JUDGMENT OF THE COURT (Sixth Chamber)

8 June 2000 *

In Case C-400/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Finanzamt Goslar

and

Brigitte Breitsohl,

on the interpretation of Articles 4, 17 and 28 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member

* Language of the case: German.

States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145 p. 1),

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida (Rapporteur), President of the Chamber, R. Schintgen, G. Hirsch, V. Skouris and F. Macken, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the German Government, by W.-D. Plessing, Ministerialrat at the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor at the same ministry, acting as Agents,

— the Greek Government, by K. Paraskevopoulou-Grigoriou, Agent for Legal Proceedings in the State Legal Service, and A. Rokofyllou, Adviser in the Special Legal Service — Section for European Community Law in the Ministry of Foreign Affairs, acting as Agents,

— the Commission of the European Communities, by E. Traversa, of its Legal Service, assisted by A. Buschmann, a national civil servant on secondment to the Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1999,

gives the following

Judgment

1 By order of 27 August 1998, received at the Court on 9 November 1998, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 4, 17 and 28 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 Those questions were raised in proceedings between Mrs Brigitte Breitsohl and the Finanzamt Goslar (Tax Office, Goslar) concerning the deduction by the Finanzamt of the value added tax ('VAT') which Mrs Breitsohl had paid on transactions carried out in preparation for a business project.

The Sixth Directive

3 Article 4 of the Sixth Directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

3. Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2 and in particular one of the following:

(a) the supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the

date of first supply or the period elapsing between the date of first occupation and the date of subsequent supply, provided that these periods do not exceed five years and two years respectively.

"A building" shall be taken to mean any structure fixed to or in the ground;

(b) the supply of building land.

"Building land" shall mean any unimproved or improved land defined as such by the Member States.

...'

4 Article 13 of the Sixth Directive provides:

'...

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:

...

(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);

...

C. *Options*

Member States may allow taxpayers a right of option for taxation in cases of:

...

(b) the transactions covered in B(d)(g) and (h) above.

Member States may restrict the scope of this right of option and shall fix the details of its use.'

5 Under Article 17 of the Sixth Directive:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...'

6 Article 20 of the Sixth Directive provides:

'1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are cancelled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed...

2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured.

...

3. In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. Such business activities are presumed to be fully taxed in cases where the delivery of the said goods is taxed; they are presumed to be fully exempt where the delivery is exempt. The adjustment shall be made only once for the whole period of adjustment still to be covered.

...

4. For the purposes of applying the provisions of paragraphs 2 and 3, Member States may:

...

— define the concept of capital goods,

— indicate the amount of the tax which is to be taken into consideration for adjustment,

— adopt any suitable measures with a view to ensuring that adjustment does not involve any unjustified advantage,

— permit administrative simplifications.

...'

7 Article 28(3) of the Sixth Directive provides:

'During the transitional period referred to in paragraph 4, Member States may:

...

(b) continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned;

(c) grant to taxable persons the option for taxation of exempt transactions under the conditions set out in Annex G;

...'

8 Annex F to the Sixth Directive, headed 'Transactions referred to in Article 28(3)(b)', mentions in point 16:

'Supplies of those buildings and land described in Article 4(3)'.

9 Annex G to the Sixth Directive, headed 'Right of option', provides:

'1. The right of option referred to in Article 28(3)(c) may be granted:

...

(b) in the case of transactions specified in Annex F;

...'

The national VAT legislation

10 Paragraph 2(1) of the Umsatzsteuergesetz 1980 (Turnover Tax Law; 'the UStG') provides:

'A trader is a person who independently carries out an industrial, commercial or occupational activity. The undertaking comprises the whole of the industrial, commercial or occupational activity of the trader. An industrial, commercial or occupational activity shall mean any permanent activity carried out for the purpose of obtaining income, even where there is no intention to make a profit or a group of persons carries out its activities only in relation to its members.'

11 Paragraph 4 of the UStG provides:

'The following transactions falling under Paragraph 1(1), points 1 to 3, are exempt from the tax:

...

9 (a) transactions falling under the Tax on the Transfer of Real Property (Grunderwerbsteuergesetz)...'

12 Paragraph 9(1) of the UStG provides, however:

'A trader may treat a supply exempted under Paragraph 4, point... 9 as taxable where the supply is made to another trader for the purposes of his business.'

13 Paragraph 15(1) of the UStG provides:

'A trader may deduct the following taxes:

taxes separately stated in invoices, within the meaning of Paragraph 14, in respect of supplies or other services performed for his business by other businesses....'

The dispute in the main proceedings and the questions referred

14 In 1989, Mrs Breitsohl applied to a motor vehicle manufacturer for a dealership. By letter of 14 April 1989, the manufacturer informed her that it accepted her application subject to certain conditions.

15 In February 1990, Mrs Breitsohl declared to her competent local authority an industrial and commercial establishment for the sale and repair of motor vehicles, and acquired, for the sum of DEM 62 670, exempt from VAT, an empty plot of land which was to be the site of the declared business. In April 1990, she commissioned a building company to construct a motor vehicle repair workshop on the plot. Excavation work began the same month. Towards mid-May 1990, those works were finished, the foundations were laid and the floor partially completed. Those works as a whole represented a sum of DEM 173 655.50.

16 When it became apparent that a rise of DEM 230 000 in the overall cost of the building works was to be expected, the bank refused to finance those additional costs. On 22 May 1990, the building company interrupted the works on account of the uncertainty as to their financing.

17 Considering that she was no longer in a position to carry out all the building work on the land or to commence business, Mrs Breitsohl agreed, by a settlement reached on 22 November 1990, to pay the building company a total amount of DEM 100 000 and to sell the building works already completed to a third party for DEM 50 000, representing DEM 43 859.65 plus DEM 6 140.35 by way of VAT. On 21 December 1990, she sold the land to the same person for DEM 61 905, with no mention of VAT.

18 In her annual VAT return for 1990, Mrs Breitsohl declared as taxable transactions DEM 43 859 arising from the sale of parts of the building and, as deductible amounts, DEM 13 900.11 in respect of lawyers' and tax accountants' fees and

building accounts. This resulted in a surplus in her favour of DEM 7 759.90. In her preliminary tax returns, Mrs Breitsohl had not claimed those amounts.

19 In its tax notice for 1990 dated 15 July 1992, the Finanzamt Goslar allowed a deductible amount of only DEM 95.20 on the ground that the services in question had been used for the purpose of a tax-exempt sale of land. The VAT due was therefore fixed at DEM 6 045.

20 On 14 August 1992, Mrs Breitsohl lodged an administrative appeal against that tax notice. By decision of 11 January 1995, the Finanzamt held that Mrs Breitsohl had not acquired the status of a trader because she had not carried out any operations having a character of permanence and was not therefore entitled to make the deduction. By contrast, it held that Mrs Breitsohl was liable for the tax clearly mentioned in the invoice concerning the sale of building works to a third party, namely DEM 6 140.35.

21 On 13 February 1995, Mrs Breitsohl brought an action against that decision before the Niedersächsisches Finanzgericht (Finance Court, Lower Saxony). By judgment of 5 December 1996, that court essentially upheld her action. Referring to the judgment of 29 February 1996 in Case C-110/94 *INZO* v *Belgian State* [1996] ECR I-857, the Finanzgericht held that the activity of trader had begun as soon as Mrs Breitsohl carried out her preparatory acts, and that she was therefore entitled to deduct the amounts of VAT corresponding to the building company's invoices. It further held that Mrs Breitsohl was properly entitled to waive the tax exemption on the supply of the immovable property, limiting that waiver to the part of the building works that had been completed and thus excluding the land from it. According to the Finanzgericht, deduction of tax could be refused only in respect of the notary's fees relating to the sale of the land.

22 On 4 March 1997, the Finanzamt Goslar appealed on a point of law (Revision) to the Bundesfinanzhof against the judgment of the Finanzgericht. In its appeal, the Finanzamt argues essentially that Paragraph 9(1) of the UStG does not allow

waiver of the exemption for the supply of real property to be limited to buildings alone. It submits that recent case-law of the Bundesgerichtshof, based on the case-law of the Court of Justice, allows the waiver of exemption referred to in Paragraph 9 of the UStG to be limited to certain parts of buildings on condition that the sale of those parts is accompanied by the sale of the parts of the land on which they stand. It maintains that the same interpretation follows from the combined provisions of Article 13B(g) and the first paragraph of Article 13C of the Sixth Directive, which mention supplies of buildings or parts thereof without providing for the possibility of a separate option in respect of the buildings on the one hand and the land on the other.

23 The Bundesfinanzhof is in doubt as to whether the principles laid down in the *INZO* judgment apply only where the tax authority has already accepted in a tax assessment, on the basis of the trader's declared intention to carry out taxable transactions, that that person has status as a taxable person, or whether the authority must in every case base taxation on the intention to carry out taxable transactions, even where it is clear as from the first examination of the tax file that the economic activity envisaged will not be taken up.

24 The Bundesfinanzhof first points out that, if it were necessary, in accordance with paragraph 23 of the *INZO* judgment, to require the declared intention to commence taxable transactions to be confirmed by objective evidence, where it has already been established, at the time of the decision on the right to deduct, that the intended taxable transactions will not in fact be carried out, the tax authority would, for tax purposes, have to treat mere intentions as business ventures and, where appropriate, take them into account under the adjustment procedure laid down in Article 20 of the Sixth Directive. The national court also raises the question whether the sale in 1990 of land and partially completed building work could still, as a supply of capital goods during the adjustment period, lead to an adjustment of the deduction under the conditions laid down in Article 20(3) of the Sixth Directive.

25 The Bundesfinanzhof then points to the fact that, in German law, exemption or, as the case may be, the option for taxation, must relate to the essential components of the immovable property, that is to say not only the land but also

fixtures, particularly buildings. It doubts whether, in the case of a supply of developed land, Community law authorises the option for taxation in respect of building works alone. It recalls in that respect that, in accordance with the combined provisions of Article 28(3)(c), Annex G, point 1(b), and Annex F, point 16, of the Sixth Directive, Member States may, on a transitional basis, grant to taxable persons the option for taxation of supplies of buildings and land. Since the German legislature has not excluded the supply of developed land from the exemption, the Bundesfinanzhof considers that it is therefore possible to waive the exemption.

26 As far as the Bundesfinanzhof can ascertain, the Sixth Directive and the case-law of the Court of Justice treat buildings and parts of buildings and the land on which they stand as a single supply item. According to paragraph 21 of the judgment in Case C-291/92 *Armbrecht* [1995] ECR I-2775, the system of taxation of a developed piece of land may vary only in accordance with whether or not it is used for the business, thereby allowing the taxable person to opt for taxation in respect of the part used for the business and not to exercise such an option in respect of the part used privately. The apportionment between those two parts should be based on the proportions of business and private use during the year of acquisition and not by reference to the geographical division. Apportionment on the basis of a fixed geographical division of the developed land might lead to double taxation where the use of the property changes.

27 The Bundesfinanzhof finally notes that, in this case, overtaxation might result from treating the land and the buildings on it as a single entity, given that the undeveloped land was acquired under the system of exemption and the building services which bore VAT were affixed to it. Either the sale of the developed land is exempt as a whole and there can be no right to deduct, even for the building works, the latter not having been carried out for the purposes of taxable transactions. Or the sale of the developed land forms the subject-matter of a waiver of exemption in its entirety, and Mrs Breitsohl benefits from the deduction in relation to the building works but is liable to VAT on the whole of the sale, even though she was not able to deduct any tax on acquisition of the undeveloped land.

28 It was in those circumstances that, having doubts as to the interpretation to be given to the provisions of the Sixth Directive applicable to the case before it, the Bundesfinanzhof decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. According to the case-law of the Court of Justice of the European Communities (Case C-110/94 *INZO* v *Belgian State* [1996] ECR I-857), even the very first investment expenditure incurred for the purposes of a business may be regarded as an economic activity within the meaning of Article 4 of Directive 77/388/EEC. The tax authority has to take account of the business person's declared intention in this regard. The status of taxable person accorded on that basis cannot, in principle, be withdrawn retroactively on account of certain events having or having not occurred (principle of legal certainty). This also applies to the deductions relating to the investment transactions.

According to those principles, is the right to deduct tax (Article 17 of Directive 77/388/EEC) on "setting up" expenditure to be accorded on the basis of the intention to take up economic activity leading to taxable transactions even where the tax authority is already aware, when the first tax assessment is made, that the intended economic activity leading to taxable transactions was not actually taken up?

If the answer to Question 1 is in the affirmative:

2. In the case of a supply of buildings or parts thereof and of the land on which they stand, can the option for taxation be restricted to the buildings and parts thereof?'

The first question

29 By its first question, the national court is asking essentially whether Articles 4 and 17 of the Sixth Directive are to be interpreted as meaning that the right to deduct the VAT paid on transactions carried out with a view to the realisation of a planned economic activity still exists even where the tax authority is aware, from the time of the first tax assessment, that the economic activity envisaged, which was to give rise to taxable transactions, will not be taken up.

30 The German and Greek Governments argue that the principles of the protection of legitimate expectations and legal certainty, on which the *INZO* judgment is based, do not apply to the case at issue in the main proceedings. In this case, unlike *INZO*, the revenue authorities had not yet recognised Mrs Breitsohl's capacity as a taxable person when she submitted her VAT return. They maintain, therefore, that Mrs Breitsohl cannot invoke the protection of legitimate expectations and rely on the conviction she had that she could deduct VAT.

31 Those governments add that the principle of the neutrality of VAT has not been infringed in the main proceedings, since Mrs Breitsohl has not carried out taxable economic activities and her capacity as a taxable person has not been recognised.

32 The German Government points to the fact that, under Articles 4(1) and 17(2) of the Sixth Directive, a taxable person has the right to deduct VAT only if the goods and services on which it was paid are used to carry out taxable transactions. It follows, in its submission, that a final decision as to the right to deduct cannot be taken until the transactions for which those goods and services were actually used are known. Preparatory acts confer upon those performing them only a provisional capacity of trader and a provisional right to deduct, subject to the suspensive condition that taxable transactions are carried out. If such transac-

tions do not follow the preparatory acts, and can no longer be anticipated, the tax authority should immediately refuse both the capacity of taxpayer and the deduction of VAT.

33 The German Government maintains that if the mere intention of a 'trader' to carry out taxable transactions gave him the right to be recognised as a taxable person, and thus a right to deduct, the tax authority would have to make its determination on a basis of a purely subjective declaration of intention and not on the basis of actual facts capable of being objectively verified. Such a situation would constitute a direct incentive to abuse.

34 In that respect, it should be recalled that a person who has the intention, confirmed by objective evidence, to commence independently an economic activity within the meaning of Article 4 of the Sixth Directive and who incurs the first investment expenditure for those purposes must be regarded as a taxable person. Acting in that capacity, he has therefore, in accordance with Article 17 et seq. of the Sixth Directive, the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct, without having to wait for the actual exploitation of his business to begin (Case C-37/95 *Belgian State* v *Ghent Coal Terminal* [1998] ECR I-1, paragraph 17; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* v *AEAT* [2000] ECR I-1577, paragraph 47).

35 It is important to note that it is the acquisition of goods or services by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods or services are put, or intended to be put, determines only the extent of the initial deduction to which the taxable person is entitled under Article 17 of the Sixth Directive and the extent of any adjustments in the course of the following periods, which must be carried out under the conditions laid down in Article 20 of that directive (Case C-97/90 *Lennartz* v *Finanzamt München* [1991] ECR I-3795, paragraph 15).

36 That interpretation is confirmed by the wording of Article 17(1) of the Sixth Directive, whereby the right to deduct arises at the time when the deductible tax becomes chargeable. In accordance with Article 10(2) of that directive, that is the case as soon as the goods are delivered to, or the services are performed for, the taxable person entitled to deduct.

37 Moreover, any other interpretation of Article 4 of the Sixth Directive would be contrary to the principle of VAT neutrality, in that it would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it, in accordance with Article 17, and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of a business and expenditure incurred during exploitation (Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655, paragraph 23; *INZO*, paragraph 16; *Gabalfrisa*, paragraph 45).

38 The arising of the right to deduct the VAT paid on the first investment expenditure is thus in no way dependent upon formal recognition of the status of taxable person by the tax authority. The only effect of that recognition is that such status, once recognised, cannot, save in situations of fraud or abuse, be withdrawn from the taxpayer with retrospective effect, without infringing the principles of the protection of legitimate expectations and legal certainty.

39 As for the risk of abuse referred to by the German Government, it should be recalled that Article 4 of the Sixth Directive does not preclude the tax authority from requiring objective evidence in support of the declared intention to commence economic activities giving rise to taxable transactions. In that context, it is important to state that a taxable person acquires that status definitively only if he made the declaration of intention to begin the envisaged economic activities in good faith. In cases of fraud or abuse, in which, for example, the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively

on the ground that those deductions were made on the basis of false declarations (*Rompelman*, paragraph 24; *INZO*, paragraphs 23 and 24; *Gabalfrisa*, paragraph 46).

40 In those circumstances, it is for the national court to check whether, taking account of the circumstances of the case in the main proceedings, and in particular the progress of the building works in mid-May 1990, the declaration of the intention to commence economic activities giving rise to taxable transactions was made in good faith and is borne out by objective evidence.

41 In the absence of fraud or abuse, and subject to adjustments which may be made in accordance with the conditions laid down in Article 20 of the Sixth Directive, the principle of VAT neutrality requires, as indicated in paragraph 36 of this judgment, that the right to deduct, once it has arisen, be retained even where the tax authority is aware, from the time the first tax assessment is made, that the economic activity envisaged, which was to give rise to taxable transactions, will not be taken up.

42 The answer to the first question must therefore be that Articles 4 and 17 of the Sixth Directive are to be interpreted as meaning that the right to deduct the VAT paid on transactions carried out with a view to the realisation of a planned economic activity still exists even where the tax authority is aware, from the time of the first tax assessment, that the economic activity envisaged, which was to give rise to taxable transactions, will not be taken up.

The second question

43 By its second question, the national court asks essentially whether Article 4(3)(a) of the Sixth Directive is to be interpreted as meaning that the option for taxation

exercised at the time of the supply of the buildings or parts of buildings and the land on which they stand must relate inseparably to the buildings or parts of buildings and the land on which they stand, or whether it may be limited to the buildings or parts thereof.

44 The German Government argues that the Federal Republic of Germany has made use of the option conferred upon it by Article 13C of the Sixth Directive by allowing its taxpayers the right to opt for taxation in the case of supply of buildings and land upon which they stand.

45 The German Government considers that, since Article 13C of the Sixth Directive expressly allows Member States to restrict the scope of the right of option and fix the details of its use, the question whether a taxpayer may exercise his right of option solely in relation to buildings, to the exclusion of the land on which they stand, is a question of national law. That provision does not preclude either a national rule authorising exercise of the right of option solely in relation to the building or solely in relation to the land, or a national rule requiring exercise of the right of option in relation to the whole of the developed land.

46 It should be noted at the outset that, since the case at issue in the main proceedings concerns the supply of a building or a part of a building and the land on which it stands 'before first occupation' as envisaged in Article 4(3)(a) of the Sixth Directive, the exemption granted by German law cannot be based on

Article 13B(g) of the Sixth Directive, and neither, therefore, can the right to opt for taxation be based on Article 13C of the directive.

47 As the national court and the Commission point out, the exemption and the right of option granted by the provisions of the UStG at issue in the main proceedings are based upon Article 28(3)(b) and (c) of the Sixth Directive, read in conjunction with Annex F, point 16 and Annex G, point 1(b), which authorise Member States during the transitional period, which has not yet expired, to continue to exempt the supply before first occupation of a building or part of a building and land on which it stands and to grant taxable persons the right to opt for taxation of such a supply.

48 The next point to be made is that, without prejudice to the option which the first sentence of Article 4(3)(a) of the Sixth Directive confers upon Member States to define the words 'land on which they stand', the concept of 'supply... of buildings or parts of buildings and the land on which they stand' cannot be defined by reference to the national law applicable in the main proceedings, given the purpose of the Sixth Directive, which is aimed at determining the basis of VAT in a uniform manner according to Community rules. Such a concept, which contributes to determining the persons who may be regarded by Member States as taxable persons by virtue of Article 4(3)(a) of the directive, must therefore be interpreted in a uniform manner in all Member States.

49 It is important to note in that respect that Article 4(3) of the Sixth Directive distinguishes between, on the one hand, the supply of building land, described as 'any unimproved or improved land defined as such by the Member States', and, on the other, the supply before first occupation of buildings or parts of buildings

and the land on which they stand, any structure fixed to or in the ground being regarded as a building within the meaning of that provision.

50 It follows from that distinction and from the wording of Article 4(3)(a) of the Sixth Directive, which refers to 'the supply... of buildings or parts of buildings and the land on which they stand', that, for the purposes of VAT, buildings or parts of buildings and the land on which they stand cannot be dissociated from each other.

51 In those circumstances, the exemption and the right of option referred to in Article 28(3)(b) and (c) of the Sixth Directive, read in combination with Annex F, point 16, and Annex G, point 1(b) must relate inseparably to buildings or parts of buildings and the land on which they stand.

52 Therefore, a taxable person who supplies buildings and land on which they stand may either use the VAT exemption for the buildings and the land taken as a whole, or opt for taxation of the whole. In the first hypothesis, the defendant in the main proceedings would have to carry out an adjustment of her deductions in accordance with Article 20(3) of the Sixth Directive. In the second hypothesis, she would be able to deduct the VAT relating to the building work in respect of which she has asserted her right to deduct, but she would, on the other hand, also have to subject the sum obtained for the sale of the land to VAT.

53 It is true that, as the national court points out, the impossibility of separating buildings and the land on which they stand in relation to exemption or the exercise of the right of option for taxation may entail a risk that those elements may be overtaxed. However, as the Advocate General points out in paragraphs 107 and 108 of his Opinion, such a risk is inherent in a system, such as that

implemented on a transitional basis by Article 28(3)(b) and (c) of the Sixth Directive, in which VAT exemptions are authorised at a stage prior to that of the final consumer, and is limited to the transitional period, at the expiry of which Member States must cease exempting supplies of buildings or parts of buildings and the land on which they stand.

54 Since, moreover, as the order for reference shows and unlike the situation analysed in paragraph 21 of the judgment in *Armbrecht*, the parts of buildings and the land on which they stood at issue in the main proceedings were intended to be used for business purposes, there is no need, as far as the right of option is concerned, to make an apportionment between that part of the buildings or parts of buildings and the land on which they stood devoted to business activities, and that part reserved for the private use of the taxpayer.

55 In those circumstances, the reply to the second question must be that Article 4(3)(a) of the Sixth Directive is to be interpreted as meaning that the option for taxation exercised at the time of the supply of buildings or parts of buildings and the land on which they stand must relate inseparably to the buildings or parts of buildings and the land on which they stand.

Costs

56 The costs incurred by the German and Greek Governments 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 (Sixth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 27 August 1998, hereby rules:

1. **Articles 4 and 17 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 are to be interpreted as meaning that the right to deduct the value added tax paid on transactions carried out with a view to the realisation of a planned economic activity still exists even where the tax authority is aware, from the time of the first tax assessment, that the economic activity envisaged, which was to give rise to taxable transactions, will not be taken up.**

2. **Article 4(3)(a) of the Sixth Directive 77/388 is to be interpreted as meaning that the option for taxation exercised at the time of the supply of buildings or parts of buildings and the land on which they stand must relate inseparably to the buildings or parts of buildings and the land on which they stand.**

Moitinho de Almeida Schintgen Hirsch

Skouris Macken

Delivered in open court in Luxembourg on 8 June 2000.

R. Grass J.C. Moitinho de Almeida

Registrar President of the Sixth Chamber