

OPINION OF MR ADVOCATE GENERAL LENZ

delivered on 14 June 1988 *

*Mr President,
Members of the Court,*

A — Facts

1. The case which occupies us today concerns once again the interpretation of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment,¹ which has been the subject of many decisions of the Court.

2. The provision which concerns us in this case is Article 13 B (d) (1) of the directive which provides that Member States shall exempt from tax 'the granting and the negotiation of credit and the management of credit by the person granting it'. Article 1 provides that the Member States are to ensure that the necessary harmonization provisions should enter into force by 1 January 1978 at the latest. The Ninth Council Directive of 26 June 1978² extended that time-limit *inter alia* for Germany until 1 January 1979.

3. In fact, as is known from other cases, it was not until the adoption of the Law of 26

November 1979, which had effect from 1 January 1980, that the directive was implemented in the Federal Republic of Germany, so that credit negotiators were exempt from tax only from 1 January 1980 (which was not provided for in the Turnover Tax Law in the version adopted on 16 November 1973).

4. In its judgment of 19 January 1982 in Case 8/81³ the Court held in response to a question for a preliminary ruling from the Finanzgericht Münster that as from 1 January 1979 a credit negotiator could rely on Article 13 B (d) (1) of the Sixth Directive if he had not passed the tax on to the persons following him in the chain of supply. That was confirmed once again in the judgment in Case 255/81⁴ of 10 June 1982 in response to a question from the Finanzgericht Hamburg.

5. Referring to the fact that the Ninth Directive was not retroactive the Court held in its judgment in Case 70/83 of 22 February 1984⁵ that, in the absence of the implementation of Directive 77/388/EEC, a credit negotiator could rely on Article 13 B (d) (1) thereof in relation to transactions

* Translated from the German.

1 — Official Journal 1977, L 145, p. 1.

2 — Official Journal 1978, L 194, p. 16.

3 — *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

4 — *R. A. Grendel GmbH v Finanzamt für Körperschaften in Hamburg* [1982] ECR 2301.

5 — *Gerda Kloppenburg v Finanzamt Leer* [1984] ECR 1075.

carried out between 1 January and 30 June 1978 if he had not passed the tax on to the persons following him in the chain of supply.

and following an amendment of the tax notice in April 1985 requiring commission from credit negotiation to be taxed once again.

6. The plaintiff in the main proceedings acts *inter alia* as credit negotiator and receives commissions from the banks for which he acts; the credit notes he receives in respect of the commissions do not mention turnover tax separately. The commissions related to 1978 and 1979 were, according to his tax returns made in June and December 1980, included in his taxable turnover.

10. Further court proceedings were commenced in relation to the tax assessment for 1978 after the plaintiff's application in December 1984 for an amendment of the tax assessment was rejected in March 1985.

7. When the plaintiff became aware of the decisions of the Court mentioned above, he requested an appropriate amendment of his tax assessment.

11. So far the plaintiff has not paid any value-added tax on the turnover in question. In the court proceedings, which were joined, the plaintiff based his view that he should have been exempt from VAT on the aforementioned decisions of this court. He also argued that only an *overt* passing on of tax gave rise to tax liability and denied that the tax had been passed on covertly.

8. When his request, made in April 1982, for an amendment of the assessment for the year 1979 was rejected, court proceedings ensued. These were settled at first because, by a notice of amendment of 11 July 1983, the Finanzverwaltung exempted from tax the plaintiff's turnover in respect of credit negotiation.

12. The defendant Finanzverwaltung at first took the view that the plaintiff could not be exempt from tax in 1978 and 1979 because there was no provision for exemption in German turnover tax law at that time; it thus followed the case-law of the Bundesfinanzhof⁶ and argued that no regard was to be had to the exemption provisions contained in the Sixth Directive before they were implemented in national law. In addition, the finance administration relies on a letter from the Bundesminister der Finanzen (Federal Finance Minister) of 27 June 1983 relating to the issue in the main proceedings. According to that letter, *covert*

9. Further court proceedings ensued, however, after a review of the case which was undertaken in order to determine whether turnover tax had been passed on covertly and which found that to be the case

6 — See the judgment of 25 April 1985 VR 123/84, *Bundesfinanzhof Entscheidungen* 143, 383 = *Betriebs-Berater* 1985, p. 1317.

passing on is passing on within the meaning of the case-law of this Court; as proof that there has been no such passing on, it must be shown that undertakings which were engaged in credit negotiation in 1978 have correspondingly reduced their commission in 1979 (in the case of commissions due in 1979 as in 1978 it therefore had to be assumed that passing on had occurred because in the second half of 1978 turnover tax was due on credit negotiations in any case).

(77/388/EEC) on turnover tax concerning the exemption from turnover tax of transactions consisting of the negotiation of credit be relied upon, in the absence of the implementation of that directive, by a credit negotiator if he did not pass that tax on to the persons receiving his services?

2. If Question 1 is answered in the affirmative, must the credit negotiator pay turnover tax if he 'covertly' passed on the tax, or only if he 'overtly' passed it on?

13. In view of those arguments the national court believed it could identify points of Community law regarding, first, the direct applicability of the directive and, secondly, the questions whether covert passing on gives rise to tax liability under the case-law of the Court and when covert passing on must be assumed to have occurred. Accordingly, by order of 15 June 1987, it stayed the proceedings and referred the following questions to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

3. If turnover tax is also payable where the tax is passed on covertly, is it sufficient, for there to have been a covert passing on of turnover tax, that the credit negotiator, in agreeing his commission, expected that out of it he would have to pay turnover tax?

B — Opinion

1. In relation to transactions carried out between 1 January and 30 June 1978 and transactions carried out in 1979, may the provision contained in Article 13 B (d) (1) of the Sixth Directive

In view of all we have heard and read, my opinion is as follows.

1. *The first question*

14. As I have already explained, this question arose from the case-law of the Bundesfinanzhof cited by the Finance Administration. The Bundesfinanzhof, not wishing to follow the interpretation of the Sixth VAT Directive given by this Court, ruled that it was not possible to rely on the exemption provision contained in Article 13 before the directive was transposed into national law. Consequently, the Finanzgericht considered that the first question had not been settled.

15. In its observations on the reference for a preliminary ruling the Finance Administration explained to the Court that it no longer relied upon the view of the Bundesfinanzhof. This was clearly because the said judgments of the Bundesfinanzhof were quashed by the Bundesverfassungsgericht (Federal Constitutional Court) in April and November 1987.⁷

16. According to those decisions of the Bundesverfassungsgericht and because no new points of view which could lead to any different assessment have emerged, reference may now simply be made to the case-law on the VAT directive. Without further argument the first question from the Finanzgericht Rheinland Pfalz may be answered to the effect that, in the absence of the implementation of the Sixth VAT directive, a credit negotiator may rely, in respect of transactions carried out between

1 January and 30 June 1978 and transactions carried out in 1979, on the provision contained in Article 13 B (d) (1) of that directive concerning the exemption from turnover tax of transactions consisting of the negotiation of credit if he did not pass that tax on to the persons receiving his services.

2. *The second question*

17. This question seeks clarification of the phrase 'where he had refrained from *passing* that tax on to persons following him in the chain of supply' appearing in the judgments⁸ mentioned at the beginning of this Opinion, and, more precisely, of the point whether only *overt* or also *covert* passing on is to be taken into account.

18. We have been told that to some extent the Finanzgerichte (Finance Courts) refuse to look at covert passing on because the view recommended by the Federal Finance Ministry is regarded as unpractical.⁹ According to the aforementioned letter from the Federal Finance Minister of 27 June 1983 (the principles of which, according to an order of the Oberste Finanzbehörden (principal revenue authorities) of the *Bund* and the *Länder* of April 1984, are also to apply to the first half of 1978), covert passing on may indeed be taken into account. Covert passing on may be assumed to exist if it is not shown that in the case of undertakings which engaged in

⁷ — Decision of the Bundesverfassungsgericht of 8 April 1987 (75/223), *Europarecht* 1987, p. 333. Decision of the Bundesverfassungsgericht of 4 November 1987 (EuGRZ 88/120).

⁸ — See footnote 4.

⁹ — See, for example, the judgment of the Finanzgericht Münster of 31 August 1983, an extract of which is included in the documents submitted to the Court by the Finanzgericht which has made this reference.

taxable credit negotiations in 1978 the commission was reduced in 1979 by the amount of tax due in respect of 1978 or if, in relation to 1978 in which tax exemption was possible only in respect of the first six months, it is not shown that in the first half of 1978 the amount of commission due was less than in the second half.

19. (a) As far as this problem is concerned, it may be said at once that the judgment in Case 15/81,¹⁰ cited in the letter from the Federal Finance Ministry and in the observations of the Finance Administration, does not help to resolve it.

20. As the Court will be aware, that judgment related to the question whether on the importation of goods sold in the country of export by a person not liable to tax the full value-added tax chargeable in the country of importation might be levied or whether Article 95 of the EEC Treaty (which prohibits imported goods from being subject to greater charges than domestic goods) required that regard should be had to the value-added tax paid abroad and not subject to refund. If this means that

imported goods could still be burdened with some of the value-added tax charged in the country of exportation and that the value-added tax due on importation must therefore be reduced by the residual amount of value-added tax paid in the country of exportation (which is still contained in the value of the goods at the time of their importation),¹¹ it may well be inferred that covert passing on of value-added tax is relevant for the purposes of Article 95 (in so far as the sale of goods by persons not liable to tax is concerned). However, this does not help to resolve the quite different problem of the passing on of value-added tax in connection with a contract for services by someone who, on his own admission, is liable to tax and does not explain what effect it should have where reliance is placed on the exemption from tax contained in the Sixth VAT Directive which was not implemented in good time.

21. (b) If regard is had only to the clause 'where he had refrained from passing that tax on to persons following him in the chain of supply' contained in the operative part of the judgments referred to at the beginning of this Opinion, it might seem that the Court had made unjustified enrichment part of Community law. This point has been addressed in other judgments in which the Court had to rule on the problem of the refund of national charges levied contrary to Community law with regard to the nature of certain rights of the Member States, which, as is well known, are very relevant here.

10 — Case 15/81 *Gaston Schul Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen Roosendaal* [1982] ECR 1409.

11 — Paragraph 34.

22. The judgment in Case 68/79¹² concerned the Danish legal system, according to which such refunds are made under the law on unjustified enrichment and account is taken of the fact that charges are incorporated in the price of goods and may be passed on down the line of trade. The Court stated that the protection of rights guaranteed in the matter by Community law did not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled. There was nothing therefore, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it had been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers.¹³

23. A similar conclusion was reached in the judgment in Case 199/82.¹⁴ That case concerned Italian law which likewise does not allow charges levied unlawfully to be refunded if this would lead to unjust enrichment of those entitled. In paragraph 13 the Court also stated there was nothing in Community law to prevent courts from taking account, under their national law, of the fact that the unduly levied charges had been incorporated in the price of the goods and thus passed on to purchasers. Thus national legislative provisions which prevented the reimbursement of taxes levied in breach of Community law could not be regarded as contrary to Community law where it was established that the person

required to pay such charges had actually passed them on to other persons.

24. An examination of the grounds of the judgments I cited at the beginning of the Opinion (in particular the judgment in Case 8/81) clearly shows, however, that the reservation now requiring interpretation is not to be understood in the sense of the observations made in the judgments in Cases 68/79 and 199/82; it in no way means the generalization of a legal concept known to several legal systems and its incorporation into tax law (so that it is unnecessary to consider any possible objections to such generalization and incorporation). The said reservation arose from considerations relating solely to tax law and based on the scheme of the VAT directive as a reaction to the objections which were made at the time by the defendant Finance Administration and the Federal Government to the possibility that the tax exemption provision in Article 13 of the VAT directive might be relied upon.

25. It will be recalled that in the discussion of the question whether individuals might derive rights from the VAT directive it was objected that this possibility could not be accepted (because directives cannot impose *obligations* on individuals directly) in so far as the legal position of other individuals was affected; if, however, the exemption provision were relied upon *a posteriori*, persons receiving the services of the credit negotiator would be affected in that way because their deductions of input tax would be affected. It seems to me that this question was dealt with in paragraph 44 of the

12 — Judgment of 27 February 1980 in Case 68/79 *Hans Just I/S v Danish Ministry of Fiscal Affairs* [1980] ECR 501.

13 — See paragraph 26 of the judgment.

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

judgment where it was stated that by availing themselves of exemption persons entitled thereto necessarily waived the right to claim a deduction in respect of input and, having been exempted from the tax, they were unable to pass on any charge whatsoever to the persons following them in the chain of supply, with the result that the *rights of third parties* could not be affected. Paragraph 46 of the judgment is also relevant; there it is stated that the Finanzamt's objection that exemptions claimed *a posteriori* under the directive by taxpayers would cause disruption was not relevant to the case of a taxpayer who had claimed the benefit of the exemptions when he submitted his tax return and who had consequently refrained from invoicing the tax to the recipients of his services, with the result that *third parties* were not affected.

26. From that it may be inferred that, where it is a question of passing on of the tax, *overt* passing on was meant since deductions of input tax are possible by persons receiving the supplies only if the tax is shown separately in the invoice (to which express reference is made in paragraph 46). The Commission also takes the view that the reservation should be understood only in that sense. In this regard it cites the requirements of clarity and the need to adhere strictly to the system introduced by the directive and in particular to Article 22 thereof (which provides that the invoice must state clearly the price exclusive of tax and the corresponding tax at each rate).

27. One could be tempted to go a step further and, again from considerations of revenue law (which admittedly do not appear in the said judgment), arrive at a definition of passing on which also includes so-called *covert* passing on. It is not difficult to think of such considerations and they are clearly apparent in the decision of the defendant Finanzamt (which is among the documents produced).

28. The main underlying premiss of those considerations is the assumption that a right may be exercised only if the aim thereby pursued may actually be achieved, which means that the exercise of the right is correspondingly limited. It would also have to be assumed that the aim of the tax exemption laid down in Article 13 of the VAT directive was not to relieve the taxable person but the end consumer who normally bears the burden of value-added tax. That aim can no longer be achieved where the tax exemption is claimed *a posteriori*, that is to say where the amount of tax (liability for which was presumed when the tax return was lodged) has in the mean time already been passed on to the person receiving the supply and further passed on by him to his credit customer and there is no practical possibility of recovery. However, given that consideration and the fact that normally there is no overt passing on to the end consumer or to persons following in the chain of supply who, like banks, cannot claim any deductions of input tax, one might well accept that it would be logical to

include covert passing on in a proper interpretation of the reservation expressed in the case-law, for only in that way would it be ensured that the exemption provision in the directive is not relied upon where the aim of exemption can no longer be achieved.

(b) ...

(c) ...

(d) the following transactions:

29. However, the question arises whether that interpretation is in accord with the intention of the Community legislature as expressed in the directive. The reason for the tax exemption in the directive was stated to be that a common list of exemptions should be drawn up so that the Community's own resources might be collected in a uniform manner in all the Member States.¹⁵ The exempting provision itself is worded as follows:

'Title X

Exemptions

Article 13

Exemptions within the territory of the country

A. ...

B. Other exemptions

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

'(a) ...

1. The granting and the negotiation of credit ...'

30. It seems to me that the legislature's intention, expressed in that provision, to exempt the negotiation of credit from turnover tax is best achieved if such turnover is not subject to tax. Although that sounds self-evident, it needs to be said in a case which is precisely concerned with avoiding that result. Thus, if on principle the result of applying the directive can only be tax exemption, any exception must be justified on the basis of either the law or other general principles of law.

31. The conditions mentioned under B in Article 13 of the directive could be regarded as justification. The first objective of those 'conditions' is to ensure 'the correct and straightforward application of the exemptions'.¹⁶ That objective is certainly best achieved by exempting from tax turnover with 'covert passing on', for any other arrangement leads to complications as this very case shows.

32. The other objects of the 'conditions' mentioned in Article 13, namely the prevention of tax evasion and avoidance,¹⁷ can be disregarded here, for they hardly apply to the present case.

¹⁵ — Eleventh recital in the preamble, Official Journal 1977, L 145, p. 2.

¹⁶ — See *Becker* [1982] ECR 73, paragraph 33.

¹⁷ — See *Becker* [1982] ECR 73, paragraph 34.

33. The only question which could arise is whether the extension of tax liability to turnover with 'covert passing on' is necessary for the purpose of 'preventing any possible . . . abuse'. Here it will be necessary to consider in particular the argument that the objective of the tax exemption, namely to make credit cheaper, cannot be achieved by the retroactive grant of tax exemption. In considering that question, it will not be possible to ignore the fact that it was not the taxpayer but the defaulting Member State which by its late implementation of the directive prevented the desired effect from taking place on the intended date.¹⁸

34. It would hardly be conceivable for a Member State to be able to levy tax on non-taxable turnover simply because it had itself prevented the desired result from taking place at the right time and an advantage not intended at the outset thus accrued to the taxpayer. If that argument were accepted, it would allow a Member State to profit from its own wrongdoing and to frustrate the effect of Community law, namely the exemption from tax of the turnover concerned. From the standpoint of Community law, this cannot be tolerated.

35. This result is perhaps not entirely satisfactory because the credit negotiator receives an advantage which was originally not intended, but it seems more acceptable than allowing the Member State to profit from its own wrongdoing.

36. I therefore come to the conclusion that a credit negotiator may rely on the directive at least if he has not expressly passed on the turnover tax to the persons to whom he supplies his services. So-called covert passing on does not therefore give rise to tax liability.

3. *The third question*

37. The purpose of this question is to establish whether turnover tax is passed on covertly simply if, on agreeing his negotiation commission, the credit negotiator expected to have to pay turnover tax out of it. It is thus based on the assumption that, under the legal situation prevailing at the time when the commission was agreed (according to which turnover tax was due also on the negotiation of credit), turnover tax was always passed on in the ensuing period.

38. If the view put forward above is accepted, then this question does not call for an answer, for in the case of 'covert passing on' no tax is payable during the relevant period so that it no longer depends on what the credit negotiator 'expected' when he agreed the negotiation commission.

39. If, however, the argument I have rejected is accepted, namely that reliance on the directive is not possible where there has

¹⁸ — See *Becker*, *ibid.*, p. 76, paragraph 47. An action for breach of obligations under the Treaty was also pending in this case but was removed from the register after the directive had been implemented (Case 132/79).

been 'covert passing on', then, without attempting to develop a proper and comprehensive theory of passing on, the question may be answered by referring to the Court's case-law on national law governing refunds and on the question of the exclusion of a refund if an improperly levied charge has been passed on.

40. The governing principle is to be found in the judgment in Case 199/82¹⁹ in which the Court ruled that the court which has to rule on the refund must be *free* to decide whether or not the burden of the charge has been passed on to other persons, which no doubt means that all the circumstances of the particular case have to be considered (there was a similar ruling in the judgment in Joined Cases 331, 376 and 378/85).²⁰

41. It must also be recalled that in its judgment in Case 68/79 the Court had already stressed that the exercise of a right under Community law, which the national courts are required to protect, should not be made practically impossible. Accordingly, as was made clear in the judgments in Case 199/82, Joined Cases 331, 376 and 378/85 and Case 104/86²¹ with regard to the question of the passing on of improperly paid charges, rules of evidence which make it practically impossible or excessively

difficult to recover charges levied in breach of Community law are not permissible.

42. The Court also made it clear that it was not lawful to presume that indirect taxes had been passed on, that presumption placing the burden of proof on the taxpayer to show that there had been no passing on, nor acceptable to limit the forms of proof (judgments in Joined Cases 331, 376 and 378/85 and in Case 104/86).

43. Accordingly, it may be said that the third question cannot simply be answered in the affirmative, and that therefore it is not permissible to proceed on the basis of the presumption contained in the question precisely because the question of actual passing on depends on the existence of a real possibility of passing on, which may have changed with the market situation since the agreement on the commission was concluded. It must also be noted that the rigid rule contained in the Federal Finance Minister's letter of 27 June 1983 appears unacceptable, for the defendant Finanzamt itself observed in its observations that the fact that the amount of commission was not altered may have been due to increased costs or a desire for increased profits.

44. However, in considering all the circumstances of the case, some importance must be attached to the fact that the plaintiff in the main proceedings himself assumed when making his tax returns that his credit negotiation transactions were taxable (because at

¹⁹ — *Ibid.*, paragraph 14.

²⁰ — Judgment of 25 February 1988 in Joined Cases 331, 376 and 378/85 *Les fils de Jules Bianco v Directeur général des douanes et droits indirects* [1988] ECR 1099.

²¹ — Judgment of 24 March 1988 in Case 104/86 *Commission v Italian Republic* [1988] ECR 1799.

the time there was no case-law on the question whether the VAT directive could be relied upon where it had not been implemented in national law). Moreover, the fact that a taxpayer will normally attempt to pass on to the next persons in the chain of supply value-added tax, which, according to the provisions applicable, is

intended to be borne by the end consumer, should also be given some weight.

45. Thus, to my mind, everything that is to be said about the third question of the Finanzgericht from the point of view of Community law has been said.

C — Conclusion

To sum up, I therefore propose that the questions submitted by the Finanzgericht Rheinland-Pfalz should be answered as follows:

‘In the absence of implementation of the Sixth Council Directive (77/388/EEC) on turnover tax, a credit negotiator may rely on the provision contained in Article 13 B (d) (1) of that directive, exempting from turnover tax transactions consisting of the negotiation of credit, in respect of transactions carried out between 1 January and 30 June 1978 as well as in respect of transactions carried out in 1979 if he did not expressly pass on the turnover tax to the persons to whom he supplied his services.’