OPINION OF ADVOCATE GENERAL COSMAS

delivered on 28 March 1996 *

The Bundesfinanzhof (Federal Finance Court) has referred to the Court for a preliminary ruling a number of questions concerning the interpretation of certain provisions of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment ('the Sixth Directive'). [1] The first three questions concern the scope of the common system of value added tax ('VAT') and, in particular, the interpretation of the term 'economic activity' as defined in Article 4(2) of the Sixth Directive. The last question from the national court concerns the precise meaning of Article 11A(1)(c) of the Sixth Directive, which determines the taxable amount for certain transactions which are treated as supplies of services for consideration (and therefore fall within the scope of the common system of VAT) by virtue of Article 6(2)(a) of the directive.

I — Facts and the questions referred for a preliminary ruling

1. Mrs Renate Enkler ('the appellant in the main proceedings') is employed in her husband's tax consultancy firm. On 15 September 1984 she notified her local authority and the competent tax office, Finanzamt Homburg ('the Finanzamt'), that she was carrying on the business of hiring out motor caravans. A few days later, on 28 September 1984, she actually purchased a motor caravan for DM 46 249, plus VAT of DM 6 474.89.

2. In her annual VAT return for 1984 the appellant claimed DM 7 270.77 by way of input tax, stating at the same time that she had used the motor caravan during that year for private purposes only. In her returns for the next two years she showed the following turnover from the hiring out of the vehicle:

— 1985: total receipts of DM 2 535, of which DM 2 205 represented payments received for hire to her husband;

* Original language: Greek.

1 — OJ 1977 L 145, p. 1.

— 1986: total income of DM 1 728, of which DM 868 represented payments received for hire to her husband.

3. The order for reference also contains the following details of the circumstances in which the vehicle was purchased and used: [2]

The appellant's husband contributed to the cost of purchasing and maintaining the vehicle by paying DM 42 321 in 1984, DM 8 270 in 1985 and DM 8 751 in 1986. For the periods when he hired the vehicle he paid the plaintiff a fixed daily rate of DM 90.

The motor caravan, which was registered in the appellant's name, was used for the first time by Mr and Mrs Enkler for a trip in the course of which they found that water was coming into the vehicle. They asked the seller to rectify the defect. While the necessary work was being done, they used the vehicle for private purposes. After it had been repaired, they hired it out twice to third parties and on one of those occasions it was damaged in an accident.

On the basis of information supplied by the appellant herself, the national court summarizes the details of the use of the vehicle as follows:

total use: 250 days, distance covered 25 781 km,

use for private purposes: 79 days, distance covered 13 100 km,

use by the appellant's husband: 40 days, distance covered 5 239 km,

hire to third parties: 18 days, distance covered 3 236 km,

journeys for repairs: 113 days, distance covered 4 206 km.

2 — The fact that, in her written observations submitted to the Court, Mrs Enkler disputes the accuracy of the Bundesfinanzhof's account of the factual circumstances of the purchase and use of the vehicle in question (although she does not cast doubt on the relevance of the questions referred for a preliminary ruling) does not affect the present proceedings. As the Court has repeatedly held, Article 177 of the Treaty does not authorize it to take cognizance of questions relating to the factual situation underlying the main proceedings or, even less, to settle a difference between the parties on the facts. It is for the national court to determine any question connected with an assessment of the facts of the case. Therefore, in replying to a question referred to it, the Court can give a ruling only on the basis of the facts which the national court puts before it in the order for reference (see, for example, Case 51/74 *Van der Hulst* [1975] ECR 79, paragraph 12, Case 36/79 *Denkavit Futtermittel* [1979] ECR 3439, paragraph 12, Case 17/81 *Pabst & Richarz* [1982] ECR 1331, paragraph 12, Case 243/83 *Binon* [1985] ECR 2015, paragraph 24, Case 74/87 *Goerrig* [1988] ECR 2771, paragraph 10, and Case C-30/93 *AC-ATEL Electronics* [1994] ECR I-2305, paragraphs 16 and 17).

4. The national court adds that:

(a) The motor caravan was covered by compulsory private third-party insurance. The appellant took out compulsory third-party insurance for hired vehicles only when the vehicle was hired out to third parties but, by agreement with the insurer, her husband was entitled to use the vehicle without additional cover over and above the compulsory private insurance;

(b) The appellant did not advertise in newspapers that the vehicle was available for hire;

(c) When it was not out on hire, the vehicle was kept in a covered parking area near the building where the Enklers lived.

5. In 1986 the appellant stated that she intended to use the vehicle for private purposes only (apparently from the date of the declaration). According to the same declaration, the taxable amount for the purpose of the turnover tax payable by her was quantified as DM 19 000, whilst she also claimed a deduction of 80% of the tax due on the ground that she was a small trader under Paragraph 19(3) of the Umsatzsteuergesetz 1980 (Law on Turnover Tax, 'UStG').

6. The Finanzamt originally assessed the turnover tax payable by the appellant for the years in question (1984 to 1986) on the basis of her returns. However, it subsequently amended its assessments by rectification notices of 3 April 1989 which, in calculating the tax payable by the appellant, took into account only the amounts corresponding to the turnover tax invoiced by her to hirers of her vehicle. The Finanzamt issued these rectification notices on the basis that the appellant owed the tax under Paragraph 14(3) of the UStG, because she had invoiced the hirers for turnover tax when she was not a trader.

7. The appellant's administrative appeal against the rectification notices was dismissed. An action which she brought before the competent Finanzgericht (Finance Court) was likewise dismissed on the ground that she was not acting as a trader when she hired out her motor caravan. According to the order for reference, the Finanzgericht took the view that the permanent activity required to be a trader presupposed an intention to obtain income, and that such intention had to be established by reference to

objectively verifiable criteria. When ascertaining whether or not those requirements were fulfilled in this case, the Finanzgericht found that the appellant did not carry on a business of hiring out motor caravans as a trader because:

(a) she had purchased only one vehicle which was by its nature intended for leisure use, and had used it mainly for private purposes;

(b) her main activity was not hire;

(c) she did not have an office or facilities for keeping and maintaining the vehicle;

(d) the vehicle was essentially financed and maintained by her husband;

(e) the motor caravan was insured as a hired vehicle only for periods when it was actually used for hire, and

(f) Mrs Enkler kept the motor caravan even though running it caused her to incur a heavy loss.

8. Mrs Enkler appealed on a point of law to the Bundesfinanzhof against the Finanzgericht's judgment. The Bundesfinanzhof, finding it necessary to interpret the relevant national provisions (point 1 of Paragraph 1(1), and Paragraph 2(1), of the UStG) in the light of the corresponding provisions of the Sixth Directive (Article 2(1) and Article 4(1) and (2)), decided to refer the following questions to the Court for a preliminary ruling:

'1. Is the hiring out of tangible property to be regarded

(a) as an activity of a person supplying services within the meaning of the first sentence of Article 4(2) of the Sixth Directive (77/388/EEC) or

(b) solely as the exploitation of tangible property for the purpose of obtaining income therefrom on a continuing basis within the meaning of the second sentence of Article 4(2) of the Sixth Directive (77/388/EEC)?

2. Is every grant of the use of tangible property for consideration an economic activity within the meaning of the second sentence of Article 4(2) of that directive or, in order for it to be an economic activity, must it be demarcated from any private activity?

Must the delimitation from any private activity be effected

— by reference to certain characteristics (for example, economic importance, duration of grant of use, amount of consideration) or

— by comparison with typical forms of the economic activity in question (in the present case, the commercial hiring out of motor caravans)?

3. Is the hiring out of a motor caravan to be deemed to be an economic activity for the purpose of obtaining income therefrom on a continuing basis if, over a period of more than two years, it is hired out only to two third parties for a few days and to the lessor's spouse for a total of approximately six weeks for a total consideration of approximately DM 4 300?

4. If the answer to the third question is in the affirmative, must the taxable amount (Article 11A(1)(c) of the Sixth Directive (77/388/EEC)) for the supply of services within the meaning of Article 6(2) of the directive include the expenses incurred during the period when the property for hire is available for the lessor's private use (unoccupied periods)?'

II — The relevant provisions of the Sixth Directive

9. The scope of the common system of value added tax introduced by the Sixth Directive is laid down by Article 2 as follows:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

10. Article 4, which forms part of Title IV of the directive headed 'Taxable Persons', provides as follows:

'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. [3]

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

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

4. ...

5. ...'.

3 — This footnote relates only to the Greek version of this Opinion.

11. Lastly, Article 6(2) of the directive provides as follows:

'The following shall be treated as supplies of services for consideration:

(a) 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;

(b) ...',

whilst Article 11A(1)(c) provides that the taxable amount is:

'in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services'.

III — Replies to the national court's questions

A — *First question*

12. The first question from the national court essentially seeks to establish, in order to determine the extent to which the hiring out of tangible property must be regarded as an 'economic activity' which, when independently carried out, renders the person concerned a taxable person for the purposes of VAT, whether reference must be made to the first sentence of Article 4(2) of the Sixth Directive (which provides that 'economic activity' in that sense includes, *inter alia*, the activities of persons supplying services) or to the second sentence of Article 4(2) (which provides that 'the exploitation of tangible ... property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity').

13. It is clear from the order for reference, taken as a whole, that, in its first question, the Bundesfinanzhof assumes that, whereas the first sentence of Article 4(2) defines 'economic activity' as including the supply of services, without laying down any other criteria, according to the second sentence of Article 4(2) there is an 'economic activity' only where — apart from the stipulation that there must be use of tangible property — such use is for a particular purpose, namely 'obtaining income therefrom on a continuing basis'. The Bundesfinanzhof's assumption appears to be based on two premisses:

(a) Under Article 4(1) of the Sixth Directive, any person who carries out any 'economic activity', whatever the purpose or the results of that activity, is a taxable person.

(b) The German version of the second sentence of Article 4(2), which states that the exploitation of tangible property for the purpose of obtaining income therefrom on a continuing basis shall *also* ('auch') be considered an economic activity, could suggest that that provision is an exception to the rule (contained not only in paragraph 1 but also in the first sentence of paragraph 2 of Article 4) that the purpose of a particular activity has no bearing upon its classification as an 'economic activity'.

14. However, that assumption is incorrect. Under Article 4(3) of the Sixth Directive, the Member States may treat as a taxable person anyone who carries out, *on an occasional basis*, a transaction relating to the activities referred to in paragraph 2. That provision must lead one to the conclusion that, even if a particular activity has the characteristics of one of the activities specified in Article 4(2), it cannot be regarded as being an 'economic

activity' which is necessarily subject to the common system of VAT, if it is carried out occasionally, that is to say, without some degree of permanence and continuity. Such an activity can be classified as 'economic' only if the Member State in question adopts a special provision to that effect by exercising its power under Article 4(3). Therefore the second sentence of Article 4(2) appears to be a particular embodiment of the first sentence rather than an exception to the rule set out therein. [4] In this connection it is significant that, according to the German version (and the English, Greek, Finnish, Portuguese and Swedish versions) of the second sentence of Article 4(2), the exploitation of tangible property for the purpose of obtaining income therefrom on a continuing basis is *also* (auch, επίσης, myös igualmente, likaså) considered an economic activity, whereas in the other language versions it is considered an economic activity *in particular* or *inter alia*. [5]

15. Therefore, in order to determine whether an activity consisting in the hiring out of tangible property is an 'economic activity', it is necessary in each case to ascertain whether the activity has a certain degree of permanence and continuity. As the hiring out of tangible property is clearly a form of exploitation of the property in question (and doubtless the most frequent), [6] it will be necessary to examine whether this more particular criterion is fulfilled, rendering the exercise of the activity in question permanent and continuous in accordance with the second sentence of Article 4(2). Consequently, it is necessary to determine whether the activity in question is pursued 'for the purpose of obtaining income therefrom on a continuing basis'.

16. I therefore propose that the following reply be given to the first question from the Bundesfinanzhof:

The hiring out of tangible property is a form of exploitation of that property. Consequently, in order for this form of exploitation to be classified as an 'economic activity' which makes the person carrying it out subject to the common system of value added tax, it is necessary to ascertain whether, pursuant to the second sentence of Article 4(2) of the Sixth Directive, that activity is for the purpose of obtaining income therefrom on a continuing basis.

4 — See, to this effect, point 12 of the Opinion of Advocate General Van Gerven in Case C-186/89 *Van Tiem* [1990] ECR I-4363, and the Opinion of Advocate General Sir Gordon Slynn in Case 268/83 *Rompelman* [1985] ECR 655.

5 — The Danish version uses the term 'blandt andet', the Spanish version 'en especial', the French 'notamment', the Italian 'in particolare' and the Dutch 'onder andere'.

6 — See the judgment in *Rompelman* cited in footnote 4 (in particular at paragraph 20), and the Opinion of Advocate General Sir Gordon Slynn in that case. See also the judgment in *Van Tiem* (paragraph 18), cited in the same footnote, and the Opinion of Advocate General Van Gerven, at point 10.

B — *Second and third questions*

17. The proposed reply to the national court's first question determines the answer to its second. It follows from what I have already said that not every activity which is carried out independently and consists in the exploitation of tangible property (or, as the order for reference has it, the 'grant of the use of property for consideration'), is to be deemed an 'economic activity' within the meaning of the Sixth Directive, but only such activity which is for the purpose of obtaining income therefrom on a continuing basis. This is therefore the necessary (and also the sufficient) test for whether an activity having those characteristics falls within the scope of the common system of value added tax, and not the test of whether the activity in question can be demarcated from a corresponding 'private' activity, referred to in the national court's second question.

18. No doubt the purely factual question of whether a particular activity is carried on for the said purpose (or whether a particular asset was acquired with a view to its use for an activity with that purpose) [7] cannot be answered solely on the basis of a declared intention of the taxable person. The administrative authority or court which is required to give a ruling must assess all the circumstances of the case, with the result that a finding that a particular activity is being carried on with a view to obtaining income on a continuing basis is based so far as possible on criteria which can be objectively ascertained or verified. [8] Among the objective criteria for such examination, the nature of the asset will be especially important, [9] as well as all the circumstances in which it is used. Clearly, if the asset is suitable only for economic exploitation, this objective criterion will normally be sufficient to conclude that the owner is exploiting it for the purpose of obtaining income therefrom on a continuing basis. On the other hand, if the asset is by its nature capable of being used by the owner for private purposes, all the circumstances in which it is used will have to be examined in order to establish whether the owner is actually using it, regardless of its nature, for the purpose of obtaining income on a continuing basis. [10] As mentioned in the national court's second question, a comparison between the circumstances in which the person concerned uses the property, on the one hand, and the circumstances in which the corresponding economic activity is usually carried out, on the other, is certainly one method for establishing whether the relevant criterion, which is — as I said in the previous paragraph — carrying on the activity in question for the

7 — According to the case-law of the Court, the acquisition of assets for the needs of an economic activity may also be considered an 'economic activity' within the meaning of Article 4(1) of the Sixth Directive (see *Rompelman*, cited in footnote 4, paragraph 22, and Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 13, and Case C-110/94 *Inzo* [1996] ECR I-857, paragraph 15).

8 — See *Rompelman*, cited in footnote 4, paragraph 24, and *Lennartz*, cited in the preceding footnote, paragraph 20.

9 — See the *Rompelman* judgment, cited in footnote 4, paragraph 24, and the *Lennartz* judgment, cited in footnote 7, paragraph 20. According to the latter judgment, the criteria for determining whether certain assets are acquired for the needs of an economic activity include the period which elapsed between their acquisition and their use for the taxable person's economic activities.

10 — See point 42 of the Opinion of Advocate General Jacobs in the *Lennartz* case, cited in footnote 7.

purpose of obtaining income on a continuing basis, is fulfilled in the present case.

19. The Bundesfinanzhof's third question is whether the hiring out of a motor caravan can be deemed to be an economic activity for the purpose of obtaining income on a continuing basis if:

(a) over a period of more than two years the vehicle was hired out to third parties on only two occasions and only for a few days,

(b) over the same period it was hired out to the lessor's spouse for approximately six weeks, and

(c) the total income received for hiring out the vehicle came to approximately DM 4 300.

20. Of course, in these proceedings for a preliminary ruling the Court has jurisdiction only to interpret the relevant Community provisions. It cannot at the same time apply to the individual case pending before the national court the provisions of the Sixth Directive which the Court has to interpret. [11] Consequently, no reply should be given to the third question, which essentially asks the Court to do precisely that, particularly as the question whether a particular activity is for the purpose of obtaining income on a continuing basis can be answered, as I have already said, only after an assessment of all the facts of the case. [12] However, in order to facilitate the national court's task, the Court should point out, in answering the second question, that the factual matters referred to in the third question are among those which, because of their objective nature, may be taken into account *together with others* (such as, for example, the fact that the appellant did not advertise) in order to determine whether the activity in question is an 'economic activity' within the meaning of the Sixth Directive. At the same time, however, the Court ought to point out that a small number of customers or modest or insufficient earnings do not *as such* justify the conclusion that there was no intention to obtain income on a continuing basis. Those facts may simply mean that there was such an intention but that it could not be realized, which is immaterial as far as the relevant provisions in this case are concerned. It is quite clear from Article 4(1) of the Sixth Directive that the definition of 'economic activity' takes no account of the results of the activity in question.

11 — For the case-law on this point see, for example, Case 5/69 *Volk* [1969] ECR 295, paragraph 2, Case 11/73 *Getreide-Import* [1973] ECR 919, paragraphs 2 and 3, Case 35/76 *Simmenthal* [1976] ECR 1871, paragraph 8, Case 10/86 *VAG France* [1986] ECR 4071, paragraph 7, Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 10 et seq., and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraph 18 et seq.

12 — See paragraph 11 of the judgment in *Shipping and Forwarding Enterprise Safe*, cited in the previous footnote.

21. I therefore suggest that no reply be given to the third question and that the following reply be given to the second:

In determining whether an independent activity consisting in the hiring out of tangible property constitutes an 'economic activity' within the meaning of Article 4(2) of the Sixth Directive, it is necessary only to ascertain whether such activity is carried on with a view to obtaining income on a continuing basis. This is entirely a question of fact which must be assessed by means of essentially objective criteria relating, for example, to the nature of the property hired out and all the circumstances in which it is used. Furthermore, the results of the activity (number of customers, level of earnings) do not constitute characteristics on which the determination may be solely based; they may be taken into account, however, together with others, when considering this determinative question.

C — *Fourth question*

22. According to the order for reference, the fourth question is put 'if the answer to the third question is in the affirmative'. Nevertheless, I consider that the fourth question should be answered in any case. As, in accordance with what has been said above, the question whether a particular activity is for the purpose of obtaining income on a continuing basis is purely a question of fact which the national court should answer in the light of all the circumstances of the case before it, it cannot be ruled out that the Bundesfinanzhof may, in the proceedings between Mrs Enkler and the Finanzamt, be faced with the situation to which the fourth question refers, that is to say, if her activity was for the purpose of obtaining income on a continuing basis. [13]

23. The fourth question is concerned with the interpretation of Article 11A(1)(c) of the Sixth Directive. That provision should obviously be construed in conjunction with Article 6(2), which it amplifies.

24. Article 6(1) defines the expression 'supply of services', which, under Article 2(1) of the Sixth Directive, is subject to value added tax when effected for consideration by a taxable person acting as such. The expression is defined in Article 6(1) by a negative: for that

13 — See Case C-127/92 *Enderby* v *Frenchay Health Authority* [1993] ECR I-5535, in particular paragraph 12, which states that where the Court receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings, it must reply to that request and is not required to consider the validity of the hypothesis on which the question is based. According to the same judgment, it is for the referring court to verify the validity of the hypothesis if that should prove to be necessary.

purpose, 'supply of services' means any transaction which does not constitute a supply of goods within the meaning of Article 5 of the Sixth Directive.

25. Nevertheless, Article 6(2)(a) and (b) treats as supplies of services effected for consideration, and therefore subject to VAT, two types of transaction which would not otherwise be subject to VAT. [14] In particular, Article 6(2)(a), which is the relevant provision in this case, treats as a supply of services effected 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.

26. Article 11A(1)(c), to which the national court's fourth question expressly refers, goes on to determine the VAT taxable amount in the case of transactions which, under Article 6(2), are to be treated as supplies of services effected for consideration. In that particular case, the taxable amount is 'the full cost to the taxable person of providing the services'.

14 — The last subparagraph of Article 6(2) provides that 'Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition'. The Federal Republic of Germany has apparently not exercised this power.

27. The problem of interpretation before the Bundesfinanzhof is the following: If a person is subject to VAT by reason of the fact that he is independently carrying out an economic activity consisting in the hiring out of tangible property to third parties, does the VAT taxable amount charged — pursuant to Article 6(2)(a) of the Sixth Directive — on the use of that property for the taxable person's private purposes cover only the expenses arising during the period when the property is actually used for those purposes, or should expenses incurred when the property is not being used by the taxable person for private purposes, but is available at any time for such use, also be regarded as being a 'cost to the taxable person of providing the services' within the meaning of Article 11A(1)(c) of the Sixth Directive and included in the taxable amount?

28. In order to answer the national court's question, it will be necessary to consider two parameters, which, moreover, are closely related to each other:

(a) the aim pursued by the Community legislature in treating the use of goods for the purposes referred to in Article 6(2)(a) of the Sixth Directive as a supply of services for consideration and

(b) the precise meaning of the expression 'use of goods' in that provision.

29. The objective of the provision is clear from its final words, to the effect that the use of goods for purposes other than those of the business is to be treated as a supply of services 'where the value added tax on such goods is wholly or partly deductible'. It follows clearly from this that, by introducing the legal fiction provided for by the relevant provision of Article 6(2), the legislature sought to prevent transactions where an asset is used for purposes other than those for which Article 17(2) of the Sixth Directive entitles the taxable person to deduct the value added tax charged on the acquisition of the asset from escaping the charge to VAT. [15] In *Kühne* [16] the Court held that it was clear from the structure of the Sixth Directive that Article 6(2)(a) 'is designed to prevent the non-taxation of business goods used for private purposes', whilst in *De Jong* [17] the Court held as follows in interpreting Article 5(6) of the Sixth Directive, which is based on the same reasoning (and provides that the application by a taxable person of goods forming part of his business assets for purposes other than those of his business, where the value added tax on the goods in question was deductible, is to be treated as a supply for consideration): 'the purpose of Article 5(6) of the Sixth Directive is to ensure equal treatment as between a taxable person who applies goods forming part of the assets of his enterprise for private use and an ordinary consumer who buys goods of the same type. In pursuit of that objective, that provision prevents a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping the payment of VAT when he transfers to business use 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.'

30. Yet what exactly is meant by 'use of goods'? The judgment in *Kühne*, cited in paragraph 29 above, might give the impression that the Court interprets this phrase very widely. In that case, one of the questions referred for a preliminary ruling was whether the taxable basis, within the meaning of Article 11A(1)(c) of the Sixth Directive, of a transaction consisting in the private use of a business asset includes all the expenses incurred by the taxable person (and therefore also those on which VAT was not deductible) or only 'the sums disbursed by him for supplies of goods and services to the extent that the VAT on these is deductible'. The Court's reply to this question was as follows: [18] 'In this regard it is sufficient, ... to state that it is consistent with the common system of value added tax not to tax the depreciation of business goods in respect of their private use where the VAT on the goods was not deductible, while at the same time taxing the expenses incurred for the

15 — According to Article 17(2) of the Sixth Directive, a person who purchases capital goods is in principle entitled to deduct the entire VAT paid on purchasing them where they are purchased exclusively for the purposes of taxable business transactions and also where he purchases them partly for those purposes and partly for private use (see, in this connection, the judgment in the *Lennartz* case, cited in footnote 7, paragraph 26, and the judgment in Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraph 20).

16 — Case 50/88 *Kühne* v *Finanzamt München III* [1989] ECR 1925, paragraph 8. See also Case C-193/91 *Mohsche* [1993] ECR I-2615, paragraph 8.

17 — Case C-20/91 *De Jong* v *Staatssecretaris van Financiën* [1992] ECR I-2847, paragraph 15.

18 — *Kühne*, paragraph 29.

maintenance and use of the goods in respect of which the taxable person is entitled to deduct tax. Such a solution would avoid both the double taxation of the goods themselves and the non-taxation of final use.' Consequently it would not be far-fetched to conclude that all 'the expenses incurred for the maintenance and use of the goods' on which input tax was deductible are subject to VAT, even if they relate to the use of the goods for purposes other than those of the business, and that consequently such expenses must be taken into account in determining the taxable amount for the VAT on use for private purposes. However, in judging the significance of the relevant paragraph of the judgment in *Kühne*, it must be borne in mind that the key issue in the *Kühne* case was not the taxation of the abovementioned expenses, but the taxation of the depreciation of a business asset by reason of its use for purposes other than those of the business, where there had been no entitlement to deduction when the asset was purchased. From this point of view, the main thrust of the paragraph of the judgment in *Kühne* seems to be the importance attached to the right to deduct the VAT charged on the purchase of the asset as a precondition for charging private use to VAT. [19]

31. What is certain, however, is that in the later judgment in the *Mohsche* case (cited in footnote 16) the Court came down absolutely unambiguously in favour of a strict interpretation of the expression 'use of goods'. That judgment was given in response to a request for a preliminary ruling made, as in this case, by the Bundesfinanzhof. The first question sought to establish whether, for the purpose of taxing the private use of a business asset where the VAT on the purchase of the asset was deductible, it was necessary to take into account, in addition to the use of the asset, of the maintenance or running costs incurred by the taxable person where no input tax could be deducted by him in respect of those costs.

32. In replying to this question, the Court begins by observing (paragraph 11) that, since Article 6(2)(a) sheds no light on the scope of the expression 'use of goods', it 'may be understood in a strict sense as referring only to the use of goods proper, or in a wider sense in which it also includes benefits, services and other expenses associated with that use'. However, the Court rejected a wide interpretation on the ground that it would be incompatible with the purpose of Article 6(2)(a) and went on to state (in paragraph 13) that 'unlike normal benefits which are taxable in principle, whether or not the input tax on the goods and services used to effect them is deductible, the private use of goods is taxable only exceptionally'. Therefore, the Court concludes (in paragraph 14)

19 — See, precisely to this effect, point 20 of the Opinion of Advocate General Jacobs in the *Mohsche* case, cited in footnote 16.

that 'the words "use of goods" must be interpreted strictly, including only the use of the goods themselves' and 'thus the ancillary services relating to that use do not come under Article 6(2)(a) of the Sixth Directive'.

33. Since, in view of the judgment in *Mohsche*, it is necessary to put a strict interpretation on the phrase 'use of goods' in the provision which treats the use of a business asset for purposes other than those of the business as a supply of services for consideration, it is clear that 'the full cost to the taxable person of providing the services' must also be strictly interpreted. According to Article 11A(1)(c) of the Sixth Directive, these constitute the taxable amount upon which the VAT chargeable on this notional 'supply of services' is calculated. Therefore, those expenses may include only those incurred as a result of using the asset itself, and not expenses incurred for services which are merely *connected* with such use, such as the maintenance or running costs of the asset. [20]

34. Let me hasten to add, however, that the question referred for a preliminary ruling in the present case is not, strictly speaking, concerned with the *nature* of the expenses which may be included in the taxable amount for the VAT charged on the use of a business asset for private purposes, but is concerned with the *periods* to be taken into account for calculating those expenses. The Bundesfinanzhof appears in fact to consider that the expenses to be taken into account for calculating the taxable amount for the VAT charged on the use of the vehicle for private purposes, if Mrs Enkler also used it for obtaining income on a continuing basis (which is the situation assumed by the fourth question from the national court, as I have already mentioned in point 22), comprise only (see page 13 of the French translation of the order for reference) pro-rata depreciation on the vehicle, that is to say, an expense which can typically be regarded as incurred 'only [through] the use of the goods' themselves within the meaning of the judgment in *Mohsche*. However, in my opinion, clarification of the nature of the expenses which may be included in the taxable amount best elucidates the terms in which the issue central to the fourth question arises: when calculating the depreciation referred to in the order for reference, is it necessary to take account of the periods when the asset, although not being used for purposes other than those of the business, is available to the taxable person in such a way that private use is possible at any time?

35. It seems to me that this question must be answered in the affirmative. I have already

20 — According to the facts set out in the judgment in *Mohsche* (paragraph 4), the maintenance and running costs were for renting a garage, road tax, insurance and parking charges. The issue in the main proceedings was whether these should be taken into account when determining the taxable amount for the VAT charged on the private use of a business asset (in that case, a car).

said (see point 29, above) that the purpose of treating the use of a business asset for private purposes as a supply of services for consideration is to place a person entitled to deduct the input tax paid when purchasing the asset (having regard to the fact that it was purchased for the needs of his economic activity or *in particular* for those needs) in the same situation as a person who uses an asset of that kind purchased for private purposes only. However, this object would not be attained completely if the finding that a business asset was used for private purposes necessarily meant continuous, uninterrupted use for such purposes. No doubt the fulfilment of certain private needs necessitates continuous use of the assets acquired for that purpose. However, the private need for which an asset is purchased is often completely satisfied simply by occasional use. In that event, the important point is that the consumer always has the *opportunity* to use the asset whenever he finds it necessary or desirable to do so. Furthermore, when goods are purchased for private purposes only, the purchaser must of course pay the input tax, without a right of deduction, regardless of whether the private need which he wishes to satisfy will be satisfied by continuous or occasional use.

36. Therefore, to ensure equal treatment as between taxable persons and final consumers, periods when a business asset is used for private purposes must be deemed to include not only periods of actual use, but also periods when the asset is available to the taxable person in such a way that he has the opportunity to use it for private purposes at any time. [21] This approach (which seems to me entirely compatible with the need, indicated in *Mohsche*, to construe the phrase 'use of goods' strictly, in so far as the interpretation proposed here attaches importance only to the asset itself), means that the taxable amount for the VAT charged on the private use of a business asset must include the expenses incurred during the period when the business asset is available, in the sense described above, for the satisfaction of needs other than those of the business. The depreciation of the asset for the duration of the period when it was 'available' in the above sense must be included in those expenses, but (having regard to the approach taken in *Mohsche*) they cannot include expenses relating to supplies of services effected in that period which are merely connected with the asset.

37. Nevertheless, the fact that the business asset is available to the taxable person for private use obviously does not exclude the possibility that this period of 'availability' will end when the asset is used for business purposes. In view of this, as the United Kingdom Government rightly pointed out in its observations and likewise the Finanzamt

21 — Therefore a period when the asset is not being used for an economic activity but when, for whatever reason, the taxable person cannot use it as he wishes for private purposes, or can do so only with difficulty, cannot be regarded as a period when the business asset is available to him for purposes other than those of the business.

at the hearing, the taxable amount for the VAT charged on the private use of a business asset should not include *all* the expenses incurred during the period of 'availability' of the asset, but only a part of the expenses in question, which should be apportioned according to the ratio between, on the one hand, the total duration of actual use of the asset for both private and business purposes and, on the other, the duration of actual use for purposes other than those of the business. In this way the object of the legal fiction provided for in Article 6(2)(a) of the Sixth Directive is attained but not exceeded. The satisfaction of private needs by means of a business asset is charged to VAT so as to ensure equal treatment as between ordinary consumers and taxable persons, without overlooking the fact that, during periods when the asset is available to a taxable person for private use, it may also be used for an economic activity.

38. I therefore propose that the following reply be given to the fourth question:

'In calculating the taxable amount for VAT on transactions treated as supplies of services under Article 6(2)(a) of the Sixth Directive, it is necessary to take into account, in accordance with Article 11A(1)(c) of the directive, not only expenses incurred during a period when a business asset is actually used for purposes other than those of the business, but also the expenses incurred during the period when the asset is available to the taxable person in such a way that he may use it at any time for purposes other than those of the business. The portion of the latter expenses which must finally be included in the taxable amount is to be fixed by apportionment according to the ratio between the total duration of actual use of the asset on the one hand and the duration of actual use for purposes other than those of the business on the other.'

IV — Conclusion

39. For the reasons given above, I propose that the Court reply as follows to the questions from the Bundesfinanzhof:

(1) The hiring out of tangible property is a form of exploitation of that property. Consequently, in order for this form of exploitation to be classified as an 'economic activity' which makes the person carrying it out subject to the common system of value added tax, it is necessary to ascertain whether, pursuant to the second sentence of Article 4(2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax:

uniform basis of assessment, that activity is for the purpose of obtaining income therefrom on a continuing basis.

(2) In determining whether an independent activity consisting in the hiring out of tangible property constitutes an 'economic activity' within the meaning of Article 4(2) of the Sixth Directive, it is necessary only to ascertain whether such activity is carried on with a view to obtaining income on a continuing basis. This is entirely a question of fact which must be assessed by means of essentially objective criteria relating, for example, to the nature of the property hired out and all the circumstances in which it is used. Furthermore, the results of the activity (number of customers, level of earnings) do constitute characteristics on which the determination may be solely based; they may be taken into account, however, together with others, when considering this determinative question.

(3) In calculating the taxable amount for VAT on transactions treated as supplies of services under Article 6(2)(a) of the Sixth Directive, it is necessary to take into account, in accordance with Article 11A(1)(c) of the directive, not only expenses incurred during the period when a business asset is actually used for purposes other than those of the business, but also the expenses incurred during a period when the asset is available to the taxable person in such a way that he may use it at any time for purposes other than those of the business at any time. The portion of the latter expenses which must finally be included in the taxable amount is to be fixed by apportionment according to the ratio between the total duration of actual use of the asset on the one hand and the duration of actual use for purposes other than those of the business on the other.