JUDGMENT OF THE COURT (First Chamber)

14 September 2006 *

In Case C-72/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht München (Germany), made by decision of 1 February 2005, received at the Court on 15 February 2005, in the proceedings

Hausgemeinschaft Jörg und Stefanie Wollny

v

Finanzamt Landshut,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric, J.N. Cunha Rodrigues, K. Lenaerts (Rapporteur) and E. Levits, Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 30 March 2006,

after considering the observations submitted on behalf of:

— Hausgemeinschaft Jörg und Stefanie Wollny, by J. Wollny and H. Wollny,

— the Finanzamt Landshut, by D. Baumann, Regierungsdirektor,

— the German Government, by U. Forsthoff, acting as Agent,

— the United Kingdom Government, by R. Hill, Barrister,

— the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11A(1)(c) 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) ('the Sixth Directive').

2 The reference was made in the course of proceedings concerning the determination of the taxable amount for the purposes of value added tax ('VAT') in respect of the use for private purposes by a taxable person of part of a building forming, in its entirety, part of the assets of his business.

Legal context

Community legislation

3 Under Article 2(1) of the Sixth Directive, VAT is chargeable on 'the supply of goods and services effected for consideration within the territory of the country by a taxable person acting as such'.

4 Article 6(2)(a) of the Sixth Directive treats as a supply of services for consideration 'the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the [VAT] on such goods is wholly or partly deductible'.

5 Under Article 11(A)(1)(c) of the Sixth Directive the taxable amount is 'in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services'.

6 Article 17(2) of the Sixth Directive provides:

'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) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...'

Article 20 of the Sixth Directive stipulates:

'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 ...

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.

By way of derogation from the preceding subparagraph, Member States may base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods the adjustment period may be extended up to 20 years.

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.

...'

National legislation

8 Paragraph 3(9a)(1) of the Law on turnover tax (Umsatzsteuergesetz, BGBl. 1993, I, p. 565) ('the UStG') treats as a supply of services for consideration the use, by a taxable person, of goods forming part of the assets of a business, for purposes other than those of that business, where input tax on such goods is wholly or partly deductible.

9 The taxable amount as regards the transactions referred to in Paragraph 3(9a)(1) is defined in Paragraph 10 of the UStG. In the version in force until 30 June 2004, that paragraph specified that the taxable amount for those transactions was assessed 'in accordance with the costs arising from making those supplies, to the extent that the input tax on such transactions is wholly or partly deductible'.

10 The version of Paragraph 10(4)(2) of the UStG which entered into force on 1 July 2004 provides:

'The taxable amount shall be assessed ... in accordance with the costs [Ausgaben] arising from making those supplies, to the extent that the tax on such transactions is wholly or partly deductible. The acquisition or production cost of an asset, to the extent that the asset forms part of the business and is used to carry out the other transaction, shall be included in those costs. Where the acquisition or production cost is at least EUR 500, it shall be apportioned evenly over a period which corresponds to the adjustment period applicable to the asset under Paragraph 15a.'

11 Paragraph 15a of the UStG relates to adjustment of deductions. Subparagraph 1 states:

'Should the relevant conditions for the initial deduction in respect of an asset alter within five years from the time at which the asset is first used, each calendar year during the alteration shall be compensated by an adjustment of the deduction in the amounts of tax apportionable to the acquisition or production cost. In the case of immovable property, including the essential parts thereof, rights governed by provisions of civil law relating to immovable property and buildings on a third party's land, a period of 10 years shall be substituted for the period of five years.'

12 Paragraph 7(4)(2)(a) of the Law on Income Tax (Einkommensteuergesetz, 'the EStG') provides that, in respect of buildings used as dwellings which were built after 1 January 1925, 'the rate of depreciation for wear and tear applying to the buildings until they are completely written off is ... 2% per year'.

The facts which gave rise to the dispute in the main proceedings and the question referred for a preliminary ruling

13 In 2003, the Hausgemeinschaft Jörg und Stefanie Wollny, a household made up of Mr and Mrs Wollny ('the household'), had a building constructed which was to form in its entirety part of the assets of its business. That building comprises the privately used rooms of the two members of the household and the rooms of a tax adviser's office which were let to one of those members. The part which is let constitutes 20.33% of the building. That letting is subject to VAT.

14 In its provisional VAT returns for December 2003 and for the months of January to March 2004, the household deducted the entire value added tax charged to it in connection with the costs of constructing the building. Relying on the rate of depreciation for wear and tear of buildings as laid down in Paragraph 7(4)(2)(a) of the EStG, it considered that the taxable amount for the private use of 79.67% of the building was a monthly amount equal to 1/12 of 2% of the construction costs apportionable to the privately used part of the building.

15 Relying on a circular of the Bundesministerium für Finanzen (German Ministry of Finance) of 13 April 2004 (BStBl. I 2004, p. 468), the Finanzamt Landshut (tax office, Landshut) took the view that the taxable amount should be established by reference to the length of the period of adjustment for deductions concerning VAT provided for in Paragraph 15a of the UStG, namely 10 years. It therefore corrected the household's calculation and fixed the taxable amount per month for VAT in respect of the private use of part of the building at 1/12 of 10% of the construction costs apportionable to that part.

16 The Finanzamt Landhut having dismissed the household's objections to the tax prepayment notices issued in accordance with the calculation set out in the previous paragraph, the household brought an action before the Finanzgericht München (Finance Court, Munich).

17 That court takes the view that a decision in the case before it depends on determining the taxable amount relating to the private use of a building which has been allocated, in its entirety, to the household's business. Observing that Article 11(A)(1)(c) of the Sixth Directive does not define the concept of 'full cost', it is unsure of the meaning to be given to that concept.

18 In that regard, it observes that the Court's judgments in Case C-230/94 *Enkler* [1996] ECR I-4517, and Case C-269/00 *Seeling* [2003] ECR I-4101, paragraph 54, include factors some of which tend towards the applicant's view and others of which tend towards that of the German tax authorities.

19 In those circumstances the Finanzgericht München decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'How is the term "full cost" in Article 11(A)(1)(c) of the [Sixth Directive] to be interpreted? Does the full cost for the privately used dwelling in a building forming, in its entirety, part of the assets of a business comprise, in addition to recurring expenses, annual depreciation for the wear and tear of buildings in accordance with the applicable national rules and/or the annual proportion of the acquisition and production cost — calculated on the basis of the applicable national period for adjustment of deductions — that has given rise to a right to deduct value added tax?'

Concerning the question referred for a preliminary ruling

20 First, according to the aim of the system introduced by the Sixth Directive, input taxes on goods or services used by a taxable person for his taxable transactions may be deducted. The deduction of input taxes is linked to the collection of output taxes. In so far as goods or services are used for the purposes of transactions that are taxable as outputs, deduction of the input tax on them is required in order to avoid double taxation. However, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted (see Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039, paragraph 24).

21 Where capital goods are used both for business and for private purposes the taxpayer has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes (Case C-434/03 *Charles and Charles-Tijmens* [2005] ECR I-7037, paragraph 23).

22 Should the taxable person choose to treat capital goods used for both business and private purposes as business goods, the input VAT due on the acquisition or construction of those goods is, as a rule, immediately deductible in full (*Seeling*, paragraph 41, and *Charles and Charles-Tijmens*, paragraph 24).

23 However, pursuant to Article 6(2)(a) of the Sixth Directive, when the input VAT paid on goods forming part of the assets of a business is wholly or partly deductible, their

use for the private purposes of the taxable person or of his staff or for purposes other than those of his business is treated as a supply of services for consideration. That use, which is therefore a taxable transaction within the meaning of Article 17(2) of that directive, is, under Article 11(A)(1)(c) thereof, taxed on the basis of the cost of providing the services (*Charles and Charles-Tijmens*, paragraph 25).

24 Consequently, where a taxable person chooses to treat an entire building as forming part of the assets of his business and uses part of that building for private purposes he is, on the one hand, entitled to deduct the input VAT paid on all construction costs relating to that building and, on the other, subject to the corresponding obligation to pay VAT on the amount of expenditure incurred to effect such use (*Seeling*, paragraph 43).

25 The question referred by the national court seeks, against that background, to ascertain how to interpret the expression 'full cost ... of providing the services' within the meaning of Article 11(A)(1)(c) of the Sixth Directive. That court is essentially raising the question whether that amount must be established by reference to the national rules applicable to depreciation for wear and tear of the building or on the basis of the length of the period for adjustment of deductions concerning VAT as laid down by national law in accordance with Article 20 of the Sixth Directive.

26 The expression at issue appears in a provision of community law which does not refer to the law of the Member States for the determining of its meaning and its scope. It follows that the interpretation, in general terms, of that expression cannot be left to the discretion of each Member State (see, to that effect, Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraphs 10 and 11).

27 In a general sense, that expression corresponds to expenses which relate to the goods themselves (see *Enkler*, cited above, paragraph 36). It includes expenses, such as acquisition and construction costs, relating to the goods in respect of which VAT was deductible, and without which the private use in question could not have taken place.

28 However, as the Sixth Directive does not contain the guidance necessary for defining uniformly and precisely the rules for establishing the full cost concerned, it must be accepted that the Member States therefore have a certain margin of discretion as regards those rules provided that they do not fail to have regard to the aims and role of the provision at issue within the scheme of the Sixth Directive (see, to that effect, *Verbond van Nederlandse Ondernemingen*, cited above, paragraphs 16 and 17).

29 In this case, it is necessary therefore to examine whether the reference made by national legislation, for the purposes of establishing the amount of those costs, to the length of the period of adjustment for deductions in accordance with Article 20 of the Sixth Directive is compatible with the aims of Article 11(A)(1)(c) of that directive and its role in the scheme thereof.

30 The purpose of Article 11(A)(1)(c) is to define the taxable amount of private use — or, more generally, of use for purposes other than those of the business — of goods forming part of the assets of a taxable person's business, as Article 6(2)(a) of the Sixth Directive treats such use as a supply of services for consideration which is therefore subject to VAT.

31 The purpose of that treatment is to prevent a taxable person who was able to deduct VAT on the acquisition or construction of goods forming part of the assets of his business from avoiding payment of that tax when he uses those goods or a part thereof for private purposes (see Case 50/88 *Kühne* [1989] ECR 1925, paragraph 8).

32 As emphasised by the German Government and, at the hearing, by the United Kingdom Government, the purpose of that device is, firstly, to ensure equal treatment as between a taxable person and a final consumer by preventing the former from enjoying an advantage to which he is not entitled by comparison with the latter who buys the goods and pays VAT on them (see, to that effect, *Enkler*, paragraphs 33 and 35, and Case C-412/03 *Hotel Scandic Gåsabäck* [2005] ECR I-743, paragraph 23).

33 Secondly, the aim is to ensure, in accordance with the underlying purpose of the system introduced by the Sixth Directive (see paragraph 20 of this judgment), a correspondence between deduction of input VAT and charging of output VAT (see, to that effect, the Opinion of Advocate General Jacobs in *Charles and Charles-Tijmens*, paragraph 60).

34 Although its scope is not exactly the same as that of Article 6(2)(a) of the Sixth Directive, the system of adjustment of deductions introduced by Article 20 of that directive finds application, like Article 6(2)(a), in situations where goods, the use of which is eligible for deduction, are then put to a use which is not eligible for deduction (see *Uudenkaupungin kaupunki*, paragraph 30). As the Advocate General observed at paragraph 98 of his Opinion, both Article 6(2) and Article 20 of the Sixth Directive relate to situations in which goods are used simultaneously for business and for private purposes.

35 Furthermore, the aim of the system of adjustment is analogous to that of the levying of VAT on the private use of immovable property. It is a matter, firstly, of avoiding giving an unjustified economic advantage to a taxable person by comparison with a final consumer, by obliging the taxable person to pay amounts equivalent to the deductions to which he was not entitled (see, to that effect, Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 90, and *Uudenkaupungin kaupunki*, paragraph 30).

36 It is a matter, secondly, of ensuring a correspondence between deduction of input tax and charging of output tax (see the Opinion of Advocate General Jacobs in *Charles and Charles-Tijmens*, point 60).

37 Taking into account that common aim, as well as the additional role assumed for that purpose by the provisions of Articles 6 and 20 in the scheme of the Sixth Directive, a Member State does not misconstrue the discretion which it enjoys in providing that the rules relating to the adjustment of deductions apply for the purposes of establishing the taxable amount for the private use of business goods.

38 As the German Government emphasised at the hearing and as the Advocate General observed at paragraph 95 of his Opinion, that approach also contributes to reducing the cash-flow advantage which the levying of VAT in instalments gives a taxable person using business property for private purposes by comparison with the final consumer who must pay the whole of the VAT on acquiring or constructing such a building.

39 Furthermore, as emphasised by the German Government and, at the hearing, by the United Kingdom Government, that approach would make it possible to preclude cases of untaxed end use in the event that the building was transferred free of VAT at the end of the period for adjustment of deductions. By spreading the levying of the VAT for the private use of the building in question over the duration of that period, it ensures, as regards that use, that the total amount of tax corresponding to the deduction of input tax is levied before a possible resale of the building exempt from VAT takes place at the end of that period.

40 It is apparent from the foregoing that the approach set out in the national legislation in question is in accordance with the aim of Article 6(2) of the Sixth Directive.

41 It is true that, as the household submitted, the Court, in paragraph 36 of *Enkler*, referred in the context of Articles 6(2) and 11(A)(1)(c) to expenses 'such as the writing-off of depreciation'.

42 However, that guidance cannot be interpreted, if it is not to misconstrue the discretion Member States have in that regard, as meaning that they have no other choice, for the purposes of establishing the taxable amount for VAT in respect of the private use of business property, than to apply the national rules applicable to depreciation for wear and tear of the building to the exclusion of any other method which, like that set out in the national legislation in question, would be compatible with the aim of Article 6(2) of the Sixth Directive.

43 Contrary to the household's submissions, the judgment in *Seeling* is not such as to call into question the above analysis either.

44 In the case which gave rise to that judgment and which also related to mixed use of a building forming part of the assets of the taxable person's business, the German Government had advocated that private use of that building be treated as a leasing or letting of immovable property which was exempt from VAT under Article 13B(b) of the Sixth Directive and did not therefore give rise to entitlement to deduct input VAT. In support of its view, it had submitted, inter alia, that, contrary to the approach of allowing the deduction of VAT paid on the whole of the construction costs of the building and levying it in instalments on the private use thereof, the approach it advocated would preclude cases of untaxed end use in the event that the building was resold free of VAT at the end of the period for adjustment provided for in Article 20 of the Sixth Directive.

45 The Court however held that such private use did not amount to a letting for the purposes of Article 13B(b) of the Sixth Directive (*Seeling*, paragraphs 49 to 52).

46 Against that background it stated in paragraph 54 of *Seeling* that, while authorising a taxable person to treat a building as forming in its entirety part of the assets of his business, and thus to deduct input VAT on all the construction costs, may produce the result that there will be untaxed end use, because the adjustment period provided for in Article 20(2) of the Sixth Directive is capable of correcting to a limited extent only the deduction of input tax made when the building was constructed, that is a consequence of a deliberate choice on the part of the Community legislature and cannot have the effect of requiring that Article 13B(b) of that directive be given a broad interpretation.

47 In doing so, the Court found that the length of the period for adjustment provided for in Article 20 of the Sixth Directive was able to preclude cases of untaxed end use to a limited extent in situations where the levying of VAT in instalments for the private use of business property was permitted over a longer period than that of the period for adjustment.

48 As the German Government has argued and as the Advocate General observed at paragraph 90 of his Opinion, that finding cannot, however, be read as depriving the Member States of the discretionary power of using a method to establish the taxable amount for such private use which, like that of spreading the levying over a period corresponding to that of the period for adjustment of deductions, makes it possible to avoid as far as possible, in the interests of equality between taxable persons and final consumers, cases of untaxed end use where assets are transferred free of VAT by taxable persons.

49 Lastly, in order to provide a helpful answer to the national court on an issue raised in some written observations and at the hearing, it must be pointed out again that, as the Commission of the European Communities and the German and United Kingdom Governments have stated, in a case where the costs of acquiring land on which a building partly used for private purposes has been erected have been subject to VAT and, having treated that land as forming part of the assets of his business, the taxable person has deducted that tax, those costs must be included in the taxable amount for VAT in respect of that private use.

50 First, the concept of the full cost to the taxable person of providing the services within the meaning of Article 11(A)(1)(c) of the Sixth Directive must be understood as covering all expenses incurred to that end, including those connected with the acquisition of the land without which the private use in question could not have taken place.

51 Secondly, the exclusion from the taxable amount for VAT of the costs of acquiring the land which gave rise to entitlement to deduct VAT would upset the correspondence between deduction of input VAT and charging of output VAT.

52 In the circumstances of this case, it is for the national court to assess whether the applicant's acquisition of the land on which it erected the building at issue was subject to VAT and whether the applicant deducted that tax.

53 In the light of the foregoing, the answer to the question referred must be that Article 11(A)(1)(c) of the Sixth Directive is to be interpreted as meaning that it does not preclude the taxable amount for VAT in respect of the private use of part of a building treated by a taxable person as forming, in its entirety, part of the assets of his business from being fixed at a portion of the acquisition or construction costs of the building, established in accordance with the length of the period for adjustment

of deductions concerning VAT provided for in Article 20 of that directive. That taxable amount must include the costs of acquiring the land on which the building is constructed when that acquisition has been subject to VAT and the taxable person has deducted that tax.

Costs

54 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 (First Chamber) hereby rules:

Article 11(A)(1)(c) 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, as amended by Council Directive 95/7/EC of 10 April 1995, is to be interpreted as meaning that it does not preclude the taxable amount for VAT in respect of the private use of part of a building treated by a taxable person as forming, in its entirety, part of the assets of his business from being fixed at a portion of the acquisition or construction costs of the building, established in accordance with the length of the period for adjustment of deductions concerning VAT provided for in Article 20 of that directive.

That taxable amount must include the costs of acquiring the land on which the building is constructed when that acquisition has been subject to VAT and the taxable person has deducted that tax.

[Signatures]