Case C-309/06

Marks & Spencer plc

v

Commissioners of Customs & Excise

(Reference for a preliminary ruling from the House of Lords)

(Taxation – Sixth VAT Directive – Exemption with refund of tax paid at the preceding stage – Erroneous taxation at the standard rate – Right to zero rate – Entitlement to refund – Direct effect – General principles of Community law – Unjust enrichment)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Option for Member States to maintain exemptions with refund of the tax paid at the preceding stage*

(Council Directive 77/388, Art. 28(2))

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Option for Member States to maintain exemptions with refund of the tax paid at the preceding stage*

(Council Directive 77/388, Art. 28(2))

3. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Option for Member States to maintain exemptions with refund of the tax paid at the preceding stage*

(Council Directive 77/388, Art. 28(2))

1. Where, under Article 28(2) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, both before and after the insertion of the amendments made to that provision by Directive 92/77, a Member State has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies, a trader making such supplies does not have any directly enforceable Community?law right to have those supplies taxed at a zero rate of value added tax.

In authorising Member States to apply exemptions with refund of the tax paid, Article 28(2) of the Sixth Directive lays down a derogation to the rules which govern the standard rate of value added tax. It is therefore correct to state that it is by reason of Community law that those exemptions, known as ‘zero-rating’, are permitted. However, Community law does not require Member States to maintain such exemptions. It is apparent from the actual wording of the original version of Article 28(2) that the exemptions which were in force on 31 December 1975 ‘may be maintained’, which means that it is for the Member State concerned alone to decide whether or not to retain a particular piece of legislation which satisfied, inter alia, the conditions set out in the final indent of Article 17 of Second Directive 67/228, now repealed, which provided that exemptions with refund of the tax paid could only be established for clearly?defined social reasons and for the benefit of

the final consumer.

(see paras 22-23, 28, operative part 1)

2. Where, under Article 28(2) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, both before and after the insertion of the amendments made to that provision by Directive 92/77, a Member State has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies but has mistakenly interpreted its national legislation, with the consequence that certain supplies benefiting from exemption with refund of input tax under its national legislation have been subject to tax at the standard rate, the general principles of Community law, including that of fiscal neutrality, apply so as to give a trader who has made such supplies a right to recover the sums mistakenly charged in respect of them.

The maintenance of exemptions or of reduced rates of value added tax lower than the minimum rate laid down by the Sixth Directive is permissible only in so far as it complies with, inter alia, the principle of fiscal neutrality inherent in that system. The principles governing the common system of value added tax, including that of fiscal neutrality, apply even to the circumstances provided for in Article 28(2) of the Sixth Directive and may, if necessary, be relied on by a taxable person against a national provision, or the application thereof, which fails to have regard to those principles. In that regard, the right to obtain a refund of charges levied in a Member State in breach of rules of Community law is the consequence and the complement of the rights conferred directly on individuals by Community law. That principle also applies to charges levied in breach of national legislation permitted under Article 28(2) of the Sixth Directive.

(see paras 33-36, operative part 2)

3. Although the principles of equal treatment and fiscal neutrality apply in principle to circumstances in which a Member State has erroneously taxed certain supplies benefiting from an exemption which that Member State has maintained in its national legislation under Article 28(2) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, and in which the trader concerned seeks to recover the sums wrongly paid, the infringement of those principles is not constituted merely by the fact that a refusal to make repayment was based on the unjust enrichment of the taxable person concerned.

By contrast, the principle of fiscal neutrality precludes the concept of unjust enrichment from being applied only to taxable persons such as ‘payment traders’ (taxable persons for whom, in a given prescribed accounting period, the output tax collected exceeds the input tax) and not to taxable persons such as ‘repayment traders’ (taxable persons whose position is the inverse of that of payment traders), in so far as those taxable persons have marketed similar goods, which is for the national court to determine.

Furthermore, the general principle of equal treatment, the infringement of which may be established, in matters relating to tax, by discrimination affecting traders who are not necessarily in competition with each other but are nevertheless in a similar situation in other respects, precludes discrimination between ‘payment traders’ and ‘repayment traders’ which is not objectively justified.

That finding is not affected where there is evidence that a trader who has been refused repayment of value added tax which was wrongly levied has not suffered any financial loss or disadvantage.

Lastly, it is for the national court itself to draw any conclusions with respect to the past from the infringement of the principle of equal treatment referred to above, in accordance with the rules relating to the temporal effects of the national legislation applicable in the main proceedings, in

compliance with Community law and, in particular, with the principle of equal treatment and the principle that it must ensure that the remedies which it grants are not contrary to Community law.

(see paras 54, 57, 64, operative part 3-5)

JUDGMENT OF THE COURT (Third Chamber)

10 April 2008 (*)

(Taxation – Sixth VAT Directive – Exemption with refund of tax paid at the preceding stage – Erroneous taxation at the standard rate – Right to zero rate – Entitlement to refund – Direct effect – General principles of Community law – Unjust enrichment)

In Case C?309/06,

REFERENCE for a preliminary ruling under Article 234 EC from the House of Lords (United Kingdom), made by decision of 12 July 2006, received at the Court on 17 July 2006, in the proceedings

Marks & Spencer plc

v

Commissioners of Customs and Excise,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J. Klu?ka, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 11 October 2007,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2007,

after considering the observations submitted on behalf of:

– Marks & Spencer plc, by D. Milne, QC, A. Hitchmough, Barrister, D. Waelbroeck, avocat, and D. Slater, Solicitor,

– the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, K. Lasok, QC, and P. Mantle, Barrister,

– Ireland, by D. O’Hagan, acting as Agent, G. Clohessy, SC, and N. O’Hanlon, BL,

– the Cypriot Government, by E. Simeonidou, acting as Agent,

– the Commission of the European Communities, by R. Lyal and M. Afonso, acting as Agents,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 28(2) 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 (OJ 1977 L 145, p. 1) ('the Sixth Directive'), in its original version, and of Article 28(2)(a) thereof, in the wording stemming from Council Directive 92/77/EEC of 19 October 1992 (OJ 1992 L 316, p. 1).

2 The reference has been made in the context of proceedings between Marks & Spencer plc ('Marks & Spencer') and the Commissioners of Customs and Excise ('the Commissioners'), concerning the latter's refusal to uphold a claim submitted by Marks & Spencer for repayment of value added tax ('VAT') which had been erroneously paid.

Legal context

Community legislation

3 Article 12(1) of the Sixth Directive states that VAT is payable, in principle, at the 'rate … in force at the time of the chargeable event'.

4 The original version of Article 28(2) of the Sixth Directive provided:

'Reduced rates and exemptions with refund of the tax paid at the preceding stage which are in force on 31 December 1975, and which satisfy the conditions stated in the last indent of Article 17 of the second Council Directive of 11 April 1967, may be maintained until a date which shall be fixed by the Council, acting unanimously on a proposal from the Commission, but which shall not be later than that on which the charging of tax on imports and the remission of tax on exports in trade between the Member States are abolished. Member States shall adopt the measures necessary to ensure that taxable persons declare the data required to determine own resources relating to these operations.

On the basis of a report from the Commission, the Council shall review the abovementioned reduced rates and exemptions every five years and, acting unanimously on a proposal from the Commission, shall, where appropriate, adopt the measures required to ensure the progressive abolition thereof.'

5 The version of Article 28(2)(a) which stems from Directive 92/77 provides as follows:

'…

(a) Exemptions with refund of the tax paid at the preceding stage and reduced rates lower than the minimum rate laid down in Article 12(3) in respect of the reduced rates, which were in force on 1 January 1991 and which are in accordance with Community law, and satisfy the conditions stated in the last indent of Article 17 of the second Council Directive of 11 April 1967, may be maintained.

Member States shall adopt the measures necessary to ensure the determination of own resources relating to these operations.

…’

National legislation

6 The Value Added Tax Act 1994 (‘the VAT Act 1994’) lays down, as a general rule, the principle that a zero rate of VAT is to be applied to the supply of food in the United Kingdom. Section 30 of the VAT Act 1994, headed ‘Zero-rating’, refers to Schedule 8 to that act, which has the same heading and which states in Part II, under the heading ‘Group 1 – Food’, in item 2 of the ‘Excepted items’, that there is an exception to the application of VAT at the zero rate as regards confectionery, not including cakes or biscuits, which are subject to tax at the zero rate, with the exception of biscuits wholly or partly covered with chocolate, those being taxed at the standard rate.

7 During the period in issue in the main proceedings, section 80 of the VAT Act 1994 was worded as follows:

‘(1) Where a person has (whether before or after the commencement of this Act) paid an amount to the Commissioners by way of VAT which was not VAT due to them, they shall be liable to repay the amount to him.

(2) The Commissioners shall only be liable to pay an amount under this section on a claim being made for the purpose.

(3) It shall be a defence, in relation to a claim under this section, that repayment of an amount would unjustly enrich the claimant.

…’

8 Section 80 of the VAT Act 1994 was amended by section 3 of the Finance (No 2) Act 2005, which made significant changes to section 80 as regards the defence of unjust enrichment. In particular, it replaced the word ‘repayment’ in subsection (3) of section 80 with the word ‘crediting’.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 From the time of the introduction of VAT in the United Kingdom, in 1973, the Commissioners, who are responsible for collecting that tax, took the view that the chocolate-covered teacakes marketed by Marks & Spencer were biscuits and not cakes and that they accordingly had to be taxed at the standard rate of VAT rather than at the zero rate. Between April 1973 and October 1994, Marks & Spencer thus paid a tax which was not due.

10 By letter of 30 September 1994, the Commissioners acknowledged their error, the teacakes being in fact cakes and subject as such to VAT at the zero rate. On the basis of this error, Marks & Spencer submitted on 8 February 1995 a claim for repayment in the amount of GBP 3.5 million. That claim was accepted only to the extent of 10% of the amount (GBP 350 000), since the Commissioners took the view that the high street retailer had passed on 90% of the VAT paid by it to its customers. Consequently, the Commissioners invoked against Marks & Spencer the defence of unjust enrichment under section 80(3) of the VAT Act 1994. The authorities also applied rules of limitation (new and retroactive), by virtue of which they were not obliged to repay any sum which had been paid to them more than three years prior to the submission of the claim for repayment. The amount which was finally paid to Marks & Spencer on 4 April 1997 was therefore GBP 88 440.

11 After unsuccessful administrative proceedings, Marks & Spencer appealed to the VAT and Duties Tribunal, which, by decision of 22 April 1998, upheld the view taken by the Commissioners. Marks & Spencer appealed to the High Court of Justice of England and Wales, Queen's Bench Division, which in turn dismissed the claim by decision of 21 December 1998. An appeal against that decision was made to the Court of Appeal of England and Wales (Civil Division), which, as regards the claim for repayment in relation to the teacakes, again dismissed Marks & Spencer's claim. However, the Court of Appeal, by decision of 14 December 1999, referred a question which related to a separate aspect of the proceedings (the taxation of gift vouchers sold by Marks & Spencer) to the Court of Justice for a preliminary ruling on the compatibility of the retroactive limitation of three years (see paragraph 10 of the present judgment) with the principles of effectiveness of Community law and of the protection of legitimate expectations. That question concerned, inter alia, the issue whether an individual could derive rights directly from a directive after it had been correctly transposed into national law, where the Member State had failed to take proper account of the scope of the directive.

12 In Case C?62/00 *Marks & Spencer* [2002] ECR I?6325, the Court ruled that the principles of effectiveness and of the protection of legitimate expectations precluded national legislation such as the United Kingdom legislation in question.

13 In the light of the grounds of the Court's decision that the legislation retroactively establishing a limitation period was incompatible with the abovementioned principles of Community law, the Commissioners, with a view to treating all claims made under section 80 of the VAT Act 1994 in the same way, on their own initiative, accepted that Marks and Spencer's claim should not be time-barred and accordingly repaid the sum claimed, up to the limit of 10%, above which they maintained that there would be unjust enrichment.

14 Marks & Spencer maintained its claims before the Court of Appeal of England and Wales (Civil Division) as to the sums which, it was contended, represented unjust enrichment, relying directly on Community law. By decision of 21 October 2003, the Court of Appeal dismissed the claim put forward by Marks & Spencer, which thereupon appealed to the House of Lords.

15 The House of Lords decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where, under Article 28(2)(a) of the Sixth … Directive (both before and after its amendment in 1992 by Directive 92/77), a Member State has maintained in its domestic VAT legislation an exemption with refund of input tax in respect of certain specified supplies, does a trader making such supplies have a directly enforceable Community?law right to be taxed at a zero rate?

2. If the answer to Question 1 is in the negative, where, under Article 28(2)(a) of the Sixth … Directive (both before and after its amendment in 1992 by Directive 92/77), a Member State has

maintained in its domestic VAT legislation an exemption with refund of input tax in respect of certain specified supplies but has mistakenly interpreted its domestic legislation with the consequence that certain supplies benefiting from exemption with refund of input tax under its domestic legislation have been subject to tax at the standard rate, do the general principles of Community law, including fiscal neutrality, apply so as to give a trader who made such supplies a right to recover the sums mistakenly charged in respect of them?

3. If the answer to Question 1 or Question 2 is in the affirmative, do the Community?law principles of equal treatment and fiscal neutrality in principle apply with the result that they would be infringed if the trader in question is not repaid the entire amount mistakenly charged on the supplies made by him in circumstances where:

(i) the trader would be unjustly enriched by repayment to him of the entire amount;

(ii) domestic legislation provides that overpaid tax cannot be repaid to the extent that repayment would lead to unjust enrichment of the trader; but

(iii) domestic legislation makes no provision similar to that referred to in (ii) in the case of claims by "repayment traders"? (A "repayment trader" is a taxable person who, in a given prescribed accounting period, makes no payment of VAT to the competent national authorities but receives a payment from them because, in that period, the amount of VAT that he is entitled to deduct exceeds the amount of VAT due in respect of supplies made by him.)

4. Is the answer to Question 3 affected by whether or not there is evidence that the difference of treatment between traders making claims for the repayment of overpaid output tax and traders making claims for additional amounts by way of input tax deduction (resulting from the over?declaration of output tax) has, or has not, caused any financial loss or disadvantage to the former and, if so, how?

5. If, in the situation described in Question 3, the Community?law principles of equal treatment and fiscal neutrality apply and would otherwise be infringed, does Community law require or permit a court to remedy the difference of treatment by upholding a trader's claim to a repayment of overpaid tax in such a way as to enrich him unjustly or require or permit a court to grant some other remedy (and, if so, which)?'

The questions referred for a preliminary ruling

The first question: the existence of a Community?law right to have a particular transaction taxed at a zero rate of VAT

Observations submitted to the Court

16 Marks & Spencer submits that a right to have a particular transaction taxed at a zero rate of VAT does exist, both under Article 12(1) of the Sixth Directive, the wording of which, it believes, is clear, precise and unconditional, and by virtue of the principle of equal treatment. The derogation of which the United Kingdom took advantage under both Article 28(2) of the Sixth Directive, in its initial version, and Article 28(2)(a) of the Sixth Directive, in the wording stemming from Directive 92/77, did not take the case outside the scope of Community law, as laid down by that article.

17 Conversely, the United Kingdom Government and Ireland take the view that a trader cannot derive from Community law any directly enforceable right to an exemption with refund of the VAT paid at the preceding stage. The right to have transactions taxed at a zero rate thus derives only from national law.

18 The Cypriot Government states that the mistake made by the Commissioners relates to the application of provisions of national law, even if the retention of such provisions is allowed by the Sixth Directive.

19 The Commission, without replying directly to the question, which it regards as irrelevant, states that the United Kingdom tax authorities were mistaken in their interpretation of the national legislation, but did not breach any obligation imposed by the Sixth Directive.

The Court's reply

20 The first question asks, in essence, whether it is possible for a trader to derive directly from Community law the right to be taxed at a zero rate where that rate is the result of provisions of national law.

21 It must first be stated that that question bears a direct relation to the facts submitted to the national court and is objectively required in order to resolve the dispute in the main proceedings (see, to that effect, Case C?18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 14, and Case C?144/04 *Mangold* [2005] ECR I?9981, paragraph 34). The Commission's contention that the first question is irrelevant must therefore be rejected as the Court has jurisdiction to rule on that question.

22 Secondly, it is important to bear in mind that, in authorising Member States to apply exemptions with refund of the tax paid, Article 28(2) of the Sixth Directive lays down a derogation to the rules which govern the standard rate of VAT (Case C-251/05 *Talacre Beach Caravan Sales* [2006] ECR I-6269, paragraph 17). It is therefore correct to state that it is by reason of Community law that those exemptions, known as 'zero-rating', are permitted.

23 However, Community law does not require Member States to maintain such exemptions. It is apparent from the actual wording of the original version of Article 28(2) that the exemptions which were in force on 31 December 1975 'may be maintained', which means that it is for the Member State concerned alone to decide whether or not to retain a particular piece of legislation which satisfied, inter alia, the conditions set out in the final indent of Article 17 of 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 1967, p. 16), now repealed, which provided that exemptions with refund of the tax paid could only be established for clearly?defined social reasons and for the benefit of the final consumer.

24 Article 28(2)(a) of the Sixth Directive can therefore be compared to a 'stand-still' clause, intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Sixth Directive (*Talacre Beach Caravan Sales*, paragraph 22). That optional maintenance of the previous status quo is therefore merely framed by the Sixth Directive. Consequently, it is pursuant to national legislation which does not constitute a measure for the implementation of the Sixth Directive (see, by analogy, Case C?36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 38), but the maintenance of an exemption which is permitted by that directive, regard being had to the social objectives pursued by the legislation of the United Kingdom in not making the final consumer pay VAT on everyday items of food, that

Marks & Spencer may claim the exemption with refund of the tax paid at the preceding stage.

25 Marks & Spencer cannot validly rely on Article 12(1) of the Sixth Directive. That provision, which states that the rate of VAT applicable is that in force at the time of the chargeable event, is intended to prevent the national legislature, in the event of a change in the rate applicable to a particular product, as borne out by Article 12(2) of the Sixth Directive, from applying to a particular transaction a rate other than that in force at the time of the event which gave rise to the VAT charged in respect of that transaction.

26 The purpose served by Article 12(1) is thus clearly to settle the issue of determining the temporal point of reference for applying a given rate of VAT.

27 The situation in the main proceedings, in which the Commissioners established that there had been an error as to whether a particular product should have been entitled to an exemption with refund of the tax paid, is completely different, as this is a question, not of a change in the rate over time, but as to whether a product is covered by an exemption with refund of the tax paid, permitted under Article 28(2)(a) of the Sixth Directive.

28 Accordingly, the answer to the first question must be that where, under Article 28(2) of the Sixth Directive, both before and after the insertion of the amendments made to that provision by Directive 92/77, a Member State has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies, a trader making such supplies does not have a directly enforceable Community?law right to have those supplies taxed at a zero rate of VAT.

The second question: the existence of a right, deriving from the general principles of Community law, to a refund of VAT paid in error

Observations submitted to the Court

29 Marks & Spencer claims that the general principles of Community law, including the principle of fiscal neutrality, apply in such a way as to provide a basis for a right to repayment, in its favour, of the VAT which was wrongly levied, since the whole system of VAT remains, by definition, within the scope of Community law, even in the case specified in Article 28(2) of the Sixth Directive, both in its initial version and in that stemming from Directive 92/77.

30 The United Kingdom Government, Ireland and the Cypriot Government maintain that the sums in question in the main proceedings were not levied in breach of any directly effective or right-conferring provision of Community law. The question is strictly one of national law and there is therefore no need whatsoever to apply the general principles of Community law. Ireland adds that if, in the present case, the principle of fiscal neutrality were to apply in order to provide a basis for a right to repayment, the final consumer, who has borne the burden of the VAT, should benefit from this.

31 The Commission submits that, in applying VAT, the competent national authorities must comply with the essential principles which underlie the common system of VAT, in particular the principle of neutrality. They are under this obligation when making refunds of overpaid tax. However, the Commission does not reply directly to the second question.

The Court’s reply

32 The second question asks, in essence, whether a trader has a right, under the general principles of Community law, including the principle of fiscal neutrality, to claim a refund of the VAT

which was wrongly levied, when the rate which should have been applied stems from national law.

33 It must be noted at the outset that the actual wording of Article 28(2)(a) of the Sixth Directive, in the version resulting from Directive 92/77, states that the national legislation which may be maintained must be 'in accordance with Community law' and satisfy the conditions stated in the last indent of Article 17 of Directive 67/228. Although the addition relating to being 'in accordance with Community law' was made only in 1992, such a requirement, which forms an integral part of the proper functioning and the uniform interpretation of the common system of VAT, applies to the whole of the period of erroneous taxation at issue in the main proceedings. As the Court has had occasion to point out, the maintenance of exemptions or of reduced rates of VAT lower than the minimum rate laid down by the Sixth Directive is permissible only in so far as it complies with, inter alia, the principle of fiscal neutrality inherent in that system (see, to that effect, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 19, and Case C?481/98 *Commission* v *France* [2001] ECR I-3369, paragraph 21).

34 It thus follows that the principles governing the common system of VAT, including that of fiscal neutrality, apply even to the circumstances provided for in Article 28(2) of the Sixth Directive and may, if necessary, be relied on by a taxable person against a national provision, or the application thereof, which fails to have regard to those principles.

35 As regards, more specifically, the right to a refund, as is apparent from the settled case-law of the Court, the right to obtain a refund of charges levied in a Member State in breach of rules of Community law is the consequence and the complement of the rights conferred directly on individuals by Community law (see in particular, to that effect, *Marks & Spencer*, paragraph 30 and the case-law cited). That principle also applies to charges levied in breach of national legislation permitted under Article 28(2) of the Sixth Directive.

36 The answer to the second question must therefore be that where, under Article 28(2) of the Sixth Directive, both before and after the insertion of the amendments made to that provision by Directive 92/77, a Member State has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies but has misinterpreted its national legislation, with the result that certain supplies which should have benefited from exemption with refund of input tax under its national legislation have been subject to tax at the standard rate, the general principles of Community law, including that of fiscal neutrality, apply so as to give a trader who has made such supplies a right to recover the sums mistakenly charged in respect of them.

The third to fifth questions: possible restrictions on the right to repayment based on the principles of equal treatment and fiscal neutrality

Observations submitted to the Court

37 Marks & Spencer claims that application of the rule of unjust enrichment to 'payment traders' (taxable persons for whom, in a given prescribed accounting period, the output tax collected exceeds the input tax) and not to 'repayment traders' (taxable persons whose position is the inverse of that of payment traders) constitutes a breach of the principles of equal treatment and fiscal neutrality. However, it is not necessary to prove that the 'payment trader' has suffered any financial loss or disadvantage. Finally, it is for each Member State, with due regard to Community law, which neither prohibits the defence of unjust enrichment nor makes it obligatory, to decide how to remedy differences in treatment that are found to be incompatible with the abovementioned principles.

38 The United Kingdom Government takes the view that the third to fifth questions referred should be answered in the negative.

39 Ireland and the Cypriot Government, in the light of the negative answer which ought, in their opinion, to be given to the first and second questions, consider that there is no need to answer the subsequent questions.

40 The Commission states that refusal to make repayment in reliance on the defence of unjust enrichment is permitted by Community law provided that it is shown that there would in fact be unjust enrichment. In addition, such a refusal must be fiscally neutral and must not discriminate between traders.

The Court's reply

– Initial observations

41 Community law does not prevent a national legal system from disallowing repayment of charges which have been levied but were not due where to do so would lead to unjust enrichment of the recipients (Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 6; Case C-343/96 *Dilexport* [1999] ECR I?579, paragraph 47; and Joined Cases C-441/98 and C-442/98 *Michaïlidis* [2000] ECR I-7145, paragraph 31). However, in order to comply with Community law, the principle prohibiting unjust enrichment must be implemented in accordance with principles such as that of equal treatment.

42 Furthermore, it is important to bear in mind that, where a charge has been wrongly levied under Community law and it is established that only part of the charge has been passed on, the national authorities must repay the amount not passed on (Joined Cases C-192/95 to C?218/95 *Comateb and Others* [1997] ECR I-165, paragraphs 27 and 28). However, even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his sales (see, to that effect, *Comateb and Others*, paragraphs 29 and 30, and *Michaïlidis*, paragraphs 34 and 35).

43 Accordingly, the existence and the degree of unjust enrichment which repayment of a charge which was levied though not due from the aspect of Community law entails for a taxable person can be established only following an economic analysis in which all the relevant circumstances are taken into account (see, inter alia, Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraphs 94 to 100).

44 It will thus be for the national court to determine whether the appraisal made by the Commissioners corresponds to the analysis described in the preceding paragraph of this judgment.

– The third question

45 The Court is, in essence, being asked whether the Community?law principles of fiscal neutrality and equal treatment would be infringed if a trader is not repaid the amount of VAT wrongly levied by the tax authorities on the ground that such a refund would result in his unjust enrichment, where that ground of refusal to make repayment is not, however, envisaged by the national legislation when the trader is, before repayment, in the position of creditor vis-à-vis the tax authorities.

46 It is necessary to examine whether, where there is a partial refusal to make repayment, such as that at issue in the main proceedings, the principle of fiscal neutrality and the general

Community-law principle of equal treatment have been infringed by the difference in treatment accorded to ‘payment traders’ and to ‘repayment traders’.

47 As regards, first, the principle of fiscal neutrality, that principle, which is a fundamental principle of the common system of VAT (see, inter alia, Case C?454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I?6973, paragraph 59), in particular precludes treating similar goods, which are thus in competition with each other, differently for VAT purposes (Case C-283/95 *Fischer* [1998] ECR I?3369, paragraphs 21 and 27, and *Commission* v *France*, paragraph 22). It follows that those products must be subject to a uniform rate (see, to that effect, *Commission* v *France*, paragraph 22).

48 Consequently, in a situation where an error in the rate affects a number of taxable persons and the repayment of the sums wrongly levied on account of that error depends, at least in part, on whether those taxable persons are initially in the position of creditors or debtors vis-à-vis the Treasury in respect of the VAT, those taxable persons are, in actual fact, subject to a genuine and different charge, analogous to that which could have resulted from the application of different rates of VAT to similar goods. Such a disparity is therefore contrary to the principle of fiscal neutrality, in so far as those taxable persons have marketed similar goods, a matter which it will be for the national court to determine.

49 Secondly, it is important to bear in mind that the principle of fiscal neutrality is the reflection, in matters relating to value added tax, of the principle of equal treatment (Case C-106/05 *L.u.P.* [2006] ECR I-5123, paragraph 48 and the case-law cited). However, although infringement of the principle of fiscal neutrality may be envisaged only as between competing traders, as has been pointed out in paragraph 47 of this judgment, infringement of the general principle of equal treatment may be established, in matters relating to tax, by other kinds of discrimination which affect traders who are not necessarily in competition with each other but who are nevertheless in a similar situation in other respects.

50 The general principle of equal treatment thus applies in a situation where traders are all holders of VAT credits, seek to obtain repayment from the tax authorities and find that their claims for a refund are treated differently, irrespective of the competitive relationships which may exist between them. It is thus necessary to examine whether that principle, in itself, precludes a legislative provision such as section 80 of the VAT Act 1994.

51 In this connection, the general principle of equal treatment requires that similar situations are not treated differently unless differentiation is objectively justified (Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9, and *Idéal tourisme*, paragraph 35).

52 It is necessary to point out that, under national legislation such as that applicable in the main proceedings, the difference in the treatment of traders with regard to the notion of unjust enrichment on the basis of their initial position as creditors or debtors vis-à-vis the Treasury in respect of VAT is not objectively justified. The fact that a trader benefits from unjust enrichment is unrelated to the position of that trader vis-à-vis the tax authorities before repayment of the VAT, as the unjust enrichment stems, when it occurs, from the refund itself, and not from that trader’s previous situation as a creditor or debtor vis-à-vis the tax authorities.

53 That analysis is borne out, if need be, by the amendment to the United Kingdom legislation following the letter of formal notice addressed by the Commission to that Member State in connection with the institution of proceedings for failure to fulfil obligations. Under section 3 of the Finance (No 2) Act 2005, referred to in paragraph 8 of this judgment, a distinction is no longer made on the basis of the taxable person’s situation vis-à-vis the Treasury.

54 The answer to the third question must therefore be that, although the principles of equal treatment and fiscal neutrality apply in principle to a case such as that in the main proceedings, an infringement of those principles is not constituted merely by the fact that a refusal to make repayment was based on the unjust enrichment of the taxable person concerned. By contrast, the principle of fiscal neutrality precludes the prohibition of unjust enrichment from being applied only to taxable persons such as ‘payment traders’ and not to taxable persons such as ‘repayment traders’, in so far as those taxable persons have marketed similar goods. It will be for the national court to determine whether that is the position in the present case. Furthermore, the general principle of equal treatment, the infringement of which may be established, in matters relating to tax, by discrimination affecting traders who are not necessarily in competition with each other but are nevertheless in a similar situation in other respects, precludes discrimination between ‘payment traders’ and ‘repayment traders’, which is not objectively justified.

– The fourth question

55 By this question, the national court is essentially asking the Court whether the answer to the third question would be different if there is evidence that a trader who has been refused repayment on the ground of the unjust enrichment resulting from that refund has not suffered any financial loss or disadvantage.

56 In that regard, it must be stated, first, that it is not necessarily the corollary of the VAT being passed on in full to the final consumer that there is no financial loss or disadvantage, since, even in that situation, as has been pointed out in paragraph 42 of this judgment, the trader may have suffered a loss as a result of a fall in the volume of his sales. Secondly, the infringement of the principle of equal treatment, mentioned in paragraphs 52 to 54 of this judgment, by national legislation such as that at issue in the main proceedings, is constituted by discrimination between traders with regard to their right to repayment of VAT which was wrongly levied, this being separate from the issue of whether those traders have in fact suffered a financial loss or disadvantage.

57 The answer to the fourth question must therefore be that the answer to the third question is not affected where there is evidence that a trader who has been refused repayment of VAT which was wrongly levied has not suffered any financial loss or disadvantage.

– The fifth question

58 By this question, the national court is essentially asking the Court whether Community law requires or permits a national court to remedy the infringement of the principle of equal treatment referred to in paragraphs 52 to 54 of this judgment by ordering that the tax which was wrongly levied be repaid in its entirety to the trader adversely affected by that infringement, even if such a repayment enriches him unjustly, or whether it requires or permits a court to grant some other remedy in respect of that infringement of the principle of equal treatment.

59 In that regard, according to settled case-law, it is, in the absence of Community legislation, for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5, and Case C?224/01 *Köbler* [2003] ECR I-10239, paragraph 46).

60 It is thus the task of the national court itself to draw any conclusions with respect to the past from the infringement of the principle of equal treatment referred to in paragraphs 52 to 54 of this judgment.

61 However, it is for the Court to indicate certain criteria or principles of Community law which must be complied with when that assessment is being made.

62 In the course of that assessment, the national court must comply with Community law and, in particular, with the principle of equal treatment, as stated in paragraph 51 of this judgment. The national court must, in principle, order the repayment in its entirety of the VAT payable to the trader who has suffered discrimination, in order to provide compensation for the infringement of the general principle of equal treatment, unless there are other ways of remedying that infringement under national law.

63 In that regard, as the Advocate General observed in point 74 of her Opinion, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the favoured category.

64 Consequently, the answer to the fifth question must be that it is for the national court itself to draw any conclusions with respect to the past from the infringement of the principle of equal treatment referred to in paragraphs 52 to 54 of this judgment, in accordance with the rules relating to the temporal effects of the national legislation applicable in the main proceedings, in compliance with Community law and, in particular, with the principle of equal treatment and the principle that it must ensure that the remedies which it grants are not contrary to Community law.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Where, under Article 28(2) 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, both before and after the insertion of the amendments made to that provision by Council Directive 92/77/EEC of 19 October 1992, a Member State has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies, a trader making such supplies does not have any directly enforceable Community?law right to have those supplies taxed at a zero rate of value added tax.**

2. **Where, under Article 28(2) of Sixth Directive 77/388, both before and after the insertion of the amendments made to that provision by Directive 92/77, a Member State has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies but has mistakenly interpreted its national legislation, with the consequence that certain supplies benefiting from exemption with refund of input tax under its national legislation have been subject to tax at the standard rate, the general principles of Community law, including that of fiscal neutrality, apply so as to give a trader who has made such supplies a right to recover the sums mistakenly charged in respect of them.**

3. **Although the principles of equal treatment and fiscal neutrality apply in principle to the case in the main proceedings, an infringement of those principles is not constituted merely by the fact that a refusal to make repayment was based on the unjust enrichment of the taxable person concerned. By contrast, the principle of fiscal neutrality precludes the concept of unjust enrichment from being applied only to taxable persons such as 'payment traders' (taxable persons for whom, in a given prescribed accounting period, the output tax collected exceeds the input tax) and not to taxable persons such as 'repayment traders' (taxable persons whose position is the inverse of that of payment traders), in so far as those taxable persons have marketed similar goods. It will be for the national court to determine whether that is the position in the present case. Furthermore, the general principle of equal treatment, the infringement of which may be established, in matters relating to tax, by discrimination affecting traders who are not necessarily in competition with each other but are nevertheless in a similar situation in other respects, precludes discrimination between 'payment traders' and 'repayment traders', which is not objectively justified.**

4. **The answer to the third question is not affected where there is evidence that a trader who has been refused repayment of value added tax which was wrongly levied has not suffered any financial loss or disadvantage.**

5. **It is for the national court itself to draw any conclusions with respect to the past from the infringement of the principle of equal treatment referred to in point 3 of the operative part of this judgment, in accordance with the rules relating to the temporal effects of the national legislation applicable in the main proceedings, in compliance with Community law and, in particular, with the principle of equal treatment and the principle that it must ensure that the remedies which it grants are not contrary to Community law.**

[Signatures]

* Language of the case: English.