OPINION OF ADVOCATE GENERAL LÉGER

delivered on 19 September 2002 [1]

1. By this reference for a preliminary ruling, the Court of Justice is prompted to interpret Articles 5 and 2(1) 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. [2]

2. The main action has been brought by Auto Lease Holland BV, [3] a leasing company with its registered office in the Netherlands, against the German tax authority. It concerns the authority's refusal to grant Auto Lease a refund of the VAT paid in Germany when its clients — lessees who have entered into a fuel management agreement with the company — fill up leased motor vehicles.

1 — Original language: French.

2 — OJ 1977 L 145, p. 1 (hereinafter 'the Sixth VAT Directive').

3 — Hereinafter 'Auto Lease'.

I — Legal framework

3. Article 2 of the Sixth VAT Directive defines the scope of VAT. Article 2(1) provides:

'The following shall be subject to value added tax:

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

4. The terms 'supply of goods' and 'supply of services' to which Article 2 refers are defined in Articles 5 and 6 of the Sixth VAT Directive. Article 5(1) provides that '"[s]upply of goods" shall mean the transfer of the right to dispose of tangible property as owner'. Under Article 6(1), '"[s]upply of services" shall mean any transaction which does not constitute a

supply of goods within the meaning of Article 5'.

5. Articles 8 and 9 of the Sixth VAT Directive concern the place of taxable transactions. Article 8(1)(b), which deals with the supply of goods, provides that, in the case of goods not dispatched or transported, the place of supply of goods is to be deemed to be the place where the goods are when the supply takes place.

6. Article 9(1) provides:

'The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied...'.

7. Under Article 11(A)(1)(a) of the Sixth VAT Directive, the taxable amount in respect of supplies of goods or services within the territory of the country is to be 'everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies...'.

8. Article 17 of the Sixth VAT Directive concerns the right to deduct, the keystone of the VAT system. It provides:

'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;

...

3. Member States shall also grant to every taxable person the right to a deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

(a) transactions relating to the economic activities as referred to in Article 4(2) carried out in another country, which

would be eligible for deduction of tax if they had occurred in the territory of the country;

...'

9. The arrangements for the refunds provided for in Article 17(3) are established by Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country.[4] Under that Directive, any taxable person established in a Member State who has paid VAT in respect of services or goods supplied to him in the territory of another Member State may apply to the second State for the refund of that VAT provided, in particular, that he has not supplied any goods or services deemed to be supplied in the territory of that Member State.[5]

II — Facts and main proceedings

10. Auto Lease is a leasing company which makes motor vehicles available to its clients. It also offers the lessee the option of entering into a 'fuel management agreement' with it. Under that agreement, the lessee receives from Auto Lease a so-called 'ALH-Pass' as well as a fuel credit card issued by the German credit card company DKV. That card names Auto Lease as a customer of DKV. It allows the lessee to fill up the leased motor vehicle with fuel and from time to time to purchase oil products individually 'in the name and at the expense of Auto Lease'. DKV regularly submits its account to Auto Lease. Each month, the lessee pays Auto Lease one twelfth of the likely annual petrol costs; at the year end, the account is then settled according to actual consumption. He also pays Auto Lease a charge in respect of fuel management.[6]

11. It is apparent from the order for reference that Auto Lease pays tax in the Netherlands on the entirety of the leasing supplies 'including the fuel costs'.[7]

12. In so far as the fuel costs are based on supplies by German undertakings, Auto Lease applied for a refund of the VAT levied by the German authorities on the supplies of fuel effected during the years 1989 to 1993.

4 — OJ 1979 L 331, p. 11 (hereinafter 'the Eighth VAT Directive').

5 — Articles 2 and 3 of the Eighth VAT Directive. See also Articles 1 and 4.

6 — Order for reference, p. 3.

7 — Page 3.

13. The German tax authority, the Bundesamt für Finanzen, initially granted the application in respect of the years 1989 to 1991, but then amended the refund decisions by setting the refund at DEM 0 and demanding repayment of the amounts previously refunded. It rejected from the outset the refund applications in respect of the years 1992 and 1993.

14. The administrative objections lodged by Auto Lease against those decisions were dismissed. At first instance, the Finanzgericht (Finance Court) (Germany) held that the oil companies had not supplied any fuel to Auto Lease and that, therefore, Auto Lease could not claim a VAT refund. The court therefore dismissed the application.

15. Auto Lease appealed on a point of law ('Revision') against that judgment to the Bundesfinanzhof (Federal Finance Court), Germany.

III — The question referred for a preliminary ruling

16. It was against that background that, by order of 22 February 2001, the Bundesfinanzhof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Where a lessee fills up a leased car in the name and at the expense of the lessor at filling stations, is there a supply of fuel by the lessor to the lessee and must tax be paid on this supply at the place of supply within the meaning of Article 8(1)(b) of [the Sixth VAT Directive] or is the "onward supply" included in the lessor's supply of a service that is taxable under Article 9 of [the Sixth VAT Directive]?'

IV — Purpose of the question referred for a preliminary ruling

17. By its question, the national court seeks to ascertain whether the lessor (Auto Lease) may obtain a refund of the VAT relating to the fuel purchased in Germany by lessees in order to fill up their leased vehicles.

18. It is clear from the grounds of the order for reference, [8] that the Bundesfinanzhof's reference raises two questions.

8 — Pages 9 and 11.

19. The first question relates to the interpretation of Article 5 of the Sixth VAT Directive. It seeks to ascertain whether, in the circumstances of this case, there is a supply of fuel by the lessor to the lessee where the lessee fills up the leased car at filling stations. However, that question raises the issue whether there was previously a supply of fuel by the oil companies to Auto Lease or whether they supplied it directly to the lessee. If the oil companies supplied the fuel directly to the lessee and not to Auto Lease, the question of how to classify the onward supply allegedly then effected by Auto Lease to the lessee does not arise.

20. The second question arises only in the event that the oil companies supplied the fuel to Auto Lease. In that case, it needs to be established whether the onward supply by Auto Lease to the lessee is an independent supply, taxable in the place where the fuel was when it was supplied (Germany), or whether it forms part of the leasing service, taxable in the place where the lessor has established its business (Netherlands). The purpose of the question is therefore to obtain details of the criteria for determining whether this is a single supply or two independent supplies.

21. The position is as follows. If the Court finds that the oil companies supplied the fuel to Auto Lease and that the onward supply to the lessee forms part of the leasing service, Auto Lease would be entitled to the VAT refund. In that case, it would fall within the scope of the Eighth VAT Directive since it would have paid the VAT on the goods supplied to it in Germany and would not carry out any supply of goods or services in that country. It would be in the position of any taxable person established in one Member State (Netherlands), who has paid VAT in respect of goods supplied to him in another Member State (Germany), and who has supplied no goods or services in the territory of the Member State (Germany) to which he applies for a refund of that VAT.

22. On the other hand, if the Court finds that the onward supply to the lessee constitutes an independent supply, taxable in Germany, Auto Lease would not be entitled to the VAT refund. In that case, the conditions laid down in the Eighth VAT Directive for conferring entitlement to a refund would not be fulfilled. In particular, Auto Lease would have carried out a taxable transaction in the territory of the country in which it paid the VAT and would therefore have to follow the normal procedure for deducting VAT in Germany.

23. I shall consider in turn the two questions identified above.

V — Reply to the questions referred for a preliminary ruling

The first question

24. The first question seeks to interpret the term 'supply of goods' contained in Article 5 of the Sixth VAT Directive. The national court asks who, the lessor or the lessee, should be regarded as having received the supply of fuel effected by the oil companies in a case, like the present one, in which the lessee fills up the leased car 'in the name and at the expense of' the lessor.

25. The national court considers that, in the present case, the goods are supplied to the lessor. This solution stems from the fact that the credit card used by the lessee is in the name of the leasing company, Auto Lease, and that it is apparent from the content of the card that he is purchasing the fuel 'in the name and at the expense of' that company. The Commission of the European Communities and the German Government take the opposite view. They consider that the goods are supplied to the person to whom it is physically delivered (namely the lessee), *a fortiori* because it is he who will in the end pay the whole price, including the VAT, even if it was initially paid by the leasing company.

26. It should be pointed out that Article 5 of the Sixth VAT Directive defines supply of goods as 'the transfer of the right to dispose of tangible property as owner'. When considering the question whether 'supply of goods' requires the transfer of legal ownership of the goods concerned, the Court replied, in its judgment in *Shipping and Forwarding Enterprise Safe*,[9] that the term covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner. It is clear from that judgment that 'supply of goods' has a meaning which is more economic[10] than legal. It relates more to the opportunity for the person in receipt of the supply to make use of the goods than to the transfer of actual ownership within the meaning of the civil law of the Member States. As the Court held, only an economic definition of the

9 — Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 7.

10 — González Sánchez, M., 'La entrega de bienes en el IVA', *Noticias C.E.E.*, 1990, No 57/68, pp. 45 and 47; Herrero de la Escosura, P., *El IVA en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas*, ed. Universidad de Oviedo — Marcial Pons, 1996, Oviedo — Madrid, pp. 58 to 70; Pérez Herrero, L.M., 'La sexta directiva comunitaria del IVA', *Derecho financiero y tributario*, Cedecs, Barcelona, 1997, and Terra, B.J.M., and Wattel, P., *European Tax Law*, ed. Kluwer, 1994, Deventer. In 'Harmonisation de fiscalités', *Jurisclasseur Europe*, fasc. 1630, p. 17, Berlin, D., considers, more specifically, that 'supply' should be regarded as a Community concept and, therefore, as independent of the definitions contained in national laws.

term is compatible with the objectives of the Sixth VAT Directive, since:

'This view is in accordance with the purpose of the directive, which is designed inter alia to base the common system of VAT on a uniform definition of taxable transactions. This objective might be jeopardised if the preconditions for a supply of goods — which is one of the three taxable transactions — varied from one Member State to another, as do the conditions governing the transfer of ownership under civil law.' [11]

27. In the present case, it is therefore necessary to determine to whom, the lessor or the lessee, the oil companies in fact transferred the right actually to dispose of the fuel. In that regard, it seems to me that the power was definitely acquired by the lessee without Auto Lease intervening in any way. In a situation in which, as in this case, the goods are physically delivered into the hands of the lessee who uses them as he thinks fit, it seems contrary to the economic logic of the Sixth VAT Directive to claim that the leasing company had the power, even momentarily, to dispose of the fuel and that it could have transferred that power to the lessee. The lessee purchases the fuel directly from petrol stations and at no time does Auto Lease have the power to decide how the fuel should be used or for what purposes.

11 — Judgment in *Shipping and Forwarding Enterprise Safe*, cited above, paragraph 8.

28. Furthermore, the argument that the fuel is supplied to the lessor because it advances the price cannot be accepted. First, it would mean that the fuel was supplied not to the leasing company, but to the German credit card company which first pays the oil companies for it and then settles its account with Auto Lease just as Auto Lease does with the lessees. Second, that argument would lead to the conclusion, which is surprising to say the least, that each time a person purchases goods using the financing offered by the vendor or a third party, those goods are not supplied to him directly, within the meaning of the Sixth VAT Directive, but are supplied directly to the supplier of the financing service who, after obtaining the goods, transfers them back to the purchaser.

29. The clause in the credit agreement under which the lessee purchases the fuel 'in the name and at the expense of' the lessor does not rebut that conclusion. At the very most, the effect of the clause would be to attribute ownership of the fuel to the lessor. However, we have already seen that legal ownership is not a conclusive factor in the definition of 'supply of goods' within

the meaning of Article 5 of the Sixth VAT Directive.

30. Similarly, the fuel management agreement cannot invalidate my assessment. As the Commission and the German Government have pointed out, that agreement is not a contract for the supply of fuel but is rather a contract to finance the purchase of fuel. The lessor does not purchase the fuel and then sell it on to the lessee; the lessee purchases the fuel, freely choosing the quality and quantity and the time of purchase. He merely uses the payment facilities offered by the leasing company. The company acts like any finance or credit institution and its role should not be distinguished from that played by the credit card company, which nobody claims was in receipt of fuel. Under that agreement, the leasing company merely refunds to the credit card company the price, including VAT, which it pays to the oil companies. Furthermore, in order to make those payments, it is not necessarily required to advance the corresponding funds, since each month it receives part of the likely annual costs from the lessees. If consumption is lower than estimated, the leasing company will simply refund the credit card company with the money paid to it by the lessees.

31. Contrary to what the national court appears to state, nor does the *Intiem* judgment [12] invalidate my assessment. In that case, the Court had been asked whether an employer could deduct the VAT on fuel which had not been supplied to him personally, but to his employees. The Court, in the light of the circumstances of the case and, in particular, of the fact that the fuel had been used by the employees exclusively for the purposes of the employer's business, had held that the employer was entitled to deduct the VAT. The national court refers to that judgment and appears to infer that it provides a basis for the view that the oil companies supplied the fuel to Auto Lease and not to the lessees. However, I consider that the line of argument followed by the Court in *Intiem* is not capable of being applied directly to this case. In *Intiem*, the question whether the supply had been made to the employer or the employees had already been settled by the national court before it referred to the Court the question whether it was possible to deduct the VAT. Indeed, it is apparent from *Intiem* that that question had been the subject of discussion during the proceedings before the national courts and that they had rejected the argument that the fuel had been supplied to the employer. Thus, paragraph 6 of the judgment states:

'The Hoge Raad rejected the appellant's complaint that the Gerechtshof had erred in

12 — Case 165/86 *Intiem* [1988] ECR 1471.

finding that the petrol is supplied directly to the appellant's employees but then raised the question *whether the fact that the petrol is*, according to that finding, *directly supplied to the... employees* precludes the deduction by the employer of the value-added tax payable on that petrol.' [13]

32. The Court itself summarised in the following terms the question referred to it:

'[T]he question raised by this case is whether that rule precludes the deduction of value-added tax where goods are purchased by a taxable person and, *after being supplied to his employees*, are used for the undertaking's business purposes.' [14]

33. It follows that, in *Intiem*, the Court did not have to give a ruling on the question raised in the present case. Nor did it express reservations regarding the premiss on which the question referred for a preliminary ruling was based, namely, that the fuel had been supplied to the employees. I consider, therefore, that the judgment is not relevant to a reply to the question referred and does not support the view that Auto Lease received the supply of fuel.

34. On the basis of the foregoing considerations, I therefore propose that the Court reply that Article 5 of the Sixth VAT Directive is to be interpreted as meaning that there is not a supply of fuel by the lessor to the lessee where the lessee fills up the leased car at filling stations in circumstances such as those of the present case.

The second question

35. In view of the reply I suggest should be given to the first question referred for a preliminary ruling, the second question becomes devoid of purpose.

13 — Emphasis added.

14 — *Ibidem*, paragraph 12. Emphasis added.

Conclusion

36. I therefore propose that the Court give the following reply to the questions referred by the Bundesfinanzhof:

Article 5 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, is to be interpreted as meaning that there is not a supply of fuel by the lessor to the lessee where the lessee fills up the leased car at filling stations in circumstances such as those of the present case.