OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 16 December 1999 *

1. This reference from the Bundesfinanzhof (Federal Finance Court), Germany, for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) expresses that court's uncertainty as to the scope of recent Court of Justice case-law on the right to deduct value added tax (hereinafter 'VAT') charged on investment expenditure.

The matter to be resolved in this case is whether, in accordance with the provisions of Sixth Council Directive 77/388/EEC [1] (hereinafter 'the Sixth Directive'), a taxable person retains the right to deduct if a change in the law after the date on which goods or services were acquired for the purpose of engaging in taxable economic activities, deprives him of the right to opt to waive the tax exemption for those activities, and whether the fact that the relevant assessment was subject to review has any effect.

I — The facts and the main proceedings

2. The object of Grundstückgemeinschaft Schloßstraße GbR (hereinafter 'Schloßstraße') is to hold development rights in respect of land, to construct office and residential buildings thereon and to turn such assets to account on a long-term basis.

3. Schloßstraße acquired the aforesaid development rights in March 1991 and applied for a building permit a few days later. As a result of problems over compliance with town-planning rules, it did not obtain the permit until May 1993. The national court has stated that at least until June 1993 the partners intended to transfer the building permit to a third party. However, since no purchaser was found, they concluded a contract with an architect to construct the building. Work commenced in January 1994 and was completed in December of the same year. Schloßstraße lets out 39.38% of the total area of the building for dwelling purposes, 13.96% to an architect's firm and the remaining 46.49% to a public limited company, 90% of whose business, as a financial service provider, was exempt from VAT.

* Original language: Spanish.

1 — Sixth Council Directive 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).

4. In its VAT returns for 1992 to 1994, Schloßstraße opted to pay tax on the letting operations planned or carried out and claimed a right of deduction on invoices for costs relating to the construction work. The right of deduction was initially allowed. However, pursuant to Articles 164 and 168 of the Abgabenordnung (Tax Code; hereinafter 'the AO'), the relevant notices of assessment were issued subject to subsequent review.

5. Following a review, the Finanzamt Paderborn decided to amend Schloßstraße's returns and notices of assessment for 1992 to 1994. The Finanzamt agreed to the deduction of tax only as to 13.96%, on the view that the only taxable use of the building was that of the architect's firm. According to the Finanzamt, it was no longer possible to allow deduction of tax in respect of the 46.49% of the building used by the public limited company for exempt operations since, for operations of that kind, the possibility of waiving the exemption had been removed with effect from 1 January 1994 following the amendment of Article 9(2) of the Umsatzsteuergesetz (Law on value added tax, hereinafter the 'UStG') by the Mißbrauchsbekämpfungs- und Steuerbereinigungsgesetz (Law on the simplification of tax legislation and combating of fraud, hereinafter the 'StMBG') of 21 December 1993. The Finanzamt also considered that Schloßstraße could no longer rely on the transitional provisions of Article 27(2) of the UStG, as amended by the StMBG, because construction of the building had not commenced until 11 November 1993, the final date prescribed by that provision.

6. The objection and the action brought by Schloßstraße against the Finanzamt decision were dismissed. In its appeal on a point of law, Schloßstraße contends that the restriction of the option introduced by the new rule contained in Article 9(2) of the UStG is inapplicable to it since construction of the building must be deemed to have commenced on the date on which it applied for a building permit or, at least, the date of its grant. Furthermore, it infers from the Court's judgment in *INZO*[2] that it can rely on the principle of the protection of legitimate expectations to claim the right to deduct tax paid during 1992 and 1993 (in particular on architect's and notarial fees).

7. In its order for reference, the Bundesfinanzhof expresses doubts as to the successful outcome of the appeal. It points out, first, that Schloßstraße cannot rely on the transitional provisions of Article 27(2) of the UStG because construction of the building did not begin until January 1994. The services already provided in 1992 and 1993 form part of the construction costs of the building and, therefore, of the building

2 — Case C-110/94 [1996] ECR I-857.

as 'capital goods'. Consequently, the decision on the deduction of VAT paid in respect of those services cannot be adopted without taking account of the construction of the building or, therefore, of the limitation introduced by Article 27(2) of the UStG, as amended by the StMBG, since it depends on the actual purpose of the building, that is to say leasing operations carried out in 1994, and whether those operations are taxable or exempt.

Since, according to the case-law of the Bundesfinanzhof relating to the UStG, a final decision on the right to deduction cannot be taken until the real use — rather than the intended use — of capital goods is ascertained, the Finanzamt was, in its view, right under Article 164(2) of the AO to amend the notices of assessment issued subject to subsequent review and to disallow deduction to the extent to which the services provided were ultimately used for tax-exempt operations.

Next, the Bundesfinanzhof observes that the retroactive application of Article 9(2) of the UStG, as amended, to tax charged on the services provided in 1992 and 1993 does not infringe the constitutional principle of non-retroactivity. At the time when the new rule entered into force, the right of deduction in respect of the capital goods had not yet crystallised because the final use of those capital goods had not yet been established and that factor is determinative as regards the decision on the right of deduction.

Finally, the national court considers that Schloßstraße cannot claim a legitimate expectation of exercising the option provided for by the old Article 9(2) of the UStG in respect of the planned leasing of the building because construction commenced only after the entry into force of the new rules.

8. Nevertheless, the Bundesfinanzhof queried whether such an interpretation of the relevant provisions of German law is consistent with the case-law of the Court of Justice on Article 17 of the Sixth Directive. It therefore stayed proceedings pending a preliminary ruling on the following questions:

'According to the case-law of the Court of Justice (Case C-37/95 *Ghent Coal Terminal NV*, in which reference is made to Case C-110/94 *INZO*), a taxable person can retain the right to deduct tax charged on goods and services where, by reason of circumstances beyond his control, he has

not made use of those goods and services for the purpose of carrying out taxable transactions.

According to that principle, does a taxable person also retain the right to deduct tax if he does in fact use the goods or services to carry out (leasing) transactions but, following a change in the law, is no longer entitled, after acquiring the goods or services, to opt to waive the tax exemption for the transactions carried out with them, and so cannot in fact carry out any *taxable* transactions?

In such a case, where there is a subsequent change in circumstances, does the right to deduct tax also continue to exist if, under national law, the tax assessments were allowed to be subject to a subsequent review, enabling a quick tax assessment to be made solely on the basis of information supplied by the taxable person, but giving the revenue authority the right to correct the tax assessment in every respect on the basis of factual and legal considerations?'

II — Observations submitted in the course of the preliminary ruling procedure

9. The German Government and the Commission have submitted written observations to the Court within the time prescribed in Article 20 of the EC Statute of the Court of Justice.

Representatives of Schloßstraße, the German Government and the Commission submitted oral observations at the hearing on 2 December 1999.

III — Analysis of the questions

10. The questions referred to the Court, which the Commission representative has described as 'difficult and technically complicated', raise two problems. On the one hand there is the problem of determining when a taxable person acquires the right to deduct VAT paid on capital goods and on the other hand there is the question whether Member States can abolish with retroactive effect, an acquired right to deduction on the ground, as in this case, that the initial assessment was provisional. [3] Before giving an opinion on these two questions, I believe we should consider the provisions of the Sixth Directive and of the German

3 — The question, on which the parties disagree and which Schloßstraße raised during the hearing, as to when construction of the building should be deemed to have commenced for the purpose of the UStG is, as the Bundesfinanzhof stated in its order for reference, a question of national law that cannot be examined here.

law applicable to the leasing of immovable property.

A — *The provisions of the Sixth Directive and of the German law applicable to the leasing of immovable property.*

11. The Sixth Directive establishes that the leasing of immovable property is usually VAT-exempt. Article 13B provides that:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(b) the leasing or letting of immovable property...'

12. However, Article 13C provides that:

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

(a) letting and leasing of immovable property;

...

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

13. In Germany, exemption from VAT on the leasing of land is established under Article 4(12)(a) of the UStG. Germany has availed itself of the opportunity afforded by the Sixth Directive to give its taxpayers the right to opt for taxation, as provided under Article 9(1) of that Law.

14. In the version of the Law that was in force before the amendments introduced by

the StMBG of 21 December 1993, Article 9(2) of the UStG provided that:

'The waiver of exemption under paragraph 1 shall not be available... in the event of the letting or leasing of land (paragraph 4(12)(a)) unless the entrepreneur proves that the land is not used or intended either for residential purposes or for activities other than those of an undertaking.'

15. With effect from 1 January 1994, the StMBG limited the scope of the aforesaid right of option in so far as this relates to the letting of land. Under Article 9(2) of the UStG as amended:

'The waiver of exemption under paragraph 1 shall be permitted... in the event of the letting or leasing of land (Article 4(12)(a)) only if the recipient of the service uses or intends using the land only for operations which do not preclude the deduction of input tax. It shall be for the entrepreneur to prove that those conditions are met.'

16. The StMBG also inserted a transitional provision into Article 27(2) of the UStG regulating the application of Article 9(2) as amended. Under that provision:

'Article 9(2) shall not apply where the building constructed on the land

...

3. is used or intended for purposes other than those indicated in paragraphs 1 and 2[4] and was completed before 1 January 1998

and where... in the cases mentioned in paragraph 3, construction of the building commenced before 11 November 1993.'

17. The case-law of the Court confirms that the Member States have a wide discretion in determining the scope of Article 13B and C.

4 — Paragraphs 1 and 2 refer to buildings used for dwelling or other purposes not related to the business of an undertaking.

18. Thus, in *Becker*[5] the Court held that 'by virtue of the power conferred upon them [by Article 13C], the Member States may allow persons entitled to exemptions provided for by the directive to waive their exemptions in all cases or within certain limits or subject to certain detailed rules'.

19. In its judgment in *Belgocodex*[6] which was delivered after this reference for a preliminary ruling was made, and to which I shall return later, the Court held that:

'the Member States have wide discretion under Article 13B and C. It is for them to assess whether they should or should not introduce the right of option, depending on what they consider to be expedient in the situation existing in their country at a given time. The freedom to grant or decline to grant the right of option is not restricted in time or by the fact that a contrary decision had been adopted in the past. Member States may therefore, within the sphere of their national powers, also revoke the right of option after having introduced it and return to the basic rule that letting and leasing of immovable property are exempt from tax'.

20. One initial conclusion with regard to the present case can be drawn from that case-law. Under the 1994 StMBG, the German Government may lawfully restrict the scope of the right to opt for taxation on the letting and leasing of land. Article 13B and C allows Member States to decide, on the basis of their economic situation at a given time, whether to grant the right to opt for taxation and also the conditions or limits that will apply to the exercise of that right.

21. That being said I shall now examine whether, under Community law, Schloßstraße had already acquired the right to make the deduction at the time the 1994 StMBG entered into force and whether that right could be retroactively withdrawn.

B — *Origin of the right to deduct VAT on investment costs*

22. The German Government considers that under the scheme of the Sixth Directive the right to deduct VAT depends on whe-

5 — Case 8/81 [1982] ECR 53, paragraph 38.

6 — Case C-381/97 [1998] ECR I-8153, paragraph 17.

ther the services taxed have been used in taxable operations. Consequently a final decision as to the right to deduct cannot be taken until it has been ascertained for what operations those services were actually used.

23. Applying those considerations to the facts described, the German Government argues that under Article 9(2) of the UStG as amended in 1994, Schloßstraße at no time enjoyed a provisional right to deduct input tax on the letting to the financial services company, since the latter did not use the leased property for taxable operations. It adds that the new version of the provision should be used as a basis since the taxable person did not let the building until after the entry into force of the StMBG, and the right to deduct should be determined when the operations in question take place and should therefore take account of any legislative amendments made before the commencement of those operations.

24. In my view, the German Government's argument is not consistent with the applicable provisions of the Sixth Directive as interpreted by the Court of Justice.

25. Under the Title, 'Origin and scope of the right to deduct', Article 17 of the Sixth Directive provides:

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

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

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

...'[7]

7 — Original wording of Article 17 of the Sixth Directive. Paragraph 2 was subsequently amended by Article 1(22) of Council Directive 91/680/EEC of 16 December 1991, supplementing the common system of value added tax and amending Directive 77/388 with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1), and by Article 1(10) of Council Directive 95/7/EEC of 10 April 1995 amending Directive 77/388 and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18).

26. Pursuant to the first sentence of Article 10(2) of the Sixth Directive: 'The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed.'

27. The Court has stated repeatedly that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of value added tax consequently ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way. [8]

28. The Court has also stated that in the absence of any provision empowering the Member States to limit the right of deduction granted to taxable persons, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs. Such limitations on the right of deduction must be applied in a similar manner in all the Member States and therefore derogations are permitted only in the cases expressly provided for in the Directive. [9] In this sense the Court indicated that the provisions Article 17(1) and (2) specify the conditions giving rise to the right to deduct and the extent of that right. They do not leave the Member States any discretion as regards their implementation. They therefore confer rights on individuals which they may invoke before a national court in order to challenge national rules which are incompatible with those provisions. [10]

29. More specifically, in accordance with the case-law of the Court investment expenditure incurred for the purposes of and with the view to commencing a business must be regarded as an economic activity within the meaning of Article 4 of the Sixth Directive, [11] and the taxable person therefore has the right to deduct the VAT paid on it. Any other interpretation would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it in accordance with Article 17 and would create an arbitrary distinction between investment expenditure incurred before actual operation of a business and expenditure incurred during operation. [12]

30. Furthermore, the right to deduct VAT on investment expenditure remains

8 — See, in particular, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19, Case 50/87 *Commission* v *France* [1988] ECR 4797, paragraph 15, and Case C-37/95 *Ghent Coal* [1998] ECR I-1, paragraph 15.

9 — See in particular *Commission* v *France*, cited in footnote 8 above, paragraphs 16 and 17, Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 27, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 18, and *Ghent Coal*, cited in footnote 8 above, paragraph 15.

10 — *BP Supergas*, cited in footnote 9 above, paragraph 35.

11 — For a detailed examination of this case-law see my Opinion on this same point in Case C-400/98 *Breitsohl* [2000] ECR I-4321, ECR I-4324, points 18 and 27.

12 — *Rompelman*, cited in footnote 8 above, paragraphs 22 and 23.

acquired where the expected economic activity has not given rise to taxable transactions or where the taxable person has been unable to use the goods or services which gave rise to deduction in the context of taxable transactions by reason of circumstances beyond his control. [13] It is contrary to the principle of legal certainty for the rights and obligations of taxable persons to depend on facts, circumstances or events which occurred after the tax authority made a finding in respect of those rights and obligations. [14] A supply of investment goods during the adjustment period may give rise to an adjustment of the deduction under the conditions set out in Article 20(3) of the Directive. [15]

31. It therefore follows from the relevant provisions of the Sixth Directive, as interpreted by the Court, that the right to deduct VAT on investment expenditure should be determined at the time when the goods or services to which the expenditure refers are delivered. If the taxable person declares that his actual intention is to use the investments in the performance of an activity which is taxable under the Sixth Directive or the national legislation in force, he will immediately acquire the right to deduct even though the planned activity never takes place.

32. Moreover, the connection between the acquisition of capital goods and the acquisition of the right to deduct is confirmed, in my opinion, by Article 20 of the Sixth Directive on adjustments of deductions. Paragraph 2 of that article states that in the case of capital goods, adjustment shall be spread over five years *including that in which the goods were acquired*, not when use of the capital goods by taxable persons commences. [16]

33. Returning to the present case, it is for the national court to verify Schloßstraße's actual intention when the investment expenditure at issue was made. [17] If its real intention was to use these investments to carry out taxable transactions — or even transactions that might become taxable by virtue of the right, later removed, to opt for taxation — then, as the Commission has claimed, Schloßstraße should be deemed to have acquired the right to deduct at the

13 — *Ghent Coal*, cited in footnote 8 above, paragraphs 19 and 20.

14 — *INZO*, cited in footnote 2 above, paragraph 21.

15 — *Ghent Coal*, cited in footnote 8 above, paragraph 23.

16 — In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years (Article 20(2), last subparagraph, as amended by Directive 95/7, cited in footnote 7 above). Paragraph 2 also states that, '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*' (my emphasis). However this option allowed to Member States is an exception to the stated general rule. Moreover, Article 17, which refers to the right to deduct, gives Member States no such option.

17 — The national court states that, until at least June 1993, the intention of the partners was to transfer the building permit. However, it is for the national court to determine whether this fact, about which the order for reference does not provide enough information, has any bearing on the legality of the provisional deduction allowed by the Finanzamt.

time when the services in question were supplied and before the changes to the law took place. I shall therefore now examine the retroactive removal of an *acquired* right to opt for taxation and entitlement to deduction.

C — *The ability of Member States to remove, with retroactive effect, acquired rights to pay and deduct VAT*

34. In discussing this point, I shall again refer to the judgment in *Belgocodex*.[18] In that case, the plaintiff in the main proceedings had acquired a property which was to be renovated. He subsequently let the property to a company that used it for its economic activities. Belgocodex then deducted the input tax changed in respect of the renovation work.

35. Belgocodex made the deduction on the basis of the Law of 28 December 1992 amending the Belgian VAT Code and introducing the right to opt for taxation of certain lettings of immovable property. However, the Law stated that the implementing regulations would state the form of option, its method of exercise and the requirements that must be met by the lease. The implementing regulations were never adopted and on 6 July 1994 the 1992 Law was formally repealed with retroactive effect.

36. As a result of this derogation, the Belgian revenue authority refused to allow Belgocodex to make the deduction it claimed and the company therefore appealed to the Tribunal de Première Instance (Court of First Instance) Nivelles, which asked the Court of Justice for a ruling as to whether a Member State which has availed itself of the possibility provided for by Article 13C of the Sixth Council Directive and has thus given its taxpayers the right to opt for taxation of certain lettings of immovable property may abolish, in a subsequent law, that right of option and thus reintroduce the exemption in full.

37. Belgocodex claimed before the Court that the principle of the protection of legitimate expectations and the principle of legal certainty preclude retroactive repeal of the national legislation in question. It contended that, upon the adoption of the Belgian Law of 28 December 1992, it could legitimately count on the right of option, whether the Royal Decree implementing that law was adopted or not.

38. In its decision, the Court recalled that the principle of protection of legitimate expectations and the principle of legal

18 — Cited in footnote 6 above.

certainty form part of the Community legal order and must be observed by the Member States when they exercise the powers conferred on them by Community directives. However, in the specific circumstances of that case, it was not for the Court but for the national court to determine whether a breach of those principles had been committed by the retroactive repeal of a law in respect of which the implementing decree had not been adopted.

39. The 'specific circumstances' of the Belgocodex case were the doubts as to whether, in accordance with applicable Belgian law, the 1992 Law really had provided a right to opt for taxation in that case, since the implementing legislation had never been adopted. That was therefore a matter for the national court to determine.

40. The Commission claims that in the present case such specific circumstances are lacking. In the light of the judgment in *Ghent Coal*,[19] it maintains that Schloßstraße cannot be deprived of the right to deduct for reasons beyond its control. The Commission takes the view that a restriction of the right of option introduced by the adoption of a law upon which transitional provisions confer retroactive effect, should be regarded for these purposes as constituting reasons beyond the control of the taxable person. Consequently, Schloßstraße should retain the benefit of the tax it had deducted before the legal amendment came into effect.

41. I share the Commission's view. It can be inferred from the order for reference that in the financial years 1992 and 1993, Schloßstraße complied with all the provisions of German law then applicable to the exercise of the right to opt for taxation. When the new law subsequently entered into force it precluded Schloßstraße from pursuing its plan to use those capital goods to perform taxable economic activities. In my view the change in the law constitutes 'circumstances beyond the control' of the taxable person, within the meaning of the judgment in *Ghent Coal*, and may not deprive him of an acquired right to deduct.

42. I should add that although, as I have said, Article 13B and C of the Sixth Directive certainly does grant Member States wide discretion to regulate the right of option, including the right to remove it, that discretion may not be used to infringe Article 17(1) of the Directive by revoking an acquired right to deduct.

43. Any such revocation would, furthermore, be a violation of the taxable person's

19 — Cited in footnote 8 above.

legitimate expectation that the provisions of the Directive will be correctly implemented. In this respect I should point out that compliance with the principle of protection of legitimate expectations, which is a general and superior principle of Community law for the protection of the individual, [20] is binding on all national authorities entrusted with the implementation of Community provisions. [21]

45. The German Government contends that even where the application of a change in the law, to an acquired right to deduct in respect of services supplied to a taxable person before that change in the law, is deemed to be an unlawful retroactive application of that law, the principle of protection of legitimate expectations and the principle of legal certainty will not have been infringed in the present case since, as a result of the right to review provisional tax assessments granted under the AO, Schloßstraße could not claim that the principle of legitimate expectations existed as to the continued validity of its right to deduct.

D — *The effect of the provisional nature of the assessments*

44. In my view the fact that, under national law, the tax authority may rectify provisional assessments of taxable persons as regards matters both of fact and of law [22] does not alter the previous analysis.

46. The tax authority's power to carry out reviews and to amend provisional assessments sent by it to taxable persons, is available in most Member States and is incontestably useful in managing taxes in general and VAT in particular. [23]

47. Consequently, if during a tax inspection it is discovered that a taxable person has attempted to defraud the Treasury by declaring as goods intended for company use goods actually acquired for his own private use, so as to be able to deduct the VAT paid on them, the tax authority can

20 — Joined Cases C-104/89 and C-37/90 *Mulder* v *Council and Commission* [1992] ECR I-3061, paragraph 15.

21 — Case 230/78 *Eridania* [1979] ECR 2749, paragraph 31. It is however clear that the change in the law introduced by the StMBG applies in full to the goods and services supplied to Schloßstraße from the date it entered into force, in other words from 1 January 1994. As the Court has held, 'the field of application of this principle [respect for legitimate expectations] cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities' (Case 84/78 *Tomadini* [1979] ECR 1801, paragraph 21).

22 — Paragraph 164 of the AO provides:
'1. Pending final review, taxes may, in general or in particular cases, be assessed subject to review, and no reasons need be stated for such assessment.
...
2. The assessment may be annulled or amended at any time whilst it remains reviewable...
4. When the prescribed period for assessment expires, the assessment shall cease to be subject to review...'.

23 — VAT is normally managed on a self-assessment basis under which the taxable persons calculate their own tax liability and pay it to the Treasury themselves.

review the declaration ex officio and cancel the previously allowed deduction.

48. This also applies to the adjustment procedure set up under Article 20 of the Sixth Directive. Under this system, and so far as capital goods are specifically concerned, the taxable person must adjust the amount of the tax to be deducted when particular circumstances arise within a particular period of time. Thus, in this case, if Schloßstraße had changed the proposed use of the building by increasing, for example, the part of it intended for residential use, the tax authority could have reduced the deductible proportion of VAT pro rata.

49. However, the documents do not indicate that Schloßstraße committed any fraud or that it changed the use it intended to make of the building when it initially exercised its right to opt for taxation and deduction. Consequently, the only ground for revoking the acquired rights of option and deduction would be, in this case, the subsequent amendment of the law abolishing the right to opt for taxation on Schloßstraße's economic activities.

50. As I have already indicated, the right to deduct at issue in this case follows directly from Article 17(1) and (2) of the Sixth Directive. Consequently, Schloßstraße did have, on the basis of Community law, a legitimate right to expect that its right to deduct would be respected. In these circumstances, I consider that the tax authority is not entitled to use the tax assessment review procedure to abolish, with retroactive effect, this acquired right, as that would infringe the taxable person's legitimate expectations which are founded on Community law.

IV — Conclusion

51. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred by the Bundesfinanzhof for a preliminary ruling:

Article 17(1) 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 must be interpreted as meaning that a Member State that decides to abolish the right to opt for deduction of tax on particular economic activities cannot withdraw, with retroactive effect, the right to deduct VAT paid on capital goods prior to the entry into force of that derogation for the purpose of engaging in those economic activities. This shall apply even if the deduction was initially granted to the taxable person subject to review.