OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 16 October 2003 [1]

I — Introduction

1. The present proceedings concern a question of value added tax law of considerable practical importance. In issue is whether the deduction of input tax may be claimed in respect of the year in which the right arises or only in respect of the year in which the business receives an invoice.

II — Relevant provisions

A — *Community law*

2. The relevant legislation is 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 [2] ('the Sixth Directive').

3. The chargeable event and the chargeability of tax are governed by Title VII of the Sixth Directive. The first subparagraph of Article 10(2) states:

'2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. Deliveries of goods other than those referred to in Article 5(4)(b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire.'

4. Article 17 governs the origin and scope of the right to deduct. Paragraphs 1 and 2 (a) state:

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

1 — Original language: German.
2 — OJ 1977 L 145, p. 1, multiple amendments.

2. 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;'

5. Article 18 provides detailed rules governing the exercise of the right to deduct. Paragraphs 1 and 2 state in part:

'1. To exercise his right to deduct, the taxable person must:

(a) in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3);

...

2. 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 and can be exercised under the provisions of paragraph 1.

However, Member States may require that as regards taxable persons who carry out occasional transactions as defined in Article 4(3), the right to deduct shall be exercised only at the time of the supply.'

6. Article 22 reads in part:

'3. (a) Every taxable person shall issue an invoice, or other document serving as an invoice in respect of all goods and services supplied by him to another taxable person, and shall keep a copy thereof.

Every taxable person shall likewise issue an invoice in respect of payments on account made to him by another taxable person before the supply of goods or services is effected or completed.

...

(c) The Member States shall determine the criteria for considering whether a document serves as an invoice.

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. Member States may require a taxable person to submit a statement, including the information specified in paragraph 4, and concerning all transactions carried out the preceding year. This statement must provide all the information necessary for any adjustments.'

B — *National law*

7. The applicable national provision is the Umsatzsteuergesetz 1999 ('the UStG').

Under the heading 'Deductions', Paragraph 15(1)(1) of the UStG provides:

'A business may deduct the following amounts of input tax:

1. the tax stated separately in invoices within the meaning of Paragraph 14 in respect of supplies or other services performed for his business by other businesses. Where the separately stated amount of tax is attributable to a payment preceding performance of such transactions, it is already deductible if the invoice has been presented and payment made'.

8. The second and third sentences of Paragraph 16(1) read:

'The tax period shall be the calendar year. In calculating the tax, the total turnover under Paragraph 1(1) to (3) and (5) shall be taken as a basis, where the tax on this arose in the tax period and tax liability has been incurred.'

9. The first sentence of Paragraph 16(2) of the UStG provides:

'The tax deductible under Paragraph 15 which falls within the tax period shall be deducted from the tax calculated pursuant to subparagraph (1).'

10. The Turnover Tax Guidelines 2000 specify in the fourth sentence of Section 192 (2):

'... where receipt of services or supplies and receipt of the invoice fall within different tax periods, deduction is permissible in respect of the tax period in which both conditions are satisfied for the first time ...'

11. According to the case-law of the Bundesfinanzhof (Federal Finance Court), an entitlement to deduct input tax arises in the assessment period in which the conditions governing entitlement under Paragraph 15(1)(1) of the UStG are all satisfied. These conditions include an invoice with a separate statement of turnover tax. Therefore Terra could not claim (retrospectively) the deduction concerned in respect of the year at issue — 1999 — in which the relevant invoices had not yet been presented to it.

III — Facts, the main proceedings and the question submitted for a preliminary ruling

12. Terra Baubedarf-Handel GmbH ('Terra') is seeking amendment of its turnover tax assessment for 1999 (the year at issue) so as to allow the deduction of further input taxes amounting to DEM 3 248.10. Terra obtained the relevant services in 1999. The relevant invoices were issued in December 1999 but were not received by Terra until January 2000.

13. The Finanzamt Osterholz-Scharmbeck did not allow the deduction of input tax arising from these invoices in the year at issue. As grounds, it cited Paragraph 15(1)(1)of the UStG. Delivery of the supplies or other services and receipt of a relevant invoice are a condition of deduction. Where receipt of the service and receipt of the invoice fall within different tax periods, in accordance with the direction in the fourth sentence of Section 192(2) of the Turnover Tax Guidelines 2000, deduction is permissible in respect of the tax period in which both conditions are satisfied for the first time. This is the 2000 assessment year, because Terra did not receive the invoices until January 2000.

14. The objection raised and action were unsuccessful. The Finanzgericht (Finance Court) agreed with the view of the Finanzamt. In the appeal, for which the Finanzgericht granted leave on account of the fundamental importance of the case, Terra essentially argues as follows: the contested judgment wrongly places a time-limit on its right to deduct the input taxes invoiced to it. It thereby infringes the Sixth Directive. Accordingly, Terra seeks the annulment of the previous decision and the contested notices and a declaration that for the 1999 tax assessment further input taxes amounting to DEM 3 248.10 are deductible.

15. The Bundesfinanzhof is uncertain whether this position in national law is in accordance with Community law and the law governing deduction of input tax in the other Member States.

16. On the one hand, the Court of Justice has ruled that a taxable person has, in accordance with the Sixth Directive, the 'right immediately to deduct'. On the other hand, Article 17 relates solely to the existence of the right to deduct input tax, whilst the conditions governing the exercise of the right are laid down in Article 18.

17. Whilst the Bundesfinanzhof has no doubt that in the case at issue the plaintiff's right to deduct input tax pursuant to Article 17 of the Sixth Directive arose in 1999 and could not, under Article 18, be exercised until the year 2000 following receipt of the invoice, it is uncertain whether this right to deduct may or must already be claimed in respect of the 1999 tax period. Article 18(1)(a) of the Sixth Directive could be interpreted as meaning that it merely lays down the conditions governing the exercise of the right to deduct, but is silent as to the tax period in respect of which the deduction must or may be claimed.

18. For this reason the Bundesfinanzhof stayed the proceedings by order of 21 March 2002 and referred the following question to the Court of Justice for a preliminary ruling:

Can a taxable person exercise his right to deduct input tax only in respect of the calendar year in which he holds an invoice pursuant to Article 18(1)(a) of Directive 77/388/EEC or must the right to deduct always be exercised (even if retrospectively) in respect of the calendar year in which the right to deduct pursuant to Article 17(1) of Directive 77/388/EEC arose?

IV — The question referred

A — *Main arguments of the parties*

19. All the parties rely on the distinction between the origin and the exercise of the right to deduct. It is also undisputed that possession of the invoice or other document serving as an invoice is required to exercise the right.

20. *Terra* takes the view that the right to deduct input tax takes effect for the assessment period in which the right to deduct arose. It follows from the principle of fiscal neutrality that the deduction is to be allowed in respect of the same period, that is, that in which the right arose; otherwise taxable persons would be charged for credits in favour of the treasury. Arbitrary prejudice to the principle of fiscal neutrality is also avoided.

21. Immediate deduction can be guaranteed in practice only through retroactive effect. It would be disproportionate to deny this retroactive effect. Moreover, the appropriate authorisation of the Member States is lacking. Finally, retroactive effect protects the taxable person from external restrictions, such as supervening changes in the legal situation or the fact that the issuer of the invoice can decide its date.

22. The other language versions are not much clearer and do not exclude retroactive effect. In certain Member States — Denmark and Sweden — it is even allowed.

23. The problem of refusal to grant retroactive effect also arises in relation to reimbursement of other taxes. In so far as refusal is a result of national procedural law, it must be asked if this is not contrary to Community law.

24. Even difficulties which arise in practice do not militate against retroactive effect. Retroactive effect need not be expressly provided for. This is more the case where it is excluded.

25. Terra therefore reaches the conclusion that the exercise of the right to deduct input tax always applies in respect of the period in which the right arose.

26. The other parties take the view, however, that the period in respect of which the deduction must be claimed is the period of the return and not the period in which the right to deduct arises.

27. As grounds, the *German Government* and the *Commission* cite Article 18(2) of the Sixth Directive. Due to the lack of clarity of the German language version they rely on other language versions.

28. *The German Government* further maintains that the two periods must coincide for reasons of logic. Retroactive deduction of input tax conflicts with the principle of fiscal neutrality, as the *French Government* also points out, since retroactivity would preclude deduction of input tax in certain cases.

29. The *Commission* again rejects Terra's argument that the principle of neutrality and that of proportionality required retroactive effect. Even a change in the law occurring between origin and exercise of the right to deduct input tax does not present a problem, as once the right to deduct has arisen it cannot thereby be taken away.

30. In addition the *German Government* and the *French Government* and the *Commission* point out the negative effects on controllability of the value added tax system connected with retroactive effect. The *German Government* also declares itself to be against the right to elect of the person submitting the return.

31. According to the *Commission* retroactive effect must be expressly provided for.

B — *Assessment*

32. First it is necessary to consider the distinction, also clearly drawn in the case-law of the Court, [3] between the origin of the right to deduct input tax, governed by Article 17 of the Sixth Directive, and the exercise of the right, the conditions for which are governed by Article 18.

33. As the Bundesfinanzhof correctly explains, this distinction was first introduced by the Sixth Directive. Paragraph 15 (1) of the UStG is however still based on an earlier directive, Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax, [4] and has not been adapted in line with Articles 17 and 18 of the Sixth Directive.

34. According to Article 17(1) of the Sixth Directive, the right to deduct arises at the time when the deductible tax becomes chargeable. Article 10(2) of the Sixth Directive provides that this is the case as soon as the goods are delivered to, or the services are performed for, the taxable person entitled to deduct. [5]

35. Whereas the right to deduct input tax therefore arises with performance of the services, according to Article 18(1) of the Sixth Directive it can only be exercised when the taxable person holds an invoice or other document serving as an invoice. [6]

36. In order to establish the relevant period in these preliminary ruling proceedings, that is, the period in respect of which the right to deduct may or must be claimed, we must start with the wording of Article 18 of the Sixth Directive.

37. In this connection several of the parties have correctly pointed out the ambiguity of the German version of Article 18(2). On one interpretation the reference to paragraph 1 could mean that the taxable person

3 — Case C-338/98 *Commission* v *Netherlands* [2001] ECR I-8265, paragraph 71.

4 — OJ, English Special Edition 1967, p. 16.

5 — Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 36.

6 — Joined Cases 123/87 and 330/87 *Jeunehomme and Others* v *Belgian State* [1988] ECR 4517, paragraph 14, and Case C-85/95 *Reisdorf* [1996] ECR I-6257, paragraph 22.

must wait for the invoice to exercise the right to deduct, but can claim the deduction retrospectively. On another interpretation the deduction must be exercised in respect of the period of the return, that is, for the period in which the invoice comes into the taxable person's possession.

38. Legal guidelines for the interpretation of a directive cannot be derived from the implementing measures taken by the Member States, for this would lead to the opposite of the principle of interpretation in conformity with directives.

39. In the face of the ambiguity of Article 18(2) of the Sixth Directive in the version of the language of the main proceedings and therefore of this reference for a preliminary ruling it is necessary to fall back on the other language versions. In such situations the Court of Justice is guided by the language versions of those provisions which were authentic at the time of adoption of the Sixth Directive. [7]

40. With regard to Article 18 of the Sixth Directive those are — apart from the German version — the Danish, English, French, Italian and Dutch versions. These language versions suggest that both conditions must be present to exercise the right: origin of the right and possession of the invoice. The period of the return and the period in respect of which the deduction is claimed must therefore match or coincide in time.

41. In favour of retroactive effect, and against exercise of the right to deduct input tax only in respect of the period in which the invoice comes into the taxable person's possession, i.e. the period of the return, there is however case-law of the Court [8] according to which the right to deduct input tax can be exercised *immediately*.

42. The judgments making up the body of this case-law tend in favour of this immediate exercise referring not only to the origin of the right but also to its exercise, as in these judgments the Court of Justice expressly cited Article *17 et seq.* — that is, not only the provisions on the origin of the right to deduct, but also those on its exercise.

7 — *Reisdorf*, paragraph 22, cited in footnote 6 above.

8 — Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 27, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 18, Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 47, and *Breitsohl*, paragraph 34, cited in footnote 5 above.

43. Retroactive effect can therefore be considered a (not insignificant) part of the principle of immediate exercise, as the criterion of 'immediate' is more likely to be fulfilled when the effects of the deduction apply to the period in which the right arose and not to a later period, that of the return.

44. The question of retroactive effect must also be examined in the light of the principle of fiscal neutrality, which according to the case-law of the Court [9] is important also in connection with the deduction of input tax. The principle of neutrality as it applies here, in relation to inward transactions, would be infringed if deduction were excluded or restricted. Relief is therefore required, and in principle deduction of input tax without retroactive effect, that is, in respect of the period of the return, would provide that. The principle of neutrality is to be understood however as requiring not any relief, but full relief. Accordingly, the principle of neutrality would be infringed if the taxable person were not released from all liability for value added tax which he did not owe.

45. If retroactive effect is not allowed a credit will accrue to the taxable person. There is however no relief for the taxable person from *this* liability where retroactive effect is excluded. To the extent to which the taxable person does not get relief however, the principle of neutrality, which requires *full* relief for the taxable person, would be infringed.

46. In relation to the mention by the German Government of refusal to permit deduction of tax in certain cases of retroactive effect, it must be said, as Terra correctly states, that this is a consequence of national procedural law and does not result from Community law. Should national procedural law however bring about a refusal to permit deduction of tax where this is neither expressly provided for nor covered by the discretion of the Member States in procedural matters, such provisions of procedural law would have to be adapted accordingly.

47. On the question of whether retroactive effect or its exclusion must be expressly provided for in the Directive, this raises the question of whether the Member States need authorisation for the stipulation of retroactive effect. However, this question only arises where retroactive effect does not already result from the construction of express provisions of Community law.

9 — See inter alia Case 268/83 *Rompelman* [1985] ECR 655, paragraph 23, Case C-110/94 *Inzo* [1996] ECR I-857, paragraph 16, *Gabalfrisa*, paragraph 45, cited in footnote 8 above, and *Breitsohl*, paragraph 37, cited in footnote 5 above.

48. The case-law of the Court cited in this connection on the limits applicable as regards the stipulation by Member States of particular conditions for the exercise of the right to deduct input tax is however not applicable to the present case.

49. The judgment in the joined cases *Gabalfrisa and Others* involved a national rule making the exercise of the right to deduct conditional on making a request and compliance with a fixed time-limit, and the taxable person who fails to fulfil these conditions loses the right or may exercise it only when taxable transactions actually begin to be carried out on a regular basis. [10] In that case it was therefore a question of conditions set by a Member State which were additional to the conditions laid down in the Sixth Directive.

50. In contrast, at issue in the present case is the application of conditions which the Sixth Directive itself lays down. A Member State requires no additional authorisation in respect of conditions set out in a directive. On the contrary: it is even under an obligation to transpose all conditions into national law and to apply them.

10 — *Gabalfrisa*, paragraph 53 et seq., cited in footnote 8 above.

51. If the claim for the right to deduct in respect of the period in which the service was supplied were allowed, that would, as explained, amount to retroactive effect. This would take the form of an adjustment to the tax decision issued in respect of that period.

52. The practical difficulties mentioned or feared in connection with this are those which are also posed in other cases of adjustment. In tax law adjustments are a very common device, however. That they thereby cause difficulties for the tax authorities and the taxable persons involved is not a particularity of the deduction of input tax.

53. Neither the argument concerning possible practical difficulties nor the argument that retroactive effect must be expressly provided for is persuasive.

54. In view of the unclear wording of Article 18 of the Sixth Directive on the point at issue it is necessary to rely on the principle of fiscal neutrality and the requirement of full relief associated with it. It follows from this that the right to deduct input tax must be exercised in respect of the period in which the right to deduct arose, as only then can full relief be ensured.

V — Conclusion

55. The reply to the question referred to the Court should therefore be:

Article 18 of the 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 is to be interpreted as meaning that the right to deduct input tax must be exercised in respect of the calendar year in which the right to deduct pursuant to Article 17(1) of the Sixth Directive arose.