JUDGMENT OF THE COURT (Fifth Chamber)

8 March 2001 *

In Case C-415/98,

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

Laszlo Bakcsi

and

Finanzamt Fürstenfeldbruck,

on the interpretation 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),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting as President of the Fifth Chamber, P. Jann and L. Sevón (Rapporteur), Judges,

Advocate General: A. Saggio,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

— the Commission of the European Communities, by E. Traversa and A. Buschmann, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Bakcsi, represented by K. Koch, Rechtsanwalt; of the German Government, represented by W.-D. Plessing; of the Greek Government, represented by M. Apessos, acting as Agent; and of the Commission, represented by E. Traversa and K. Gross, acting as Agent, at the hearing on 23 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 13 April 2000,

gives the following

Judgment

1 By order of 24 September 1998, received at the Court on 20 November 1998, the Bundesfinanzhof (Federal Finance Court) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive').

2 Those questions have arisen in proceedings between Mr Bakcsi and the Finanzamt (Tax Office) Fürstenfeldbruck concerning liability to value added tax ('VAT') in respect of the sale of a motor car which he had purchased from a private individual without entitlement to deduct VAT and which he used for both business and private purposes.

The legal framework

The Community legislation

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

4 Article 4(1) and (2) 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....'.

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

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

6 Heading (a) of the first subparagraph of Article 6(2) 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 value added tax on such goods is wholly or partly deductible'.

7 Article 11.A(1)(a) of the Sixth Directive provides that the taxable amount is to be, 'in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies'.

The national legislation

8 According to the order for reference, supplies of goods made for consideration within Germany by a taxable person in the course of his business are subject to VAT pursuant to the first sentence of Paragraph 1(1)(1) of the Umsatzsteuergesetz (Law on Turnover Taxes) 1980. Under the first sentence of Paragraph 10(1) of that Law, the turnover relating to such supplies is assessed on the basis of the consideration which passes.

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

9 During 1990, Mr Bakcsi carried on business as a self-employed haulage contractor. For that purpose he used a Mercedes 300 D motor car, which he had purchased from a private individual without being able to deduct VAT. The vehicle was used to the extent of 70% for business purposes.

10 Mr Bakcsi disposed of the motor car on 16 May 1990 for DEM 19 000, without showing the VAT element separately in an invoice.

11 By notice of assessment of 24 May 1994, the Finanzamt Fürstenfeldbruck held that the sale of the car by Mr Bakcsi had to be subject to VAT, taking as the taxable amount the sale price, that is to say, DEM 19 000, less the VAT amount included in that sum, namely DEM 2 334.

12 The Finanzgericht (Finance Court), before which the matter was brought following dismissal of the appeal lodged by Mr Bakcsi, also took the view that the sale had to be subject to VAT on the ground that, by claiming deduction of the input tax paid in respect of the costs of repairs to the car, Mr Bakcsi had demonstrated his decision to allocate the car to his business. According to the Finanzgericht, Mr Bakcsi had 'brought' the car into his business on 17 April 1989.

13 Mr Bakcsi appealed to the Bundesfinanzhof on a point of law ('Revision') against that decision of the Finanzgericht.

14 In the order for reference, the Bundesfinanzhof takes the view that Mr Bakcsi was a taxable person within the meaning of Article 2(1) of the Sixth Directive. It adds that Mr Bakcsi could have sold the car in that capacity only if he had purchased it for the purposes of his economic activity within the meaning of Article 4 of the Sixth Directive and allocated it to his business.

15 Citing the case-law of the Court, the Bundesfinanzhof notes that a trader may allocate mixed-use goods either wholly or partly to his business (see Case C-97/90 *Lennartz* [1991] ECR I-3795 and Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraph 20). On the other hand, it expresses doubts as to whether it is possible for a trader to allocate such goods entirely to his private assets.

16 In the event that Mr Bakcsi was required to allocate the car, whether wholly or in part, to his business, or at any rate did so allocate it, the Bundesfinanzhof doubts whether the car, which was already subject to VAT at an earlier stage, must again be subjected to it in full. It points out in this regard that, having been unable to deduct input VAT, Mr Bakcsi could have avoided taxation at the time of the sale of the car by first withdrawing it from his business, in accordance with Article 5(6) of the Sixth Directive.

17 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May a trader allocate goods used for mixed purposes (business and non-business) wholly to his private assets, regardless of the extent to which they are used in his business?

(2) Where a person has acquired goods from a private individual for the purposes of his business with no right to deduct input tax and subsequently disposes of them, is that disposal fully liable to turnover tax in accordance with Articles 2(1) and 11.A(1)(a) of Directive 77/388/EEC?'

The first question

Arguments of the parties

18 Mr Bakcsi submits that a taxable person must be able to retain within his private assets mixed-use goods which he has purchased from a private individual and in

respect of which he cannot deduct VAT. Consequently, he is not required to pay VAT when he sells those goods. Such latitude enables him to avoid the unequal treatment which would result from double application of VAT in a case such as that in the main proceedings.

19 The German Government notes that, even though the Court, in its judgments in *Lennartz* and *Armbrecht*, cited above, did not expressly rule on the question whether a taxable person can allocate mixed-use goods entirely to his private assets, it did not indicate the opposite. Nor does the Sixth Directive contain any provision prohibiting such a decision.

20 The German Government points out in this regard that it follows from the wording of heading (a) of the first subparagraph of Article 6(2) of the Sixth Directive that the allocation must be based on a decision by the trader. Further, it follows from Article 5(6) of the Sixth Directive that it must be possible immediately to allocate an item of property to private assets at the time when it is acquired.

21 The German Government also submits that the proof of the choice of allocation to the business results in particular from the fact that the taxable person exercises, in whole or in part, the right to deduct input VAT. In the case of goods purchased from a private individual, the acquisition of which does not create a right to deduct, it is necessary to determine whether VAT has subsequently been deducted in respect of expenses connected to those goods, such as those incurred for repairs.

22 The Greek Government submits that the right of a trader to allocate mixed-use goods entirely to his private assets does not appear to be excluded by any provision in the Sixth Directive. However, if a right to deduct VAT that has been paid is exercised in respect of expenses relating to such goods, for instance expenses connected with upkeep or repair, the goods ought automatically to be

regarded as forming part of the business assets. That being so, the provisions of the Sixth Directive relating to the fixing of the percentage of the right to deduct, to the application of VAT on a transfer for consideration, and to a taxable person's private use of goods would be applicable.

23 The Commission argues that a taxable person has the right to decide whether, and in what proportion, he wishes to allocate goods to his private assets or to his business. The manner in which that taxable person has exercised this freedom of choice at the moment when the event giving rise to VAT occurs is a question of fact, the answer to which will depend on an assessment of all the relevant circumstances. The taxable person, it submits, demonstrates his decision to allocate goods by using them, in whole or in part, for the purposes of his economic or private activities. If he uses them for mixed purposes, he cannot possibly be allocating them entirely to his private assets.

Findings of the Court

24 In paragraph 16 of its judgment in *Armbrecht*, the Court held that it is clear from the wording of Article 2(1) of the Sixth Directive that a taxable person must act 'as such' in order for a transaction to be subject to VAT. According to paragraph 17 of that judgment, a taxable person carrying out a transaction in a private capacity does not act as a taxable person. Consequently, as paragraph 18 of *Armbrecht* makes clear, a transaction carried out by a taxable person in a private capacity is not subject to VAT.

25 The Court also pointed out, in paragraph 19 of *Armbrecht*, that there is no provision in the Sixth Directive which precludes a taxable person who wishes to retain part of an item of property amongst his private assets from excluding it from the VAT system. According to paragraph 20 of that judgment, this interpretation makes it possible for a taxable person to choose whether or not to integrate into his business, for the purposes of applying the Sixth Directive, part

of an asset which is given over to his private use. The Court went on in that paragraph to point out that the availability of that option does not impede the application of the rule that capital goods used for both business and private purposes may none the less be treated as business goods the VAT on which is in principle wholly deductible.

26 Nor, it should be observed, does the Sixth Directive contain any provision which would preclude a taxable person who acquires a capital item in order to use it for both business and private purposes from retaining it wholly within his private assets and thereby excluding it in full from the system of VAT.

27 When a taxable person thus decides to retain a capital item entirely within his private assets, whether or not he uses it for both business and private purposes, no portion of the input VAT due or paid on the acquisition of the item is therefore deductible.

28 In that respect, the choice, for a taxable person, between assigning goods to his private assets and assigning them, in whole or in part, to his business assets may be based on a variety of considerations, including the fact that he is not, in any event, authorised to deduct the residual VAT on a business asset purchased second-hand from a non-taxable person.

29 It is also necessary to point out that the use, for business or private purposes, to which a taxable person actually puts a capital item need be taken into account for the purpose of determining how that item has been assigned only if the taxable person requests the right to deduct, wholly or in part, the input VAT paid in respect of the acquisition. In such a case, it is necessary to determine whether the goods have been acquired by the taxable person acting, at least in part, as such, that is to say, for the purposes of his economic activities within the meaning of Article 4 of the Sixth Directive. This is a question of fact to be determined in the light of all the circumstances of the case, including the nature of the goods

concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person's economic activities (see, to this effect, *Lennartz*, paragraphs 21 and 35).

30 Moreover, it follows from heading (a) of the first subparagraph of Article 6(2) and from Article 11.A(1)(c) of the Sixth Directive that the use of capital goods for the private use of a taxable person or of his staff or for purposes other than those of his business, where the VAT on such goods is wholly or partly deductible, is treated as a supply of services for consideration and is taxed on the basis of the cost of providing the services (see *Lennartz*, paragraph 26).

31 In contrast, if the taxable person has chosen to retain a capital item wholly within his private assets and was therefore not entitled to deduct the input VAT paid on the acquisition, the use of the item for his business purposes cannot be subject to VAT.

32 In the light of the foregoing, the Commission's argument that a taxable person demonstrates his decision to assign an item by using it wholly or partly for the purpose of his business activities and is therefore precluded from assigning a mixed-use item wholly to his private assets must be rejected.

33 It is also necessary to reject the argument put forward by the German and Greek Governments to the effect that the taxable person's choice to integrate into his business assets an item of property purchased from a private individual, the acquisition of which does not create a right to deduct VAT, results from the fact that he exercises the right to deduct the VAT levied on the expenses connected to the item, such as repairs. The purpose to which a particular capital item is assigned determines the application of the VAT system to the item itself and not to

the goods and services employed for its use and maintenance. The right to deduct the VAT levied on those goods and services is a separate matter coming under the application of Article 17 of the Sixth Directive. That right depends, in particular, on the connection between those goods and services and the taxed transactions of the taxable person. It follows that the tax arrangements applicable to the supply of capital items must be dissociated from those concerning the taxable expenses incurred for their use and maintenance.

34 The answer to the first question must therefore be that a taxable person who acquires a capital item in order to use it for both business and private purposes may retain it wholly within his private assets and thereby exclude it entirely from the system of VAT.

The second question

Arguments of the parties

35 The German and Greek Governments, together with the Commission, submit that, when a taxable person transfers for consideration an item which he has assigned to his business, he must, under Articles 2(1) and 11.A(1)(a) of the Sixth Directive, apply VAT to the whole of the consideration obtained, irrespective of the fact that he has been unable to deduct the VAT charged on the item because the item was purchased from a private individual.

Findings of the Court

36 As has already been stated in paragraph 24 of the present judgment, it is clear from the wording of Article 2(1) of the Sixth Directive that a taxable person must act 'as such' in order for a transaction to be subject to VAT.

37 A taxable person who sells a business asset is acting in a business capacity and therefore as a taxable person.

38 Consequently, where a taxable person has chosen to incorporate wholly into his business assets a capital item which he uses for both business and private purposes, the sale of that item is subject in full to VAT, in accordance with Articles 2(1) and 11.A(1)(a) of the Sixth Directive.

39 Where a taxable person assigns to his business assets only the part of the item used for business purposes, the sale of that part alone is subject to VAT (see, to this effect, *Armbrecht*, paragraph 24).

40 In this regard, it is necessary to point out that, when a taxable person has chosen to incorporate, wholly or partly, the capital item into his business assets, the fact that the item was purchased second-hand from a non-taxable person and that the taxable person was therefore not authorised to deduct the residual VAT attaching to that item is irrelevant. It is an item applied for business purposes and its sale constitutes a taxable supply within the meaning of the Sixth Directive.

41 However, as the national court has pointed out, it follows from Article 5(6) of the Sixth Directive that the taxable person may withdraw the item from his business for his private use or that of his staff, or apply it for purposes other than those of his business. This withdrawal is treated as a supply for consideration where the item has given rise to entitlement to full or partial deduction of VAT.

42 In this regard, it should be noted that the purpose of Article 5(6) of the Sixth Directive is, in particular, to ensure equal treatment as between a taxable person who withdraws goods from his business and an ordinary consumer who buys goods of the same type. In pursuit of that objective, Article 5(6) prevents a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping payment of VAT when he transfers those goods from his business for private purposes and from thereby enjoying advantages to which he is not entitled by comparison with an ordinary consumer who buys goods and pays VAT on them (see Case C-20/91 *De Jong* [1992] ECR I-2847, paragraph 15, and Case C-48/97 *Kuwait Petroleum* [1999] ECR I-2323, paragraph 21, as well as, with regard to heading (a) of the first subparagraph of Article 6(2) of the Sixth Directive, which is based on the same principle, Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 33).

43 Once the taxable person has thus withdrawn a capital item from his business and, where appropriate, paid the VAT on that withdrawal, he is free to dispose of that item as he wishes, since Article 5(6) of the Sixth Directive imposes no limit in that regard.

44 It follows that, since the taxable person has not been authorised to deduct the residual VAT on capital goods purchased second-hand from a non-taxable person, the VAT on such goods must be considered not to be deductible for the purposes

of Article 5(6) of the Sixth Directive and no tax may therefore be levied on that withdrawal under that provision (see, with regard to heading (a) of the first subparagraph of Article 6(2), Case 50/88 *Kühne* [1989] ECR 1925, paragraph 9). If the taxable person subsequently sells the goods, he will be carrying out that transaction in a private capacity, and not as a taxable person. That transaction will therefore be excluded from the system of VAT.

45 Such an interpretation is compatible with the objective of equal treatment pursued by Article 5(6) of the Sixth Directive, since the taxable person does not enjoy any advantage to which he is not entitled in comparison with an ordinary consumer.

46 Taxation of the item in such a situation, where it does not create an entitlement to deduction of residual tax, would lead to double taxation contrary to the principle of fiscal neutrality inherent in the common system of VAT, of which the Sixth Directive forms part (see, with regard to heading (a) of the second subparagraph of Article 6(2) of the Sixth Directive, *Kühne*, cited above, paragraph 10, and Case C-193/91 *Mohsche* [1993] ECR I-2615, paragraph 9).

47 Accordingly, the answer to the second question must be that, where a taxable person has chosen to incorporate wholly into his business assets a capital item which he uses for both business and private purposes, the sale of that item is subject in full to VAT, in accordance with Articles 2(1) and 11.A(1)(a) of the Sixth Directive. Where a taxable person assigns to his business assets only the part of the item used for business purposes, only the sale of that part is subject to VAT. The fact that the item was purchased second-hand from a non-taxable person and that the taxable person was therefore not authorised to deduct the residual VAT on that item is irrelevant in this regard. However, if the taxable person withdraws such an item from his business, the VAT on that item must be considered not to be deductible for the purposes of Article 5(6) of the Sixth Directive and no tax may therefore be levied on that withdrawal under that provision. If the taxable person subsequently sells the item, he will be carrying out that transaction in a private capacity and the transaction will therefore be excluded from the system of VAT.

Costs

48 The costs incurred by the German and Greek Governments and 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 (Fifth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 24 September 1998, hereby rules:

1. A taxable person who acquires a capital item in order to use it for both business and private purposes may retain it wholly within his private assets and thereby exclude it entirely from the system of value added tax.

2. Where a taxable person has chosen to incorporate wholly into his business assets a capital item which he uses for both business and private purposes, the sale of that item is subject in full to value added tax, in accordance with Articles 2(1) and 11.A(1)(a) 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. Where a taxable person assigns to his business assets only the part of the item used for business purposes, only the sale of that part is subject to value added tax. The fact that the item was purchased second-hand from a non-taxable person and that the taxable person was therefore not authorised to deduct the residual value added tax on that item is irrelevant in this regard. However, if the taxable person withdraws such an item from his business, the value added tax on that item must be considered not to be deductible for the purposes of Article 5(6) of the Sixth Directive and no tax may therefore be levied on that withdrawal under that provision. If the taxable person subsequently sells the item, he will be carrying out that transaction in a private capacity and the transaction will therefore be excluded from the system of value added tax.

Edward Jann Sevón

Delivered in open court in Luxembourg on 8 March 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber