JUDGMENT OF THE COURT (First Chamber)

11 September 2003 *

In Case C-155/01,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Cookies World Vertriebsgesellschaft mbH iL

and

Finanzlandesdirektion für Tirol,

on the interpretation, in particular, of Articles 5 and 6 of the 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),

* Language of the case: German.

THE COURT (First Chamber),

composed of: M. Wathelet, President of the Chamber, P. Jann and A. Rosas (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Cookies World Vertriebsgesellschaft mbH iL, by R. Kapferer, Wirtschaftsprüfer and Steuerberater,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Commission of the European Communities, by K. Gross and E. Traversa, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 October 2002,

gives the following

Judgment

1 By order of 29 March 2001, received at the Court on 11 April 2001, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation, in particular, of Articles 5 and 6 of the 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').

2 The question was raised in proceedings between Cookies World Vertriebgesellschaft mbH iL ('Cookies World') and Finanzlandesdirektion für Tirol (Regional Tax Authority for the Tyrol) regarding Cookies World's liability to value added tax ('VAT') for the use of a motor vehicle which it had leased from a German undertaking and used in Austria for the purposes of its business.

Legal background

Community rules

3 Article 2(1) of the Sixth Directive makes the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such subject to VAT.

4 Under Article 5(1) of the Sixth Directive '"[s]upply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

5 Article 5(6) of the Sixth Directive provides:

'The application by a taxable person of goods forming part of his business assets for his private use... or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration....'

6 Article 5(7) of the Sixth Directive provides:

'Member States may treat as supplies made for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the value added tax on such goods, had they been acquired from another taxable person, would not be wholly deductible;

(b) the application of goods by a taxable person for the purposes of a non-taxable transaction, where the value added tax on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with subparagraph (a);

...'

7 According to Article 6(1) of the Directive, '"[s]upply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5'.

8 The first subparagraph of Article 6(2) of the Sixth Directive is worded as follows:

'The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person... or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible'.

9 The second paragraph of Article 6(2) provides that the Member States may derogate from the provisions of that paragraph provided that such derogation does not lead to distortion of competition.

10 Article 9(1) of the Sixth Directive states:

'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 or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'

11 Article 9(2) of the Sixth Directive sets out a number of exceptions to that principle.

12 Article 17(3) of the Sixth Directive sets out the principles governing the right to a deduction or refund of VAT paid on inputs.

13 Article 17(6) and (7) of the Sixth Directive state:

'6. Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value added tax. Value added tax shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force.

7. Subject to the consultation provided for in Article 29, each Member State may, for cyclical economic reasons, totally or partly exclude all or some capital goods or other goods from the system of deductions. To maintain identical conditions of competition, Member States may, instead of refusing deduction, tax the goods

manufactured by the taxable person himself or which he has purchased in the country or imported, in such a way that the tax does not exceed the value added tax which would have been charged on the acquisition of similar goods.'

14 Article 2 of the 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 (OJ 1979 L 331 p. 11, 'the Eighth Directive') provides:

'Each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any value added tax charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC and of the provision of services referred to in Article 1(b).'

15 Under Article 5 of the Eighth Directive:

'For the purposes of this Directive, goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 of Directive 77/388/EEC as applicable in the Member State of refund.'

National law

— Legal position prior to the accession of the Republic of Austria to the European Union, that is until 31 December 1994

16 Paragraph 3(11) of the Umsatzsteuergesetz 1972 (Austrian Law on Turnover Taxes, 'UStG 1972'), in the version published in the BGBl. No 636/1975, on 'other services', was worded as follows:

'A service is supplied within the national territory where the trader operates exclusively or for the most part within the national territory or where the trader permits an act within the national territory or a state of affairs within the national territory or omits an act within the national territory...'

17 It is clear from the considerations set out by the national court that, under that provision, leasing transactions relating to a car were deemed to have been effected in Austria if the vehicle was predominantly used there.

18 Paragraph 12(2)(2)(c) of the UStG 1972, in the version published in the BGBl. No 410/1988, which governed the supply of goods and the provision of services on national territory for business purposes, provided:

'Supplies of goods or supplies of services are not made for business purposes... if they are connected with the acquisition (manufacture), lease or use of cars, dual-purpose vehicles or motor-bicycles...'

— Legal position after the accession of the Republic of Austria to the European Union, that is from 1 January 1995

19 Paragraph 3a(12) of the Umsatzsteuergesetz 1994, in the version published in the BGBl. No 21/1995 ('the UStG 1994'), is worded as follows:

'In any other case, a service is supplied at the place from which the trader operates his business. If the service is supplied from business premises, the place of the business premises shall constitute the place where the service is supplied.'

20 It is clear from the file that, under that provision, leasing transactions relating to a car, even if the vehicle has been used mainly in Austria, are deemed to be effected in the Member State from which the supplier of the vehicle runs his undertaking.

21 According to Paragraph 12(2)(2)(b) of the UStG 1994, supplies of goods, supplies of services or imports are not for business purposes if they are connected with the lease or use of cars, dual-purpose vehicles or motor-bicycles.

22 Paragraph 1(1)(2)(d) of the UStG 1994, which was added to the UStG 1994 and came into force on 6 January 1995, establishes the criteria for own consumption and provides that it is subject to VAT in Austria. Own consumption is deemed to occur to the extent that a trader incurs expenditure (expenses) relating to supplies abroad which, if they had been effected to the trader within the national territory

would not, under Paragraph 12(2)(2), have entitled the trader to deduction of input tax. That applies only, however, to the extent that the trader is entitled abroad to refund of the foreign input tax.

23 It is clear from the file that the fiscal criteria laid down in Paragraph 1(1)(2)(d) of the UStG of 1994 are designed so that the exclusion of deduction of VAT in connection with the leasing of certain vehicles is applied in Austria in the same way, from the economic point of view, as it was until the end of 1994, that is, the date of Austria's accession to the European Union. As is apparent from paragraphs 16 to 18 of the present judgment, the leasing of vehicles gave rise, under the tax system laid down by the UStG 1972, to transactions subject to turnover tax in Austria, and the taxable person has not been able to deduct that tax. The legal position has been changed as a result of the accession of the Republic of Austria to the European Union and the transposition of the Sixth Directive. Leasing transactions are accordingly deemed to be effected in the Member State where the lessor of the vehicle has his business. That means that, in the absence of a provision such as that laid down in Paragraph 1(1)(2)(d) of the UStG 1994, such transactions are no longer taxable in Austria.

Main proceedings and the question referred for a preliminary ruling

24 Cookies World is a limited company established in Austria which operates a commercial undertaking. It leased a car from a German undertaking which it used in Austria for the purposes of its business.

25 By decision of 15 June 1999 the Finanzamt Schwaz (Tax Office, Schwaz) (Austria) assessed the turnover tax for Cookies World for 1997. On that occasion it included in the taxable turnover the car leasing charge, applying Paragraph 1(1)(2)(d) of the UStG 1994.

26 Cookies World appealed against that decision, requesting that the turnover tax be assessed without including the leasing of the vehicle in question, that is by disregarding Paragraph 1(1)(2)(d) of the UStG 1994. The supply of the vehicle constituted a transaction which, for VAT purposes, was deemed to be effected in the place from which the trader carried on his business. As regards the leasing of vehicles under a contract, the place where that service is effected is generally the State in which the supplier of the vehicle has his place of business, in this case Germany, and is subject to tax there. Paragraph 1(1)(2)(d) of the UStG 1994 has the effect, however, of creating a second chargeable event for one and the same transaction. Such double taxation cannot be justified on the basis of the 'standstill' clause laid down in Article 17(6) of the Sixth Directive. That provision simply concerns the exclusion of the right to a deduction of VAT and not the introduction of events giving rise to VAT. Moreover, it permits only the retention of existing national measures. The event giving rise to VAT, referred to in Paragraph 1(1)(2)(d) of the UStG 1994, was first introduced into Austrian law on 6 January 1995 and cannot be reconciled with the conditions laid down by Community law.

27 By decision of 20 July 2000 the Finanzlandesdirektion für Tirol dismissed the appeal by Cookies World. It considered that, until the Sixth Directive was amended, the Member States were entitled to retain national measures excluding deduction of VAT. That included taxation for personal use defined in Paragraph 1(1)(2)(d) of the UStG 1994. It served principally, for reasons of competition neutrality, to cancel out the effects of the refund of VAT that the trader was able to claim abroad.

28 Cookies World appealed against that decision to the Verwaltungsgerichtshof. It argued that its turnover tax for 1997 had been assessed by applying a national measure contrary to Community law.

29 Taking the view that the dispute before it required an interpretation of the Sixth Directive, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it compatible with the 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, in particular Articles 5 and 6 thereof, for a Member State to treat the following event as a taxable transaction: the incurring of expenditure relating to services supplied abroad that, if they had been supplied within the national territory to the trader, would not entitle the trader to a deduction of input tax?'

The question referred for a preliminary ruling

Observations submitted to the Court

30 It is not disputed by the parties who have submitted observations that the hire of a vehicle under a leasing contract is a supply of services within the meaning of Article 6(1) of the Sixth Directive.

31 Cookies World and the Commission submit that the place where that supply of services is taxed must be defined, in accordance with Article 9(1) of the Directive, on the basis of the place of business of the supplier of the vehicle subject to the leasing contract, in this case Germany.

32 The Austrian Government admits that, in accordance with the Sixth Directive and Paragraph 3a(12) of the UStG 1994, services concerning the leasing of vehicles are deemed to be supplied in the Member State where the supplier has established his place of business. However, by virtue of Paragraph 12(2)(2) of the UStG 1994, such supplies are not deemed to be for business purposes. What is taxed in Austria is own consumption as defined in Paragraph 1(1)(2)(d) of the UStG 1994. Such personal use requires a link with Austrian territory. That link exists, since the expenditure of the lessee of the vehicle reduces his assets and, moreover, the service is used in Austria. The application of Paragraph 1(1)(2)(d) in conjunction with Paragraph 12(2)(2) of the UStG 1994 leads to the exclusion of the deduction of VAT being applied, from the economic point of view, in the same way as it was until the end of 1994, that is until the accession of the Republic of Austria to the European Union.

33 Cookies World and the Commission take the view that the provisions of the Sixth Directive do not justify the fiscal criterion set out in Paragraph 1(1)(2)(d) of the UStG 1994.

34 The Austrian Government submits, to the contrary, that it is consistent with the Sixth Directive for a Member State to subject to VAT expenditure in relation to supplies effected abroad in the circumstances laid down in Paragraph 1(1)(2)(d) of the UStG 1994. In order to determine the legal basis of such taxation, Articles 5(7), 6(2) and 17(6) of the Sixth Directive must be read together. Article 17(7) must also be taken into consideration.

35 The Austrian Government points out that the first subparagraph of Article 6(2) of the Sixth Directive sets out the transactions which are treated as supplies of services for consideration. That provision is applicable generally, namely to all chargeable events of own consumption, where total or partial deduction is indeed due in one Member State as the place where the service is supplied but where the own consumption takes place in another Member State.

36 The Austrian Government also relies, in support of its position, on the second subparagraph of Article 6(2) of the Sixth Directive, which provides that the Member States may derogate from the provisions of that article, provided that such derogations do not lead to distortion of competition. Paragraph 1(1)(2)(d) of the UStG 1994 is designed to eliminate such distortions. In the absence of the constituent elements of own consumption within the meaning of that provision, services relating to cars, assuming that the transaction has given rise — in a Member State where the concept of business has a wider scope — to the refund of input tax, would be more favourable than services effected in Austria.

37 Cookies World and the Commission point out that Article 6(2) of the Sixth Directive presupposes that the service was used for purposes other than those of the business. That is not the position in this case, since Cookies World used the vehicle for the purposes of its business. The Commission also observes that Paragraph 1(1)(2)(d) of the UStG 1994 assumes that the taxable person is entitled abroad to a refund of the foreign input tax. Such entitlement properly arises only where the relevant supply is used for purposes of business. Consequently, use of the vehicle cannot be regarded as use of part of the assets of the business for purposes other than those of the business within the meaning of Article 6(2), first subparagraph, (a), of the Sixth Directive. Moreover, the Commission considers that the second subparagraph of Article 6(2) in no way authorises the Member States to introduce chargeable events not provided for by the Sixth Directive.

38 As regards the standstill clause provided for in Article 17(6) of the Sixth Directive, the Austrian Government argues that it merely maintained in force the rule referred to in Paragraph 12(2)(2) of the UStG 1972, which provides for the exclusion of VAT deduction for the lease of certain vehicles. Since Article 17(6) of the Sixth Directive authorises, in the cases mentioned, the exclusion of the right to deduct VAT, without stating the actual procedure, Member States are free to determine those procedures. The Austrian Government concedes that Paragraph 1(1)(2)(d) of the UStG 1994 was first inserted into the UStG 1994 on 6 January 1995. The interval between 1 January 1995 and 6 January 1995 was due, however, to logistical considerations.

39 Cookies World and the Commission submit that Article 17(6) of the Sixth Directive concerns only the exclusion of the right to deduct VAT. No support can be found in that paragraph for the double taxation of one and the same economic transaction. Moreover, Paragraph 1(1)(2)(d) of the UStG 1994 was not part of national law at the time of the Republic of Austria's accession to the European Union, on 1 January 1995, although that is a prerequisite for applying the standstill clause provided for in Article 17(6) of the Sixth Directive.

40 The Austrian Government submits that support for Paragraph 1(1)(2)(d) of the UStG 1994 can also be found in Article 17(7) of the Sixth Directive. Even if that paragraph can be relied on only indirectly as the basis for the disputed provision, it nevertheless reveals the purpose of the directive, which is to thwart distortions of competition by providing special systems as regards the right to deduct VAT. Therefore, special systems in that area are lawful provided that they serve to restore fair competition. If it is accepted that special systems within the meaning of the last sentence of Article 17(7) of the Directive are not contrary to the Directive, it should be considered that that is also the case as far as a system such as that provided for in Paragraph 1(1)(2)(d) of the UStG 1994 is concerned.

41 Cookies World and the Commission submit that the provision in question cannot be based on Article 17(7) of the Sixth Directive. That provision applies expressly subject to the consultation provided for in Article 29 of the Directive, which in this case did not take place. Moreover, Article 17(7) can justify only short-term exclusions and not permanent exclusion measures from the scheme of VAT deductions.

42 Moreover, Cookies World wonders whether Paragraph 1(1)(2)(d) of the UStG 1994 is designed to protect Austrian car leasing businesses and whether it might infringe fundamental freedoms, in particular, the free movement of services laid down in Article 49 EC et seq. The Austrian Government contests that argument.

The Court's reply

43 It is established that the dispute in the main proceedings concerns a transaction with cross-border aspects. An undertaking established in one Member State, Austria, leases a vehicle from an undertaking established in another Member State, Germany, with a view to using that vehicle mainly in Austria.

44 In order to answer the question it is appropriate, at the outset, to consider whether the original taxation in Germany of the hire of a vehicle under a leasing contract and the subsequent refund of input tax were in accordance with the rules laid down by the Sixth and Eighth Directives.

45 In that regard, it must be observed that the leasing of vehicles is a supply of services within the meaning of Article 6(1) of the Sixth Directive, in respect of which the place of taxation is determined in Article 9.

46 As the Court has stated, *inter alia*, in Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14, Article 9 of the Sixth Directive is designed to secure the rational delimitation of the respective areas covered by national VAT rules by determining in a uniform manner the place where services are deemed to be provided for tax purposes. That provision is deemed definitively to determine the Member State with exclusive competence to tax a supply of services.

47 It is clear from the case-law of the Court that, in respect of the leasing of all forms of transport, the place of taxation laid down by the Sixth Directive is generally, for the sake of simplification, deemed to be the place where the supplier of the form of transport has established his business or has a fixed establishment and not the place where the goods hired out are used (see, to that effect, Case 51/88 *Hamann* [1989] ECR 767, paragraphs 17 and 18).

48 It should be remembered that the Court has held that the term 'fixed establishment' in Article 9(1) of the Sixth Directive must be interpreted in such a way that an undertaking established in one Member State which hires out or leases a number of vehicles to clients established in another Member State, does not possess a fixed establishment in that other Member State by engaging in that hiring out or leasing (Case C-190/95 *ARO Lease* [1997] ECR I-4383).

49 The fact remains that, in the circumstances of this case, the place where the supplier of the leased vehicle has established his business or has a fixed place of

business is in Germany and the place of supply of the vehicle-leasing services is deemed to be in that State. Therefore, the VAT on the leasing of the vehicle had to be paid in Germany by the lessor of the vehicle who passes it on in the leasing charge for that vehicle.

50 It is clear from the order for reference that Cookies World used the leased vehicle outside Germany for the purposes of its business. Under Article 17(3)(a) of the Sixth Directive, in conjunction with Articles 2 and 5 of the Eighth Directive, it was entitled to a refund of the VAT which had been passed on in Germany in the leasing charge for the vehicle in question.

51 Accordingly, the taxation by the German authorities of the leasing of the vehicle in question and the subsequent refund to Cookies World of the input tax paid which was passed on in the leasing charge complied with the rules laid down in the Sixth and Eighth Directives.

52 Next, it must be considered whether the Sixth Directive precludes a provision such as that in Paragraph 1(1)(2)(d) of the UStG 1994, by which a Member State subjects to VAT the payment for services supplied in another Member State, by regarding as own consumption the fact that a trader incurs expenditure (expenses) relating to supplies of services abroad which, if they had been made to the trader within national territory, would not have enabled him to benefit from deduction of VAT. However, that is the case only if the trader is entitled abroad to a refund of the foreign input tax.

53 The Austrian Government submits that the provision in question complies with the Sixth Directive. In support of its position it relies in particular on Articles 5(7)

and 6(2) in conjunction with Article 17(6) of that Directive. It also relies, but more indirectly, on Article 17(7).

54 The arguments put forward by the Austrian Government that the taxation provided for in Paragraph 1(1)(2)(d) of the UStG 1994 complies with Articles 5(7) and 6(2) of the Sixth Directive cannot be accepted.

55 As regards Article 5(7) of the Sixth Directive it is sufficient to observe, as it is stated in paragraph 45 of the present judgment, that the leasing of vehicles is a supply of services within the meaning of Article 6(1) of the Sixth Directive rather than a supply of goods within the meaning of Article 5(1). Accordingly, there is no need to consider whether Paragraph 1(1)(2)(d) of the UStG 1994 correctly applies Article 5(7) of the Sixth Directive which concerns goods.

56 As regards Article 6(2), first subparagraph, (a), of the Sixth Directive, it must be recalled that under that provision the use of goods forming part of the assets of a business for purposes other than those of its business is to be treated as supplies of services for consideration where the VAT on such goods is wholly or partly deductible. As is apparent from the Court's case-law, that provision is designed to prevent the non-taxation of business goods used for private purposes (see, *inter alia* Case 50/88 *Kühne* [1989] ECR 1925, paragraph 8).

57 It is clear from the order for reference that the vehicle leased by Cookies World was used in Austria for the purposes of its business. Moreover, it must be recalled

that Paragraph 1(1)(2)(d) of the UStG 1994 assumes that the lessee was entitled abroad to a refund of foreign input tax. Such entitlement properly arises only in a case where the service is used for the purposes of the business in the State where the VAT was paid. Accordingly, since the use of the vehicle gave rise to entitlement to a refund, it cannot be considered at the same time as use for purposes other than those of the business within the meaning of Article 6(2), first subparagraph, (a), of the Sixth Directive.

58 As to the second subparagraph of Article 6(2) of the Sixth Directive, it must be recalled that that provision authorises the Member States to derogate from the provisions of that article, provided that such derogation does not lead to distortion of competition.

59 As the Advocate General pointed out in point 29 of his Opinion, the exceptions to harmonisation must be interpreted strictly. Any recourse to derogating systems entails divergence between the levels of the tax burden in the Member States. As the Commission rightly argues in paragraph 46 of its observations, the second subparagraph of Article 6(2) of the Sixth Directive must generally be interpreted as meaning that the Member States may refrain from treating certain supplies or uses as services supplied for consideration. On the other hand, that provision in no way authorises the Member States to provide for chargeable events not referred to in the first subparagraph of Article 6(2) of the Sixth Directive.

60 Finally, the taxation in Austria by the Finanzamt Schwaz was based on the charge for the vehicle leased in Germany by Cookies World, that is the consideration for the use of the vehicle under a leasing contract. As it is clear from paragraph 51 of

the present judgment, the leasing of the vehicle in question had already lawfully been subject to VAT in Germany. To tax a supply of services in another Member State when it has already lawfully been subject to VAT in the State of the supplier of the services gives rise to double taxation contrary to the principle of fiscal neutrality inherent in the common system of VAT. The fact that VAT had to be paid by the lessor of the vehicle in Germany while, in Austria, that obligation fell on Cookies World does nothing to change the fact that in reality one and the same economic transaction, that is, the hire of a vehicle under a leasing contract, was taxed twice.

61 The Austrian Government's argument that justification for taxation such as that laid down in Paragraph 1(1)(2)(d) of the UStG 1994 results from the application of Article 17(6) and (7) of the Sixth Directive must also be dismissed.

62 Under Article 17(6) of the Sixth Directive, and in particular the second subparagraph, the Member States are authorised to retain their existing legislation as at the date of entry into force of the Sixth Directive in regard to exclusion from the right of deduction until such time as the Council has adopted the provisions envisaged by that article (see Case C-345/99 *Commission* v *France* [2001] ECR I-4493, paragraph 19).

63 It appears from the file that Paragraph 1(1)(2)(d) of the UStG 1994 is designed so that the exclusion of the deduction of VAT in connection with the leasing of certain vehicles is applied in Austria in the same way, from the economic point of view, as it was until the end of 1994, that is, at the time of Austria's accession to

the European Union. It seems that the Austrian Government has achieved the objective of retaining the existing legislation on the subject only indirectly. A new chargeable event for VAT purposes has been introduced in the taxation scheme by way of a new provision, which is not the situation referred to by Article 17(6) of the Sixth Directive.

64 In any case, even supposing that Article 17(6) of the Sixth Directive was generally applicable to the facts in the main proceedings, it must be observed that the procedural requirements laid down by that provision for the retention of the national scheme for deduction of VAT are not satisfied.

65 The Sixth Directive entered into force in the Republic of Austria on the date of its accession to the European Union, 1 January 1995. It is therefore that date which is relevant for the purpose of the application of the second subparagraph of Article 17(6) of the Sixth Directive in so far as concerns that Member State.

66 It is apparent from the order for reference that Paragraph 1(1)(2)(d) of the UStG 1994 first entered into force on 6 January 1995. As the Court has already held in Case C-40/00 *Commission* v *France* [2001] ECR I-4539, paragraph 17, national legislation does not constitute a derogation permitted by the second subparagraph of Article 17(6) of the Sixth Directive if its effect is to increase, after the entry into force of the Sixth Directive, the extent of existing exclusions, thus diverging from the objective of that directive.

67 As far as concerns Article 17(7) of the Sixth Directive, which is relied on indirectly by the Austrian Government, it is not necessary to rule on the question whether the national measures in question in the main proceedings are of a temporary nature and designed to deal with a cyclical economic situation; it is nevertheless common ground that the Austrian authorities did not consult the VAT Committee before adopting Paragraph 1(1)(2)(d) of the UStG 1994. The Austrian Government cannot therefore rely on Article 17(7) of the Sixth Directive to the detriment of taxable persons (see, by way of analogy, concerning Article 27(1) and (5) of the Sixth Directive, Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 34).

68 In the light of the foregoing, the answer to the question referred by the national court must be that the provisions of the Sixth Directive preclude a measure of a Member State which provides that payment for services supplied in other Member States to a person in the first Member State is subject to VAT whereas, had the services in question been supplied within the territory of the country, the person to whom they were supplied would not have been entitled to deduction of input tax.

Costs

69 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Verwaltungsgerichtshof by order of 29 March 2001, hereby rules:

The provisions of the 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 preclude a measure of a Member State which provides that payment for services supplied in other Member States to a person in the first Member State is subject to VAT whereas, had the services in question been supplied within the territory of the country, the person to whom they were supplied would not have been entitled to deduction of input tax.

Wathelet Jann Rosas

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass M. Wathelet

Registrar President of the First Chamber