-added tax *due* or *paid* in respect of goods or services supplied or to be supplied to him by another taxable person.'

6. The expression 'tax due' thus refers, according to the German Government, exclusively to the tax which must be paid to the collecting authority on the basis of a correct application of the legislation and not that due only because it is mentioned on the invoice.

7. At the hearing, the German Government emphasized in particular the changes that the Council had made to the proposal for a directive submitted by the Commission. Article 17(2)(a) of that proposal provided that the taxable person was to be entitled to deduct from the tax which he was liable to pay

'value-added tax invoiced to him . . . in respect of goods or of services supplied to him'.

The Council replaced the expression 'tax invoiced' by 'tax due or paid' and added at the end the words 'by another taxable person'. By doing so, it wanted to exclude cases in which the tax is due solely because it is mentioned on the invoice.

8. There can obviously be no question of my contesting that such was the Council's intention, or at least, that of some of its members, but the fact remains that according to Article 21 any person who mentions the value-added tax on an invoice is to be liable to pay that tax. However, Article 17(2)(a) refers to tax *due* or paid and I consider that it is for the Court to interpret the directive on the basis of the terms in which it is worded and not in accordance with what one or other of the Member States believes to have been the real intention of the Council.

9. The Spanish Government argues that according to Article 17(1), the right to deduct arises as soon as the deductible tax becomes chargeable. It concludes that taxes which are not chargeable to the taxable person who passes them on cannot give rise to deduction. Taxable persons in that situation are liable to pay only the amounts due in accordance with the applicable law.

10. Article 21 of the directive is entitled 'Persons liable to pay tax to the authorities' and Article 21(1)(c) provides that any person who mentions the value-added tax on an invoice is liable to pay it. A taxable person who so mentions it must therefore be liable to pay it whether or not it is legally due.

11. Moreover, according to Article 10(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* . . . '.

According to Article 10(2),

'the chargeable event shall occur and the tax shall become *chargeable when* the goods are *delivered* or the services *are performed*'.

12. Any tax mentioned on an invoice, even if it is not legally due, thus becomes chargeable once the transaction to which it relates has been carried out.

13. The governments which have submitted written observations also refer to Article 18(1)(a) which provides that to exercise his right to deduct, the taxable person must hold an invoice, drawn up in accordance with Article 22(3). Subparagraph (b) of that provision provides that

'the invoice shall state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions'.

14. In my opinion, that provision lays down a *lex generalis* from which the *lex specialis* in Article 21(1)(c) derogates. In principle, every invoice must mention the exact amount of tax applicable to the goods or services to which it refers. However, when that rule is not observed and an amount not legally due, or which is erroneous, appears on the invoice, the person who drew up the invoice is none the less liable, by virtue of Article 21(1)(c), to pay the amount actually mentioned, and that amount may later be deducted by the taxable person to whom the goods were delivered or for whom the service was performed.

15. The Netherlands Government, although it, too, considers that only tax 'in fact due' may be deducted, adopts a position which is less radical than that of the other governments by referring to the practice developed in the Netherlands. In accordance with that practice, 'the tax authorities at first look to the person who improperly mentioned the tax on the invoice. It is only if that step appears to have no chance of producing a result that, *under certain conditions, for example, in the absence of good faith on the part of the person who received the invoice,* the tax deducted is later also charged to the latter. That course of conduct is based on the principles of sound administration . . . '.

16. The Netherlands Government thus indicates to the Court the path it ought to

follow in order to resolve the problem. Since it is clear from Article 21(1)(c) that all tax mentioned on an invoice is due to the authorities, it is logical to claim it in the first place from the person who drew up the invoice. If the amount thus due can be recovered, there is no longer any reason to claim it a second time from the person to whom the goods were delivered or to whom the service was rendered (hereinafter referred to as 'the second taxable person').

17. If the tax was not automatically paid by the first taxable person or cannot be recovered from him, the following distinction must, to my mind, be drawn:

(a) if the second taxable person has also not paid the tax to the supplier, there is a strong presumption of fraudulent collusion and the administration is then fully justified in claiming payment from the second taxable person, thus rendering ineffective the deduction made by him;

(b) if, on the other hand, it transpires that the second taxable person has actually paid the amount in question to the first, it should not be possible for the authorities to claim that amount from the second taxable person.

18. To treat, in such a situation, both taxable persons as jointly and severally liable to pay the tax, and to do so in the absence of any provision prescribing such liability, would not be in accordance with the principles of justice and equity. Article 21(1)(a) and (b) permits the Member States to impose joint and several liability where the taxable transaction is carried out by a taxable person resident abroad but Article 21(1)(c) makes no such provision.

19. Moreover, if recognition of a right to deduct were refused in such a case, the selfsame right could just as well be denied every time the first taxable person failed to pay to the authorities an amount legally due and correctly calculated.

20. Furthermore, if such joint and several liability were to be laid down, it would impose a wholly excessive duty of care on all traders; can it be imagined that all firms could verify whether each amount of VAT mentioned on the countless invoices which they receive each year from their suppliers is correct?

21. Like the Commission and the appellant in the main proceedings, I also consider that it would be contrary to the scheme and purpose of the Sixth Directive to refuse to permit a deduction to be made in the circumstances of this case. The purpose of the VAT system is to ensure neutrality of taxation so as, in particular, not to distort the conditions of competition. The essential factor is, therefore, to avoid double taxation of the same 'added value'. It follows that the right to deduct must be acquired each time that the tax has to be paid, which is the case if it appears, even incorrectly, on an invoice.

22. Moreover, the Court has pointed out the importance of the above considerations in its case-law in holding that

'the deduction system is meant to relieve the trader entirely of the burden of the VAT *payable or paid* in the course of all his economic activities. The common system of value-added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way'. [1]

23. I think the judgment in *Schul I* [2] is even more instructive inasmuch as it is there stated that

'value-added tax is chargeable on each transaction only after deduction of the amount of value-added tax borne directly by the cost of the various price components'.

24. It follows that what matters is whether the second taxable person actually paid the VAT to the first. If so, he may deduct it even if it was incorrectly claimed from him.

25. In its judgment of 21 September 1988 in Case 50/87 *Commission* v *France* [1988] ECR 4797, the Court was also led to point out that

'in the absence of any provision empowering the Member States to limit the right of deduction granted to taxable persons, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs. Such limitations on the right of deduction have an impact on the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in the cases *expressly provided for* in the directive' (paragraphs 16 and 17).

However, there is no provision in the directive providing that an amount due solely because it is mentioned on the invoice does not give rise to a right to deduct.

26. Finally, with regard to the need to prevent fraud, the Court stated in paragraph 22 of the same judgment that that need cannot justify measures derogating from the directive otherwise than under the procedure which is provided for in Article 27.

27. I therefore consider that the objections raised by the governments are not convincing and that the right to deduct provided for in the Sixth Directive extends to tax due solely because it is mentioned on the invoice, except where it is shown that the amount in question was not paid to the taxable person who drew up the invoice.

Second question

28. In the event that the first question is answered in the affirmative, the Hoge Raad also asks the Court whether the directive allows the Member States to exclude — either entirely or in certain special cases — the right to deduct such tax by laying down requirements regarding the invoice.

1 — Case 268/83 *Rompelman v Minister van Financien* [1985] ECR 655, paragraph 19.

2 — Case 15/81 *Schul v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, paragraph 10.

29. It can be seen from Article 18(1)(a) that to exercise his right to deduct, the taxable person must hold an invoice drawn up in accordance with Article 22(3). According to Article 22(3)(b), the invoice is to state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions.

30. In its judgment of 14 July 1988 [3] in *Jeunehomme*, the Court held that although the directive does no more than require an invoice containing certain information, Member States may provide for the inclusion of additional information. Article 22(8) provides that

'Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud'.

31. In the operative part of the abovementioned judgment, the Court ruled that

'Articles 18(1)(a) and 22(3)(a) and (b) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 allow Member States to make the exercise of the right to deduction subject to the holding of an invoice which must contain *certain particulars which are necessary* in order to ensure the levying of value-added tax and permit supervision by the tax authorities. Such particulars must not, by reason of their number or technical nature, render the exercise of the right to deduction practically impossible or excessively difficult'.

32. In the main proceedings, it is not, properly speaking, additional information which is in question but the following requirements.

33. According to Article 35(1)(g) of the Netherlands Turnover Tax Law of 1968, the invoice which a trader must issue to another trader in respect of goods or services he supplies to the other trader must mention clearly

'the amount of the tax due in respect of the goods or services supplied. *A different amount of tax may not be stated*'.

34. Secondly, Article 24b of the Turnover Tax Implementation Order 1968 provides that, where there is subcontracting, VAT is charged not to the subcontractor who performs the service but to the (principal) contractor who purchases it. The subcontractor should not mention any amount in respect of VAT on his invoice but should insert in its place the words 'value-added tax transferred'.

35. It follows moreover from the Netherlands legislation that when a principal contractor receives an invoice which infringes one of the provisions summarized above, he is not entitled to deduct the amount incorrectly mentioned on the invoice because it is not drawn up in the prescribed manner, notwithstanding the

3 — Joined Cases 123 and 330/87 *Jeunehomme and Others* v *Belgian State* [1988] ECR 4517

fact that the person who mentioned that amount on the invoice is also liable to pay it to the authorities.

36. Let me now consider the general rules and the 'transfer' rules.

37. (a) I would like to make the following observations concerning the prohibition of mentioning on an invoice an amount of VAT other than that legally due.

38. I consider that even if that obligation is not complied with, a Member State cannot be permitted to deprive a (principal) contractor of his right to deduct on the basis of an argument of form to the effect that the invoice does not correspond to the provisions of national law on the drawing up of invoices.

39. In my opinion, the obligation not to mention an amount of VAT other than that legally due does not constitute one of the 'other obligations' which the Member States may impose under Article 22(8) for the correct levying and collection of VAT. On the contrary, it is an obligation which, although not provided for expressly in the directive, is none the less implicit therein.

40. Moreover, the directive has already laid down a sanction if that obligation is not fulfilled (Article 21(1)(c)): any person who mentions (even incorrectly) a tax on an invoice or other document serving as an invoice is liable to pay it.

41. Furthermore, I pointed out in connection with the answer to be given to the first question that the right to deduct applies to tax which is due solely because it is mentioned on the invoice.

42. It is also therefore inconceivable that the Member States may derogate from so fundamental a principle of the Sixth Directive as the right to make deductions on the basis of a provision of their national law requiring that an invoice mention the exact amount of VAT legally due, to the exclusion of any other amount.

43. (b) Let me now turn my attention to the transfer rules. Those rules were brought into effect in the Netherlands only by virtue of a derogation from the Sixth Directive granted by the Council [4] under Article 27.

44. Article 27(1) commences as follows:

'The Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce *special measures for derogation* from the provisions of this directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.'

45. The basic provision of the VAT transfer rules derogates from one of the fundamental principles of the Sixth Directive, namely the principle that the invoice must state clearly the price exclusive of tax and the corresponding tax at each rate as well as

4 — OJ C 197, 31.7.1982, p. 1.

any exemptions. In this case, there is no exemption from but a transfer of VAT, with the effect that there is undoubtedly a derogation from that principle.

46. However, I consider that rules derogating from the Sixth Directive, authorized by the Council, must necessarily be regarded as a body. The VAT transfer rules are intended to prevent certain types of tax evasion. In order for the rules to achieve those objectives, the principal contractor would have to supervise the activities of each of his subcontractors and accept from them only invoices bearing the words 'value-added tax transferred'. The prohibition of deducting tax incorrectly mentioned on such an invoice is intended to make the principal contractor exercise care. The prohibition is therefore an essential element of those special rules. This second derogation from the principles of the directive must also therefore be regarded as covered by the Council's authorization.

Conclusion

47. On the basis of the foregoing considerations, I would propose that the Court should answer the Hoge Raad's questions as follows:

'(1) The right to make the deduction provided for in the Sixth VAT Directive applies to the tax which is due solely because it is mentioned on the invoice except in cases in which it can be established that the amount in question was not paid to the taxable person who drew up the invoice.

(2) The Sixth Directive does not allow the Member States to exclude the right to deduct VAT by laying down a requirement that the invoice mention the exact amount of VAT legally due, to the exclusion of any other amount.'

The situation is different where a Member State has been authorized by the Council under Article 27 of the directive to apply rules derogating from the directive, and prohibiting the mention of an amount of VAT on the invoice and excluding the right to deduct if that prohibition is not complied with.