OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 18 June 1998 *

1. This preliminary reference raises a number of issues regarding the application of the 'transitional' VAT exemptions which Member States have been permitted to continue to apply in accordance with Article 28(3)(b) of the Sixth Directive. [1] The Court is, in particular, asked whether Sweden was entitled from its accession until 1 January 1997 to exempt from VAT royalties received from the grant or assignment of exclusive rights to exhibit motion pictures. However, in its observations the Commission has queried the jurisdiction of the Court to answer the questions referred on the basis that the referring body should not be regarded as a 'court or tribunal' for the purposes of Article 177 of the Treaty.

I — Legal and factual context

A — *The legal context*

2. Under Article 2(1) of the Sixth Directive, 'the supply of goods and services effected for consideration within the territory of the country by a taxable person acting as such' is subject to VAT. Article 6 of the Directive is concerned with the 'supply of services', which, as defined in Article 6(1), includes 'assignments of intangible property whether or not it is the subject of a document establishing title'. Title XVI, comprising Article 28, concerns 'transitional provisions'. Article 28(3)(b) permits Member States, during the transitional period, to 'continue to exempt the activities set out in Annex F under conditions existing in the Member States concerned'. The relevant provision of Annex F in the instant case is that contained in point 2, which refers to:

'Services provided by authors, artists, performers, lawyers and other members of the liberal professions, other than the medical and paramedical professions, in so far as these are not services specified in Annex B to the Second Council Directive of 11 April 1967.' [2]

* Original language: English.

1 — 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.

2 — Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax; OJ, English Special Edition 1967 (I), p. 16 (hereinafter 'the Second Directive'). I shall also for brevity hereinafter refer simply to 'Annex B'.

Point 1 of Annex B to the Second Directive covers 'assignments of patents, trade marks and other similar rights, and the granting of rights in respect of such rights'. Finally, according to the Act of Accession between the Member States of the European Union and, *inter alia*, the Kingdom of Sweden in Annex XV, section IX 'Taxation', point 2 aa: [3]

'For the purposes of applying Article 28(3)(b) [of the Sixth Directive], so long as the same exemptions are applied in any of the present Member States, the Kingdom of Sweden may exempt from VAT:

— services supplied by authors, artists, and performers referred to in point 2 of Annex F;

... .'

3. The relevant provisions of Swedish VAT legislation are contained in Article 11(1) of Title 3 of the 1994 Mervärdesskattelagen (Law on Value Added Tax, hereinafter 'the 1994 Law'), [4] under which, as it applied at the material time, [5] turnover arising from the grant or assignment of copyright in literary and artistic works is — subject to certain exceptions which are not relevant in the present case — [6] exempt from tax. [7] This provision applies regardless of the legal form of the assignor. Under Article 1 of the 1960 Law, films are expressly covered.

B — *The facts and the main proceedings*

4. On 6 March 1996 Victoria Film A/S (hereinafter 'the applicant'), a Danish undertaking, applied to the Skatterättsnämnden (Revenue Board) for a preliminary decision on a question concerning the appropriate VAT treatment of dealings in film rights. The applicant through, *inter alia*, its Swedish subsidiary engages in the activity of commercial film production in Sweden and in other countries. Its application in the main proceedings concerned the filming, primarily for television, of detective novels written by certain Swedish

3 — Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded; OJ 1994 C 241, p. 21 (hereinafter 'Act of Accession').

4 — SFS 1994: 200.

5 — The period at issue runs until 31 December 1996.

6 — Reference is made to Articles 1, 4 or 5 of Law 1960: 729 on Copyright in Literary and Artistic Works (lagen om upphovsrätt till litterära och konstnärliga verk, hereinafter 'the 1960 Law').

7 — From 1 January 1997, turnover from such grants or assignments has been made liable to VAT; SFS 1996: 1327.

authors. In order to finance the production of the films, due to begin in Sweden on 1 August 1996, the rights to exhibit them on television and in cinemas were assigned mainly to television-network undertakings in Sweden, Denmark, the Netherlands and Germany. [8]

5. The applicant sought a preliminary decision from the Skatterättsnämnden that the assignments in question were liable to VAT under the 1994 Law in order to be able to deduct VAT on its inputs. It contended that services supplied by authors or artists could only be exempt from VAT under point 2 of Annex F in so far as they were provided by natural persons, the applicant being a legal person. The right of deduction is, it says, directly effective and may be relied upon by an individual against a national tax authority's refusal to permit its registration for VAT purposes.

6. The Riksskatteverket (National Tax Board) submitted that, in any event, the relevant provisions of the Sixth Directive do not satisfy the criteria for direct effect.

8 — It would appear from the order for reference that the assignments had already occurred at the time of the application to the Skatterättsnämnden. Although the Court has not been informed of the amount paid in consideration of the assignments, it may be presumed to be quite considerable given that the total production budget was calculated as being SKR 48.2 million.

7. The Skatterättsnämnden defined the main issue as being whether dealings in rights such as film rights come within the notion of services supplied by authors, artists or performers for VAT purposes. It also pointed out that, if the incompatibility of the national exemption were established, the direct effect issue arising would be somewhat unusual since the trader would be claiming that it was liable to pay VAT. Accordingly, it has decided to refer the following questions to the Court:

'1. Does Article 28(3)(b) of the Sixth VAT Directive in conjunction with point 2 of Annex F to the Directive, and having regard to the terms of Annex XV, IX Taxation, point 2 aa, of the Treaty of Accession between the Member States of the European Union and Sweden concerning Sweden's accession to the European Union, mean that Sweden may have provisions in its national legislation having the tenor of Article 11(1) of Title 3 of the Value Added Tax Law as worded until 31 December 1996?

If the answer to that question is in the negative, an answer to the following question is sought:

2. Does the fact that Article 28(3)(b) does not allow national legislation to provide for an exemption from tax liability for the transactions referred to in Question 1 mean that this provision, Article 6(1) or any other provision of the Sixth Directive has so-called direct effect in this regard and can therefore be relied upon as against a national authority by the person dealing in such rights as a ground justifying treatment of those transactions as taxable transactions?

If, again, that question is answered in the negative, an answer to the following question is sought:

3. Can the person dealing in those rights still claim a right to deduct on the basis of Article 17(2) or another provision of the Directive, that is to say, does the provision have direct effect even though the transaction does not give rise to any output tax?'

II — Observations

8. Written and oral observations have been submitted in this case by the Riksskatteverket, the Kingdom of Sweden and the Commission; the Republic of Finland submitted only written observations.

9. In the light of the admissibility objection raised by the Commission in its observations, it is appropriate initially to consider the nature of the body which has made the reference in the present case, before subsequently discussing the content of the questions referred.

III — Admissibility

A — *The Skatterättsnämnden and the preliminary-decision procedure*

10. In its order for reference the Skatterättsnämnden describes itself as 'a special board which, upon application by a taxable person, can give a preliminary decision on matters of taxation'. The Skatterättsnämnden furnishes the following explanation of its functions by reference to the Lagen om förhands-

besked i taxeringsfragor (Law concerning preliminary opinions in fiscal matters, hereinafter 'the 1951 Law'):

'It is divided into two divisions, one for direct taxation and the other for indirect taxation. The Government appoints the members for a maximum period of four years and determines the composition of the divisions. Cases are determined after preparation and presentation of reports by civil servants at the Board's offices.

An application for a preliminary decision must be made in writing. If the Board finds that, in view of its contents, the application is not to be dismissed immediately, the observations of the Riksskatteverket ... in the matter must be obtained.

If the application is taken up for examination, the Board rules, to the extent considered necessary, how the question referred to it is to be determined in relation to the applicant's assessment to tax and, as far as value added tax is concerned, the position concerning the applicant's liability to tax.

A decision concerning a preliminary decision may be appealed against to the Regeringsrätten [Supreme Administrative Court] by the applicant or by the Riksskatteverket without any requirement of leave to appeal. Such an appeal must be made within a period of one month from the time when the appellant received notice of the preliminary decision. A decision dismissing an application may not be appealed against.

A preliminary decision which has gained legal force serves as a guide in matters of assessment to tax and — as far as value added tax is concerned — in relation to the account period concerned by the ruling and to the extent to which the party seeking the ruling demands. A preliminary decision is therefore binding on the State if the applicant makes a claim to this effect. However, this does not apply if, after the preliminary decision is given, a statutory amendment is adopted such as to affect the assessment to tax in the case with which the preliminary decision is concerned.

In summary, it can be said that the Skatterättsnämnden adopts decisions in forms similar to courts of law in matters which concern *inter alios* taxable persons, relations to the public at large regarding their liability to tax.'

11. In its written observations the Commission first recalls that the notion of 'court or tribunal' for the purposes of Article 177 of the Treaty must be given an autonomous Community-law construction. A fundamental distinction must, in its opinion, be made

between bodies which exercise a judicial role and those which merely carry out administrative functions. Relying, in particular, on the Court's judgments in *Almelo* [9] and *Job Centre*, [10] the Commission concludes that the Skatterättsnämnden falls into the latter category; its preliminary opinions do not differ in substance from decisions made by the tax administration in respect of the imposition of tax.

12. Sweden, in its written observations, says that the Skatterättsnämnden plays a vital role in the Swedish fiscal system and that its decisions have an important influence on commercial activities. Furthermore, Sweden contends that it is very important for its fiscal system that the Skatterättsnämnden be permitted to refer questions to the Court.

13. In its written answers to a number of questions put to it by the Court concerning, in particular, the structure and organisation of the Skatterättsnämnden, as well as the independence of its members and the extent to which requests for its preliminary decision must concern concrete disputes between the tax administration and taxpayers, Sweden first emphasises that, under Article 2 of the 1951 Law, the Skatterättsnämnden is a permanent body comprising 18 full and 18 deputy members, all of whom are nominated by the Swedish Government for four-year mandates. Of the 18 full members, the Government nominates two as presidents (one for each division of the Skatterättsnämnden) and three as vice-presidents, as well as deciding to which division the other members shall be allocated. Only the two presidents are engaged full-time with the Skatterättsnämnden; all of the other members (and deputy members) have other full-time positions as judges, civil servants or in the private sector. The two presidents and the members who act as rapporteurs for the Skatterättsnämnden must be (or have the qualifications required of) judges. The quorum for hearing a request for a preliminary decision is fixed at six members, which must include a president and a vice-president.

14. It also refers to Article 9 of Chapter 1 of the Regeringformen (Swedish Constitution) under which the procedure followed by the Skatterättsnämnden must be both objective and impartial, a requirement secured by the Brottbalken (Swedish Criminal Code), which contains provisions on active and passive corruption. Moreover, the Forvaltninglagen (Law applicable to the administration) [11] provides rules concerning the right to object to a specific Skatterättsnämnden member sitting in a particular case. [12]

9 — Case C-393/92 [1994] ECR I-1477.

10 — Case C-111/94 [1995] ECR I-3361.

11 — SFS 1986: 223.

12 — However, in response to a question posed at the hearing, counsel for Sweden confirmed that members of the Skatterättsnämnden are not required, on appointment, to take a specific oath of office.

15. Thirdly, the procedure before the Skatterättsnämnden, which is adversarial, is initiated by a written request. [13] If it is not immediately rejected under Article 6 of the 1951 Law, the Riksskatteverket, or, where appropriate, a commune or a region, is required to submit observations. The opinion sought must concern the fiscal situation of the requesting taxpayer, namely a particular transaction or a number of transactions. Typically, Sweden points out, it will concern the fiscal treatment of a proposed transaction which the taxpayer intends to enter into but in respect of which he is in dispute with the tax administration. However, it appears that the taxpayer may decide not to proceed with the transaction, particularly if the ruling of the Skatterättsnämnden is unfavourable. Sweden asserts that the preliminary-decision procedure before the Skatterättsnämnden is effectively the counterpart in administrative law of a declaratory judgment in Swedish civil law.

16. Finally, under Article 11 of the 1951 Law a preliminary decision is binding on the tax administration. The ordinary administrative courts are bound by the decision in any subsequent litigation. This, Sweden contends, demonstrates that Skatterättsnämnden decisions are more binding in nature than certain other decisions on which the Court has ruled. [14] The fact that an appeal may be brought to the Regeringsrätten against its decisions underscores the judicial nature of such opinions. Moreover, Sweden questions whether, if the Skatterättsnämnden were unable to refer questions to the Court, the Regeringsrätten would be entitled to do so on appeal.

17. At the oral hearing, the Commission maintained its view that the Skatterättsnämnden could not be regarded as a 'court or tribunal' for the purposes of Article 177 of the Treaty. It contended that the non-judicial nature of the Skatterättsnämnden was confirmed by the fact that, under the 1951 Law, there was no requirement for the existence of a real dispute between the taxpayer and the tax administration before a request for a decision could be made. Even if there would often be a difference of understanding as to the scope or application of the relevant fiscal provisions, such differences of opinion would essentially be of an unofficial nature. The Commission also submitted that the Court's recent judgments in *Dorsch Consult* [15] and *Garofalo and Others* [16] did not affect its view that a body such as Skatterättsnämnden could not be regarded as competent to refer questions to the Court.

18. It also emerged clearly at the hearing that the Skatterättsnämnden is not bound to

13 — At the oral hearing in the present case, Sweden confirmed that the bill to amend the law on preliminary opinions (Reformerat förhandsbesked i skattefrågor, m. m.), to which it refers in its written reply to the Court's questions, was adopted on 21 April 1998 by the Swedish Parliament and will enter into force on 1 July 1998. The new law will permit the Riksskatteverket to request preliminary decisions of the Skatterättsnämnden.

14 — Case 36/73 *Nederlandse Spoorwegen* v *Minister van Verkeer en Waterstaat* [1973] ECR 1299 and Joined Cases C-69/96 to C-79/96 *Garofalo and Others* (hereinafter '*Garofalo*'), [1997] ECR I-5603.

15 — Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* (hereinafter '*Dorsch Consult*'), [1997] ECR I-4961.

16 — Loc. cit., footnote 14 above.

provide any ruling and that there is no appeal against a decision not to do so.

B — *Analysis*

19. It should initially be emphasised that the question whether a referring body is a 'court or tribunal' for the purposes of Article 177 of the Treaty is a matter of Community law rather than national law. [17] Thus, in *Vaassen* v *Beambtenfonds Mijnbedrijf*, [18] the Court held that the Scheidsgerecht (Arbitration Tribunal), [19] which had jurisdiction to hear appeals against decisions concerning the management of a pension fund for the mining industry concerning the rights of members and former members or their survivors, but which was actually set up under Dutch private law by all the organisations representing employers and wage-earners in the mining industry, was to be considered a 'court or tribunal' within the meaning of Article 177 of the Treaty. On the other hand, in *Corbiau* v *Administration des Contributions* [20] the Court decided, notwithstanding two decisions of the Luxembourg Conseil d'État (Council of State) recognising the judicial character of decisions of the Directeur des Contributions Directes et des Accises (Director of Taxation and Excise Duties) of Luxembourg, that the Director had an organisational link with the body that made the disputed tax assessment and was not, therefore, 'an authority acting as a third party in relation' to that body. [21]

20. The Court has generally adopted a broad approach when determining the ambit of the notion of a 'court or tribunal'. [22] It is hardly surprising, given the wide variety of national bodies which may seek to refer questions to the Court, that the development of a general definition of a 'court or tribunal' has been eschewed. The Court has, nevertheless, enumerated a number of criteria whose application largely determines whether a referring body will be regarded as competent to make a reference. In its recent judgment in *Dorsch Consult* the Court listed the following factors by way of example:

'... whether the body is established by law, whether it is permanent, whether its jurisdic-

17 — See in this respect, most recently, the judgments in *Dorsch Consult*, loc. cit., paragraph 23 and *Garofalo*, loc. cit., paragraph 19. The dual reference to 'court or tribunal' in the English and Irish versions ('cúirte nó binse') of Article 177 of the Treaty, is not reflected in other language versions. Accordingly, the correct inquiry is not to determine whether a body is first a 'court' and, if not, a 'tribunal', but, instead, whether it is encompassed by the single Community concept of 'court or tribunal'; see Anderson, *References to the European Court* (Sweet and Maxwell London, 1995), at p. 29.

18 — Case 61/65 [1966] ECR 261.

19 — As Advocate General Gand pointed out in his Opinion, '... in spite of being called an Arbitration Tribunal, the Scheidsgerecht has very little in common with such a body'; loc. cit., p. 281.

20 — Case C-24/92 [1993] ECR I-1277.

21 — Paragraphs 15 and 16. See paragraph 4 of the Opinion of Advocate General Darmon who noted that the soundness of the decisions of the Conseil d'État was disputed by eminent academic commentators, including the late Judge Schockweiler; see paragraphs 37 to 39.

22 — The Court's approach prompted Advocate General Mancini, in his Opinion in one of the leading cases, to observe that: 'The criteria by which the Community concept of a "court or tribunal" is defined could not be wider. That explains why the Court has permitted national judicial bodies of all kinds to consult it, irrespective of the nature and purpose of the proceedings in the course of which they raise a question or of whether the robe they are wearing when they do so is more or less markedly judicial'; see Case 14/86 *Pretore di Salò* v *Persons Unknown* [1987] ECR 2545, p. 2556.

tion is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.'

That this list is not exhaustive and that each factor is not always relevant emerges clearly from the case-law. Thus, in *Job Centre* the Court declared inadmissible certain questions referred to it by the Tribunale Civile e Penale di Milano (Civil and Criminal District Court, Milan, hereinafter 'the Tribunale') in what were described as non-contentious proceedings ('*giurisdizione voluntaria*') concerning an application for the confirmation of the articles of association of a company. [23] The Court held that, although the preliminary-reference procedure under Article 177 of the Treaty does not require that the proceedings before the national court '... during which the national court frames a question ... [be] *inter partes*, it is none the less apparent ... that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'. [24]

21. In the present case, I am satisfied, on the basis of the information provided in the order for reference, as supplemented by Sweden's written reply to the questions put to it by the Court, that the Skatterättsnämnden is an independent body established by law, which exercises its functions on a permanent basis, whose procedures are adversarial, and which gives its decisions based on the application of the relevant rules of both national and Community law. Furthermore, it has compulsory jurisdiction in the sense that there is no other body in Sweden from which a taxpayer can obtain a binding preliminary decision of the sort at issue in this case. The doubts expressed by the Commission regarding the admissibility of references from the Skatterättsnämnden stem, however, from its opinion that preliminary decisions of the type at issue may not, at least for the purposes of the application of Article 177 of the Treaty, be viewed as being of a *judicial* nature.

22. In my opinion, there are two factors regarding the functions of the Skatterättsnämnden, at least in so far as its jurisdiction in respect of preliminary decisions is concerned, which, at first sight, might be deemed to support the admissibility objection raised by the Commission.

23. In the first place, the Skatterättsnämnden is not obliged to respond to applications for a preliminary opinion. The first paragraph of Article 7 of the 1951 Law provides that, in effect, where the Skatterättsnämnden, having regard to the content of the request, considers that it is not appropriate to give a preliminary decision, it shall refuse the request. No reasons need be given and such decisions are not appealable. From the information provided by Sweden, it seems clear that the power conferred on the Skatterättsnämnden by the 1951 Law is used to weed out spurious requests,

23 — Loc. cit., footnote 10 above.

24 — *Job Centre*, paragraph 9.

though it appears from an answer given at the hearing that there is no established practice. Moreover, Sweden has pointed out that the request must concern the actual fiscal situation of the requesting taxpayer; in other words, the application must concern one or several specific transactions and the response given must have a concrete rather than a hypothetical impact on him. Finally, there is nothing to suggest that, in exercising its discretion to reject requests under Article 7, the Skatterättsnämnden acts other than on the basis of judicial criteria. Consequently, I am satisfied that its broad powers to refuse requests for preliminary decisions do not affect its status as a 'court or tribunal' within the meaning of Article 177 of the Treaty.

24. It is somewhat unusual that it is not possible, under the 1951 Law, to appeal to the Regeringsrätten decisions refusing to accept an application for a preliminary decision. Nevertheless, I do not think that factor alone serves to deprive the Skatterättsnämnden of its status as 'court or tribunal' for the purposes of Article 177 of the Treaty.

25. Secondly, the binding effect of preliminary decisions is contingent upon the applicant taxpayer actually carrying out the transactions covered by the request. However, I am not persuaded that the possibly contingent nature of Skatterättsnämnden preliminary rulings deprives them of the status of judicial decisions for the purposes of Community law. In the present case, there seems to me to be very little that could genuinely be described as contingent, let alone hypothetical, about the effects of the Skatterättsnämnden's ultimate decision for the applicant. There is nothing in the present case that suggests that the Court's case-law concerning 'hypothetical' references is applicable. In *Foglio* v *Novello* the Court confirmed that its duty under Article 177 'is not that of delivering advisory opinions on general or hypothetical questions but that of assisting in the administration of justice in the Member States'. [25] This doctrine has been applied in subsequent cases where the questions referred raised a problem which was 'a hypothetical one' in the sense that the problem did not or could not arise for consideration, even before the national court, at least in so far as it appeared from the nature of the dispute as set out in the order for reference, [26] or, alternatively, if it was obvious that the interpretation of Community law sought by the national court bore no relation to the facts of the main action or its purpose. [27] The Court has, however, never applied this principle generally in respect of an entire form of proceeding before a referring body, even if that procedure allows potentially hypothetical matters to be raised. Furthermore, there is nothing to suggest that the questions referred in the present case are, in so far as the dispute between the Riksskatteverket and the applicant is concerned, hypothetical. I would suggest an analogy with the many cases on customs classification where the Court gives preliminary rulings without imposing any precondition of a particular import or export transaction being in issue.

25 — Case 244/80 [1981] ECR 3045, paragraph 18.

26 — Case C-83/91 *Meilicke* v *ADC/ORGA* [1992] ECR I-4871, paragraphs 30 and 31.

27 — See, *inter alia*, Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraph 61; Case C-291/96 *Grado and Bashir* [1997] ECR I-5531, paragraph 12; and the recent orders of the Court of 25 May 1998 in Case C-361/97 *Nour* [1998] ECR I-3101, Case C-362/97 *Karner*, not published in the ECR, and Case C-363/97 *Lindau*, not published in the ECR, in particular paragraph 12 of each of the orders.

26. It would appear that, at the moment of its application on 6 March 1996, the applicant had already assigned the rights in question. Even if this were not the case, it would almost certainly have taken various other preparatory steps, such as purchasing the right to adapt the books upon which the films were to be based and perhaps even engaging actors, artists and other personnel that would later be required, such that its request could not be described as of purely hypothetical interest to it. In such circumstances there is little doubt that, in March 1996, the subject-matter of the application was of considerable actual and practical importance for the applicant. To my mind, this is what underlies Sweden's observation that the Skatterättsnämnden only deals with concrete cases. [28] It follows, in my opinion, that the mere fact that applicants for preliminary decisions from the Skatterättsnämnden need not necessarily have undertaken, or undertake, the transactions that were the subject-matter of the request at the time it was lodged does not render non-judicial the ultimate decision made by the Skatterättsnämnden for the purposes of Article 177 of the Treaty.

27. I am fortified in this conclusion by the case-law of the Court where it has addressed the possibility that the body which had made the preliminary reference before it might not have been one which gives 'judgment in proceedings intended to lead to decisions of a judicial nature'. [29]

28. In *Job Centre* the Court held that a reference made by the Tribunale — which was manifestly, in form, 'a court or tribunal' under Article 177 of the Treaty — in an *inter partes* procedure [30] brought for the confirmation of the articles of association of a company was inadmissible, since the proceedings would not 'lead to a decision of a judicial nature'. [31] Such applications involve the performance of 'a non-judicial function which, in other Member States, is entrusted to administrative authorities'. [32] Thus, the Court found that the Tribunale was 'exercising administrative authority without being at the same time called upon to settle any dispute'. [33] That is not the case here. The Skatterättsnämnden is not an administrative decision-maker; it is entirely separate from the Riksskatteverket. Thus, if its decisions are to be classified as non-judicial for the purposes of Article 177 of the Treaty, I agree with Sweden that it would be difficult to envisage how the role of the Regeringsrätten, in so far as it reviews on appeal preliminary decisions of the Skatterättsnämnden, could be classified differently; in reality both assess the correctness of the Riksskatteverket's proposed tax treatment of certain transactions in cases where that treatment is disputed by the taxpayer.

28 — The three examples, taken from actual decisions of the Skatterättsnämnden furnished by Sweden in its written reply to the Court's questions support this view. In two of the examples, the applicants were actually engaged in economic activities out of which the subject-matter of their requests arose. Only in one was the transaction still anticipated at the time of the application. However, the request concerned the fiscal evaluation of a certain aspect of a more general corporate restructuring plan, which would appear to have already been in train.

29 — *Job Centre*, loc. cit. above, paragraph 9.

30 — In paragraph 16 of his Opinion in *Job Centre*, Advocate General Elmer pointed out 'that the Pubblico Ministero was heard in the case before the Tribunale ...'.

31 — *Job Centre*, paragraph 9.

32 — Ibid., paragraph 11.

33 — Ibid.

29. Finally, I should say that, unlike the Commission, I find the Court's recent decisions in *Dorsch Consult* and *Garofalo* to be of assistance in recommending that the reference in the present case be admitted. [34] In the former, one of the objections raised by the Commission to the admissibility of the reference from the Vergabeüberwachgausschuß des Bundes (Federal Public Procurement Awards Supervisory Board) was that its decisions were not enforceable. This was dismissed by the Court, which found that 'when the supervisory board finds that determinations made by a review body are unlawful, it directs that body to make a fresh determination, in conformity with the supervisory board's findings on points of law', and, thus, that the 'determinations of the supervisory board are binding'. [35]

30. In *Garofalo* the Court had to consider the role of the Italian Consiglio di Stato (Council of State) in respect of the 'opinions' it is required to give in the context of extraordinary petitions to the President of the Italian Republic. Since the procedure, in effect, provides persons seeking the annulment of an Italian administrative act with an alternative to instituting an appeal in the Tribunale Amministrativo Regionale (Regional Administrative Court), and since the applicants were actually seeking the annulment of a decision of the Minister for Health, there was little doubt as to the existence of a dispute. The perceived difficulty lay in the fact that the opinion of the Consiglio di Stato was not, as a matter of law, binding on the President. The Court, however, relied upon the fact that a decision not to follow the opinion of the Consiglio di Stato may 'be adopted only after deliberation within the Council of Ministers and must be fully reasoned'. [36] In those circumstances, and having regard to the nature and status of the Consiglio di Stato, the Court held that, 'when it issues opinion in the context of an extraordinary petition, the Consiglio di Stato constitutes a court or tribunal for the purposes of Article 177 of the Treaty'. [37]

31. Although the difficulties in *Dorsch Consult* and *Garofalo* concerning the admissibility of the references are only partially comparable to those at issue in the present case, the Court's decisions to answer the questions referred demonstrate that, apart from cases where the subject-matter of the proceedings before the referring body is clearly administrative in nature, the Court will not readily classify a national proceeding, where the criteria discussed in paragraph 20 above are satisfied, as one which will not 'lead to a decision of a judicial nature'.

32. In the light of the above considerations, I recommend that the Court answer the questions referred in the present case.

34 — Loc. cit. above.

35 — *Dorsch Consult*, paragraph 29.

36 — *Garofalo*, paragraph 24. Although the Court did not refer to any statistics, it may be assumed that it bore in mind the statement of Advocate General Ruiz-Jarabo Colomer that '[I]n practice, the compulsory involvement of the advisory body plays a key role in the decision on the petition'; see paragraph 35 of his Opinion.

37 — Ibid., paragraph 27.

IV — Substance

33. The substantive issues raised by the questions referred in this case are relatively straightforward in comparison with the thorny question of admissibility. The Skatterättsnämnden essentially wishes to know whether Article 28(3)(b) and point 2 of Annex F of the Sixth Directive permit a Member State to continue to exempt royalties received from the grant or assignment of exclusive film-exhibition rights from liability to VAT and, if not, whether the taxable person may rely on the right to deduction provided by the directive notwithstanding the fact that no output tax has been paid.

A — *Question 1*

(i) The Act of Accession

34. Assuming that the assignments of rights at issue can be considered to have been 'services supplied by authors, artists and performers', it seems beyond doubt that they are covered by both point 2 of Annex F and the provisions of the Act of Accession quoted at paragraph 2 above. The Act of Accession prescribes, as a precondition for Sweden's right to rely upon Article 28(3)(b) and point 2 of Annex F, the continued application, prior to its accession, of 'the same exemptions' in any of the then 12 Member States. It seems clear that this requirement was satisfied. In the first place, neither the order for reference nor any of the observations submitted to the Court query Sweden's entitlement, on the basis of the Act of Accession, to invoke the transitional exemption set out in point 2 of Annex F. Secondly, the Commission's report of 2 July 1992 to the Council on the transitional provisions resulting from Article 28(3) of the Sixth Directive and Article 1(1) of the Eighteenth Council Directive of 18 July 1989 states, in respect of point 2 of Annex F, that 'six Member States are currently applying the F2 derogation (Belgium, Denmark, Spain, Greece, Ireland and the Netherlands)'. [38]

(ii) The application of Annex B to the Second Directive

35. The services listed in point 2 of Annex F may only fall within the scope of the transitional exemption granted by Article 28(3)(b) 'in so far as these are not services specified in Annex B to the second Council Directive of 11 April 1967'. It is, thus, necessary to consider the effect of this reference.

38 — See SEC(92)1006 final.

36. In the first place, is its ostensible purpose affected by the fact that Article 37 of the Sixth Directive repealed the Second Directive? I am satisfied from the wording of Article 37, which speaks of the cessation of 'effect' of the Second Directive, that it is only the continued application of the provisions of the Second Directive that was repealed. The reference made to the Second Directive in point 2 of Annex F to the Sixth Directive serves to define the material scope of the exemption therein described. It excludes 'services specified in Annex B ...', although the cessation of effect of the Second Directive was contemporaneously provided for.

37. Furthermore, the intention underlying the reference to the Second Directive emerges from the legislative history of point 2 of Annex F. In its proposed amendments of 11 October 1974 [39] to its initial 1973 proposal, [40] the Commission had proposed the following addition to Article 14 B of the main text of the 1973 draft: '(n) supplies of services by authors, writers, composers, lecturers, journalists, actors, musicians, where they are not themselves involved in the publishing or reproduction of their works'. This amendment was not adopted by the Council, which, instead, chose merely to permit, in Article 28(3)(b) and point 2 of Annex F (the text of these latter provisions not having been contained in either of the Commission's proposals), the transitional continuance of certain existing exemptions. However, the services covered by Annex B to the Second Directive had been compulsorily subject to VAT under Article 6(2) of that directive. Failure to give effect to the Annex B exclusion from the scope of point 2 of Annex F would, thus, lead to a result where the Sixth Directive would exempt services previously subject to VAT. Moreover, there is no reason why the principle of strict construction of exemptions should not apply in respect of Annex F. [41] Thus, in so far as Annex B limits the scope of an exemption, it should, at the very least, not be given a narrower interpretation than its words require. [42]

38. Accordingly, I am satisfied that the 'services specified' in Annex B must be excluded from the scope of the transitional exemption permitted by point 2 of Annex F to the Sixth Directive. It remains to consider what services are covered by the Annex B exclusion.

39 — Amendments to the proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment; OJ 1974 C 121, p. 34.

40 — Proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment; OJ 1973 C 80, p. 1.

41 — This principle has been stated on many occasions by the Court: see Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 13; Case C-453/93 *Bulthuis-Griffioen* v *Inspecteur der Omzetbelasting* [1995] ECR I-2341, paragraph 19; and, most recently, Case C-346/95 *Blasi* v *Finanzamt München I* [1998] ECR I-481, paragraph 18.

42 — See Case 173/88 *Skatteministeriet* v *Henriksen* [1989] ECR 2763, paragraph 12. To my mind, the natural corollary of the principle of the strict interpretation of exemptions is that exceptions to exemptions must be construed broadly; see paragraph 37 of my Opinion in Case C-468/93 *Gemeente Emmen* v *Belastingsdienst Grote Ondernemingen* [1996] ECR I-1721, and paragraph 21 of the Opinion of Advocate General Gulmann in Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437..

(iii) The scope of Annex B to the Second Directive

39. The notion of 'assignments of patents, trade marks and other similar rights, as well as the granting of licences in respect of such rights', is, to my mind, sufficiently broad to encompass the assignment of copyright. Such a provision is particularly suited for the application of the *ejusdem generis* principle of construction. [43] The application of that principle presupposes that a *genus* can be identified from the matters enumerated in the text under scrutiny which precedes the general words; in other words, whether a common element emerges from perusal of a number of specific words which may be used in construing the general words. In this case I am satisfied that such an element exists. The specific references to 'patents' and 'trade marks' call to mind two of the principal types of intellectual property provided in the laws of the Member States and recognised in the case-law of the Court. Without further words, the provision would, of course, refer only to those two. However, the general words 'and other similar rights' must be given a meaning by reference to the elements suggested by the prior specific words. I do not consider that these words should be interpreted as applying only to rights similar either to patents or to trade marks. In my opinion, they should be construed as alluding to other intellectual property rights, one of the most important of which is, of course, copyright. It follows, in my opinion, that the assignment of the rights to exhibit motion pictures by a film-production company, such as the applicant, must be regarded as excluded from the ambit of point 2 of Annex F to the Sixth Directive.

40. Such assignments are clearly taxable supplies for the purposes of Article 2(1) of the Sixth Directive, which subjects to VAT 'the supply of goods or services effected for consideration ... by a taxable person acting as such'. Since the assignment of such cinematographic rights consists of the assignment of intangible property, it is covered by the first indent of Article 6(1), and should be treated as a supply of services which is taxable under Article 9(1), in principle, in the Member State where the supplier has established his business or has a fixed establishment from which the service is supplied. Consequently, I recommend that the Court answer the first question referred to the effect that national-law provisions which seek to exempt such supplies from VAT are incompatible with the Sixth Directive.

43 — For a brief discussion of the nature of this principle, see paragraph 21 of my Opinion in Case C-167/97 *Linthorst, Pouwels and Scheres* v *Inspecteur der Belastingdienst* [1997] ECR I-1195 (hereinafter '*Linthorst*'), as well as paragraph 67 of the Opinion of Advocate General Darmon in Case C-63/92 *Lubbock Fine* v *Commissioners of Customs & Excise* [1993] ECR I-6665. It has also been invoked as an aid to interpretation by Advocate General Sir Gordon Slynn in his Opinion in Case 218/86 *SAR Schotte* v *Parfums Rothschild* [1987] ECR 4905, p. 4911. The Court in *Linthorst*, although not referring by name to the principle, considered it in that case before finding it to be inapplicable; see paragraph 20.

(iv) Alternative view

41. In the event of the Court not regarding assignments of copyright as covered by point 1 of Annex B to the Second Directive, I would offer, *ex abundante cautela*, the following comment on the alternative view that could be taken of the scope of point 2 of Annex F to the Sixth Directive. I should say straightaway that I do not think that such assignments may be regarded as falling within the notion of 'services supplied by ... members of the liberal professions', as Sweden has submitted. In the absence of a specific indication by the Community legislature that it intended to adopt a very broad notion of what would traditionally be viewed as 'the liberal professions', I do not think that the services of authors, artists, performers are included. I draw support for this view from the statement of the Court in *Linthorst*, where, referring to that part of the third indent of Article 9(2)(e) which covers 'services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services', the Court declared that 'the only common feature of the disparate activities mentioned in that provision is that they all come under the heading of liberal professions'. [44] However, I agree with the observations of Finland and Sweden that it would be inappropriate to construe the exemption provided in point 2 of Annex F as limited to services provided by natural persons. Finland has referred to the principle of fiscal neutrality, enunciated by the Court on numerous occasions in relation to the Community VAT system. [45] Since VAT applies to the supply for consideration of goods or services, it is reasonable to assume that the Community legislature had in mind the exemption of the commercial exploitation of creative or artistic works when it included the 'services of authors, artists, performers' in point 2 of Annex F. I see no reason in principle or logic for limiting that exemption to supplies made by natural persons. If authors, artists or performers wish to form legal persons for the purposes of the commercial exploitation of their works, the principle of fiscal neutrality, as well as the need to avoid distortions of competition, requires that they be treated no differently for VAT purposes from those who choose not to adopt such a form. Moreover, given the generally high costs of film production, it is likely that most films will be produced by corporate bodies. To limit the scope of the exemption to natural persons would, thus, effectively exclude film production, a very important modern outlet for the collective provision of services by authors, artists, and performers, from the scope of the exemption.

B — *Questions 2 and 3*

42. As regards the second and third questions, it is sufficient to observe that the Court has consistently held that the provisions of

44 — *Linthorst*, loc. cit., footnote 43 above, paragraph 20.

45 — See Case C-317/94 *Gibbs* v *Commissioners of Customs & Excise* [1996] ECR I-5339, and, in particular, paragraph 23.

the Sixth Directive are capable of having direct effect. [46] To my mind, this applies *a fortiori* with regard to both Article 6, which defines the notion of 'supplies of services' for the purposes of giving effect to the distinction made by Article 2(1) between the taxable supply of goods and services, and Article 17 concerning the right of deduction. The cornerstone of the VAT system is that a taxable person pays VAT only on the difference between the tax included in the supplies of goods and services which he has purchased from his suppliers and that due on his own supplies. The wording of both provisions is mandatory and, as the Court has already held in respect of the provisions of Article 17(1) and (2), '[t]hey do not leave the Member States any discretion as regards their implementation'. [47]

43. The Skatterättsnämnden has sought specific guidance as to whether any special considerations apply where a taxable person invokes the directly effective provisions of the Sixth Directive in order to assert its liability to pay VAT. Although a taxpayer would not normally voluntarily seek to pay tax, the nature of the VAT system is such that, occasionally, liability to VAT will be beneficial to a taxable person. As Advocate General Darmon pointed out in his Opinion in *Lubbock Fine* v *Commissioners of Customs & Excise*, 'where a taxable person carries out an exempt transaction, he is not obliged to pay tax on the transaction, but he is also unable to deduct the tax which has been invoiced to him by his suppliers or to pass on any charge whatsoever to the person following him in the chain of supply'. [48] Consequently, since '[a]n exemption from VAT may therefore lead to an increase in his tax burden', he may 'have an interest in being subject to VAT'. [49] There is therefore nothing untoward in seeking to register for VAT.

44. By its third question, the Skatterättsnämnden wishes to know whether the right to deduct may be affected by the fact that a taxable person did not include output tax on the supplies which he made. As I have already noted, the fundamental basis of the right of deduction recognised in Article 17 of the Sixth Directive is that VAT inputs 'may be deducted only in so far as the goods and services in respect of which those inputs have arisen constitute "price components" of a taxable transaction'. [50] Accordingly, the Court has held that, in general, 'where a taxable person supplies services to another taxable person who uses them for an exempt transaction, the latter person is not entitled to deduct the input VAT paid'. [51] Sweden refers to the fact that, since the assignment of the rights at issue was exempt in Swedish law, no VAT was charged by the applicant, and contends that, if the applicant were now to be permitted to register for VAT and seek to deduct its VAT inputs, the *ex post facto* recovery of

46 — See, *inter alia*, Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, Case C-10/92 *Balocchi* v *Ministero delle Finanze* [1993] ECR I-5105 and Case C-62/93 *BP Supergas* v *Greek State* [1995] ECR I-1883.

47 — *BP Supergas*, ibid., paragraph 35.

48 — Loc. cit., paragraph 29 of the Opinion.

49 — Ibid.

50 — See paragraph 9 of the Opinion of Advocate General Tesauro in Case C-302/93 *Debouche* v *Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-4495.

51 — See Case C-4/94 *BLP Group* [1995] ECR I-983, paragraph 28, and *Debouche* v *Inspecteur der Invoerrechten en Accijnzen*, loc. cit., paragraph 16.

the VAT which should have been charged on the assignments would probably be very difficult. In consequence, Sweden asserts that it would be contrary to Article 17(2) of the Sixth Directive to allow the right of deduction in such circumstances. I do not agree.

45. For the reasons I have already discussed in paragraphs 35 to 40 above, the assignment of rights in cinematographic works has never been exempt from VAT. Thus, transactions such as those at issue in the main proceedings have always been compulsorily subject to VAT. It follows from the plain and unambiguous wording of Article 17(2) that, once the taxable person uses the goods and services giving rise to the inputs for the purposes of his taxable transaction, he is entitled to exercise the right of deduction.

46. Sweden would appear to assume that such a result would permit a taxable person, like the applicant, to have the best of both worlds; namely the benefit of deducting its inputs whilst not simultaneously being liable to pay VAT on its outputs. This concern is misconceived. The applicant will only be entitled to deduct its inputs from its outputs like all other taxable persons under the VAT system: the amount in respect of which it will be entitled to claim a reimbursement pursuant to Article 18 of the Directive, which deals with the 'rules governing the exercise of the right to deduct', will, thus, only be that by which its inputs exceed its outputs. Thus, the applicant will be required to account for VAT on its supplies, *whether or not* it added it to the price charged to its customers for the assignments at issue. Moreover, it is not the responsibility of the applicant to ensure that the VAT which should have been included in the price of the assignment transactions is actually reflected as an input in the VAT return of the assignees. In so far as those assignees are registered for VAT in Sweden, it is up to them to claim deduction of inputs. [52]

47. Accordingly, I would recommend to the Court that it answer the third question to the effect that the failure of a taxable person to add the value of the output tax at the time of calculating the price of the assignment of exclusive rights to exhibit motion pictures cannot affect the right of that taxable person, who has made the assignments in question, to deduct from the VAT which he ought to have paid in respect of those assignments the VAT component of the goods and services supplied to him for the purposes of making the motion pictures that were the subject-matter of the assignments.

52 — In respect of those assignees which were not registered for VAT in Sweden, since the assignments should have been subject to VAT in Sweden they would, if they had paid VAT, have been entitled to claim a refund in accordance with Article 7(4) 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 fact that no VAT has been paid does not therefore adversely affect overall Swedish VAT revenues.

V — Conclusion

48. In the light of the foregoing, I recommend that the questions referred by the Skatterättsnämnden be answered as followed:

(1) The assignment of rights to exhibit motion pictures by a film-production undertaking does not come within the scope of the transitional exemption provided for in Article 28(3)(b) 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, read in conjunction with point 2 of Annex F to that Directive;

(2) It follows, in particular, from Articles 2(1), 6(1) and 17 of the Sixth Council Directive that a person who makes taxable supplies of exclusive rights to exhibit motion pictures may rely upon those provisions against a national tax authority which refuses to permit it to make a VAT declaration in which that person seeks to deduct the VAT component of the goods and services used for the purposes of producing the films in question from the VAT which should have been included in the price charged on the assignment of those rights;

(3) The failure of a taxable person to add the value of the output tax at the time of calculating the price of the assignment of exclusive rights to exhibit motion pictures cannot affect the right of that taxable person, who has made the assignments in question, to deduct from the VAT which he ought to have paid in respect of those assignments the VAT component of the goods and services supplied to him for the purposes of making the motion pictures that were the subject-matter of the assignments.