Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 29 June 2016[1]

Case C-378/15

Mercedes Benz Italia SpA
v
Agenzia delle Entrate Direzione Provinciale Roma 3(Request for a preliminary ruling from the

Commissione tributaria regionale di Roma (Regional Tax Court, Rome, Italy))

(Reference for a preliminary ruling — Taxation — Value added tax — Sixth Directive 77/388/EEC — Third subparagraph of Article 17(5) — Deduction of input tax — Deductible proportion — Calculation)

I – **Introduction**

1. The request for a preliminary ruling submitted by the Commissione tributaria regionale di Roma (Regional Tax Court, Rome, Italy) concerns the interpretation of point (d) of the third subparagraph of Article 17(5) of Sixth Directive 77/388/EEC[2] permitting Member States to derogate from the general rule for calculating the deductible proportion laid down in the second subparagraph of Article 17(5) and in Article 19 of that directive.

2. The main issue raised in this request for a preliminary ruling concerns the scope of the abovementioned derogation. Is it limited, like the other derogations laid down in the third subparagraph of Article 17(5) of the Sixth Directive, to ‘mixed use goods and services’, that is goods and services used to carry out both transactions in respect of which VAT is deductible and transactions in respect of which VAT is not deductible? Or does it have a broader scope, covering all goods and services acquired by a ‘mixed taxable person’, namely a taxable person who carries out both transactions in respect of which VAT is deductible and transactions in respect of which VAT is not deductible? The question also arises as to the calculation methods which the Member States are able to impose under that derogation.

3. This request was made in proceedings between Mercedes Benz Italia SpA (‘Mercedes Benz’) and the Italian tax authorities regarding the company’s right to deduct value added tax (VAT).

1 — Original language: French.

2 — Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) (‘the Sixth Directive’).

II – **Legal framework**

A – *EU law*

4. According to the wording of the question submitted for a preliminary ruling, the national court asks the Court about the interpretation of Article 168 and Articles 173 to 175 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.[3]

5. Nevertheless, it is apparent from the decision to refer that the main proceedings concern Mercedes Benz's right to deduct VAT in respect of the 2004 tax year. Therefore, as the European Commission points out, the relevant facts of the main proceedings are not covered, *ratione temporis*, by Directive 2006/112, which did not repeal and replace the Sixth Directive until 1 January 2007.[4]

6. Accordingly, it is necessary to apply the Sixth Directive. This does not, however, have any effect on the substance of the reply to be given to the question submitted by the national court, as the relevant provisions of both directives are essentially identical.[5]

7. Paragraphs 1, 2 and 5 of Article 17 of the Sixth Directive entitled 'Origin and scope of the right to deduct', as amended by Article 28f of Directive 91/680, are worded as follows:

'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 transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country;

…

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.However, Member States may:

(a) authorise the taxable person to determine a proportion for each sector of his business, provided that separate accounts are kept for each sector;

(b) compel the taxable person to determine a proportion for each sector of his business and to keep separate accounts for each sector;

(c) authorise or compel the taxable person to make the deduction on the basis of the use of all or part of the goods and services;

3 — OJ 2006 L 347, p. 1.

4 — See Article 411(1) and Article 413 of Directive 2006/112.

5 — Article 17(2) and (5) and Article 19 of the Sixth Directive thus contain provisions which correspond, *mutatis mutandis*, to Article 168 and Articles 173 to 175 of Directive 2006/112.

(d) authorise or compel the taxable person to make the deduction in accordance with the rule laid down in the first subparagraph, in respect of all goods and services used for all transactions referred to therein;

(e) provide that where the value added tax which is not deductible by the taxable person is insignificant it shall be treated as nil.'

8. Article 19(1) and (2) of the Sixth Directive provides:

'1. 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.

2. By way of derogation from the provisions of paragraph 1, there shall be excluded from the calculation of the deductible proportion, amounts of turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business. Amounts of turnover attributable … to incidental real estate and financial transactions shall also be excluded.'

B – *Italian law*

9. Article 19(5) of decreto del Presidente della Repubblica n. 633 — istituzione e disciplina dell'imposta sul valore aggiunto (Presidential Decree No 633 establishing and regulating value added tax), of 26 October 1972 ('DPR No 633/72') provides:

'As regards taxable persons who engage in both activities giving rise to transactions in respect of which VAT is deductible and activities giving rise to VAT exempt transactions …, only such proportion of the VAT shall be deductible as is attributable to the former transactions and the relevant amount shall be calculated by applying the deductible proportion laid down in Article 19-bis.'

10. Article 19-bis of DPR No 633/72 provides:

'1. The deductible proportion referred to in Article 19(5) shall be calculated based on the ratio between the amount of the transactions in respect of which VAT is deductible, carried out during the year, and the same amount increased by the exempt transactions carried out during the same year. The deductible proportion shall be rounded up or down to the next unit depending on whether the decimal point falls at above or below five tenths.

…

2. For the purpose of calculating the deductible proportion under paragraph 1, no account shall be taken … of the exempt transactions listed in points (1) to (9) [of Article 10 of DPR No 633/72], where they do not form part of the taxable person's main activity or are incidental to his taxable transactions. However, tax relating to the goods and services used exclusively to carry out the latter transactions remains non-deductible.'

III – **Main proceedings, question referred for a preliminary ruling and procedure before the Court**

11. Following a tax inspection, the Agenzia delle Entrate Direzione Provinciale Roma 3 (tax authorities, Rome 3 Regional Directorate, Italy; 'the Agenzia') sent Mercedes Benz a tax notice issued for VAT purposes for the 2004 tax year seeking recovery of EUR 1 755 882 plus penalties and interest due. The recovery demand stated that interest received by Mercedes Benz on loans granted to its subsidiaries in the total amount of EUR 41 878 647 had been wrongly excluded from the calculation of the proportion referred to in Article 19-bis of DPR No 633/72.

12. In its VAT return for the 2004 tax year, Mercedes Benz had classified its financial activities, namely the granting of loans, as incidental to its taxable activities, thereby justifying the exclusion of the interest accrued on those loans from the calculation of the proportion. According to the Agenzia, the grant of those loans was one of Mercedes Benz's main activities: the interest in question accounted for 71.64% of the company's total turnover.

13. Mercedes Benz filed an appeal against the notice of assessment from the Agenzia before the Commissione tributaria provinciale di Roma (Provincial Tax Court, Rome), which was dismissed. The company lodged an appeal against that decision before the referring court.

14. In the main proceedings, Mercedes Benz pleads, first, the incidental nature of its financing transactions and, secondly, the distorting effect of the Italian VAT system to the benefit of the Italian tax authorities, in the light of the application of a 'mathematical' method for calculating the proportion, based on an exclusively formal criterion (the composition of the taxable person's turnover), rather than a 'substantive' method, based on the actual assessment of the share of acquisitions to be used in taxable transactions. Mercedes Benz submitted two expert reports concluding that the costs borne by the company in 2004 for the acquisition of goods and services had a marginal impact on its exempt transactions, namely its financial activities. [6]

15. The parties agree that the method for determining the right to deduct VAT, laid down in Article 19(5) of DPR No 633/72, applies to all goods and services acquired by a mixed taxable person during a tax year.

16. The company argues that the Italian legislature incorrectly transposed Articles 173 to 175 of Directive 2006/112 by providing, under Article 19(5) of DPR No 633/72, that the calculation of the deductible proportion, referred to in Article 19-bis of DPR No 633/72, applies to all goods and services acquired by mixed taxable persons. That method of calculation makes it impossible to ascertain precisely the amount of VAT that can be attributed to transactions in respect of which VAT is deductible. According to the company, the abovementioned articles of the directive make clear that the scope of the proportion is confined to the goods and services which are used by the taxpayer to carry out both transactions in respect of which VAT is deductible and those in respect of which VAT is not deductible.

6 — It is apparent from the decision to refer that one of those reports found that the impact was 0.22%, while the other found that it was equivalent to zero.

17. The Agenzia, for its part, reiterates that the tax reminders sent were lawful, citing the grounds set out in its notice of assessment.

18. The Commissione tributaria regionale di Roma (Regional Tax Court, Rome) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'For the purposes of exercising the right of deduction, are national provisions (in particular Article 19(5) and Article 19-bis of DPR No 633/72) and the practice of the national tax authorities which require that reference be had to the composition of a trader's turnover, including in order to identify so-called incidental transactions, but make no provision for a method of calculation that is based on [both] the composition and the actual destination of the acquisitions and that objectively reflects the actual share of the expenditure attributable to each of the — taxed and untaxed — activities engaged in by the taxpayer incompatible with an interpretation of Articles 168 and Articles 173 to 175 of Directive 2006/112/EC which is guided by the principles of proportionality, effectiveness and neutrality, as set out in Community law?'

19. Written observations were lodged by Mercedes Benz, the Italian Government and the European Commission, all of which attended the hearing on 14 April 2016.

IV – **Legal analysis**

A – *Wording of the question referred*

20. By its request for a preliminary ruling, the referring court asks the Court about the interpretation of Article 19(5) and Article 19-bis of DPR No 633/72 as well as the practice of the national tax authorities in order to determine whether those articles and that practice are consistent with Article 168 and Articles 173 to 175 of Directive 2006/112.

21. It should be noted that, pursuant to Article 267 TFEU, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the treaties and the validity and interpretation of acts of the institutions of the European Union. The jurisdiction of the Court is confined to considering provisions of EU law only. It is for national courts to assess the scope of national provisions and the manner in which they must be applied.[7]

22. Furthermore, as stated in points 5 and 6 of this Opinion, the relevant facts of the main proceedings are covered, *ratione temporis*, not by Directive 2006/112 but by the Sixth Directive.

23. Accordingly, the question referred must be construed as seeking to ascertain whether Article 17(2) and (5) and Article 19 of the Sixth Directive are to be interpreted as precluding national provisions and a practice of the national tax authorities, such as the provisions and practice at issue in the main proceedings, which require taxpayers who carry out both transactions in respect of which VAT is deductible and transactions in respect of which VAT is not deductible to determine the amount of VAT deductible by applying a proportion, established in accordance with Article 19 of that directive, for all goods and services acquired, including those used exclusively to carry out either transactions in respect of which VAT is deductible or transactions in respect of which VAT is not deductible.

7 — Judgment of 1 June 2006, *Innoventif* (C-453/04, EU:C:2006:361, paragraph 29), and order of 25 January 2007, *Koval'ský* (C-302/06, not published, EU:C:2007:64, paragraph 17 and the case-law cited).

B – *Introductory remarks*

24. As a preliminary point, brief reference should be made to the fundamental principles governing the right to deduct VAT.

25. It is apparent from Article 17(2) of the Sixth Directive that a taxable person is entitled to deduct VAT 'in so far as the goods and services are used for the purposes of his taxable transactions'. Determination of the right to deduct is thus based on an attribution of input costs to output transactions. [8]

26. According to settled case-law of the Court, the right to deduct provided for in Article 17 *et seq*. of that directive is a fundamental principle of the common system of VAT, which in principle may not be limited and is exercisable immediately in respect of all the taxes charged on transactions relating to inputs. [9]

27. In the Court's view, that system is designed to relieve the trader entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT consequently ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way. [10]

28. Where goods or services acquired by a taxable person are used for the purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted. [11]

29. The first subparagraph of Article 17(5) of the Sixth Directive provides that, as regards mixed use goods and services, [12] 'only such proportion of the [VAT] shall be deductible as is attributable to [transactions in respect of which VAT is deductible]'. According to the second subparagraph of that provision, the deductible proportion is to be determined in accordance with Article 19 of the Sixth Directive, paragraph 1 of which essentially provides for the calculation of the deductible proportion based on a fraction equivalent to turnover in VAT-deductible transactions divided by total turnover. [13]

30. The calculation of the deductible proportion provided for in Article 19(1) of the Sixth Directive entails an approximation of the amount of VAT attributable to the taxpayer's taxable transactions, since as a general rule it would be difficult if not impossible to ascertain precisely to what extent mixed use goods and services are used to carry out those transactions. [14] That calculation is based on

8 — See, in a similar manner, Opinion of Advocate General Jacobs in *Kretztechnik* (C-465/03, EU:C:2005:111, point 71).

9 — See judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 56 and the case-law cited). For VAT to be deductible, the input transactions must have a direct and immediate link with the output transactions giving rise to a right of deduction and be a component of the cost of those transactions. However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. See judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraphs 23 and 24 and the case-law cited).

10 — See judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 57 and the case-law cited).

11 — See judgment of 18 December 2008, *Royal Bank of Scotland* (C-488/07, EU:C:2008:750, paragraph 16 and the case-law cited).

12 — Mixed use goods and services are often general costs relating to both the taxable transactions and the exempt transactions of the taxable person.

13 — Also see Opinion of Advocate General Jacobs in *Abbey National* (C-408/98, EU:C:2000:207, point 10). Transactions outside the scope of the Sixth Directive which do not therefore give rise to a right to deduct must be excluded from the calculation of the deductible proportion referred to in Articles 17 and 19 of the Sixth Directive. See judgment of 29 April 2004, *EDM* (C-77/01, EU:C:2004:243, paragraph 54 and the case-law cited).

14 — Also see Opinion of Advocate General Cruz Villalón in *BLC Baumarkt* (C-511/10, EU:C:2012:245, point 33), in which the Advocate General observed that the general rule for calculating the proportion laid down in Article 19 of the Sixth Directive, 'enables, in principle, a fair and reasonably accurate calculation of the amount which is ultimately deductible'. In addition, see Opinion of Advocate General Mengozzi in *Wolfgang und Wilfried Rey Grundstücksgemeinschaft GbR* (C-332/14, EU:C:2015:777, point 92).

the assumption that the composition of the mixed use goods and services corresponds to the composition of the taxpayer's turnover. In other words, the general rule for calculating the proportion is based on the premiss that the taxpayer uses mixed use goods and services for his taxable activities and for his exempt activities in proportion to the turnover for each set of activities.

31. Under the third subparagraph of Article 17(5) of the Sixth Directive, Member States may however derogate from the general rule for calculating the proportion laid down in Article 19 of that directive by authorising or compelling the taxable person to determine the deductible amount by applying special proportions, namely one of the other calculation methods listed in points (a) to (e) of that subparagraph.[15]

32. In this case, the Italian Government stated that, by adopting the contested provisions, namely Article 19(5) and Article 19-bis of DPR No 633/72, the Italian legislature exercised the discretion provided for in point (d) of the third subparagraph of Article 17(5) of the Sixth Directive.[16] It seems obvious to me that the provisions in question cannot be justified under the other derogations set out in points (a) to (e) of that subparagraph, which provide for the possibility of determining a separate proportion for each sector of business (points (a) and (b)), applying a deduction on the basis of the actual use made of all or part of the goods and services for a specific activity (point (c)), and not taking account of negligible non-deductible amounts (point (e)).[17] Consequently, in the analysis which follows, I will confine myself to reviewing the derogation laid down in point (d) of the third subparagraph of Article 17(5) of the Sixth Directive.

33. The question which arises is therefore whether that derogation, laid down in point (d) of the third subparagraph of Article 17(5) of the Sixth Directive ('the derogation laid down in point (d)), permits provisions such as those applicable in the main proceedings which require mixed taxable persons to determine the deductible amount by applying a proportion, established in accordance with Article 19 of the Sixth Directive, for all input goods and services acquired regardless of the use to which they are put.

34. This question comprises two parts which I will consider in turn. First, it is necessary to examine the scope of the derogation laid down in point (d) and, in particular, ascertain whether it goes beyond mixed use goods and services, unlike the general rule on the deductible proportion and the other derogations laid down, respectively, in the first and third subparagraphs of Article 17(5) of the Sixth Directive. Secondly, the methods of calculation permitted under the derogation laid down in point (d) must be identified.

15 — The nature of the third subparagraph of Article 17(5) of the Sixth Directive as a derogation is apparent from the introduction to that subparagraph ('However, Member States may'). Member States are not under an obligation to restrict themselves to only one of the methods listed in the third subparagraph of Article 17(5). See judgment of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 38).

16 — Now Article 173(2) of Directive 2006/112. According to the Italian Government, Article 19-bis of DPR No 633/72 essentially reproduces the wording of Article 174 of Directive 2006/112 (ex Article 19 of the Sixth Directive).

17 — See, to that effect, judgment of 18 December 2008, *Royal Bank of Scotland* (C-488/07, EU:C:2008:750, paragraph 19). Incidentally, I note that the meaning of the expression 'exclude the right of deduction in certain circumstances' used by the Court in the paragraph cited above and in paragraph 23 of that judgment is not self-evident. It was nevertheless reproduced in the judgment of 12 September 2013, *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraph 31).

C – *Scope of point (d) of the third subparagraph of Article 17(5) of the Sixth Directive*

1. The different interpretations proposed

35. Point (d) of the third subparagraph of Article 17(5) of the Sixth Directive allows Member States to ‘authorise or compel the taxable person to make the deduction in accordance with the rule laid down in the first subparagraph, in respect of all goods and services used for all transactions referred to therein’.

36. In this case, there are two different proposed interpretations of ‘in respect of all goods and services used for all transactions referred to therein’.

37. The Italian Government and the Commission [18] argue that this expression must be construed as covering all goods and services used either for transactions in respect of which VAT is deductible, or for transactions in respect of which VAT is not deductible. That interpretation means including all goods and services acquired by a mixed taxable person during a tax year within the scope of the derogation laid down in point (d).

38. By contrast, Mercedes Benz contends that this expression must be interpreted as covering only mixed use goods and services acquired by the taxpayer during a given tax year.

39. I admit that the wording of point (d) of the third subparagraph of Article 17(5) of the Sixth Directive is not a paragon of clarity. [19] For the reasons set out below, I nevertheless concur with Mercedes Benz’s preferred interpretation, in so far as the interpretation proposed by the Italian Government and the Commission is, in my view, contrary to the case-law of the Court and incompatible with the aim pursued by the derogations laid down in the third subparagraph of Article 17(5) of the Sixth Directive. [20]

2. Case-law of the Court

40. The general principle of proportion referred to in the first subparagraph of Article 17(5) of the Sixth Directive is clearly confined to mixed use goods and services, as is apparent from the wording of that provision. [21]

18 — It seems to me that the Commission’s position changed during the procedure before the Court. In its written observations, it submitted that the Italian system at issue was clearly contrary to the principle of VAT neutrality, in that it required the taxpayer to apply the proportion method irrespective of the use to which the acquired goods and services were put.

19 — The use of the words ‘referred to therein’ in point (d) of the third subparagraph of Article 17(5) could militate in favour of the Italian Government and the Commission’s preferred interpretation, according to which this term relates to the ‘transactions’ carried out by the taxpayer rather than the ‘goods and services’ acquired by him. In addition, the words ‘all goods and services’ might simply indicate that, in contrast to the derogations laid down in points (a) to (c) of that third subparagraph, the derogation laid down in point (d) does not permit the application of a different proportion for each sector of the taxpayer’s business or for a part of his mixed use goods and services, but does permit the application of a proportion solely for all such goods and services. A comparison of the different language versions of the Sixth Directive does not shed any light on the matter.

20 — I recall that, according to the Court’s settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording and objective but also the context in which it occurs and the objectives pursued by the rules of which it is part. See judgment of 12 June 2014, *Lukoyl Neftohim Burgas* (C-330/13, EU:C:2014:1757, paragraph 59).

21 — Under the first subparagraph of Article 17(5), that principle applies ‘as regards goods and services to be used by a taxable person both for transactions … in respect of which [VAT] is deductible, and for transactions in respect of which [VAT] is not deductible’.

41. The deductible proportion system, established by Article 17(5) of that directive, thus draws a distinction depending on the use of the goods and services, not the nature of the taxable person. Obviously, only mixed taxable persons are affected by the deductible proportion rule, as they are the only taxable persons to purchase mixed use goods and services as provided for in that directive.[22] However, the fact remains that the decisive criterion as regards the application of that article is the nature of the goods and services, not the nature of the taxable person concerned.

42. The Court has also stated that mixed taxable persons are treated in exactly the same way as persons who exclusively engage in taxable or exempt activities,[23] so that they can deduct all of the VAT paid on purchases of goods and services used exclusively in their taxable transactions and cannot deduct any of the VAT paid on purchases of goods and services used exclusively in their exempt transactions.

43. In its judgment in *Portugal Telecom*,[24] the Court expressly ruled on the scope of the derogations laid down in the third subparagraph of Article 17(5) of the Sixth Directive as follows:'39. … Article 17(5) of the Sixth Directive lays down the rules applicable to the right to deduct VAT where the VAT relates to input transactions used by the 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", limiting the right of deduction to that proportion of the VAT which is attributable to the former transactions. It follows from that provision that, where a taxable person uses goods and services in order to carry out both transactions in respect of which VAT is deductible and transactions in respect of which it is not, he may deduct only that proportion of the VAT which is attributable to the former (judgment [of 27 September 2001, *Cibo Participations*, C-16/00, EU:C:2001:495], paragraphs 28 and 34).

40. It follows from that case-law, first, that the deduction system provided for in Article 17(5) of the Sixth Directive only covers cases in which the goods and services are used by a taxable person to carry out both economic transactions which give rise to a right to deduct and those which do not, that is to say, goods and services for mixed use and, second, that Member States may use one of the methods of deduction referred to in the third subparagraph of Article 17(5) only for those goods and services.

41. On the other hand, the goods and services which are used by the taxable person solely to carry out economic transactions giving rise to a right to deduct do not fall within the scope of Article 17(5) of the Sixth Directive, but are covered, as regards the deduction system, by Article 17(2) thereof.'

44. The Court thus drew no distinction between the different derogations laid down in the third subparagraph of Article 17(5) of the Sixth Directive. That approach, which was subsequently confirmed by the case-law of the Court,[25] precludes in my view the interpretation that the derogation laid down in point (d) permits the application of a deductible proportion in respect of all goods and services acquired by a mixed taxable person.

22 — Although the Court held in its judgment of 6 October 2005, *Commission* v *Spain* (C-204/03, EU:C:2005:588, paragraph 25), that Article 17(5) of the Sixth Directive 'only applies to mixed taxable persons', a careful reading of that judgment reveals that this assertion was made in circumstances where the Court found that Article 17(5) did not permit a restriction of the right to deduct of 'fully taxable persons', namely taxable persons who carry out only taxable transactions.

23 — See judgments of 8 June 2000, *Midland Bank* (C-98/98, EU:C:2000:300, paragraph 26); of 22 February 2001, *Abbey National* (C-408/98, EU:C:2001:110, paragraph 38); and of 23 April 2009, *Puffer* (C-460/07, EU:C:2009:254, paragraph 60).

24 — Judgment of 6 September 2012 (C-496/11, EU:C:2012:557, paragraphs 39 to 41).

25 — See judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 26).

45. That finding would be sufficient, in principle, to conclude that Article 17(2) and (5) of the Sixth Directive precludes provisions such as those applicable in the main proceedings which require a large number of taxable persons who engage in mixed activities to determine the deductible amount by applying a proportion in respect of all goods and services acquired by them. In the following section of this Opinion, I will demonstrate that a teleological interpretation of point (d) of the third subparagraph of Article 17(5) of that directive leads to the same conclusion as that reached by the Court in *Portugal Telecom.*[26]

3. Teleological interpretation of point (d) of the third subparagraph of Article 17(5) of the Sixth Directive

46. Given the nature of point (d) of the third subparagraph of Article 17(5) of the Sixth Directive as a derogation, the conclusion resulting from *Portugal Telecom*[27] that this provision does not go beyond mixed use goods and services seems to me to be entirely logical, in so far as the scope of derogations tends not to be broader than the general rule from which they are supposed to derogate.[28]

47. That conclusion is also supported by the aim pursued by the derogations listed in the third subparagraph of Article 17(5) of the Sixth Directive.

48. The *travaux préparatoires relating to the Sixth Directive*[29] *thus show that this third subparagraph is 'aimed at avoiding inequalities in the application of the tax. Such inequalities may work to the detriment or to the advantage of the taxable person, given that the proportion is a fixed amount which may give rise to deductions either greater or smaller than would have resulted on the basis of actual use. In this connection the States may authorise or oblige the taxable person to determine special proportions and to make deductions on the basis of actual use to which all or part of the goods and services are put in the business concerned, where he is able to show such use by means of separate accounts*'.

49. The inequalities to which the *travaux préparatoires* refer arise when the income generated by each of the taxpayer's activities is not proportionate to the incidence of the costs, including VAT, borne in the acquisition of mixed use goods and services. In those circumstances, the general proportion, established in accordance with Article 19 of the Sixth Directive, namely on the basis of turnover, would not give an appropriate indication of the amount of VAT attributable to taxable transactions, in so far as that proportion is based on an incorrect presumption.[30]

50. *By way of example, where a mixed taxable person makes most of his turnover from exempt transactions (for example, financial services or insurance) in respect of which VAT is not deductible, while the mixed use goods and services acquired by him are used mainly in taxable transactions in respect of which VAT is deductible, the deductible proportion, calculated in accordance with Article 19 of the Sixth Directive based on the composition of the taxpayer's turnover, necessarily results in a deductible amount which is lower than that determined on the basis of the actual use to which the goods and services are put.*

26 — Judgment of 6 September 2012 (C-496/11, EU:C:2012:557).

27 — Judgment of 6 September 2012 (C-496/11, EU:C:2012:557).

28 — Close correlations between the derogation laid down in point (d) and the general principle of proportion laid down in the first subparagraph of Article 71(5) of the Sixth Directive are also apparent from the express reference made in the first derogation to 'the rule laid down in the first subparagraph'.

29 — Explanatory memorandum to the original proposal for a Sixth Directive of 29 June 1973, Supplement 11/73 to the *Bulletin of the European Communities*, p. 18. In the proposed wording, the third subparagraph of Article 17(5) contained only three exceptions, corresponding to those appearing in points (a) to (c) of the directive that was adopted. There is nothing to suggest that the objective of the third subparagraph was altered by the additional exceptions set out in points (d) and (e), which were inserted during the legislative procedure.

30 — See point 30 of this Opinion.

51. *On the other hand, where most of the turnover derives from taxable transactions, while the mixed use goods and services acquired are used mainly in exempt transactions, the deductible amount as a result of applying the general proportion is 'too high' compared to the actual use to which those goods and services are put. In both cases, the value of the proportion, determined according to the calculation method provided for in Article 19 of the Sixth Directive, would be distorted, as the composition of the taxpayer's turnover does not correspond to the actual use to which the mixed goods and services are put.* [31]

52. *In order to avoid such inequalities and thus ensure VAT neutrality, the derogations listed in points (a) to (d) of the third subparagraph of Article 17(5) of the Sixth Directive permit Member States to authorise or compel the taxable person to apply one of the other methods of calculation in order to determine the deductible amount.* [32]

53. *Although the general calculation method provided for in Article 19 of the Sixth Directive aims to simplify the determination of the 'proportion of the [VAT] as is attributable to [taxable transactions]' within the meaning of the first subparagraph of Article 17(5) of that directive, the third subparagraph thereof seeks to reduce the inequalities created by that self-same simplification mechanism.* [33] *In keeping with those principles, the Court has held that the purpose of the third subparagraph is to allow Member States to apply other calculation methods in order to achieve greater accuracy* in determining the extent of the right to deduct. [34]

54. *As regards goods and services used exclusively to carry out either taxable transactions or exempt transactions, the deductible amount may be easily and accurately determined without recourse to simplification mechanisms. Consequently, for those goods and services the deductible proportion would be, in all cases, 100% and 0%, respectively. For that reason, the objective of simplification does not apply to such goods and services and thus does not justify any approximation of the deductible amount.*

55. *By contrast, the application to those goods and services of a calculation method based on approximation would be contrary to the principle of VAT neutrality. First, it would deprive mixed taxable persons of their right enshrined in the Sixth Directive to deduct all of the input VAT paid on purchases of goods and services used exclusively for the purpose of taxable transactions. Secondly, it would permit deductions not contemplated by that directive, in that it would be possible to deduct some of the VAT paid on purchases of goods and services used exclusively for exempt transactions.*

56. As the Court has held, derogations from the right to deduct are permitted only in the cases expressly provided for in the Sixth Directive. [35] I seriously doubt that the substantial derogations outlined above, advocated by the Italian Government and the Commission, were intended by the EU legislature.

31 — *To a certain extent, Article 19(2) of the Sixth Directive is capable of minimising those inequalities, by providing that amounts of turnover attributable to some incidental transactions will be excluded from the calculation of the deductible proportion referred to in Article 19(1). See, to that effect, judgment of 29 April 2004, EDM (C-77/01, EU:C:2004:243, paragraph 75). That would not, however, address the inequalities stemming from a high turnover on exempt transactions, as illustrated by the present case.*

32 — See judgment of 18 December 2008, *Royal Bank of Scotland* (C-488/07, EU:C:2008:750, paragraph 19).

33 — I do not share the view of the Italian Government that the derogations laid down in the third subparagraph of Article 17(5) of the Sixth Directive also intend to simplify the determination of the deductible amount. Also see Opinion of Advocate General Cruz Villalón in *BLC Baumarkt* (C-511/10, EU:C:2012:245, point 42).

34 — See judgment of 10 July 2014, *Banco Mais* (C-183/13, EU:C:2014:2056, paragraph 29). Also see judgments of 18 December 2008, *Royal Bank of Scotland* (C-488/07, EU:C:2008:750, paragraph 24), and of 8 November 2012, *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 18).

35 — See judgment of 6 September 2012, *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 35 and the case-law cited).

57. Neither the wording of the Sixth Directive nor its *travaux préparatoires* contain any suggestion of such an intention on the part of the legislature.[36] By contrast, the fact that the derogation laid down in point (d) appears in the third subparagraph of Article 17(5) of the Sixth Directive clearly demonstrates, to my mind, that this is in fact a derogation from the calculation of the general proportion, provided for in the second subparagraph of Article 17(5) and in Article 19 of that directive, and not a derogation from the more general principle, enshrined in Article 17(2), according to which the taxable person is entitled to make deductions from the VAT which he is liable to pay 'in so far as the goods and services are used for the purposes of his taxable transactions'.

58. In contrast to the submissions of the Italian Government, I am of the opinion that the power given to mixed taxable persons under Italian law[37] to separate their activities, so that, by exercising that power, they will be entitled, according to the Italian Government, to deduct all VAT paid on acquisitions relating to their taxable transactions, but will not be able to deduct VAT paid on acquisitions relating to their exempt or non-taxable transactions, has no bearing on the assessment whether that legislation is compatible with the Sixth Directive.

59. That purely discretionary power makes the deduction provided for in the Sixth Directive contingent on a choice made by the taxable person, which is not compatible with the objective of that directive to ensure the extensive harmonisation of VAT rules.[38]

60. Based on the foregoing, I consider that the Court is, in principle, fully able to reply to the question referred by the national court, by finding that Article 17(2) and (5) of the Sixth Directive precludes national provisions which require a mixed taxable person to determine the deductible amount of VAT by applying a proportion, established in accordance with Article 19 of that directive, in respect of all goods and services acquired by him, regardless of the use to which they are put.

61. Nonetheless, so far as this point is relevant and for the sake of completeness, I will make the following comments on the calculation methods which may be imposed by Member States under point (d) of the third subparagraph of Article 17(5) of the Sixth Directive. Those comments also serve to rebut the argument put forward by the Italian Government that my favoured interpretation of the scope of that provision renders it meaningless, in that, if my interpretation were to be accepted, the provision would simply repeat what is in any event laid down in the first subparagraph of Article 17(5).

D – *Calculation methods permitted under point (d) of the third subparagraph of Article 17(5) of the Sixth Directive*

62. Point (d) of the third subparagraph of Article 17(5) of the Sixth Directive provides that the deduction is to be made 'in accordance with the rule laid down in the first subparagraph'.

36 — Indeed, the derogation laid down in point (d) did not appear in the original proposal of the Commission of 29 June 1973 (Proposal for a Sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes. Common system of value added tax: uniform basis of assessment) (COM(73) 950 final) or in the amended proposal of 26 July 1974 (Amendments to the proposal for a Sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes. Common system of value added tax: uniform basis of assessment) (COM(74) 795 final). It was added without explanation before the Council adopted the directive. Article 17(5) of the Sixth Directive is based on the pro rata rule provided for in the third subparagraph of Article 11(2) and in Article 11(3) of the Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ English Special Edition, Series I, Volume 1967, p. 16), which left it to Member States to lay down the criteria for determining the deductible amount.

37 — Article 36(3) of DPR No 633/72. I note that the referring court makes no reference to that national provision which permits the separate application of VAT in relation to some of the taxpayer's activities.

38 — I also note that the possibility under point (a) of the third subparagraph of Article 17(5) of that directive to authorise the application of a different proportion for each sector of the taxpayer's business only covers mixed use goods and services and does not therefore vindicate the Italian rules which cover all goods and services acquired.

63. I admit that this reference to the general principle of proportion in the first subparagraph of Article 17(5) of the Sixth Directive raises difficulties of interpretation, particularly as regards the calculation methods permitted under point (d) of the third subparagraph of Article 17(5) of that directive.

64. However, the case-law of the Court provides two useful points of clarification in that regard.

65. First, although the Sixth Directive does not specifically lay down the calculation methods which may be used by Member States under the derogations appearing in points (a) to (d) of the third subparagraph of Article 17(5) of the Sixth Directive, those derogations permit the application of calculation methods *other* than those provided for in Article 19 of that directive, which is supported by the case-law of the Court.[39]

66. In consequence, contrary to the submissions of the Italian Government and the Commission,[40] the reference in point (d) of the third subparagraph of Article 17(5) of the Sixth Directive to the first subparagraph thereof relates not to the calculation method provided for in the second subparagraph of Article 17(5) and in Article 19 of that directive, but solely to the general principle of proportion, according to which only such proportion of the VAT is deductible as is attributable to transactions giving rise to a right to deduct.[41]

67. Consequently, the derogation laid down in point (d) permits, in my view, the application of proportions other than the 'standard' proportion, established in accordance with Article 19 of the Sixth Directive.[42] Although that derogation gives Member States the freedom to determine a calculation method, it cannot permit provisions, such as those applicable in the main proceedings, which extend the method referred to in Article 19 beyond the scope of the deductible proportion system, namely to cover goods and services used exclusively to carry out taxable or exempt transactions.

68. Secondly, it is apparent from the case-law of the Court that the purpose of the third subparagraph of Article 17(5) of the Sixth Directive is to enable Member States to take into account the specific characteristics of the taxable person's activities in order to achieve greater accuracy in determining the extent of the right to deduct.[43] The case-law also shows that Member States must, in the exercise of the powers conferred on them by that provision, respect the effectiveness of the first subparagraph of Article 17(5) of the Sixth Directive and the principles which underlie the common system of VAT, in particular those of fiscal neutrality and proportionality.[44]

39 — See judgments of 18 December 2008, *Royal Bank of Scotland* (C-488/07, EU:C:2008:750, paragraph 19); and of 8 November 2012, *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 15); as well as order of 13 December 2012, *Debiasi* (C-560/11, not published, EU:C:2012:802, paragraph 39).

40 — In that connection, the Commission relies on the judgment of 8 November 2012, *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 20). I accept that this judgment may lead to confusion as to the calculation method that can be applied under point (d) of the third subparagraph of Article 17(5) of the Sixth Directive, in so far as the Court seems to draw a distinction between the derogation laid down in point (d) and the other derogations set out in that same subparagraph. Although that distinction was reproduced in the judgment of 12 September 2013, *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraph 51), it does not, however, appear in earlier case-law (see judgment of 18 December 2008, *Royal Bank of Scotland*, C-488/07, EU:C:2008:750, paragraph 21), or in the most recent case-law (see judgment of 10 July 2014, *Banco Mais*, C-183/13, EU:C:2014:2056, paragraph 25).

41 — This distinction between the *principle of proportion* and the *rule for calculating the proportion* is more obvious in Directive 2006/112, which repealed and replaced the Sixth Directive with effect from 1 January 2007. Article 173(2)(d) of that directive thus specifically refers to the 'rule laid down in the first subparagraph of paragraph 1', corresponding to the first subparagraph of Article 17(5) of the Sixth Directive and not to paragraph 1 as a whole, which would have also included the rule for calculating the proportion.

42 — See, to that effect, Opinion of Advocate General Cruz Villalón in *BLC Baumarkt* (C-511/10, EU:C:2012:245, point 29), in which the Advocate General observed that the derogation laid down in point (d) entails 'the possibility of other deductible proportions'. Also see Opinion of Advocate General Cruz Villalón in *Le Crédit Lyonnais* (C-388/11, EU:C:2013:120, point 59).

43 — See point 53 and footnote 34 of this Opinion.

44 — See judgment of 8 November 2012, *BLC Baumarkt* (C-511/10, EU:C:2012:689, paragraph 16). Also see judgments of 12 September 2013, *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraph 52), and of 10 July 2014, *Banco Mais* (C-183/13, EU:C:2014:2056, paragraph 27).

69. Provisions such as those described by the referring court do not satisfy any of the requirements set by the Court. Thus, by requiring mixed taxable persons to determine the deductible amount by applying an approximate proportion,[45] established in accordance with Article 19 of the Sixth Directive, in respect of all goods and services acquired by them, that is to say on a broader basis than that provided for in the Sixth Directive, such provisions necessarily lead to less accurate results than those deriving from the application of the 'standard' proportion.[46] In addition, the method referred to in those provisions produces, as illustrated above,[47] results which are incompatible with the principle of VAT neutrality.

70. To conclude, the examination of the calculation methods permitted under point (d) of the third subparagraph of Article 17(5) of the Sixth Directive also leads to the conclusion that provisions such as those at issue in the main proceedings are not compatible with the Sixth Directive.

V – **Conclusion**

71. In the light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Commissione tributaria regionale di Roma (Regional Tax Court, Rome, Italy) as follows:

Article 17(2) and (5) and Article 19 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 91/680/EEC of 16 December 1991, must be interpreted as precluding national provisions and a practice of the national tax authorities, such as the provisions and practice at issue in the main proceedings, which require taxpayers who carry out both transactions in respect of which VAT is deductible and transactions in respect of which VAT is not deductible to determine the amount of VAT deductible by applying a proportion, established in accordance with Article 19 of that directive, in respect of all goods and services acquired, including those used exclusively to carry out either transactions in respect of which VAT is deductible or transactions in respect of which VAT is not deductible.

45 — See point 30 of this Opinion.

46 — I cannot endorse the Commission's argument that the derogation laid down in point (d) permits such provisions, since they merely represent a derogation and would lead to more accurate results than the 'standard' proportion laid down in the first subparagraph of Article 17(5) of the Sixth Directive. In my view, such provisions are bound to lead to less accurate results and for that reason are contrary to the objective of fiscal neutrality pursued by the derogations laid down in the third subparagraph of Article 17(5) of that directive.

47 — See points 54 and 55 of this Opinion.