OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 24 March 1988 *

Mr President,
Members of the Court,

1. I — The High Court of Justice, Queen's Bench Division, London, wishes to determine the correct interpretation of certain provisions of the Seventeenth Council Directive (Directive 85/362/EEC) of 16 July 1985 [1] on exemption from value-added tax on the temporary importation of goods other than means of transport.

2. The essential purpose of the questions submitted is to determine whether or not exemption from United Kingdom value-added tax should be granted where a horse is purchased with the benefit of exemption from value-added tax under Irish legislation and is thereupon temporarily imported into the United Kingdom.

3. The proceedings before the national court concern an application lodged by an English company specializing in auctions of thoroughbred horses, Tattersalls Ltd, which is based in Suffolk, challenging the interpretation of Articles 10 (c) and 11 (b) of the Seventeenth Directive adopted by the Commissioners of Customs and Excise, who, pursuant to Article 5 of the Value-added Tax (Temporarily Imported Goods) Relief Order 1985, [2] grant a temporary importation exemption from VAT for racehorses imported from Ireland for a maximum period of two years for training or racing in the United Kingdom, even though the sale of the horses in question is exempt from VAT in Ireland.

4. Essentially, the parties to the main proceedings differ as to whether or not the goods (in this case racehorses) which the legislation of the exporting State exempts from VAT are to be regarded as 'acquired subject to the rules governing the application of value-added tax in the Member State of exportation' (see the articles cited) and whether or not such goods may therefore benefit from temporary importation exemption from VAT in the importing Member State.

5. In view of that problem of interpretation, the High Court decided to submit to the Court for a preliminary ruling the questions which are set out in the Report for the Hearing.

6. II — Only the applicant in the main proceedings (Tattersalls Ltd) considers that goods must be regarded as 'acquired subject to the rules governing the application of value-added tax in the Member State of exportation' only where tax was paid at the time of acquisition. If, however, it was not so paid, the acquisition does not, in the applicant's view, comply with the rules on the application of VAT.

* Translated from the Portuguese.

1 — OJ L 192, 24.7.1985, p. 20.

2 — Superseded as from 1 January 1987 by a 1986 order containing the same provisions.

7. It is clear that the literal content of the provisions in question points to a different interpretation.

8. Although the wording is somewhat different,[3] Articles 10 (c) and 11 (b) make the exemption subject to the same conditions:

(a) the goods must have been acquired subject to the value-added tax rules in the State of exportation;

(b) an exemption from VAT must not have been granted in respect of those goods by virtue of their being exported.

9. The purchase of a thoroughbred horse which, under the rules in force in Ireland, is exempt from VAT there cannot be regarded as taking place in contravention of those rules. They in turn are in conformity with Community law, which provides for the exemption in question during the transitional period on the conditions laid down in Article 28 (3) (b) in conjunction with point 4 of Annex F to the Sixth Council Directive (77/388/EEC) of 17 May 1977,[4] and those conditions are satisfied in Ireland.

3 — The difference derives from the fact that in one case (Article 10) the various requirements are formulated positively as conditions for the grant of the exemption and in the other case (Article 11) they are expressed negatively as conditions for the exemption to be withheld. The English version of the directive also uses two different expressions: in Article 10 (c) 'subject to the rules 'and in Article 11 (b) 'pursuant to the rules'. No importance should be attached to this difference of terminology, particularly since it is wholly absent from other versions (for example the French and Italian language versions).

4 — OJ L 145, 13.6.1977, p. 1.

10. Thus, provision for that exemption is validly included in the rules on the application of VAT in the exporting Member State.

11. Adopting a logical interpretative approach, we must conclude that, if the legislature had intended to grant a temporary exemption only in cases where the acquisition was subject to tax in the exporting country, it would have expressed itself in an entirely different manner (by saying, for example, that VAT should have been paid or that the acquisition should have been subject to application of the tax). It did not do so because it was in fact seeking to apply a different solution.

12. Furthermore, it must be borne in mind that this matter falls within the area of fiscal law characterized by rules defining the incidence of the tax, in relation to which certain legal writers — in homage to the principle *nullum vectigal sine lege* or in compliance with the principle that taxes must be legal or conform to prescribed legal types — reject as unacceptable not only the application of rules by analogy but also the adoption of an extensive interpretation.

13. Even if that approach is not accepted — and if it is conceded moreover that certain traditional principles of domestic tax law cannot be transposed without amendment into the field of Community tax — it must be recognized that there is no agreement, even among the most 'permissive' writers, that an extensive interpretation can be taken so far as to dispense with any link to the literal meaning of the provision.

14. By virtue of what is known in German law as the 'Andeutungstheorie', [5] it is usually considered that extensive interpretation is limited by the 'possible meaning' of the letter of the law and that, therefore, that method of interpretation can only attribute to the provision in question a meaning which, although not perfectly expressed in the wording of the provision, nevertheless somehow fits in with it, albeit in a less than felicitous way. [6]

15. It appears that the interpretation put forward by the applicant in the main proceedings displays the characteristics of a corrective or even partially repealing interpretation, [7] in so far as it conduces to excluding an exemption which can clearly be granted within the letter of the law.

16. Is it justified in this case to have recourse — an approach adopted in particular by the German courts in certain decisions [8] — to an interpretation which openly goes against the letter of the law, in order to avoid 'an absurd and economically indefensible result'?

17. Or — if we do not wish to be so radical — is it acceptable to say that it is necessary, as a result of considering the rational or teleological element of the interpretation, that is to say the meaning and purpose of the rules at issue or their place within the general scheme of the tax system, to adopt a different interpretation from that which prima facie flows from the literal wording of the provision, thus concluding that the latter incorrectly expressed the legislature's intention?

18. The applicant seeks to draw that conclusion from the necessary link between the two parts of Articles 10 (c) and 11 (b).

19. In its view, Article 10 (c) calls for *cumulative* fulfilment of the two conditions laid down for the availability of temporary importation exemption. In the applicant's view, the second condition (the goods did not benefit from exemption by virtue of being exported) is only meaningful if the first condition refers to an owner who, when purchasing goods, paid VAT in the Member State of exportation. If an exemption had been granted at the time of purchase, there would not be any VAT from which the owner could have been exempted by virtue of the goods having been exported.

20. That is without doubt clever reasoning, but it is fallacious.

21. It is true that, under the general system of value-added tax, the rule is that taxable transactions are subject to tax (Article 2 of the Sixth Directive) and exemption is the exception; it is therefore acceptable to say that the usual situation under the first part of the paragraph is that the transaction in the Member State of exportation is subject to VAT.

22. But, since the exemptions are bindingly provided for in Community law, that is not the only situation in which the goods are acquired 'in accordance with the rules governing the application of VAT in the Member State of exportation'.

5 — See the references given in Karl English, *Einführung in das juristische Denken*, 4th edition, Kohlhammer Verlag, 1968, pp. 82, 104, 105, 146 and 149 (Portuguese translation of the 13th edition: *Introdução ao Pensamento Jurídico*, Gulbenkian, 1965, pp. 119, 162 *et seq.*, 239 and 243).

6 — See J. M. Cardoso da Costa, *Curso de Direito Fiscal*, Almedina, 1970, p. 191, note (1) and p. 193, note (2).

7 — See J. Oliveira Ascensão, O *Direito — Introdução e Teoria Geral*, Gulbenkian, 1980, p. 373 *et seq.*

8 — See the reference in Kruse, *Steuerrecht*, I, Munich, 1973, paragraph 8.

23. The introduction of the copulative conjunction 'and' linking the two parts of that paragraph therefore indicates the requirement (second condition) that, where there is an exemption in the Member State of exportation, that exemption should not be ascribable to the exportation of the goods. That of itself confirms that compliance with the rules governing the application of value-added tax mentioned in the first part of the provision covers the hypothesis of exemption from the tax, without which the limitation of the condition laid down in the second part to cases where the exemption is granted because the goods have been exported would become incomprehensible. In other words, if the first part already meant that the temporary importation exemption from VAT is not granted for a transaction which is legally exempt from VAT in the Member State of exportation, it would not be necessary to lay down a new condition to the effect that that exemption is only withheld where the goods have benefited from an exemption from VAT *by reason of the exportation thereof.* Thus, it is the applicant's interpretation which ultimately deprives the provision of any meaning.

24. The second part of the paragraph, read in conjunction with the first part, therefore seems to mean that, if for any reason the owner paid VAT at the time of purchase, he would not be able to benefit from a temporary importation exemption if the transaction was exempt by reason of being an export transaction; and that, if, having being granted an exemption, he did not pay the tax, that exemption must not have derived from the fact that the goods were exported. In other words, the grant of an exemption by virtue of the goods in question having been exported is excluded *in any case.*

25. The wording used in Article 11 (b) appears to confirm that the interpretation which I advocate is correct. Article 11 (b) provides that temporary importation exemption is not to be granted *either where* the goods were not acquired pursuant to the rules governing the application of VAT *or where*, although those rules were complied with, the goods benefited from exemption from VAT by virtue of being exported.

26. It is entirely clear that two separate situations are envisaged in which temporary importation exemption cannot be granted — non-compliance with the VAT rules *or* exemption by reason of exportation — not two stages in the same process, as the applicant in the main proceedings appears to presume.

27. It was, however, on the basis of that presumption that the applicant, focusing its attention on Article 11 (b), reaffirmed its position at the hearing, insisting once more that only if the two parts of the provision are interpreted in conjunction with each other can they have any coherent meaning.

28. In the applicant's view, the second part of the paragraph relates to cases where, VAT having been paid at the time of acquisition in the Member State of exportation in accordance with the rules governing the application of the tax in that State, the tax paid is, by way of a second stage, reimbursed at the time of exportation.

29. The first part of the paragraph thus refers, according to the applicant, to those cases where VAT was not paid at the time of acquisition because the transaction was exempt from VAT: in those circumstances, the importer cannot benefit from a fresh exemption upon temporary importation.

30. There is an error in the applicant's argument — and the United Kingdom was right to draw attention to it.

31. Tattersalls argues from the premiss that the VAT is first paid in respect of the acquisition of the goods and is then reimbursed upon exportation.

32. However, that is not how the general system operates: goods acquired for exportation constitute a category of goods of which the purchase is exempt from VAT, as provided for in Article 15 of the Sixth Directive. It is the actual deliveries of goods which the seller or the purchaser dispatches or transports outside the territory of the country of exportation which, in accordance with paragraphs (1) and (2) respectively of Article 15 of the Sixth Directive, are exempt from VAT.

33. The logic underlying the structure of Article 11 (b) of the Seventeenth Directive (and of Article 10 (c)) is, therefore, different from that attributed to it by Tattersalls, in so far as it is based on the following idea: if the goods are not intended for exportation, the purchaser will pay the tax if tax is due; exemption by reason of exportation will be granted only if the exportation is *definitive*, it then being pointless to grant *temporary* importation exemption from the tax in the State of importation.

34. That — and that alone — was the only case of exemption in respect of the acquisition of goods which Articles 10 and 11 sought to exclude from the benefit of temporary importation exemption from VAT in the country of importation. The legislature was certainly not unaware of the existence of exemptions other than those granted in respect of exportation: although it excluded only the latter from the grant of temporary importation exemption under the Seventeenth Directive, it did so because it intended or accepted that an exemption on that basis should be able to co-exist with the remaining cases of exemption.

35. Ultimately, the significance of the regime provided for in the Seventeenth Directive is that, in the case of temporary importation, the goods continue during the period concerned to be subject to the rules governing VAT in the State of exportation, regardless of whether those conditions involve the actual application of the tax or provide for an exemption, and whether the rate of VAT in the country of exportation is equal to, or greater or less than (and even considerably less than) the rate applicable in the country of importation.

36. The justification for the exemption under Articles 10 and 11 of the Seventeenth Directive (and it is here that Tattersalls makes a fundamental error) is not the fact that the tax has been paid in the country of exportation but rather the fact that the importation is temporary — and that consideration is valid both when the acquisition of the goods was subject to VAT in the State of exportation and when it was not as a result of being exempted for some reason other than definitive exportation (for example, as occurs in this case where the exemption is of the kind provided for in Article 28 (3) of the Sixth Directive), and where the goods were acquired by inheritance or donation or the transaction was carried out by a non-taxable person.[9] The contrary argument put forward by the applicant at the hearing, derived from the fact that it is possible for the owner of a mare to export temporarily, for training or

9 — This follows from the fact that, once again, it is 'the rules governing the application of VAT' (in particular Article 2 of the Sixth Directive, which is necessarily transposed into national legislation) which exclude the levying of taxation in the case of transactions in which no consideration is paid and those carried out by non-taxable persons.

racing in an another Member State, a colt to which that mare has given birth, can easily be turned against it: according to the applicant's interpretation, that colt could not be allowed to run a single race in another Member State without paying the VAT applicable in that State, unless it had been subject to tax in the State of exportation merely by reason of having been born!

37. The justification for temporary importation exemptions of this kind is given in the preamble to the Seventeenth Directive, as was pointed out by several of the parties to the proceedings: '... it is important to reduce fiscal barriers to the movement of goods within the Community in order to facilitate the supply of services and thus develop and strengthen the internal market' (first recital); and '... the widest possible exemption from value-added tax for goods temporarily imported from one Member State to another will contribute towards the realization of this objective' (second recital).

38. I am not unaware of the fact that when the scheme of the Seventeenth Directive was worked out account was not taken of the temporary exemptions provided for in Annex F to the Sixth Directive and that, in such cases, the application of the regime provided for in the Seventeenth Directive gives rise to distortions in trade and competition, brought about by differences in the rules on tax incidence as between the Member States.[10] But the solution is to be found not by proposing an interpretation of the Seventeenth Directive which gives rise to consequences not intended by it, but rather by bringing to an end the validity (which, from the outset, was acknowledged to be limited and temporary) of the provision which enables Ireland, by way of derogation from the general scheme of the Sixth Directive, to exempt the purchase of thoroughbred horses from VAT.

39. As long ago as 4 December 1984, the Commission submitted to the Council a proposal for an Eighteenth Directive on VAT[11] which removed from Annex F to the Sixth Directive deliveries of thoroughbred horses and greyhounds. However, the Council did not adopt the Commission's proposal, and the derogation therefore remains. Tattersall's interpretation is basically an attempt to remedy, with respect to this case, the practical effects of the Council's omission, arrogating to itself the latter's legislative power. Such a procedure is not lawful and accordingly, as Community law stands at the present time, we must accept the existence of a distortion of competition, which is no less disturbing than that which is brought about by the lack of uniformity of rates of taxation in the various Member States, but is just as inevitable.

40. That conclusion cannot be countered by reliance upon Article 14 (2) of the Sixth Directive, the second subparagraph of which provides that the Member States *may* adapt their national provisions in order to minimize distortions of competition pending the entry into force of the Community tax rules referred to in the first subparagraph of that provision, which are intended to define the scope of the exemptions provided for in Article 14 (1). It was pursuant to Article 14 (2) that, with respect to temporary imports, the Seventeenth Directive laid down rules governing, at Community level,

10 — In the present case no such distortions would occur if the position was such that the United Kingdom was able to grant the same exemption under Article 28 of the Sixth Directive.

11 — OJ C 347, 29.12.1984, p. 3.

the grant of the exemption provided for in Article 14 (1) (c). It is not therefore possible to base on the second subparagraph of Article 14 (2) any argument capable of overriding the express provisions of the Seventeenth Directive and of Article 28 (3) (b) and Annex F of the Sixth Directive.

41. The cases of distortion resulting from this system are, moreover, limited by the conditions imposed by the Seventeenth Directive for the grant of the temporary importation exemption. Article 10 (c) and Article 11 (b) each form part of a set of conditions which define the scope of that regime, the conditions being particularly restrictive in the case of Article 11, that is to say where the goods in question belong to a person established within the territory of the Member State of importation — a situation that appears to cause Tattersalls particular concern in so far as it gives rise to distortion which is liable to affect it adversely. One of the conditions imposed in the latter case is, for example, that the temporary importation exemption is not granted if the importer is not a taxable person. [12]

42. The interpretation proposed by the applicant for the first part of the paragraphs in question having been rejected, it is clear that those provisions can only mean that, in order to benefit from temporary importation exemption, the owner of the temporarily imported goods must have complied with the rules governing the application of VAT in the Member State of exportation. The purpose of the provisions is therefore — as was emphasized by the Commission — to make certain that the benefit of the exemption is not granted to any person who, by tax evasion or avoidance, has failed to comply with the tax rules applicable to the acquisition of goods.

43. Contrary to the applicant's view, it does not appear to be the case that the need to verify the fulfilment of that condition by the importing Member State makes it impossible to apply the provision or gives rise to a requirement which cannot be satisfied.

44. On the one hand, it is doubtful whether the requirement of compliance with the rules governing the application of VAT, laid down in the first part of the subparagraphs in question, is to be understood as referring to anything other than the latest acquisition, that is to say the acquisition by the person who exports or temporarily imports the goods. Apparently, the legislature did not wish to require verification of compliance with the VAT rules by the seller of the goods or by the subsequent owners thereof. That is what appears from the terms used in the directive and is the reasonable inference to be drawn from them.

45. In any event, there is nothing to indicate that verification of that kind would give rise to any particular difficulties.

46. Proof of compliance with the VAT rules at the time of purchase may be required directly, particularly since, in the normal course of events, the temporary importation is effected by the person who acquires the goods or was already the owner thereof.

12 — The official Portuguese translation of the directive is defective at this point.

47. Moreover, Community law provides, in case of doubt, for cooperation and mutual assistance between the tax authorities in the Member States, in order to combat tax evasion and avoidance. Since the adoption of Council Directive 79/1070/EEC of 6 December 1979,[13] amending Council Directive 77/799/EEC of 19 December 1976,[14] the obligations concerning cooperation and exchange of information enabling taxes to be levied correctly apply also to value-added tax.

48. III — In those circumstances, I propose that the Court should give the following answer to the questions submitted by the High Court:

'Article 10 (c) and Article 11 (b) of the Seventeenth Directive on value-added tax must be interpreted as meaning that temporary importation exemption is granted in respect of goods of which the acquisition in the Member State of exportation was lawfully exempted from value-added tax, provided that the said exemption was not granted by virtue of the goods in question being exported.'

13 — OJ L 331, 27.12.1979, p. 8.
14 — OJ L 336, 27.12.1977, p. 15.