Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 17 December 2015 [1]

**Case C-550/14**

**Envirotec Denmark ApS**
**v**
**Skatteministeriet(Request for a preliminary ruling**

from the Østre Landsret (Denmark))

(Tax legislation — Value added tax — Article 198(2) of Directive 2006/112/EC — Tax payable by the customer in the case of the supply of gold material or semi-manufactured products — Gold bars made from melting down various gold-bearing metal objects)

## I – Introduction

1. 'To gold they tend, on gold all things depend', muses *Gretchen*, in 'Faust' by Johann Wolfgang von Goethe, on the relationship between jewellery and natural beauty. [2] How would she feel and what turn would her thinking take if the gold in the necklace and earrings in which she so admires herself came, inter alia, from other people's teeth? This, after all, may well be the outcome in the present case, which concerns the treatment for value added tax ('VAT') purposes of a supply of gold bars which have been composed from a variety of recycled gold objects and are to go on to be used to manufacture jewellery and other items.

2. Gold attracts special attention in the EU VAT legislation, too. It is one of the special provisions applicable to gold that forms the subject matter of the present Danish request for a preliminary ruling. In this case, the Court will have to determine who is liable to pay VAT in a situation in which the items changing hands are not 'fresh' gold bars but recycled ones. This, however, is a matter with which *Gretchen* would probably be less concerned.

## II – Legal context

### A – *EU law*

3. The charging of VAT within the Member States of the European Union is governed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [3] ('VAT Directive'). It is true that 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:

1 — Original language: German.

2 — Johann Wolfgang von Goethe, 'Faust. A Tragedy', 'evening', final three lines (2802 to 2804).

3 — OJ 2006 L 347, p. 1.

uniform basis of assessment [4] ('Sixth Directive'), which was in force until 31 December 2006, is not applicable in the dispute in the main proceedings. However, it already contained the provisions that are crucial to the outcome of the present case and the drafting history of which must for that reason be taken into account too.

4. In accordance with Article 2(1)(a) of the VAT Directive, 'the supply of goods for consideration within the territory of a Member State by a taxable person acting as such' are to be subject to VAT.

5. So far as concerns the person liable to pay VAT, Article 193 of the VAT Directive, in the version applicable in the dispute in the main proceedings, [5] provides:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods …, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202.'

6. In that regard, Article 198 of the VAT Directive provides by way of derogation:

'…

2. Where gold material or semi-manufactured products of a purity of 325 thousandths or greater, or investment gold as defined in Article 344(1) is supplied by a taxable person exercising one of the options under Articles 348, 349 and 350, Member States may designate the customer as the person liable for payment of VAT.

3. Member States shall lay down the procedures and conditions for implementation of paragraphs 1 and 2.'

7. In that connection, recital 55 in the preamble to the VAT Directive states:

'In order to prevent tax evasion while at the same time alleviating the financing burden for the supply of gold of a degree of purity above a certain level, it is justifiable to allow Member States to designate the customer as the person liable for payment of VAT.'

8. In addition, in accordance with Article 199(1)(d) of the VAT Directive, Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

'(d) the supply of used material, used material which cannot be re-used in the same state, scrap, industrial and non-industrial waste, recyclable waste, part processed waste and certain goods and services, as listed in Annex VI.'

9. The aforementioned Annex VI includes, inter alia, the following items:

'(1) Supply of ferrous and nonferrous waste, scrap, and used materials including that of semi-finished products resulting from the processing, manufacturing or melting down of ferrous and non-ferrous metals and their alloys;

(2) supply of ferrous and non-ferrous semi-processed products and certain associated processing services;

4 — OJ 1977 L 145, p. 1.

5 — This is the version of the VAT Directive as last amended by Council Directive 2010/88/EU of 7 December 2010 amending Directive 2006/112/EC on the common system of value added tax, with regard to the duration of the obligation to respect a minimum standard rate (OJ 2010 L 326, p. 1).

(3) supply of residues and other recyclable materials consisting of ferrous and non-ferrous metals …;

(4) supply of … ferrous and non-ferrous waste …;

…;

(6) supply of scrap and waste from the working of base materials.'

10. Finally, Article 168 of the VAT Directive provides as follows in relation to the right to deduct input tax which may be claimed in respect of goods acquired:

'In so far as the goods … are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…'

B – *National law*

11. In Denmark, VAT is charged in accordance with the Danish VAT Law. Paragraph 46(1) of that Law governs the determination of the person liable to pay VAT:

'The tax shall be payable by any taxable person carrying out a taxable supply of goods … in Denmark. However, it shall be payable by the recipients of goods … where

…

(4) the recipient is an undertaking registered in Denmark which receives investment gold, on which tax is payable under Paragraph 51a, or gold as a raw metal or as semi-manufactured products of a purity of 325 thousandths or greater.'

## III – Dispute in the main proceedings

12. The dispute in the main proceedings concerns the Danish VAT owed by the company Envirotec Denmark ApS ('Envirotec') for the final quarter of 2011.

13. In that quarter, Envirotec purchased from another Danish company 24 bars with an average gold content of between 500 and 600 thousandths. In addition to the gold, the bars also contained various other materials such as, for example, teeth, rubber, PVC, copper, amalgam, mercury and lead. The vendor had formed the bars by melting together industrial waste as well as old jewellery, cutlery, watches and so on. Consequently, in order to be able to use the gold contained in the bars to manufacture other gold-bearing products, the bars' other components had first to be removed.

14. Envirotec was charged a total of DKR 1 099 695 (approximately EUR 150 000) by way of VAT on the purchase of the 24 bars, which Envirotec paid to the vendor. The vendor, however, failed to remit that amount to the Danish tax authority. The vendor was subsequently put into liquidation on grounds of insolvency.

15. Envirotec is now seeking a refund of the VAT paid to the vendor from the Danish tax authority by asserting a right to deduct that VAT as input tax. The Danish tax authority, however, takes the view that, in accordance with Paragraph 46(1)(4) of the Danish VAT Law, it is not the vendor but Envirotec itself which is liable to pay VAT on the transaction. By extension, therefore, Envirotec cannot claim back the amount of VAT which it wrongly paid to the vendor as deductible input tax. Envirotec, on the other hand, is of the opinion that the Danish provision on the transfer of liability to pay VAT to the customer, which was adopted on the basis of Article 198(2) of the VAT Directive, is not applicable to its particular situation.

## IV – Procedure before the Court

16. The Østre Landsret (Eastern Regional Court), now seised of the dispute, considers the interpretation of EU law to be decisive in the dispute in the main proceedings and, on 28 November 2014, referred the following question to the Court pursuant to Article 267 TFEU:

'Are bars consisting of a random, rough fusion of various scrapped, gold-bearing metal objects covered by the terms "gold material or semi-manufactured products" within the meaning of Article 198(2) of the VAT Directive?'

17. In the procedure before the Court, the Kingdom of Denmark, the Republic of Estonia and the European Commission submitted written observations in March 2015.

## V – Legal assessment

18. By the question which it has referred, the national court wishes to ascertain, in essence, whether the bars forming the subject matter of the dispute in the main proceedings fall within the scope of Article 198(2) of the VAT Directive. Pursuant to that provision, in the case, inter alia, where 'gold material or semi-manufactured products of a purity of 325 thousandths or greater' is supplied, Member States may provide that the person liable for payment of VAT is the customer acquiring the goods, and not, as is usually the case, the supplier.

19. I take the view that the question referred must be answered in the affirmative. After all, bars consisting of a fusion of various gold-bearing metal objects such as those at issue in the dispute in the main proceedings, in so far as they constitute 'gold material', satisfy the conditions for the application of Article 198(2) of the VAT Directive. This follows from an interpretation of the wording, context and objective of the provision, as I shall demonstrate at length.

### A – *Wording*

20. First of all, a reading of the various language versions of Article 198(2) of the VAT Directive shows that its wording does not provide a uniform picture as regards the meaning of the term 'gold material'.

21. Thus, the Danish-language version uses the term 'råmetal', translatable into German as 'Rohmetall' ('raw metal'),[6] which, in common usage, refers to pure, unworked metal. The expression 'd'or sous forme de matière première' ('gold in raw material form') in the French-language version points in the same direction.

6 — See in this regard the Danish- and German-language versions of the now applicable Article 199a(1)(j) of the VAT Directive, which was introduced by Article 1(2)(b) of Council Directive 2013/43/EU of 22 July 2013 amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud (OJ 2013 L 201, p. 4).

22. On such a narrow construction, only gold bars consisting of pure — that is to say, almost 100% — gold could be included in the term 'gold material' within the meaning of Article 198(2) of the VAT Directive. Consequently, a fusion of various gold-bearing metal objects to form a bar with a gold content of only 500 to 600 thousandths, such as the bars at issue in the present proceedings, would not be covered by the term 'gold material'.

23. On the other hand, the German- and English-language versions of Article 198(2) of the VAT Directive, for example, inasmuch as they refer respectively to 'Goldmaterial' and 'gold material', contain from the outset terms which have a broader meaning than 'raw metal' and, in their literal sense, are not restricted to pure gold. After all, 'gold material' may be construed as any material which consists partly of gold, including, therefore, the fusion of various gold-bearing metal objects at issue here.

24. It is settled case-law that, where the various language versions of a provision of EU law differ, as they do here, their meaning cannot be determined on the basis of their wording alone, but only by reference to their context and their objective.[7]

B – *Context*

25. First of all, therefore, the context of the term 'gold material' in Article 198(2) of the VAT Directive might be of some assistance in answering the question whether a bar which consists of a fusion of various gold-bearing metal objects falls within the scope of that term.

1. Minimum purity requirement in Article 198(2)

26. The aforementioned provision applies to the supply of 'gold material or semi-manufactured products of a purity of 325 thousandths or greater'. If the phrase 'of a purity of 325 thousandths or greater' relates not only to 'semi-manufactured products' but also to 'gold material', the latter term would of necessity have to include not only pure gold but also material with a lower gold content, such as that at issue here.

27. If, however, it is assumed that that phrase relates only to semi-manufactured products, the minimum purity requirement would not apply to gold material. This might support the conclusion, on the one hand, that any degree of purity is sufficient for material to be assumed to be gold material. However, since this would be a very liberal interpretation, the absence of an explicit requirement with respect to the purity of gold material might also indicate that only pure gold can be included in the term 'gold material'.

28. It is impossible to determine unequivocally from the wording of that provision the terms to which the phrase concerning minimum purity refers. The German-, English- and French-language versions at least are open to both interpretations.

29. Recital 55 in the preamble to the VAT Directive is of no assistance in this regard either. It is true that, in describing the objective pursued by Article 198(2) of the VAT Directive, it refers synoptically to the goods covered by that provision as 'gold of a degree of purity above a certain level'. This, however, does not necessarily support the conclusion that the minimum degree of purity of 325 thousandths is

7 — See the judgments in *Bouchereau* (30/77, EU:C:1977:172, paragraph 14); *Rockfon* (C-449/93, EU:C:1995:420, paragraph 28); and *Hedqvist* (C-264/14, EU:C:2015:718, paragraph 47).

intended to apply both to gold material and to semi-manufactured products. After all, the requirement thus laid down in recital 55 in the preamble to the VAT Directive would be satisfied even if the term 'gold material' were construed as referring only to pure gold, that is to say material of a degree of purity of 995 thousandths or greater, for example. [8]

30. Consequently, the minimum purity requirement laid down in Article 198(2) of the VAT Directive does not make apparent whether the term 'gold material' includes the bars at issue in the present case.

2. Inclusion of gold scrap in Article 199(1)(d)

31. On the same subject of interpreting the context of Article 198(2) of the VAT Directive, Envirotec had taken the view in the dispute in the main proceedings that none of the terms in that provision is capable of including scrap or waste consisting of gold such as that at issue in the present case. This is because, so far as concerns gold *scrap*, the transfer of liability to pay VAT to the customer is governed by the special provision contained in Article 199(1)(d) of the VAT Directive, which was not introduced until later.

32. In that connection, the referring court clearly proceeds on the assumption that the decisive provision in the dispute in the main proceedings, Paragraph 46(1)(4) of the Danish VAT Law, is based not on Article 199(1)(d) but only on Article 198(2) of the VAT Directive, which is the subject of the question referred. It therefore makes a difference to the dispute in the main proceedings whether the transfer of liability to pay VAT to the customer in the case of the bars at issue is covered by one or other of the aforementioned authorising provisions of the VAT Directive.

33. In this regard, it is true that the provision cited by Envirotec contains a list of items which, according to the wording of that provision, also includes recycled goods containing gold, gold being one of the 'non-ferrous metals' mentioned a number of times in that list. The scope of Article 199(1)(d) of the VAT Directive, however, is specifically *not* restricted to gold, but includes, among other things, all other non-ferrous metals. Consequently, the provision to be interpreted in the present case, which is to say that contained in Article 198(2) of the VAT Directive, could be regarded as a *lex specialis* in relation to gold which, as such, also applies to gold scrap.

34. However, the drafting history of Article 199(1)(d), which concerns, inter alia, non-ferrous waste, provides an indication that the provision to be interpreted in the present case, which is to say Article 198(2) of the VAT Directive, is *not* intended to cover gold scrap.

35. The predecessor provisions [9] to Article 199(1)(d) in the Sixth Directive were not introduced, by Directive 2006/69/EC, until after the predecessor provision [10] to Article 198(2) of the VAT Directive was introduced. However, Amending Directive 2006/69/EC is formulated as if the EU legislature assumed at that time that there was still no provision transferring liability to pay VAT to the customer so far as gold scrap was concerned, even though, at that time, the predecessor provision to Article 198(2) of the VAT Directive, to be interpreted in the present case, was of course already in force.

8 — See the definition of investment gold in Article 344(1)(1) of the VAT Directive.

9 — The predecessor provision to Article 199(1)(d) of the VAT Directive is Article 21(2)(c)(iv) in the version of Article 28g of the Sixth Directive and was introduced by Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain decisions granting derogations (OJ 2006 L 221, p. 9).

10 — The predecessor provision to Article 198(2) of the VAT Directive is the first sentence of Article 26b(F) of the Sixth Directive and is based on Council Directive 98/80/EC of 12 October 1998 supplementing the common system of value added tax and amending Directive 77/388/EEC — Special scheme for investment gold (OJ 1998 L 281, p. 31).

36. Amending Directive 2006/69/EC repealed a number of provisions authorising the Member States [11] to depart from existing EU VAT law. [12] As is clear from recital 8 in the preamble to Directive 2006/69/EC and the drafting history [13] of that directive, that text was intended to repeal all the authorising provisions which are now covered by the provisions of the new directive and which would therefore be unnecessary in future. In this regard, Annex II to Directive 2006/69/EC refers first to a Council Decision which allowed the United Kingdom of Great Britain and Northern Ireland to introduce a special tax accounting scheme with a view to avoiding fraud and tax evasion in connection with 'supplies of gold, gold coins and gold scrap'. [14]

37. The fact that that authorising provision was not repealed until the adoption of Directive 2006/69/EC indicates that the EU legislature also seemed to assume that the amending directive had changed the law in relation to supplies of gold. Since the then newly created provision that is now contained in Article 199(1)(d) related primarily to scrap and waste, this might support the conclusion that, as Envirotec has argued, gold *scrap* is covered by that provision alone, and not by Article 198(2) of the VAT Directive.

38. In and of itself, however, that argument, which is based on the drafting history of a provision other than that under examination in the present case, is still largely unconvincing. Since not even the original draft of Directive 2006/69/EC [15] made any provision for the aforementioned authorisation granted to the United Kingdom to be repealed, it is also possible that the provision repealing that authorisation was inserted in the course of the legislative procedure only because it had been discovered that it was already obsolete under the law applicable at that time.

39. In the final analysis, therefore, the existence of a special rule for non-ferrous waste in Article 199(1)(d) of the VAT Directive does not provide a basis on which to determine beyond doubt the scope of Article 198(2) of the VAT Directive, at issue in the present case.

### 3. Customs classification

40. Finally, in so far as reference was also made in the dispute in the main proceedings to the classification of goods for customs purposes, the comparison thus drawn is unconvincing. The Combined Nomenclature, [16] which contains classifications of goods that are used primarily to determine the relevant rate of duty, [17] pursues objectives different from those of the provision to be interpreted in the present case, namely Article 198(2) of the VAT Directive.

11 — Those authorising provisions were adopted on the basis of Article 27 of the Sixth Directive.

12 — See Article 2 of Directive 2006/69/EC in conjunction with Annex II thereto.

13 — See the Commission Proposal of 16 March 2005 for a Council Directive amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion and avoidance, and repealing certain decisions granting derogations (COM(2005) 89 final), p. 4.

14 — The Council Decision deemed to have been adopted on 15 April 1984 authorising the United Kingdom to apply a measure derogating from the Sixth Directive with a view to avoiding certain types of fraud or tax evasion on supplies of gold, gold coins and gold scrap between taxable persons by a special tax accounting scheme (OJ 1984 L 264, p. 27).

15 — See the Commission Proposal (cited in footnote 11), p. 11 and 12.

16 — Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1).

17 — See Article 1(3) of Regulation (EEC) No 2658/87 (cited in footnote 16).

41. In so far as the Court, in order to interpret the VAT Directive, has also made reference to the use of terms in the Combined Nomenclature, it has done so only in relation to the relevant rate of taxation.[18] That said, so far as concerns the determination of the rate of taxation, it is clear from Article 98(3) that the VAT Directive itself links that rate to some extent to the Combined Nomenclature.[19]

42. No such link to the definitions contained in the Combined Nomenclature is present, however, in the case of the provision to be interpreted here, namely Article 198(2) of the VAT Directive. That provision is not concerned with the determination of the rate of taxation and — unlike Article 148(b) of the VAT Directive, for example — does not contain an explicit reference to the Combined Nomenclature.

4. Conclusion with respect to the interpretation of the context

43. In the light of all the foregoing, it cannot be determined beyond doubt from the context of Article 198(2) of the VAT Directive whether a bar consisting of a fusion of various gold-bearing metal objects can be included in the term 'gold material'. The answer to that question must therefore be found in the objective pursued by that provision.

C – *Objective*

44. As is clear from the eighth recital in the preamble to Directive 98/80/EC, which introduced the predecessor provision to Article 198(2) of the VAT Directive,[20] that provision is intended both to 'prevent tax [evasion]' and to alleviate the 'financing charge'. Recital 55 in the preamble to the VAT Directive is now worded similarly. Moreover, the drafting history of Directive 98/80/EC contains nothing to indicate that that provision pursues any other objectives.[21]

1. Prevention of tax evasion

45. The provision at issue is intended to prevent tax evasion in so far as the transfer of liability to pay VAT from the supplier to the customer acquiring the goods ensures that the tax authority is not the subject of fraud whereby the person liable to pay VAT and the person entitled to deduct input tax are not one and the same.

46. How such a fraud can be perpetrated is apparent from the situation in the present case.[22] Envirotec is seeking to deduct the input VAT which it paid to its supplier but which that supplier never remitted to the tax authority. In that context, if Envirotec and its supplier had colluded with intent to defraud the tax authority, they could have knowingly relieved it of the amount of input tax claimed, since Envirotec would have received from the tax authority a payment to the value of the VAT paid, but the tax authority would have been unable to collect the corresponding tax from the supplier. If,

18 — See the judgment in *Commission* v *Spain* (C-360/11, EU:C:2013:17, paragraph 44).

19 — That provision states that, when applying reduced rates to certain categories of goods, Member States may use the Combined Nomenclature to establish the precise coverage of the category concerned.

20 — See footnote 10 above.

21 — See the Commission Proposal of 27 October 1992 for a Council Directive supplementing the common system of value added tax and amending Directive 77/388/EEC — special scheme for gold (COM(92) 441 final), the Opinion of the Economic and Social Committee of 28 April 1993 on the proposal (OJ 1993 C 161, p. 25) and the minutes of the sitting of the European Parliament of 7 March 1994 (OJ 1994 C 91, p. 1), p. 15 and 16, and of 10 March 1994 (OJ 1994 C 91, p. 198), pp. 209 and 239 to 243.

22 — See also in this regard the explanation provided in the Commission Proposal of 29 September 2009 for a Council Directive amending Directive 2006/112/EC as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud (COM(2009) 511 final), p. 3.

however, the person liable to pay VAT on a supply of goods is the customer acquiring those goods rather than the supplier, such fraud is impossible. For, in those circumstances, the liability to pay VAT and the right to deduct input tax both lie with the same person, with the result that the tax authority does not have to pay out any money.

47. In the same vein, the Council too recently stated in recital 4 in the preamble to Directive 2013/42/EU[23] that 'the designation of the recipient as the person liable for the payment of the VAT (reverse charge) is, in certain cases, an effective measure to stop VAT fraud in specific sectors'.

48. The EU legislature defined those sectors in Articles 198 to 199a of the VAT Directive. The sectors in question are the trade in gold, the construction industry, the waste industry and the trade in greenhouse gas emission allowances. Following Directive 2013/43/EU,[24] the list contained in Article 199a has since been extended to include other sectors such as, for example, the trade in mobile telephones, microprocessors, microcomputers, precious metals and cereals. In this sphere, as recital 4 in the preamble to that directive makes clear, the EU legislature appears to be constantly responding to cases of fraud arising in practice in particular sectors.

49. So far as concerns the trade in goods, the majority of the goods in respect of which provision may be made to transfer liability to pay VAT to the customer have one abstract feature in common. That is to say that they have a high market value in relation to their size. The reason for this is that the risk of VAT fraud being committed by means of the trade in goods tends to be greater the more valuable and the more easily transportable the goods traded are, a point made in particular by the Republic of Estonia.

50. In the light of that objective, the provision to be examined in the present case, that is to say Article 198(2) of the VAT Directive, must be interpreted in such a way as to take account of the specific risks which the EU legislature considers to be associated with the trade in gold from the point of view of potential VAT fraud. That risk, as recital 55 in the preamble to the VAT Directive also emphasises, is dictated by the degree of purity of the gold in an object. If the degree of purity is high, then, by extension, the relationship between the size of the object and its market value is susceptible to fraud.

51. This means, first, that there is no reason to include only pure gold within the term 'gold material' within the meaning of Article 198(2) of the VAT Directive if there is no doubt that the provision at issue applies at least to semi-manufactured products of a purity of 325 thousandths or greater. Secondly, that minimum purity requirement must relate not only to semi-manufactured products but also to gold material if it is to apply only to high-value material. Thirdly and finally, so far as gold material is concerned, it is incompatible with the function of that provision to distinguish between 'pure' alloys and gold 'scrap', given that, inasmuch as value is determined by degree of purity, the susceptibility to fraud of transactions involving gold-bearing objects is unlikely to depend on such a distinction.

### 2. Alleviation of the financing charge

52. That interpretation is confirmed by the second objective pursued by the provision at issue, that is to say to alleviate the financing charge.

23 — Council Directive 2013/42/EU of 22 July 2013 amending Directive 2006/112/EC on the common system of value added tax, as regards a Quick Reaction Mechanism against VAT fraud (OJ 2013 L 201, p. 1).

24 — Cited in footnote 6.

53. As the Commission stated in its proposal for the predecessor provision to Article 198(2) of the VAT Directive,[25] the transfer of liability to pay VAT from the supplier to the customer also serves to offset the competitive disadvantages suffered by domestic trade by comparison with intra-Community trade. For, in the case of cross-border transactions between taxable persons, the system of taxation applicable to intra-Community trade dictates that the person liable to pay VAT is always the person acquiring the goods.[26] This spares the customer the obligation to pre-finance VAT that would fall to him in the case of a purely national transaction, inasmuch as he would initially have to pay his gold supplier the price of the supply plus VAT and could only later obtain a refund of that VAT from the tax authority by submitting a VAT return. By making the customer liable to pay VAT in the case of national transactions as well, the legislature was able to create equal conditions of competition.

54. In its proposal, the Commission emphasised that, although not confined to gold, that problem is unacceptable in such cases given the 'very high value of the metal'.[27] The decisive factor in relation to this objective of Article 198(2) of the VAT Directive is therefore once again the intrinsic value of the objects traded and, thus, the purity of their gold content.

3. Restriction to customers who are taxable persons

55. Furthermore, it is implicit in the objectives of Article 198(2) of the VAT Directive as described above that that provision is intended to cover only supplies to customers who are *taxable persons*. For, in accordance with Article 168(a) of the VAT Directive, taxable persons alone are entitled to deduct input tax. However, it is only supplies to customers entitled to deduct input tax that carry the risk of VAT fraud and have the potential consequence of imposing on the customer the pre-financing obligation described above.

56. However, that restriction of the scope of Article 198(2) of the VAT Directive is not given explicit expression in the wording of that provision.[28] It must therefore be ensured in the definition of the goods to which that provision applies and thus also has a bearing on the interpretation of the terms 'gold material' and 'semi-manufactured products'.

57. In this regard, the term 'semi-manufactured products' refers by definition only to goods generally acquired only by taxable persons in the course of their economic activities. Semi-manufactured products must be distinguished from end products. Whereas end products can be offered for sale directly to an end consumer, semi-manufactured products must undergo further processing beforehand.[29]

58. In the light of the objectives of the provision at issue as described above, the same must apply to the term 'gold material'. That term cannot include all material with a degree of gold purity of 325 thousandths, but must cover only material that is not an end product and is not therefore suitable for supplies to non-taxable persons.

25 — See p. 13 of the Commission Proposal.

26 — See Articles 2(1)(b)(i), 138 and 200 of the VAT Directive.

27 — Ibid. (footnote 25).

28 — It is only in the case of investment gold that that restriction is apparent, from the reference to the options provided for in Articles 348 to 350 of the VAT Directive, which themselves require that the customer must himself be a taxable person.

29 — See to that effect the judgment in *Artrada and Others* (C-124/03, EU:C:2004:674, paragraph 34) in relation to Article 2(4) of Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products (OJ 1992 L 268, p. 1).

4. Result of the teleological interpretation

59. In accordance with the spirit and purpose of Article 198(2) of the VAT Directive, the term 'gold material' therefore covers any material which is intended for further processing and not for final consumption but which is not a semi-manufactured product, provided that it has a gold purity of 325 thousandths or greater.

60. Since, according to the information supplied by the referring court, the bars at issue are further processed for the manufacture of products and have a degree of purity of 500 thousandths or greater, they therefore fall under the term 'gold material' within the meaning of that provision, provided that they are not semi-manufactured products.

D – *Distinction between gold material and semi-manufactured products*

61. Lastly, it therefore remains for me to consider, in the context of the present case, how the term 'gold material' is to be distinguished from the term 'semi-manufactured products', to which the aforementioned provision also refers.

62. It is true that, for the purposes of Article 198(2) of the VAT Directive, this question is not of decisive importance given that, as we have seen, the objective of that provision requires in both cases that the goods in question have a degree of purity of 325 thousandths or greater and are not end products. A distinction must none the less be drawn between those two terms, in particular in the event that, contrary to my submission, the Court takes the view that the term 'gold material' includes only pure gold.

63. In accordance with the literal meaning customarily inherent in them, the terms 'gold material' and 'semi-manufactured products' are to be distinguished by reference to their degree of processing in relation to the end product. Thus, 'gold material' designates goods only the gold content of which — irrespective of the form in which it is present in each particular case — is relevant to the further production process. 'Semi-manufactured products', on the other hand, are to be understood as goods which have already undergone some measure of processing with a view to becoming an end product, such as, for instance, material which has been pre-formed for the purposes of the end product. In the case of gold, this might, for example, include blanks for rings.

64. Since, in the case of the bars at issue here, it is only the gold that they contain that is to be extracted for further processing, the bars not having yet been pre-formed in preparation for becoming an end product, those bars are therefore gold material and not semi-manufactured products within the meaning of Article 198(2) of the VAT Directive.

65. By contrast, in so far as the Danish tax authority seeks in the dispute in the main proceedings to infer from Article 2(c) of Decision 2004/228/EC[30] that bars such as those at issue in these proceedings fall within the term 'semi-manufactured products', its submission is unconvincing. According to that decision, the Kingdom of Spain is authorised to designate the recipient of the supply as the person liable to pay VAT in the case of 'supplies of semi-finished products (e.g. ingots …) resulting from the processing, manufacturing or melting down of non-ferrous metals …'. It cannot be concluded from the foregoing, however, that bars produced from melting down gold are also to be regarded as 'semi-manufactured products' in the context of the provision under examination here, that is to say Article 198(2) of the VAT Directive. Aside from the fact that at least some of the language versions of the two provisions — including the German — use two different terms in this regard, Article 2(c) of Decision 2004/228/EC, unlike the provision requiring interpretation here, that is to say Article 198(2)

30 — Council Decision 2004/228/EC of 26 February 2004 authorising Spain to apply a measure derogating from Article 21 of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 2004 L 70, p. 37).

of the VAT Directive, does not actually require a distinction to be drawn between the terms 'material' and 'semi-manufactured product'. It is therefore very easy to ascribe to the term 'semi-finished product' as used in the aforementioned decision a broader meaning than that which attaches to the term 'semi-manufactured product' in the provision under examination here.

E – *Conclusion*

66. On the basis of the interpretation of the wording, context and objective of Article 198(2) of the VAT Directive, it must therefore be concluded that bars such as those at issue in the main proceedings, in so far as they constitute gold material, satisfy the conditions for the application of that provision.

## VI – Conclusion

67. I therefore propose that the Court's answer to the question referred by the Østre Landsret should be follows:

Article 198(2) of the VAT Directive applies to bars which, like those at issue in the dispute in the main proceedings, consist of a random, rough fusion of various scrapped, gold-bearing metal objects and have a degree of gold purity of greater than 500 thousandths.