OPINION OF ADVOCATE GENERAL JACOBS
delivered on 9 March 1995 *

1. In this case the Administrative Court of First Instance, Athens, seeks a ruling on whether the special arrangements in the Greek legislation for taxing supplies of petroleum products comply with the provisions of the Sixth VAT Directive ('the Sixth Directive') [1] relating to the taxable amount and the right of deduction and, if not, whether those provisions have direct effect and can be relied on by a taxable person to claim a retrospective refund of tax from the date when the relevant Greek Law came into force, namely 1 January 1987.

The Greek legislation

2. Article 11(1) and (2) of Greek Law No 1571/1985 ('the Petroleum Law') provide that the basic price of petroleum products is to be fixed regularly by ministerial order on the basis of factors determined by presidential decree, such as the cif price in Greek ports of finished products loaded in ports of EC Member States situated in the Mediterranean or in Northern Europe. The basic price may be defined by ministerial order as the selling price on the domestic market of products coming from State refineries.

3. By virtue of Article 11(3) of the Petroleum Law additional economic factors to be taken into account in the formation of the selling price on the Greek market are to be determined by ministerial order. The difference between the selling price and the cif price in Greek ports is to cover the cost of transport, the specific cost of supplying frontier regions, regions facing difficulties and tourist regions, the profit margin of bulk dealers and retailers, stocking costs and other factors. The consumer price is also to be fixed by ministerial order, being the selling price increased by taxes, charges and levies in favour of the State or third parties.

4. At the material time for the purposes of these proceedings Greek Law No 1642/1986 on the application of VAT

* Original language: English.

1 — Sixth Council Directive 77/388/EEC 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, OJ 1977 L 145, p. 1.

('the VAT Law') laid down special rules for the taxation of petroleum products. Article 37 of the VAT Law provided as follows:

'1. In the supply and importation of finished petroleum products, the tax referred to in this Law is to be calculated on their basic price as defined by Article 11 of [the Petroleum Law] and Presidential Decree 619/1985. The said basic price is increased by duties, charges, the special tax on consumers and other levies in favour of the State or third parties, with the exception of the tax provided for in this Law.

...

3. A company marketing petroleum products is liable to pay the tax. The questions of the time at which the tax liability arises, the amount of tax due and payment thereof are governed by the customs provisions in force for the levy of the special tax on the consumption of petroleum products, together with which the tax provided for in the present law is levied.

4. In the supply of petroleum products, companies marketing petroleum, filling stations and other retailers and distributors are not obliged to submit returns under Article 31, nor do they have the right to deduct the tax provided for under Article 23. On invoices for the supply of finished petroleum products to the above persons, the tax is to be incorporated in the price and a note entered on the invoice "no deduction of value added tax".

5. For the purposes of applying Article 24(1), the amount of annual turnover of the persons referred to in paragraph 4 *supra* arising from the supply of petroleum products is to be added to the denominator of the fraction laid down by that provision. Those persons are obliged to record purchases of petroleum products in a special column in their accounts.

6. Transport and storage services for petroleum products are exempted from the tax referred to in this Law.

7. Subject to the provisions in Article 23(4)(e), value added tax on petroleum products is to be deducted where the taxable person uses them either as a primary or secondary material in the production of goods, the supply of which is subject to that tax, or for the supply of taxable services ... .'

5. Article 24(1), referred to in Article 37(5), provided:

'If the taxable person uses goods and services to carry out transactions in respect of some of which there is no right to deduct, the tax deducted is limited to a percentage of the total tax. The percentage is to be determined on the basis of a fraction, the numerator being the amount of annual turnover less the value added tax relating to transactions for which there is entitlement to deduct the tax, and the denominator being the sum of the transactions referred to in the numerator and the transactions on which there is no entitlement to deduct.'

The Community legislation

6. The Community VAT legislation does not contain any special arrangements for the taxation of petroleum products. However, the following general provisions are of relevance.

7. Article 2 of the First VAT Directive, [2] as amended by Article 36 of the Sixth Directive, provides:

'The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.

The common system of value added tax shall be applied up to and including the retail trade stage.'

8. Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2 — First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes, OJ, English Special Edition 1967, p. 14.

2. the importation of goods.'

9. Article 11 provides:

'A. *Within the territory of the country*

1. The taxable amount shall be:

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

... .

B. *Importation of goods*

1. The taxable amount shall be:

(a) the price paid or to be paid by the importer, where this price is the sole consideration defined in A(1)(a);

(b) the open market value, where no price is paid or where the price paid or to be paid is not the sole consideration for the imported goods.

...

2. Member States may adopt as taxable amount the value defined in Regulation (EEC) No 803/68.

...'

10. Article 17 provides:

'Origin and scope of the right to deduct

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

2. In so far as the goods and services are used for the purposes of his taxable transac-

tions, 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;

(b) value added tax due or paid in respect of imported goods;

... .

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person.

...'

11. Article 19(1) provides:

'The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:

— as numerator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3),

— as denominator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which value added tax is not deductible. The Member States may also include in the denominator the amount of subsidies, other than those specified in Article 11A(1)(a).

The proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next unit.'

The facts and the national court's questions

12. The plaintiff in the main proceedings markets petroleum and related products in Greece. According to its VAT returns its turnover for the period from 1 January to 31 December 1987 amounted to DR 2 012 096 225. However, only 13% of its transactions (DR 251 189 876) gave rise to the right of deduction. The remaining 87% (DR 1 760 906 349) consisted in sales of petroleum products in respect of which the right of deduction was denied by Article 37(4) of the VAT Law. During the same period the plaintiff incurred DR 14 336 654 by way of input tax on general expenses. Pursuant to the VAT Law, in particular Articles 24(1) and 37(5), the plaintiff claimed deduction of only 13% of that amount (DR 1 863 765), i. e. the proportion attributable to turnover giving rise to the right of deduction. Subsequently, however, by an application of 31 December 1990 revoking its original returns on the ground of excusable error, the plaintiff claimed deduction of the remaining 87% (DR 12 472 889) of input tax not deducted on its original returns. In support of its claim it argued that the special method for taxing petroleum products was contrary to the provisions of the Sixth Directive, in particular Articles 11 and 17.

13. The Administrative Court of First Instance, Athens, to which the plaintiff has appealed, has referred the following questions to this Court for a preliminary ruling:

'(1) Was the Greek Government entitled, for whatever reason,

(a) under the rules contained in Article 37(1) and (4) of [the VAT Law], on the one hand, to subject the importation of finished petroleum products to value added tax to be calculated on the basic price referred to above, which differs from that provided for in Article 11A(1) and B(1) and (2) of the Sixth Council Directive, and, on the other hand, to exempt companies marketing petroleum products, filling stations and other retail sellers from the obligation to submit related returns, thus depriving them of the right to deduct the tax; and

(b) to exempt from the tax, pursuant to Article 37(6) of [the VAT Law], services in respect of the transport and storage of petroleum products unconnected with the transport etc. of those products from the first to another named destination?

(2) If the reply is in the negative, that is to say, if the Greek Government was not so entitled, are Article 11A(1) and B(1) and (2) and Article 17(1) and (2) of the Sixth Directive unconditional and sufficiently clear, enabling the plaintiff company to rely upon them as superior law before the Administrative Court of First Instance before which the case is pending?

Further, if the latter is the case, in application of those provisions in the directive, may the taxable person request retrospectively from 1 January 1987 when [the VAT Law] came into force deduction of the tax on the inputs referred to which was not deducted and a refund of the amount of any tax paid on that basis for 1987 which was not due?'

Admissibility of the questions

14. The Greek Government puts forward a series of contentions regarding the admissibility of the national court's questions. It seems to me that only one of those contentions merits close consideration, namely that Question 1 is inadmissible because the national court does not explain the connection between the method of taxing imports and supplies of petroleum products under Article 37(1) of the VAT Law and the calculation of the deductible proportion under Article 24(1) of the Law; nor does it explain the relevance to the dispute of a ruling by the Court on the compatibility of Article 37(1) of the Law with Article 11 of the Sixth Directive or the compatibility of Article 37(6) of the Law with the directive.

15. It is true that the dispute, as described in the order for reference, is limited to the right of the plaintiff in the main proceedings, a petroleum-marketing company, to deduct tax on its general expenses. Consequently, the plaintiff's claim is ultimately based solely on Article 17 of the Sixth Directive. However, as I shall explain below, the refusal of deduction of tax is intimately linked with the special VAT arrangements under Greek law for petroleum products, and in my view the national court quite reasonably considered that it was desirable to seek a ruling which would enable it to decide on the compatibility with Community law of those arrangements as a whole, including the rule refusing deduction of tax. I therefore consider that the Court should reply to Question 1 as put by the national court, reformulating it only in so far as is necessary to avoid ruling directly on the Greek legislation.

Question 1(a)

16. In its written observations the plaintiff contends that the Greek legislation conflicts

with Articles 11 and 17 of the directive, a view that is shared by the Commission. The Greek Government, on the other hand, contends that its legislation does not depart from the Community rules, but merely lays down accounting arrangements adapted to the Greek market. On that market the price of petroleum products is fixed and remains the same from the moment when the products leave the refineries to the moment when they are supplied to the final consumer. The VAT arrangements take account of this by providing for collection of tax on the full consumer price at the beginning of the marketing process. That price, which includes all taxes, duties, levies and charges except for the VAT itself, the profit margin of intermediaries in the marketing chain as well as transport and storage costs, is in conformity with Article 11. Charging and deduction of tax at later marketing stages is unnecessary since the products have been fully taxed at the first stage and the tax is passed down the marketing chain to the consumer in the price of the products. The Greek arrangements do not alter the tax burden for the final consumer.

17. In my view the Greek rules depart both in form and in substance from those of the First and Sixth Directives. This may be illustrated by the following example taken from the Greek Government's written observations:

Company B, a petroleum marketing company, acquires petroleum products from petroleum company A for DR 200 per litre, made up of the basic price of DR 190 (including the gross profit margin and any taxes and duties) and VAT of DR 10. [3] From that price of DR 200 company B takes a commission of DR 6 per litre. Under the Greek rules VAT is levied at a single stage, namely on importation of the products by company A. Company A passes on to company B the VAT paid on importation as a component of its selling price. Company B neither charges VAT on the resale of the products nor deducts VAT on their purchase from company A; however, the VAT is a component of company B's selling price.

18. It is clear from the foregoing example that the essential difference between the Greek rules and the Community rules is that the former impose VAT on petroleum products as a single levy at the beginning of the marketing process. They are therefore contrary to the fundamental principle, laid down by Article 2 of the First Directive, that VAT should be imposed at all stages of production and distribution.

19. The Greek arrangements also infringe a number of specific provisions of the Sixth Directive, in particular Articles 2, 11 and 17.

3 — According to a second example given by the Greek Government, the selling price of DR 200 could alternatively be made up of a basic price of DR 175, a gross profit margin of DR 15 and VAT of DR 10. The different methods of fixing the basic price under the Petroleum Law do not appear to affect the VAT treatment.

20. Article 2 subjects to tax the supply 'of goods ... effected for consideration within the territory of the country by a taxable person acting as such'. By virtue of that provision the sale of petroleum products by both company A and company B ought to be taxed, whereas under the Greek rules tax is levied solely on the importation of the products by company A.

21. Article 11A(1)(a) provides that the taxable amount in respect of domestic transactions is in principle the consideration which has been or is to be obtained by the supplier; accordingly, Article 11A(3)(b) excludes from the taxable amount price discounts and rebates allowed to the customer and accounted for at the time of the supply. Article 11B(1) provides that the taxable amount for imports is the price paid by the importer where the price is the sole consideration, or the open market value where no price is paid or the price paid is not the sole consideration. Under Article 11B(2) Member States may alternatively adopt as the taxable amount for imports the value defined in Council Regulation (EEC) No 803/68 of 27 June 1968 on the valuation of goods for customs purposes. [4] That regulation was replaced by Council Regulation (EEC) No 1224/80 of 28 May 1980. [5] Under that regulation the primary value for customs purposes is the transaction value, i. e. the price actually paid or payable for the goods when sold for export to the customs territory of the Community: see Article 3.

22. The effect of those rules is to ensure that VAT is charged at each marketing stage on the price or value of the goods *at that stage*. However, it is apparent from the above example that under the Greek rules VAT is levied once and for all on importation on the basis of the final consumer price of the goods on the Greek market.

23. Finally, Article 17(2) confers on taxable persons the right to deduct VAT on goods and services in so far as they are used for the purposes of taxable transactions. As already noted, company B's sales of petroleum products are taxable transactions by virtue of Article 2 and ought to give rise to deduction of tax.

24. I do not share the Greek Government's view that the differences between its rules and the Community legislation can be dismissed as mere accounting arrangements. As I have demonstrated, the Greek rules depart from the Community legislation with respect to basic notions such as taxable transactions, the taxable amount and the right of deduction.

4 — OJ, English Special Edition 1968, p. 170.

5 — OJ 1980 L 134, p. 1. The relevant rules are now contained in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), which repealed Regulation No 1224/80.

25. Moreover, they lead to substantially different results. The Greek Government appears to be correct in its assertion that its rules do not affect the tax burden on the final consumer. The government confirmed at the hearing that special provision is made to ensure that taxable persons who purchase petroleum products for the purposes of their business rather than for the purpose of re-sale do not incur an irrecoverable VAT cost.

26. There nevertheless remains an important defect in the rules which is of direct relevance to the dispute in the main proceedings. This may be illustrated by expanding the above example given by the Greek Government. Let us suppose that, during the period in question, 80% of company B's turnover derives from sales of petroleum products and 20% derives from other transactions, all of which are taxable. Let us suppose further that during the same period company B incurs VAT of DR 10 000 000 on general expenses attributable to its business as a whole.

27. Under the rules of the Sixth Directive the tax would function normally in such a case. Since there is no exemption in the Sixth Directive for supplies of petroleum products, company B's entire turnover would be taxable and give rise to deduction of tax. Consequently, Article 17(5), which concerns the case where a taxable person purchases goods and services partly for the purpose of transactions not giving rise to the right of deduction, would not apply. The same is true of Article 19(1), which lays down the fraction to be used in calculating the deductible proportion in such a case. Company B would therefore be entitled to full deduction of tax on its general expenses.

28. Under the Greek rules, however, company B's sales of petroleum products would not give rise to deduction. Consequently, Article 24(1) of the VAT Law, which implements Article 19(1) of the directive, would apply. By virtue of Article 24(1), in conjunction with Article 37(5) of the Law, company B would be entitled to deduct only 20% (i. e. DR 2 000 000) of the VAT on its general expenses, since its turnover giving rise to deduction represents only 20% of its total turnover (i. e. the total of its turnover giving rise to the right of deduction and its turnover not so giving rise, namely its petroleum sales).

29. It is this aspect of the Greek legislation which has led to the dispute in the main proceedings. As noted above, under the rules of the Sixth Directive the supply by a taxable person of petroleum products, which is a taxable transaction, would not lead to a restriction of his right to deduct tax on general expenses. The plaintiff in the main proceedings correctly concludes that it was wrongly refused deduction of tax on such expenses.

30. The plaintiff's claim for a refund of tax does not appear to extend to the VAT incurred on its purchases of petroleum products. In my view the plaintiff correctly limits its claim in that way. Under the Greek rules the plaintiff neither pays VAT to the tax authorities on its sales of petroleum products nor deducts VAT on the purchase of such products. Nor does it ultimately bear the VAT burden on the products, since it passes the VAT on to its customers as a hidden component of their price. While under the rules of the Sixth Directive it would be entitled to deduct VAT on the purchase of the products, the benefit of that deduction would be wholly cancelled out by the output tax which it would be obliged to pay on the sale of the products. Consequently, the plaintiff does not incur any additional VAT burden as a result of being unable to deduct VAT on the petroleum products themselves.

31. It might be objected that the Sixth Directive cannot, in the absence of implementation, impose an obligation on the plaintiff to pay tax on its sales of petroleum products since a directive can only confer rights on individuals and cannot impose obligations on them unless implemented in national law; the output tax which would be payable if the directive had been properly implemented must therefore be disregarded in calculating the refund to which the plaintiff is entitled under the directive. However, in the case of a directive such as the Sixth Directive, which lays down a comprehensive scheme of taxation, it is in my view possible to determine whether a taxable person has overpaid tax under national rules only by considering the combined effect of all relevant provisions of the directive on the transactions in question and by comparing the resultant liability with that arising under the national rules. The provisions determining the liability of a taxable person in respect of particular transactions must be regarded as an inseparable whole.

32. No such difficulty arises in relation to the plaintiff's claim for a refund of the VAT incurred on its general expenses. As the above example demonstrates, the refusal to allow deduction of part of such VAT causes the plaintiff to incur an irrecoverable VAT cost contrary to the Sixth Directive.

33. This aspect of the Greek legislation is in fact puzzling since it does not fit in with the logic of the special arrangements for petroleum products. The rationale for the partial disallowance of deduction of VAT under Articles 17(5) and 19(1) of the Sixth Directive, which Article 24(1) of the VAT Law is intended to implement, is that deduction of tax on goods and services is not justified in so far as they are used for the purpose of making supplies that are not taxed. If VAT were deductible on the cost components of tax-free supplies, this would result in tax avoidance. However, under the Greek rules

the sale of petroleum products is not tax-free. The products are taxed on the full consumer price at the beginning of the marketing process. Their sale by intermediaries does not give rise to further taxation or to deduction of tax purely for technical reasons, i. e. because under the Greek arrangements tax is charged at a single stage and is then passed on as a hidden component of the price.

34. The Greek Government contends, in the alternative, that its rules, although derogating from the Sixth Directive, have been authorized by the Council under the procedure laid down in Article 27(1) to (4) of the Sixth Directive, which provides:

'1. 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. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

3. The Commission shall inform the other Member States of the proposed measures within one month.

4. The Council's decision shall be deemed to have been adopted if, within two months of the other Member States being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.'

35. The Greek Government claims that, by bringing the entire text of the draft VAT Law to the notice of the Commission, it complied with Article 27(2). The special arrangements were therefore tacitly approved by the Council under Article 27(4).

36. However, the view that it is sufficient for a Member State to notify the text of all or part of its legislation without drawing attention to specific measures is inconsistent with the terms of Article 27(2) to (4) and with the procedure laid down in those provisions. The Commission is obliged to notify proposed measures to the other Member States *within one month*. Moreover, unless the matter is raised in the Council a decision is deemed to be taken *two months* after such notification. Notwithstanding that short

period for tacit approval of measures, notification is far from being a mere formality. Measures authorized under Article 27 must pursue the aims stated in Article 27(1) and may not derogate from the rules of the directive, 'except within the limits strictly necessary for achieving those aims': see paragraph 29 of the judgment in *Commission* v *Belgium*. [6] It is therefore essential that the Member States and, in particular, the Commission should be given a proper opportunity to examine proposed measures in order to verify that those requirements are met. In view of the time limits imposed by Article 27, this is possible only if specific notice is given of the proposed measures.

37. Moreover, in my view the Greek rules could not — at least not without substantial modification — properly be authorized under Article 27. Even if one accepts the Greek Government's assertion that the rules are necessary to prevent tax avoidance or evasion, it is, as I have already explained (see paragraph 33), difficult to see why the limitation on the deduction of input tax on general expenses is a necessary part of such arrangements. This aspect of the rules does not seem strictly necessary for the purpose of achieving the aim of the arrangements as required by the judgment in *Commission* v *Belgium*. [7]

38. I therefore conclude that the Greek Government was not entitled to apply arrangements such as those described in Question 1(a).

Question 1(b)

39. By this question the national court asks whether the Greek Government was entitled to exempt from tax services connected with the transport and storage of petroleum products unconnected with the transport of those products from the first to another named destination.

40. This question must also be given a negative reply.

41. Article 11B(3) of the Sixth Directive provides that the taxable amount is to include:

'(b) incidental expenses, such as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the country.

6 — Case 324/82 [1984] ECR 1861.

7 — Cited above in note 6.

"First place of destination" shall mean the place mentioned on the consignment note or any other transport document by means of which the goods are imported into the country of importation. In the absence of such an indication, the first place of destination shall be taken to be the place of the first transfer of cargo in that country.

Equally, the Member States may include in the taxable amount the incidental expenses referred to above where they result from transport to another place of destination, if the latter is known at the time when the chargeable event occurs.'

42. Article 14(1)(i) of the Sixth Directive exempts:

'... the supply of services, in connection with the importation of goods where the value of such services is included in the taxable amount in accordance with Article 11B(3)(b).'

43. By virtue of Article 17(3)(b) VAT is deductible on supplies of goods and services used for services exempted under Article 14(1)(i).

44. It is clear from those provisions that the reason for the exemption for services connected with the importation of goods in Article 14(1)(i) is that the cost of such services is already included, pursuant to Article 11B(3)(b), in the taxable amount for the importation of the goods to which the services relate. Since, notwithstanding that exemption, VAT is deductible on goods and services used in providing such services, VAT remains fully deductible on the cost components of the imported goods.

45. Article 37(6) of the VAT Law exempts all transport and storage services for petroleum products. That Article 37(6), unlike Article 14(1)(i) of the directive, does not limit the exemption to expenses on services incurred up to the first place of destination or another known place of destination may be explained by the fact that under the Greek rules the taxable amount for imports of petroleum products is based on the consumer price, thus including the cost of all services incurred up to the final marketing stage.

46. However, those arrangements, like those for the petroleum products themselves, are contrary to the Sixth Directive, which contains no exemption for such services except within the limits defined by Article 14(1)(i). Nor, for the reasons given in relation to Question 1(a), can they be regarded as having been notified and tacitly authorized under Article 27 of the directive.

Question 2

47. By the first part of this question the national court asks whether Article 11A(1) and B(1) and (2) and Article 17(1) and (2) of the Sixth Directive have direct effect.

48. It is clear from a reading of those provisions that they meet the requirements of being unconditional and sufficiently precise. That is so notwithstanding the discretion accorded to the Member States by Article 11B(2) to adopt as the taxable amount for imports the value defined in Regulation No 803/68. A taxable person may nevertheless rely on Article 11 to resist the application of a taxable amount which conforms neither to Article 11B(1) nor to Article 11B(2).

49. It may be noted moreover that the direct effect of Article 11A(1) does not appear to have been questioned in the cases in which preliminary rulings have been sought on that provision: see in particular *Naturally Yours Cosmetics Ltd* v *Commissioners of Customs and Excise*, [8] *Boots* v *Commissioners of Customs and Excise* [9] and *Empire Stores* v *Commissioners of Customs and Excise*. [10] The same applies to Article 17(2) of the directive: see in particular *Intiem* [11] and *Lennartz* v *Finanzamt München III*. [12]

50. In the second part of Question 2 the national court asks whether a taxable person may claim a refund of the tax overpaid under the Greek Law retrospectively from 1 January 1987, the date when the Law came into force.

51. It may be noted that the Sixth Directive does not lay down rules concerning the time limits for claims for the refund of overpaid tax or the grounds on which such claims may be made.

52. The Court has held that: 'in the absence of Community rules on the subject, it is for the domestic legal system of each Member

8 — Case 230/87 [1988] ECR 6365.

9 — Case C-126/88 [1990] ECR I-1235.

10 — Case C-33/93 [1994] ECR I-2329.

11 — Case 165/86 *Leesportefeuille 'Intiem' CV* v *Staatssecretaris van Financiën* [1988] ECR 1471.

12 — Case C-97/90 [1991] ECR I-3795.

State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law, provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law': see paragraph 16 of the judgment in *Emmott*, [13] where the Court reaffirmed the principles laid down in *Rewe* [14] and *San Giorgio*. [15]

53. The Court has thus sought to achieve a balance between the need to ensure the effectiveness of Community law and the right of Member States, in the absence of relevant Community provisions, to lay down procedural rules governing administrative and judicial proceedings. Time-limits for appeals in tax matters must be regarded as an application of the principle of legal certainty protecting both the taxpayer and the administration; [16] they are also consistent with the principle of sound administration.

54. The imposition by a Member State of a reasonable time-limit for appeals in respect of a tax year cannot be considered to make reliance on Community law virtually impossible [17] or, to use the phrase employed elsewhere by the Court, excessively difficult. [18] It appears that Greek law lays down a time-limit for appeals of three years from the end of the tax year concerned. [19] Such a time-limit does not seem unreasonably short.

55. It is true that in *Emmott*, [20] a case concerning the Equal Treatment Directive, [21] the Court held that, owing to the particular nature of directives, 'until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time'.

56. However, in its judgments in *Steenhorst-Neerings* [22] and *Johnson*, [23] the Court held that the *Emmott* ruling was to be regarded as

13 — Case C-208/90 *Emmott* v *Minister for Social Welfare and Attorney General* [1991] ECR I-4269.

14 — See Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989, paragraph 5 of the judgment.

15 — Case 199/82 *Amministrazione delle Finanze dello Stato* v *SpA San Giorgio* [1983] ECR 3595.

16 — *Rewe*, cited in note 14.

17 — See *Rewe*, cited above in note 14, paragraph 5 of the judgment; *San Giorgio*, cited above in note 15, paragraph 12; *Emmott*, cited above in note 13, paragraph 16. See also Joined Cases C-31/91 to C-44/91 *Lageder & Others* [1993] ECR I-1761, paragraphs 27 to 29.

18 — See *San Giorgio*, cited in note 15, paragraph 14 of the judgment; Joined Cases C-6/90 and C-9/90 *Francovich & Others* [1991] ECR I-5357, paragraph 43.

19 — Article 91(2) of Legislative Decree 321 of 17-18 October 1969, Official Journal of the Greek Government A 205.

20 — Cited above in note 13, paragraph 23 of the judgment.

21 — Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6, p. 24.

22 — Case C-338/91 *Steenhorst-Neerings* v *Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475.

23 — Case C-410/92 *Johnson* v *Chief Adjudication Officer* [1994] ECR I-5483, paragraph 26.

confined to 'the particular circumstances of that case, in which a time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under the directive'.

57. Consequently it appears that the plaintiff can succeed only if its application was made within the time-limit laid down by national law. That may be the case since it appears that the plaintiff submitted its application revoking its tax returns for 1987 on 31 December 1990, i. e. on the last day of the three-year period following the tax year in question.

58. The question then is whether the plaintiff can rely on the failure of Greece to implement the directive. In my view it follows from the principle that claims based on Community law must not be treated less favourably than claims based on national law that, wherever taxable persons are entitled to a refund of tax in respect of a particular tax year on grounds recognized by national law, that possibility must extend to claims based on Community law; that is so regardless of the nature of the grounds recognised by national law. It is not, in my view, necessary to engage in the difficult and somewhat artificial exercise of seeking a comparable claim under national law. Indeed such an approach does not follow from the Court's case-law on this matter. That case-law is based on the principle that, subject to the requirement of ensuring the effectiveness of Community law, it is for the Member States, in the absence of harmonized rules, to decide upon the appropriate balance between the requirements of legal certainty and sound administration and the need to ensure the correct application of the tax in a particular tax year. Where a Member State allows a tax year to be re-opened at the instance of the taxable person within a certain period on any ground, it accepts by implication that for the period for which the claim is permitted it is the need to ensure correct application of the tax which takes precedence. The Member State cannot therefore object that a claim based on Community law must be refused on grounds of legal certainty or sound administration.

59. That conclusion is particularly appropriate in the case of a Member State's failure to implement a directive, where the State itself is at fault and has led the taxable person to make the error in question. A taxpayer must be entitled to assume, when preparing his tax returns, that the national legislation has correctly implemented all relevant Community directives, and is therefore entitled to rely exclusively on the national legislation for that purpose. If subsequently he discovers that the national legislation is defective, then it must be open to him to seek a revision of his assessment within the time-limit laid down by national law for revision on any other ground.

60. The position is in any event clear where national law provides for revision of an assessment on the ground of the taxpayer's excusable error, as appears to be the case here. In such circumstances, it must be open to the taxpayer to claim a revision of his assessment, since the error in question can be said to be directly attributable to the Member State's failure to implement the Directive.

61. I should finally comment briefly on the Greek Government's remark at the hearing that the success of a claim for reimbursement of overpaid tax depended in part on whether the VAT had been passed on to the final consumer. Since under the Greek arrangements for petroleum products the selling price of the products is fixed, it is in this case difficult to see how a petroleum-marketing company would be able to pass on overpaid VAT to its customers.

Conclusion

62. Accordingly I am of the opinion that the questions referred should be answered as follows:

1) (a) The provisions of the Sixth VAT Directive, in particular Articles 2, 11 and 17, prohibit a Member State from applying rules under which VAT is imposed on the importation of petroleum products by reference to a basic price such as that defined in the order for reference and under which petroleum-marketing companies, filling stations and other retailers neither account for tax on their supplies of such products nor deduct tax on the purchase thereof.

(b) The Sixth Directive, in particular Article 14(1)(i), does not permit a Member State to exempt from tax services relating to the transport and storage of petroleum products unconnected with the transport of such products to the first place of destination or to another place of destination known when the chargeable event occurs.

2) (a) Article 11A(1) and B(1) and (2) and Article 17(1) and (2) have direct effect and may therefore be relied upon by a taxable person before a national court in order to resist the application by national tax authorities of incompatible national law.

(b) In the absence of relevant Community rules, it is for national law to determine whether a taxable person may request a refund of tax retrospectively from the date of the entry into force of a national law which is contrary to Community law. However, national procedural rules must not discriminate between claims based on national law and those based on Community law and must not render excessively difficult the protection of rights guaranteed by Community law. Where national law provides for the refund of overpaid tax on grounds such as error, that provision must extend to claims based on the failure of the Member State concerned to implement correctly the Community legislation.