JUDGMENT OF THE COURT (Sixth Chamber)
27 June 1989 *

In Case 50/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht München (Finance Court, Munich) for a preliminary ruling in the proceedings pending before that court between

Heinz Kühne, Munich,

and

Finanzamt München (Tax Office, Munich) **III**

on the interpretation of Article 6(2)(a) 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 (Official Journal 1977, L 145, p. 1),

THE COURT (Sixth Chamber)

composed of: T. Koopmans, President of Chamber, T. F. O'Higgins, G. F. Mancini, C. N. Kakouris and F. A. Schockweiler, Judges,

Advocate General: F. G. Jacobs
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of:

the Government of the Federal Republic of Germany, by R. Morawitz, Ministerialdirigent at the Federal Ministry of Economic Affairs, acting as Agent, at the hearing,

* Language of the case: German.

the Government of the Portuguese Republic, by L. Fernandez and A. Correia, acting as Agents, in the written procedure,

the Commission of the European Communities, by its Legal Adviser H. Etienne, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 25 January 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 March 1989,

gives the following

Judgment

1 By an order of 9 December 1987, which was received at the Court on 16 February 1988, the Finanzgericht München referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p. 1), hereinafter referred to as the 'Sixth Directive'.

2 Those questions were raised in an action brought by Dr H. Kühne, a lawyer in Munich, challenging a notice of assessment to VAT issued to him by the Finanzamt München III.

3 The Umsatzsteuergesetz (Law on turnover tax) 1980 makes the private use of a business car subject to turnover tax. Furthermore, the residual part of the VAT on second-hand goods sold to a taxable person by a private person who is not a taxable person for VAT purposes is not deductible by the taxable person, even if the goods are used for the latter's business.

4 Dr Kühne, who as a lawyer is a taxable person for VAT purposes, bought from a private person, who was therefore a non-taxable person, a second-hand business car which was also used for his private purposes. The Finanzamt München III charged VAT on the car in respect of its depreciation in proportion to the private use made of it by Dr Kühne and the latter brought an action before the Finanzgericht München challenging the tax assessment. He claimed that since he had been unable to deduct the VAT on the car, if tax were charged on the depreciation of the car by reason of his private use turnover tax would be levied twice, which would be contrary to the VAT system. The plaintiff claimed that for purposes of private use account should be taken of the actual running costs of the car, and not of depreciation.

5 The Finanzgericht considered that a literal application of the Law on turnover tax raised some doubt as regards the Sixth Directive, Article 6(2)(a) of which makes taxation of the private use of goods forming part of the assets of a business subject to the condition that the VAT on such goods have been wholly or partially deductible. The national court therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'I — How should Article 6(2) of the Sixth Directive be interpreted?

(1) Does the conditional clause "where the value-added tax on such goods is wholly or partly deductible"

(a) exclude the taxation of private use only in cases where input tax is not deductible on account of use of the goods for exempt transactions in the business (Paragraph 15(2) of the Law on turnover tax) or on account of use of the goods for purposes other than those of the taxable transactions of the taxable person (Article 17(2) of the Sixth Directive), or

(b) does it also exclude such taxation where input tax is not deductible for other reasons, for example because of acquisition from a non-taxable person?

If Question (1)(b) is answered in the affirmative:

(2) Is VAT on goods partly deductible within the meaning of Article 6(2)(a) of the Sixth Directive when a taxable person may not deduct VAT for the supply of the goods to him but may do so for supplies of services or goods which he has made use of or received from other businesses for the maintenance (repairs, servicing, etc.) or for the use (fuels, lubricants, etc.) of the goods?

(3) If Question (2) is answered in the negative:

(a) Does the second sentence of Article 6(2) allow Member States to make derogations only in the sense of refraining wholly or partly from taxing the use of goods within the meaning of Article 6(2)(a), or

(b) are they also authorized to tax such use irrespective of whether the VAT on the goods used is wholly or partly deductible?

II — If Question (3)(a) is answered in the affirmative:

(1) Did the German legislature incorrectly transpose the Sixth Directive into national law in so far as, by Paragraph 1(1)(2)(b) of the Law on turnover tax it levies VAT on the use of goods forming part of the assets of a business even when the VAT on such goods is not wholly or partly deductible?

If Question (1) is answered in the affirmative:

(2) May a taxable person rely on Article 6(2)(a) of the Sixth Directive as interpreted by the Court of Justice in the courts responsible for financial matters in the Federal Republic of Germany?

III — If Question I(1)(a), (2) or (3)(b) is answered in the affirmative or Question II(1) or (2) is answered in the negative:

How should Article 11(A)(1)(c) of the Sixth Directive be interpreted? Does the cost consist of all the expenses incurred by the taxable person for the service or only of (where appropriate a proportion of) the sums disbursed by him for supplies of goods and services to the extent that the VAT on these is deductible?'

6 Reference is made to the Report for the Hearing for a fuller account of the law applicable and the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The taxation of the private use of goods forming part of the assets of a business (Question I(1))

7 This question seeks essentially to ascertain whether Article 6(2)(a) of the Sixth Directive precludes taxation of the depreciation of business goods in respect of their private use where the VAT on such goods was not deductible because they were purchased from a non-taxable person.

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.

9 Since a taxable person is not permitted to deduct the residual tax on business goods purchased second-hand from a non-taxable person, the VAT on such goods must be considered not to be deductible for the purposes of Article 6(2)(a) of the Sixth Directive and no tax may therefore be levied under that provision on the depreciation of the goods in respect of their private use.

10 Such taxation of business goods on which the residual tax was not deductible would lead to double taxation contrary to the principle of fiscal neutrality which is inherent in the common system of value-added tax, of which the Sixth Directive forms part.

11 The answer must therefore be that Article 6(2)(a) of the Sixth Directive must be interpreted as precluding taxation of the depreciation of business goods in respect of their private use where the VAT on such goods was not deductible because they were purchased from a non-taxable person.

The right to 'partial' deduction (Question I(2))

12 This question seeks to establish whether the answer to the first question is different where, although the taxable person was not able to deduct the VAT in respect of the supply of the goods to him, he was none the less able to deduct the VAT on the various goods and services supplied by other taxable persons for the use and maintenance of the goods.

13 Article 6(2)(a) of the Sixth Directive provides that the private use of business goods may be taxed only if the VAT on the goods themselves, and not the expenses incurred for their use and maintenance, was deductible.

14 It follows that the tax rules applicable to the supply of business goods must be distinguished from those concerning the taxable expenses incurred for their use and maintenance.

15 The answer must therefore be that the reply to the first question is the same where, although the taxable person was not able to deduct the VAT in respect of the supply of the goods to him, he was none the less able to deduct the VAT on the supplies of goods and services which he sought and obtained from other taxable persons for the maintenance or use of the goods.

The Member States' power of derogation (Question I(3))

16 This question is designed to ascertain whether the Member States' power to derogate from the rule requiring taxation of the private use of business goods allows them to refrain from taxing such use wholly or partly or allows them to tax such use whether or not the VAT on such goods was wholly or partly deductible.

17 It follows from the foregoing that the imposition of VAT on the private use of business goods on which the VAT was not wholly or partly deductible gives rise to double taxation contrary to the principle of fiscal neutrality inherent in the common system of value-added tax.

18 Consequently, the Member States' power to derogate from the rule requiring the taxation of the private use of business goods cannot in any event allow them to impose VAT on such use where the VAT on the goods was not wholly or partly deductible.

19 The answer must therefore be that the second sentence of Article 6(2) does not allow Member States to tax the private use of business goods where the VAT on such goods was not wholly or partly deductible.

The implementation of the Sixth Directive in national law (Question II(1))

20 This question seeks essentially to ascertain whether Article 6(2) of the Sixth Directive, as interpreted above, precludes national tax legislation imposing VAT

on the private use of business goods where the VAT on those goods was not wholly or partly deductible.

21 In view of the replies given above, that question must be answered in the affirmative.

The direct effect of Article 6(2) of the Sixth Directive (Question II(2))

22 This question concerns the issue whether Article 6(2) of the Sixth Directive may be relied upon by a taxable person before the courts of a Member State in so far as that provision precludes taxation of the private use of business goods where the VAT on those goods was not wholly or partly deductible.

23 As the Court has held (see, in particular, the judgment of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by individuals as against any national provision which is incompatible with the directive.

24 It follows from the foregoing that the aforesaid provision purely and simply prohibits the imposition of VAT on the private use of business goods where the VAT on the goods was not wholly or partly deductible.

25 The obligation not to tax the private use of business goods which arises from that prohibition is thus unconditional and does not depend for its implementation or its effects on the adoption of any Community or national measure.

26 This prohibition is therefore complete, legally perfect and consequently capable of producing direct effects in the legal relations between Member States and persons within their jurisdiction.

27 The answer must therefore be that Article 6(2) of the Sixth Directive may be relied on by a taxable person before the courts of a Member State in so far as that provision precludes taxation of the private use of business goods where the VAT on those goods was not wholly or partly deductible.

The taxable amount in respect of the private use of business goods (Question III)

28 This question seeks to determine whether the taxable amount for the purposes of Article 11(A)(1)(c) of the Sixth Directive in respect of the private use of business goods includes all the expenses incurred by the taxable person or merely the consideration for the supply of goods and services on which the VAT is deductible.

29 In this regard it is sufficient, in the light of the replies given above, 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 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.

Costs

30 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions submitted to it by the Finanzgericht München, by order of 9 December 1987, hereby rules:

(1) **Article 6(2)(a) of the Sixth Council Directive 77/388/EEC on the harmonization 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 the taxation of the depreciation of business goods in respect of their private use where the value-added tax on such goods was not deductible because they were purchased from a non-taxable person;**

(2) **The reply given above is the same where, although the taxable person was not able to deduct the value-added tax in respect of the supply of the goods to him, he was none the less able to deduct the value-added tax on the goods or services which he sought and obtained from other taxable persons for the maintenance or use of the goods;**

(3) **The second sentence of Article 6(2) of the Sixth Directive does not allow Member States to tax the private use of business goods where the value-added tax on such goods was not wholly or partly deductible;**

(4) **Article 6(2) of the Sixth Directive may be relied on by a taxable person before the courts of a Member State in so far as that provision precludes taxation of the private use of business goods where the value-added tax on those goods was not wholly or partly deductible.**

Koopmans O'Higgins

Mancini Kakouris Schockweiler

Delivered in open court in Luxembourg on 27 June 1989.

J.-G. Giraud
Registrar

T. Koopmans
President of the Sixth Chamber