OPINION OF ADVOCATE GENERAL JACOBS
delivered on 10 November 1992 *

My Lords,

1. In this case the Bundesfinanzhof has asked the Court to give a ruling on the interpretation of the Sixth VAT Directive (Council Directive 77/388/EEC; OJ 1977 L 145, p. 1), in particular Article 6(2) thereof. The central issue in the case is whether a trader who uses a motor car belonging to his business for private purposes must account for tax, by way of a charge for private use, on the cost of various non-taxable or exempt items of expenditure incurred in connection with the maintenance or use of the car (in particular garage rental, tax, insurance and parking fees).

The relevant Community provisions

2. Article 6(2) of the Sixth 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 was wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition.'

3. Article 11A(1) of the Directive provides that:

'The taxable amount shall be:

(a) ...

(b) ...

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

* Original language: English.

... .'

4. Under those provisions, therefore, a taxable person (that is to say a person engaged in an economic activity within the meaning of Article 4 of the directive) who puts to private use goods belonging to his business or receives services from his business for private purposes is deemed to make a supply of services to himself for a consideration equal to the full cost of the services. Article 6(2)(a) is designed to prevent a taxable person from enjoying tax-free use of goods by putting to private use business goods on which he deducted VAT under Article 17 of the directive (that is to say, on which he recovered the VAT charged by his supplier from the tax authorities by setting it off against the VAT for which he was liable on his own supplies to customers). It therefore applies only if the taxable person deducted at least part of the VAT which he paid on the goods. Article 6(2)(b) is intended more generally to prevent a taxable person from receiving tax-free services from his business.

The facts and the questions put by the national court

5. Mr Mohsche, who carries on business in Germany as a tool-maker, uses a motor car belonging to his business for private purposes. In determining Mr Mohsche's VAT liability in respect of his private use of the car for 1983, the German tax authorities included in the taxable amount both an amount in respect of the depreciation of the car and a proportion of various costs incurred in connection with its use and maintenance. Mr Mohsche appealed against the tax authorities' decision to the Finanzgericht. The latter held that the tax authorities had correctly included the depreciation of the car in the taxable amount. (The Bundesfinanzhof observes that this appears to have been based on the fact — not expressly mentioned by the Finanzgericht — that Mr Mohsche had deducted VAT on the acquisition of the car.) The Finanzgericht decided, however, that under Paragraph 1(1)(2)(b) of the Umsatzsteuergesetz 1980 [German Turnover Tax Law], construed in accordance with the Community provisions, the taxable amount should not have included some of the expenses incurred for the maintenance or use of the car (in particular garage rental, road tax, insurance and parking fees), since Mr Mohsche neither was charged nor deducted VAT on them. The tax authorities have appealed to the Bundesfinanzhof, which in its order for reference concludes that the Finanzgericht's interpretation of the German legislation is incorrect. The Bundesfinanzhof is, however, uncertain whether the German legislation correctly implements Article 6(2) of the Sixth Directive and therefore asks the Court to give a preliminary ruling on the following questions:

'1. Does Article 6(2) of the Sixth Directive (77/388/EEC) prohibit taxation of the private use of goods forming part of the

assets of a business upon whose acquisition the taxable person was able to deduct VAT, in so far as such use also includes services which the taxable person received without deduction of input VAT from third parties for the maintenance or use of the goods?

2. If so, can a taxable person rely upon that prohibition before the national courts?'

The first question

6. In their written observations both the German Government and the Commission argue that Article 6(2) must be interpreted in the light of the principle of fiscal neutrality underlying the common VAT system. However, they differ in their views as to the precise nature of that neutrality and the consequences for the interpretation of Article 6(2). The German Government considers that a taxable person in the position of Mr Mohsche must be equated with a normal consumer hiring or leasing the motor car from a taxable person. In such a case VAT would be payable on the full amount of the lease payments regardless of whether the lessor was entitled to deduct VAT on insurance and other items. Accordingly, in the German Government's view the private use of goods for the purposes of Article 6(2)(a) must include costs incurred by the taxable person in connection with such use regardless of whether VAT was deducted on them.

7. The Commission, on the other hand, considers that Mr Mohsche should be equated with a private individual purchasing a car rather than a lessee. That exempt or untaxed costs incurred by a lessor of a car are included in the value of his taxable lease charges is an anomaly of the VAT system. Although in principle Article 6(2)(a) covers services or other costs connected with the use of a motor car, it should be interpreted as excluding exempt or untaxed costs from the charge for private use even where VAT was deductible on the goods.

8. Both the German Government and the Commission have referred to the Court's judgment in Case 50/88 *Kühne* v *Finanzamt München III* [1989] ECR 1925. That case also concerned the interpretation of Article 6(2)(a) and even had certain factual similarities with the present case. Dr Kühne, who was a lawyer, was likewise charged VAT in respect of the private use of a motor car belonging to his business. The private-use charge was also based partly on the depreciation of the car and partly on expenses incurred for its maintenance and use. However, there the similarity between the two cases ends. First, unlike Mr Mohsche, Dr Kühne had not deducted VAT on the acquisition of the car because he had bought it

second-hand from a private person. Secondly, unlike the costs involved in this case, Dr Kühne's expenditure on the maintenance and use of the car related to taxable supplies on which he had deducted the VAT (repairs, servicing, lubricants, etc). In *Kühne*, therefore, the situation was in fact the converse of that in the present case. The issue was whether Article 6(2)(a) prevented the German authorities from taxing the depreciation of the car even though VAT was deductible on the expenditure incurred on its maintenance and use.

9. The Court held that, since a taxable person was not permitted to deduct the tax remaining in the value of goods purchased second-hand from a private individual, the VAT on such goods was not wholly or partly deductible within the meaning of Article 6(2)(a); consequently, that provision did not permit a tax charge in respect of private use to be levied on the depreciation of the goods. That was so notwithstanding the fact that the taxable person was able to deduct VAT on the various supplies received for the use and maintenance of the goods.

10. In my view, the prohibition on taxation of private use which the Court recognized in that case should also apply to exempt or untaxed costs incurred by a taxable person in connection with the use and maintenance of goods. Admittedly, a literal reading of the phrase 'the use of goods' in Article 6(2)(a) is inconclusive. The phrase may be understood in a narrow sense as relating to the use of the goods alone, or in a broader sense as encompassing services and other costs related to such use; on the latter view it would follow that such services should be included within the charge for private use regardless of whether VAT was deducted on them, since Article 6(2)(a) merely requires that VAT should have been deducted, wholly or partly, on the goods.

11. However, the broader view, advocated by the German Government, is inconsistent with the purpose of Article 6(2)(a). Unlike normal supplies, which are in principle taxable regardless of whether VAT was deductible on the goods and services used for making them, the private use of goods is taxable under Article 6(2)(a) only if VAT was deductible on the goods. It follows that the purpose of the provision is to place the taxable person, to the extent to which he puts business goods to private use, in the position in which he would have been if he had acquired the goods as a private individual without any right of deduction.

12. That view is consistent with the Court's judgment in *Kühne*, where the Court stated (at paragraph 8):

'It is clear from the structure of the Sixth Directive that that provision is designed to prevent the non-taxation of business goods used for private purposes and therefore requires the taxation of the private use of such goods only where the tax paid on their acquisition was deductible.'

13. If in this case Mr Mohsche, a taxable person, had purchased the car wholly for private purposes, he would have been treated like a private purchaser (see the judgment in Case C-97/90 *Lennartz* v *Finanzamt München III* [1991] ECR I-3795, paragraphs 8 to 11; see also the judgment in Case C-20/91 *De Jong* [1992] ECR I-2847, in particular at paragraph 17). A private purchaser would not pay VAT on untaxed items such as the car tax, and his tax burden in respect of an exempt item such as car insurance would be limited to the VAT which the insurance company, as a supplier of exempt insurance services, was unable to recover on its purchases under Article 17(2) of the directive and hence was obliged to pass on to him in the insurance premiums. It seems absurd that, if Mr Mohsche acquires the car partly for business use, he should suffer an increased tax burden in respect of his private use. As the Commission stated at the hearing, Mr Mohsche is not hiring the car from a car-hire firm or taking a taxi. Nor is he in the business of leasing or hiring cars. He is a toolmaker who has bought the car partly as a trader and partly as a private individual.

14. In the order for reference the suggestion is made that Article 6(2)(a) might be read together with Article 13B(c), which exempts supplies of goods where for certain defined reasons the tax paid on the purchase of the goods was not deductible. On that reading a private-use charge under Article 6(2)(a) would be prohibited only where the VAT was not deductible for one of the reasons specified in Article 13B(c). That view is untenable since the exemption in Article 13B(c) is limited to supplies of goods. If it had been the intention that Article 6(2)(a) should be read in conjunction with Article 13, the latter would surely have contained an equivalent exemption for services consisting in the use of goods. Moreover, it might have been expected that Article 6(2)(a) would contain an express reference to Article 13.

15. I therefore agree with the Commission's conclusion that untaxed and exempt costs on which no VAT was deducted should be excluded from the scope of Article 6(2). The analysis upon which the Commission bases that conclusion is, however, inconsistent with the wording of Article 6(2)(a). If, like the Commission, we assume that the expression 'use of goods' includes services and other costs connected with such use, then the letter of Article 6(2)(a) demands that they should be included in the charge for private use, since the application of the provision depends solely on VAT being deductible on the goods.

16. In my opinion, the conclusion advocated by the Commission can properly be reached by construing the expression 'use of goods' narrowly as encompassing only the use of the goods themselves. Private use of ancillary services connected with such use would not then form part of the taxable service deemed to arise under Article 6(2)(a). The 'full cost' of that service within the meaning of Article 11A(1)(c) would thus be limited to the cost of making available the goods alone. No tax charge would therefore arise in respect of exempt or untaxed motoring expenses such as those at issue here.

17. It might be objected that this interpretation would lead to avoidance of tax on taxable services and costs. However, since Article 17(2) of the directive allows a taxable person to deduct VAT on his purchases of goods and services only in so far as they are used for the purposes of his taxable transactions, he would not be entitled to deduct VAT on services used for private purposes. Where a motor car is used partly for private purposes, it would be necessary to apportion the VAT on the motoring expenses according to the degree of private use. Thus the VAT would be deductible only to the extent to which the car was used for business purposes.

18. This view is consistent with the wording of Article 6(2)(a) and also with its underlying rationale. It seems to me that the purpose of using the device of a deemed supply in order to make adjustments in respect of the private use of goods, rather than the more obvious solution of restricting the right to deduct input VAT incurred upon their acquisition, was to allow account to be taken of changes in the proportion of private use of goods from one year to the next. The same consideration does not apply to services received by a business since they are generally consumed immediately or within a short period.

19. Moreover, this interpretation of Articles 6(2)(a) and 17(2) leads to a coherent treatment of the various categories of private use. In particular, services received by a taxable person from third parties and used for private purposes would be treated in conformity with the aims of the directive regardless of whether they relate to the use of goods and, if so, whether VAT happens to have been deductible on the goods.

20. It is true that at paragraph 29 of its judgment in *Kühne* the Court suggested, when considering the taxable amount for the purposes of Article 11A(1)(c), that motoring expenses on which VAT was deducted should be taxed. However, the issue in *Kühne* was not the taxation of the motoring expenses but the taxation of the depreciation of the car itself. The point which the Court was making was that it was consistent with the aims of the common VAT system to refrain from taxing the depreciation of the car whilst taxing the motoring expenses. For the reasons given above it would in my view

be more consistent with the wording and scheme of the directive to ensure taxation of the motoring expenses by denying a taxable person the right of deduction to the extent to which the car is put to private use. I would add however that, since the same result may be achieved by the German method of allowing full deduction of such expenses and subsequently imposing a charge for private use on the relevant proportion thereof, there seems to be no objection to the use of that method, provided that it is restricted to motoring expenses on which VAT was deducted.

21. I will comment finally on two specific points that have been raised. First, the German Government has observed that for practical reasons the possibility of partial taxation of the use of goods in proportion to the input tax deducted was rejected in the discussions preceding the adoption of the Sixth Directive. Whilst that observation may be valid with respect to the case where the VAT on the goods themselves was only partly deductible, I fail to see why there should be any practical difficulty in distinguishing between goods and the costs incurred for their use and maintenance.

22. Secondly, in my opinion those submitting observations correctly take the view that Article 6(2)(b) is inapplicable to the present case. That provision appears to apply to services provided for private purposes by the taxable person's own undertaking. The absence of any requirement concerning deduction of tax is consistent with that view. Unlike subparagraph (a) of Article 6(2), subparagraph (b) is not intended merely to cancel out the relevant proportion of the input tax deducted on goods put to private use. Its purpose is to prevent a taxable person from receiving a tax-free commercial service from his undertaking on which a private individual would have to pay VAT.

The second question

23. By its second question the Bundesfinanzhof asks whether a taxable person may rely upon Article 6(2) before the national courts.

24. In *Kühne* the Court held (at paragraph 26) that the prohibition on the taxation of private use of business goods where the VAT on the goods was not wholly or partly deductible was capable of producing direct effects in the legal relations between Member States and persons within their jurisdiction. It seems to me that the criteria for direct effect are equally satisfied by the prohibition on taxation of exempt or untaxed services and costs incurred for the maintenance and use of business goods.

Conclusion

25. I am accordingly of the opinion that the questions put by the Bundesfinanzhof should be answered as follows:

(1) Article 6(2) of the Sixth VAT Directive (77/388/EEC) prohibits taxation of the private use of services which a taxable person received without deduction of input VAT from third parties for the maintenance or use of goods put to private use.

(2) A taxable person may rely upon that prohibition before the courts of a Member State.