JUDGMENT OF THE COURT (Fifth Chamber)

8 May 2003 *

In Case C-269/00,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Wolfgang Seeling

and

Finanzamt Starnberg,

on the interpretation of Articles 6(2)(a), 13B(b) and 17(2)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, D.A.O. Edward, P. Jann and S. von Bahr (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Seeling, by H.G. Zaisch, Steuerberater,

— the German Government, by W.-D. Plessing and T. Jürgensen, acting as Agents,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents, assisted by A. Böhlke, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Seeling, represented by H.G. Zaisch, the German Government, represented by B. Muttelsee-Schön, acting as Agent, and the Commission, represented by K. Gross, assisted by A. Böhlke, at the hearing on 7 February 2002,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2002,

gives the following

Judgment

1 By order of 25 May 2000, received at the Court on 3 July 2000, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 6(2)(a), 13B(b) and 17(2)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

2 That question was raised in proceedings between Mr Seeling and the Finanzamt Starnberg (hereinafter 'the Finanzamt') relating to Mr Seeling's right to deduct in full value added tax (hereinafter 'VAT') paid as input tax in connection with the construction of a building which he treated as forming, in its entirety, part of the assets of his business but part of which he uses for private purposes.

Legal background

Community legislation

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

4 Article 6(2)(a) of the Sixth Directive treats as a supply of services for consideration 'the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible'.

5 Under Article 11A(1)(c) of the Sixth Directive, the taxable amount is to be 'in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services'.

6 Under Article 13B(b) of the Sixth Directive, the Member States are to exempt:

'the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes'.

7 Article 13C of the Sixth Directive provides as follows:

'Member States may allow tax payers the right of option for taxation in cases of:

(a) letting and leasing of immovable property;

(b) ...

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

8 Article 17(2)(a) of the Sixth Directive provides:

'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.'

9 Article 20 of the Sixth Directive, on adjustments of deductions, as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18), provides as follows, in paragraph (2):

'In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one-fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured.

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.

In the case of immovable property acquired as capital goods the adjustment period may be extended up to 20 years.'

National legislation

10 Under Paragraph 1(1)(2)(b) of the Umsatzsteuergesetz (Law on Turnover Tax, BGBl. 1993 I, p. 565), in the version in force in the year in point (1995) (hereinafter 'the UStG'), private use is subject to VAT. Private use includes cases where a trader in the context of his business effects transactions, other than the supply of goods, for purposes extraneous to the business.

11 Under Paragraph 4(12)(a) of the UStG the leasing and letting of immovable property are exempt.

12 Paragraph 9(1) of the UStG provides that the trader may waive the exemption provided for in Paragraph 4(12) if the transaction is effected for the purposes of

another trader's business. Paragraph 9(2) of the UStG provides that the exemption may be so waived only where the lessee uses or intends to use the immovable property exclusively for transactions which do not preclude the deduction of input tax.

13 Paragraph 15(2)(1) of the UStG precludes deduction of VAT on supplies of goods and services used for exempt transactions.

14 The order for reference indicates that, under the Bundesfinanzhof's earlier case-law, the use of immovable property forming part of the assets of a business for purposes other than those of the business is exempt and the right to deduct under Paragraph 15(2)(1) of the UStG is therefore precluded where the immovable property is let within the meaning of Paragraph 4(12)(a) of the UStG if the right to use that property is conferred on a third party for consideration. In the case of private use, waiver of the exemption pursuant to Paragraph 9 of the UStG is not permissible because that provision presupposes a transaction with another trader for his business.

The main proceedings and the question referred

15 Mr Seeling owns a tree-surgery and horticultural business which is subject to the normal tax rules. In 1995 he erected a building which he treated as forming, in its entirety, part of the assets of his business. Since its completion he has used it partly for business and partly for residential purposes.

16 In his VAT declaration for 1995 Mr Seeling claimed the deduction in full of the amount of VAT paid as input tax for the construction of the building. He declared as taxable personal use the private use of a dwelling in the building.

17 However, the Finanzamt regarded the private use of part of the building as being exempt personal use and refused the corresponding deductions.

18 The Finanzgericht (Finance Court) (Germany) confirmed the decision of the Finanzamt and dismissed Mr Seeling's appeal.

19 Mr Seeling brought an appeal on a point of law ('Revision') against that decision before the Bundesfinanzhof. He argued that it follows from Community law that his private use of part of the building is taxable and therefore deduction of the amount of the input tax attributable to that part of the building is not precluded.

20 After observing that it is the Court's case-law (Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 25) that Article 6(2)(a) of the Sixth Directive is designed to ensure equal treatment as between taxable persons and final consumers, the Bundesgerichtshof questioned the scope of that equivalence of treatment. It queried in particular whether the partial use of goods forming part of the assets of a business for the private use of the taxable person may be regarded as an exempt 'leasing or letting of immovable property', within the meaning of Article 13B(b)

of the Sixth Directive. According to it, that question was not conclusively settled by the judgment in Case C-291/92 *Armbrecht* [1995] ECR I-2775.

21 In those circumstances, the Bundesfinanzhof has decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'May a Member State treat the use for private residential purposes of a dwelling in business premises forming as a whole part of the assets of the business — which is equated to a supply of services for consideration under Article 6(2)(a) of Directive 77/388/EEC — as tax-exempt (in accordance with Article 13B(b) of that directive, but without the possibility of waiving the exemption), with the result that deduction under Article 17(2)(a) of the directive of the value added tax which arose in connection with the construction of the premises is precluded to that extent?'

The question referred for a preliminary ruling

22 By its question the national court is essentially asking whether Articles 6(2)(a) and 13B(b) of the Sixth Directive must be interpreted as meaning that they preclude a national law which treats as an exempt supply of services, on the basis that it constitutes a leasing or letting of immovable property within the meaning of Article 13B(b), the private use by a taxable person of part of a building forming, in its entirety, part of the assets of his business.

Observations submitted to the Court

23 Mr Seeling argues that the equivalence of treatment provided for in Article 6(2)(a) of the Sixth Directive does not mean that the taxable person must be equated to a lessee.

24 The sole purpose of Article 6(2)(a) of the Sixth Directive is to prevent the benefit of deducting input tax paid on the business asset in question from being acquired definitively by the taxable person. Only the expenses subject to VAT paid as input form part of the taxable amount for the purposes of that provision (see *Armbrecht*). The deduction of input tax should not be precluded but simply offset or, in other words, neutralised.

25 According to Mr Seeling, tax neutrality in respect of the private use of goods forming part of the assets of a business cannot be assured unless deduction of the input tax is allowed in full initially, and the private use then taxed over the entire period of use, in accordance with Article 6(2)(a) of the Sixth Directive.

26 The German Government submits that Article 6(2) of the Sixth Directive broadens the scope of Article 13 of the directive. It follows from the equivalence of treatment provided for in Article 6(2)(a) of the Sixth Directive that all provisions of that directive applicable to supplies of services are, in principle, also applicable to situations deemed to be equivalent.

27 In this case, the conditions to be satisfied for there to be equivalence of treatment in accordance with Article 6(2)(a) of the Sixth Directive are met. The taxable person treated the entire building as part of the assets of his business, whilst at the same time using part of it as a private residence. Furthermore, the asset gave rise to an entitlement to proportional deduction of input tax, in this case in the amount attributable to that part of the immovable property used for business purposes.

28 The German Government submits that equivalence of treatment means that Article 13B(b) of the Sixth Directive applies as the most appropriate analogous provision. It contends that, since Article 6(2)(a) of the Directive deems the use of an asset of a business for private purposes equivalent to a supply of services, and since that use most closely resembles, from the point of view of final consumption, a lease, the exemption provided for in Article 13B(b) of the directive applies.

29 The German Government adds that the sense and purpose of Article 6(2)(a) of the Sixth Directive, namely to avoid the non-taxation of private use of business assets (see Case 50/88 *Kühne* [1989] ECR 1925, paragraph 8), also militate in favour of the proposition that Article 13B(b) of the directive applies to private use. From the point of view of final consumption, whether the taxable person leases the residence or uses it himself is immaterial. It is therefore appropriate, in this case, to treat both cases alike for tax purposes.

30 The German Government also cites the principle of tax neutrality as supporting the applicability of Article 13B(b) of the Sixth Directive, referring to paragraphs 9 and 17 of the judgment in *Kühne*.

31 In that connection, it points out that if the private use of the building were to decrease in the years following its acquisition, *a posteriori* deduction *pro rata temporis* of input tax could be applied for during the 10-year adjustment period provided for in Article 20(2) of the Sixth Directive.

32 However, if private use were subject to VAT — thus giving rise to entitlement to deduct as input tax the VAT on all the construction costs incurred in respect of the building — there would be untaxed end use. The building could then, for instance, be sold free of VAT to a private individual after the adjustment period of 10 years provided for in Article 20(2) of the Sixth Directive, without any *a posteriori* adjustment being made to the deduction of VAT paid as input upon acquisition of the building. In this second case, the taxable person would thus obtain an advantage because taxing the private use of the building over 10 years would, in most instances, correct to a very limited extent only the deduction of the VAT paid as input tax at the time when the building was acquired. Under Article 11A(1)(c) of the directive, the full cost to the taxable person of providing the services constitutes the taxable amount for transactions treated as equivalent under Article 6(2) of the directive. Since a building will not, as a rule, depreciate within 10 years, taxing its private use over 10 years will not enable the sums of VAT paid as input tax to be offset in their entirety by the amount of depreciation. That result contravenes the principle of fiscal neutrality.

33 The Commission observes that it follows from Article 6(2)(a) of the Sixth Directive that, where a taxable person makes private use of goods forming part of the assets of his business, he is deemed to be supplying services to himself, in

consideration for a sum corresponding to the amount of the costs attributable to the supply of those services, which amount is calculated in accordance with the provisions of Article 11A(1)(c) of the directive. The use of goods forming part of the assets of the business other than for the purposes of that business is therefore taxable where the goods in question give rise to an entitlement to deduct input tax wholly or in part.

34 That provision is designed to ensure equal treatment as between the taxable person and the final consumer with regard to non-business use. It therefore treats a taxable person making private use of goods forming part of the business in the same way as an individual who has acquired goods without entitlement to deduct. The Court held at paragraph 8 of the judgment in *Kühne* that it is 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 and therefore requires the taxation of the private use of such goods only where the tax paid on their acquisition was deductible.

35 With respect to the German conception of private use as a leasing transaction entered into by the taxable person with himself, the Commission submits that it finds no basis either in Article 6(2)(a) or in Article 13B(b) of the Sixth Directive.

36 With regard to Article 13B(b), it observes that the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law (see, *inter alia*, Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 11, and Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 21), and must therefore be interpreted strictly (see, *inter alia*, *Stichting Uitvoering Financiële Acties*, paragraph 13; Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 12, and Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 52, and Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 64).

37 The Commission emphasises that the exception to the general principle of taxation laid down in Article 13B(b) of the Sixth Directive is only applicable where the specific characteristics of a contract to let, and in particular the duration of the right of enjoyment of the property, which is an essential element, are actually met (see *Commission* v *Ireland*, paragraph 56, and *Commission* v *United Kingdom*, paragraph 68). Accordingly, the inclusion in that exception of a fictional leasing transaction by the taxable person to himself is not permissible.

38 As for Article 6(2)(a) of the Sixth Directive, the Commission argues that, as an exception, that provision too must be interpreted strictly. It cannot be inferred from Article 6(2)(a) that the Member States may, contrary to its unambiguous wording, at will transform a taxable transaction into an exempt transaction by treating it as being equivalent.

39 Finally the Commission observes that, according to the Court's case-law, a taxable person may choose whether or not to integrate into his business, for the purposes of applying the Sixth Directive, part of an asset which is given over to his private use. Accordingly, capital goods used both for business and private purposes may none the less be treated as business goods, the VAT on which is in principle wholly deductible (*Armbrecht*, paragraph 20).

Findings of the Court

40 It must first of all be pointed out that it is settled case-law that a taxable person may choose whether or not to integrate into his business, for the purposes of applying the Sixth Directive, part of an asset which is given over to his private use (see *Armbrecht*, paragraph 20, and Case C-415/98 *Bakcsi* [2001] ECR I-1831, paragraph 25).

41 If the taxable person chooses to treat capital goods used both for business and private purposes as business goods, the VAT due as input tax on the acquisition of those goods is in principle wholly and immediately deductible (see, *inter alia*, Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 26, and *Bakcsi*, cited above, paragraph 25).

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

43 Accordingly, where a taxable person chooses to treat an entire building as forming part of the assets of his business and subsequently uses part of that building for private purposes, on the one hand, he is entitled to deduct the input VAT paid on all construction costs relating to that building and, on the other, he is subject to the corresponding obligation to pay VAT on the amount of expenditure incurred to effect such use.

44 Next, as regards Article 13B(b) of the Sixth Directive, the Court has repeatedly stated that the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, in particular, *Stichting Uitvoering Financiële Acties*, paragraph 13, and Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 43).

45 Accordingly, contrary to what the German Government contends, Article 13B(b) of the Sixth Directive cannot be applied by analogy.

46 Moreover, it is settled case-law that the exemptions in Article 13 of the Sixth Directive constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (see, in particular, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 15, and *Commission* v *Germany*, paragraph 44).

47 In that regard, it must be observed that the wording of Article 13B(b) of the Sixth Directive provides no illumination as to the scope of the words 'letting or leasing of immovable property'.

48 None the less, leaving aside the specific cases expressly mentioned in Article 13B(b), the concepts 'leasing' and 'letting of immovable property', which, as pointed out in paragraph 44 of this judgment, constitute an exception to the general VAT rules contained in the Sixth Directive, must be construed strictly (see *Commission* v *Ireland*, paragraph 55, and *Commission* v *United Kingdom*, paragraph 67).

49 The letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive essentially involves the landlord of property assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to

exclude other persons from it (see Case C-409/98 *Mirror Group* [2001] ECR I-7175, paragraph 31, and Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 21).

50 The private use by the taxable person of a dwelling in a building which he has treated as forming, in its entirety, part of the assets of his business does not satisfy those conditions.

51 It is a feature of such use not only that no rent is paid but also that there is no genuine agreement on the duration of the right of enjoyment or the right of occupation of the dwelling, or to exclude third parties.

52 It follows that the private use by the taxable person of a dwelling in a building which he has treated as forming, in its entirety, part of the assets of his business does not fall within Article 13B(b) of the Sixth Directive.

53 Nor, finally, does the German Government's argument based on the principle of fiscal neutrality and the adjustment of deductions under Article 20 of the Sixth Directive alter that conclusion.

54 While authorising a taxable person to treat a building as forming, in its entirety, part of the assets of his business, and thus to deduct input VAT on all the construction costs, by taxing the private use by the taxable person of a dwelling in that building may have the result, as the German Government maintains, that there will be untaxed end use, because the adjustment period provided for in

Article 20(2) of the Sixth Directive is likely to correct to a limited extent only the deduction of input tax made when the building was constructed, that is a consequence of a deliberate choice on the part of the Community legislature and cannot have the effect of requiring that another article of the directive be given a broad interpretation.

55 In addition, it must be observed that, since the entry into force of Directive 95/7 in May 1995, the adjustment period for capital goods in the form of immovable property may be extended to 20 years, rather than 10 years as previously. It is clear from the fifth recital in the preamble to that directive that this amendment was made precisely in order to take account of the duration of the economic life of such goods.

56 The reply to the question referred for a preliminary ruling must therefore be that Articles 6(2)(a) and 13B(b) of the Sixth Directive must be interpreted as precluding national legislation which treats as an exempt supply of services, on the basis that it constitutes a leasing or letting of immovable property within the meaning of Article 13B(b), the private use by a taxable person of part of a building which is treated as forming, in its entirety, part of the assets of his business.

Costs

57 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundesfinanzhof by order of 25 May 2000, hereby rules:

Articles 6(2)(a) and 13B(b) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, must be interpreted as precluding national legislation which treats as an exempt supply of services, on the basis that it constitutes a leasing or letting of immovable property within the meaning of Article 13B(b), the private use by a taxable person of part of a building which is treated as forming, in its entirety, part of the assets of his business.

Wathelet Timmermans Edward

Jann von Bahr

Delivered in open court in Luxembourg on 8 May 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber