OPINION OF ADVOCATE GENERAL JACOBS

delivered on 6 April 1995 *

1. Where a taxable person sells a guesthouse which he has put to both business and private use and in so doing waives the exemption from tax for which the sale would otherwise qualify under Article 13(B)(g) of the Sixth VAT Directive, [1] must he pay tax on the portion of the proceeds that is attributable to the parts of the guesthouse put to private use? That, essentially, is the issue which has led the Bundesfinanzhof to refer to the Court three questions concerning the interpretation of the Sixth Directive.

2. After an oral hearing held on 17 June 1993 before the Second Chamber, Advocate General Van Gerven delivered his Opinion on 15 September 1993. By order of 13 December 1994 the Court reopened the oral procedure and a further hearing was held before the full Court on 14 March 1995.

The facts and questions

3. The case raises issues of some complexity. The basic facts are however simple. Mr Armbrecht, a hotelier, owned a property comprising a guesthouse, a restaurant and parts used as a private dwelling. In 1981 he agreed to sell the property for a price of DM 1 150 000 'plus 13% VAT'. He claims that the reference to VAT in the notarial document was intended to relate solely to the parts of the building put to business use and that he neither charged nor received VAT in respect of the parts used as a private dwelling. In his VAT declaration for 1981 he treated as taxable the sale of the business parts but entered as tax-free the proceeds of DM 157 705 in respect of the private dwelling. Following an inspection the Finanzamt took the view that Mr Armbrecht should also have paid tax on the sale of the dwelling. Mr Armbrecht appealed successfully to the Finanzgericht, which took the view that, contrary to the position under the German Civil Code, there were for the purposes of VAT law two separate goods where a property was used partly for business purposes and partly as a dwelling. Since Mr Armbrecht did not charge the purchaser VAT on the sale of the private dwelling, he was not liable to VAT thereon. The Bundesfinanzhof, before which the matter has now come, seeks a ruling on the following questions:

'(1) Where an immovable property is disposed of, does the portion of the property used for business purposes

* Original language: English.

1 — 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; OJ 1977 L 145, p. 1.

constitute a separate item of supply for the purposes of Article 5(1) of the Sixth VAT Directive (77/388/EEC)?

(2) Is an immovable property of which part of the rooms are used for private purposes and part for business purposes used wholly for the purposes of taxable transactions of the business under Article 17(2) of the Sixth VAT Directive (77/388/EEC), or is it also possible for just the portion used for the purposes of the business to be assigned to the business?

(3) Can the adjustment of the input-tax deduction under Article 20(2) of the Sixth Directive be limited to the portion of an immovable property used for business purposes?'

4. The essential issue underlying those questions is whether a taxable person may choose to exclude the parts of an immovable property set aside for private occupation from the assets of his business for the purposes of the Sixth Directive, notwithstanding the fact that the immovable property constitutes a single asset under the national law governing the ownership of property. In his Opinion of 15 September 1993 Advocate General Van Gerven concluded that a taxable person was so entitled. I take the same view, although I do so on different grounds.

The Community legislation

5. Before I turn to the individual questions, it may be helpful to set out the provisions of the Sixth Directive that are of particular relevance to the present case.

6. Article 2(1) subjects to tax:

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

7. Article 5(1) provides:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

8. Articles 5(6) and 6(2)(a) lay down provisions concerning the private use of

goods or services by a taxable person. Article 5(6) provides:

'The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business shall not be so treated.'

Article 6(2)(a) treats as a supply of services:

'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.'

9. Article 13(B) lays down a series of exemptions for immovable property transactions. Article 13(B)(b) exempts, subject to certain exceptions of no relevance here:

'the leasing or letting of immovable property ...'

Article 13(B)(g) and (h) exempt from tax:

'(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);

(h) the supply of land which has not been built on other than building land as described in Article 4(3)(b).'

10. Article 4(3)(a) and (b), referred to in those provisions, define the supplies excluded from exemption as follows:

'(a) the supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply or the period elapsing between the date of first occupation and the date of subsequent supply, provided that these periods do not exceed five years and two years respectively.

"A building" shall be taken to mean any structure fixed to or in the ground;

(b) the supply of building land.

"Building land" shall mean any unimproved or improved land defined as such by the Member States.'

11. Article 13(C) adds the following important qualification to the foregoing exemptions:

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

(a) letting and leasing of immovable property;

(b) the transactions covered in B ... (g) and (h) above.

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

12. Article 17(2) 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'.

13. Article 20(2) and (3) lays down rules for the adjustment of deduction in respect of capital goods where the degree to which such goods are used for the purpose of taxable transactions varies over time:

'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 ten years.

3. In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. Such business activities are presumed to be fully taxed in cases where the delivery of the said goods is taxed; they are presumed to be fully exempt where the delivery is exempt. The adjustment shall be made only once for the whole period of adjustment still to be covered.'

Question 1

14. The Bundesfinanzhof's question is framed in terms of Article 5(1) of the directive. It asks whether the business portion of an immovable property constitutes a separate item of supply for the purposes of that provision. In that regard the German Government has placed great emphasis on the fact

that Mr Armbrecht's guesthouse is a single property under German civil law and is registered as a single plot in the land registry. Much of the discussion has focused on this issue. It seems to me, however, that that discussion is beside the point.

15. There can, I think, be little doubt that Article 5(1) refers to national law for the purpose of determining the extent of the property rights transferred and that in this case Mr Armbrecht transferred the right to dispose of the entire guesthouse within the meaning of that provision. That is so notwithstanding the judgments of the Court referred to in these proceedings. It is true that in *de Jong* [2] the Court held that, where a builder acquired land in his private capacity and subsequently built a house on it for his private occupation, the charge for private use applied solely to the value of the building and not to the value of the land; the land never became part of the builder's business assets and hence could not be transferred to private use for the purposes of Article 5(6). However, that case was a very special one. It must be remembered that the power of Member States to treat as a supply of goods (rather than services) the supply by a builder of works of construction on land to which he does not hold the title arises from a specific provision in Article 5(5)(b). That provision does not however authorize a Member State to treat a builder constructing a dwelling on his customer's land as making a supply of goods consisting not only of the dwelling but also the land. He clearly cannot be treated as supplying to his customer land already owned by the customer. Equally therefore Mr de Jong could not be treated as supplying to himself land already held in his private capacity. The need to include a specific provision in Article 5 suggests, if anything, that the general rule is that a building is transferred together with the land on which it stands as a single property for the purposes of Article 5(1).

16. Nor, in my view, is it helpful to refer to the judgment in *Shipping and Forwarding Enterprise Safe*. [3] There the Court held that the term 'supply of goods' did not refer to the transfer of ownership in accordance with the procedures laid down by national law but covered any transfer of tangible property by one party which empowered the other party actually to dispose of it as if he were the owner; consequently, there could be a supply of goods even if legal title were not transferred. That ruling does not however remove the need to refer to national law in order to determine the extent of the rights that have been transferred for the purpose of Article 5(1), as is apparent from the fact that

2 — Case C-20/91 [1992] ECR I-2847.

3 — Case C-320/88 *Staatssecretaris van Financiën* v *Shipping and Forwarding Enterprise Safe BV* [1990] ECR I-285.

the Court left it to the national court to determine whether a transfer of the right of disposal had taken place.

17. Nor finally is it of any relevance that under German civil law partial ownership of immovable property may be possible in some circumstances since no such question arises here.

18. However, that is not the end of the matter. Article 5(1) of the directive must be read in conjunction with Article 2(1), which subjects to tax supplies of goods and services only where they are effected 'by a taxable person acting as such'. In my view the proper question in this case is whether a trader who disposes of the privately occupied parts of an immovable property is acting wholly in his capacity as a taxable person or partly as a private individual. In other words, it is necessary to consider whether the property rights, as defined by national law, are held by the taxable person partly in his private capacity. Since little is to be gleaned from the wording of Article 2(1) itself, it is necessary to resolve that question by reference to the aims and scheme of the directive.

19. Before turning to that question I must consider a point raised by the German Government at the hearings. The Government argues that, since Article 13C allows Member States to restrict the scope of the option to tax and fix the details of its use, the German legislature is entitled to require a taxable person to opt to tax the whole of an immovable property. Consequently, the national court's first question does not arise.

20. That view is however inconsistent with the basic structure of the Sixth Directive. As already noted, Article 2(1) defines the scope of the tax. It subjects to tax supplies of goods and services effected by a taxable person acting as such. Article 13 provides for a series of exemptions from tax for certain supplies of goods and services. Such supplies do not give rise to a liability to tax but nevertheless fall within the scope of the tax for the purposes of Article 2(1). They must be distinguished from supplies which fall outside the scope of the tax under Article 2(1), such as sales by private individuals.

21. The German Government's view disregards that basic structure. Article 13C allows

Member States to restrict the scope of the option to tax. The exercise of an option to tax converts an exempt supply into a taxable supply and confers upon the taxable person the right of deduction. It cannot however convert a supply which falls outside the scope of the tax into a taxable supply. In other words, the option to tax can operate only within the framework defined by Article 2(1). Consequently, the national court quite rightly considered that the first question arising in this case was whether the disposal of the privately occupied part of the guesthouse fell within the scope of the tax. If it does not, it cannot be brought into the scope of the tax by the exercise of the option to tax. Moreover, as I shall explain below, the problem arising in this case reflects a more general problem relating to the German rules on private use.

22. This is the fourth case referred by the German courts in which the Court has had occasion to consider the provisions of the directive on private use. [4] It is apparent from those cases that the principle underlying the German implementing rules is that, in order to ensure fiscal neutrality between taxable persons and private individuals, a taxable person putting goods or services to private use must be placed in the same position for VAT purposes as one of his customers. The German rules therefore require a taxable person to assign goods acquired partly for business and partly for private use to the business. The taxable person is seen as having the right to deduct tax in full on the goods under Article 17(2) of the directive, but must then account for his private use of them by paying an annual charge based on the depreciation of the goods under Article 6(2)(a). If he subsequently sells the goods, VAT is chargeable in full on the sale under Article 2(1).

23. The logic of the German arrangements demands that the taxable person should be obliged to account for a charge for private use even if he is unable to deduct VAT on the acquisition of the goods, for example, because they were acquired from a private individual (see the *Kühne* case, below at paragraph 29). It also demands that he should be required to account for the private use of services connected with the use of goods even if no VAT was deductible on the services because they were exempt or untaxed (see the *Mohsche* case, below at paragraph 30). In both cases a customer of the taxable person's business would suffer tax in full on the goods or services even though the taxable person was unable to deduct VAT on them.

4 — See Case 50/88 *Kühne* v *Finanzamt München III* [1989] ECR 1925; Case C-97/90 *Lennartz* v *Finanzamt München III* [1991] ECR I-3795; and Case C-193/91 *Finanzamt München III* v *Mohsche* [1993] ECR I-2615.

24. From the explanations given by the Finanzamt at the hearings it appears that the application of the German rules to immovable property, although more complex, is based on the same principles. It may be noted that under the Sixth Directive the letting of immovable property and the supply of such property (other than building land and new buildings) are in principle exempt: see Article 13(B)(b), (g) and (h) above. Article 13C none the less allows Member States to grant taxable persons the right to opt to tax such transactions, subject to restrictions which they lay down. The German rules restrict the use of the option to cases where the customer uses the property for the purposes of his business. The restriction is a logical one since the purpose of the option is to allow the tax to function normally in transactions between taxable persons.

25. In keeping with the logic of the German arrangements the private use of an immovable property is equated with an exempt residential letting by the business. In other words, the private use is deemed to be a supply by the taxable person under Article 6(2)(a), but is exempted under Article 13(B)(b). The effect of this is that, in contrast to the position with other goods, on the acquisition of an immovable property a taxable person is not entitled to deduct the VAT on the proportion of the property put to private use since it is referable to an exempt supply. Nor however is he obliged to pay a charge for private use under Article 6(2)(a).

26. A further aspect of the German implementing rules is worth noting. In the case of goods other than immovable property annual variations in the degree of private use are reflected in the size of the charge for private use. In the case of immovable property this is not possible since there is no annual charge. However, an adjustment is made under the national rules implementing Article 20(2) of the directive on the adjustment of deductions made in respect of capital goods. Under those rules variations in the relative proportions of taxable use and exempted private use within a period of ten years from the acquisition of the property are reflected in an adjustment of the initial deduction, which is based on the proportions applicable in the year of acquisition. Thus, for example, suppose that a taxable person purchases an immovable property which he puts in year one to 80% taxable business use and 20% private use. If in year two his private use decreases to 10% he will be entitled to an additional deduction for that year of 1/10th x (20%-10%) of the tax. If the taxable person sells the property to a taxable person within the ten-year adjustment period and opts to tax the property, he is deemed to put the property to taxable use for the remainder of the ten-year period and receives a partial refund. However, after the ten-year adjustment period no further adjustment is made. Consequently, if a taxable person opts to tax

the sale of a property after the ten-year period he must charge tax on the full sale price notwithstanding the fact that he has borne tax definitively on the part of the property put to private use. Thus, in effect the German rules depreciate the property on a straight-line basis over ten years.

27. The French Government shares the German Government's view that an immovable property put to mixed use must in principle be regarded as a single business asset. Its reply to the written questions put by the Court indicates that, although functioning somewhat differently, the French rules are based on similar principles to the German ones. The issue arises to a lesser extent because, unlike the German rules, the French rules do not provide for an option to tax the sale of used buildings. However, a used building is automatically subject to VAT if it is sold for the first time within a period of five years from its completion. As in the case of the German rules, the taxable sale gives rise to an additional deduction in respect of the parts put to private use.

28. The Portuguese Government's reply to the Court's questions indicates that under Portuguese law an option to tax must be exercised in respect of the whole of the immovable property. Finally, the United Kingdom observes that under its law a taxable person may exercise the option to tax solely in respect of the business parts of an immovable property. The sale of the privately occupied parts is treated as an exempt supply.

Relevant case-law

29. In its previous rulings the Court has given only qualified approval to the German rules. In *Kühne* it held that no charge to tax arose under Article 6(2)(a) in respect of the private use of a motor car acquired second-hand without deduction of tax from a private individual. The Court held that the provision was:

'designed to prevent non-taxation of business goods used for private purposes and therefore requires the taxation of private use of such goods only where the tax paid on their acquisition was deductible.'

30. Similarly, in *Mohsche* it held that the term 'use of goods' in Article 6(2)(a) did not cover services ancillary to such use. The effect of the ruling was to exclude from the basis of the charge for private use the value

of ancillary services on which no VAT had been deducted.

31. Thus, in those judgments the Court, although not calling in question the basic method employed by the German rules for accounting for private use, rejected the underlying notion that a taxable person must be equated with one of his customers. It is sufficient that he should be subject to the tax burden to which he would have been subject if he had purchased the goods or services in question himself privately. It is clear therefore that the notion of fiscal neutrality underlying the German rules on private use, including the private occupation of immovable property, differs from the Court's understanding of the relevant provisions of the directive. There lies the root of the problem in this case.

32. Of particular relevance to the present case is a third case referred by the German courts, namely that of *Lennartz*. [5] The Court was asked to consider the lawfulness of a rule denying taxable persons the right to deduct VAT on the acquisition of capital goods put to both business and private use unless business use amounted to a specific minimum proportion. In order to rule on that question it was necessary for the Court first of all to consider the scheme of the Sixth Directive with respect to private use of capital goods. At paragraph 26 of its judgment the Court stated:

'In reply to the national court's question, it must be emphasized in the first place that, pursuant to Article 6 of the Sixth Directive, the use of capital goods for the private use of a taxable person or for purposes other than those of his business, where the VAT on such goods is wholly or partly deductible, is treated as a supply of services for consideration. It is apparent from the combined provisions of Article 6(2)(a) and of Article 11A(1)(c) that, where a taxable person acquires goods which he employs partly for private use, he is deemed to effect for consideration a supply of services taxed on the basis of the cost of providing the services. Consequently, a person who uses goods partly for the purposes of taxable business transactions and partly for private use and who, upon acquiring the goods, recovered all or part of the input VAT, is deemed to use the goods entirely for the purposes of his taxable transactions within the meaning of Article 17(2). Consequently, such a person is in principle entitled to a right of total and immediate deduction of the input tax paid on purchasing the goods.'

33. The principle that capital goods put to both business and private use should be

5 — Cited above in note 4.

treated as a business asset on which VAT is in principle fully deductible was in conformity with the views expressed by the French and German Governments in their observations in that case. However, since both France and Germany felt that it was inappropriate to grant taxable persons the right of full deduction where business use was minimal, both Member States had rules denying deduction in such circumstances. Unlike France, however, Germany had not sought authorization of its rule from the Council under Article 27 of the Sixth Directive. The Court held that, in the absence of such authorization, the rule could not be relied upon against taxable persons.

34. At first sight it may seem strange that a motor car that is used partly for private purposes may be treated as assigned wholly to the business. However, such an analysis may in some circumstances promote the neutrality of the tax by allowing proper account to be taken of changes in the degree of private use over the useful life of the car by a taxable person or as between a taxable vendor and a taxable purchaser. This may be illustrated by a simple example:

35. A lawyer working in Munich purchases a new motor car, which in year one he puts to 30% business use. In year two he acquires an important new client in Hamburg and travels regularly by car to his client's premises. Accordingly, his business use in year two increases to 80%. In year three some of his new client's problems have been resolved and his business use falls to 50%. At the end of the year he sells the motor car to another taxable person, whose business use in year one is 25%.

36. According to the Court's interpretation in *Lennartz*, the lawyer would be entitled to assign the car wholly to his business and to deduct all the VAT on the acquisition of the car since he would be deemed to use it wholly for the purpose of taxable transactions. In years one to three he would be subject to a charge for private use under Article 6(2)(a) which would vary according to the degree of private use in the year in question. The charge would be based on the cost to the business of making the car available, which would include an amount for depreciation of the capital cost of the car. Upon the sale of the car at the end of year three he would account for tax on the selling price of the second-hand car. The process would then begin again with the purchaser, who would be entitled to deduct the tax charged by the vendor but would be liable for a charge for private use.

37. The above treatment is in conformity with the basic principles of the tax in so far

as a taxable person incurs a VAT burden only in respect of his private consumption of goods and services and incurs no VAT burden in respect of his taxable business activities. Consequently, although in *Kühne* and *Mohsche* the Court considered certain aspects of the German rules to be incompatible with the directive, in *Lennartz* it accepted the basic mechanism for accounting for private use advocated by the French and German Governments.

39. Secondly, it is difficult to see the relevance of a distinction based on the fact that, unlike an immovable property, a motor car cannot be geographically divided up or on the — somewhat questionable — notion that it cannot be used simultaneously for business and private use. The rationale for allowing a taxable person to deduct tax in full on the acquisition of goods and to account for private use by means of a periodic charge is to allow account to be taken of variations in the proportions of business and private use, a rationale which may apply equally to immovable property.

The scope of the *Lennartz* judgment

38. Mr Armbrecht and the Commission seek to distinguish the *Lennartz* case from the present one on the ground that, unlike immovable property, a motor vehicle cannot usefully be divided into two separate parts, a view shared by Advocate General Van Gerven. I do not consider such a distinction to be necessary or appropriate. First, in *Lennartz* the Court was concerned with whether a taxable person *had the right* to deduct tax on the acquisition of the motor car. The case arose precisely because Mr Lennartz was not permitted to treat his motor car as a business asset because of the German minimum use requirement and wished to do so. The present case raises the converse issue, namely whether a taxable person may be *required* by a Member State to assign the privately occupied parts of an immovable property to his business.

40. Finally, as I shall explain below, a fixed geographical division of an immovable property into business and privately occupied parts is inconsistent with the scheme of the directive and liable to lead to double taxation.

41. There is however an important difference between the goods in issue in *Lennartz* and those in issue in the present case which is relevant to the solution in this case. The *Lennartz* case concerned goods which, in the normal course of events, depreciate in

value over a useful life which can be estimated with reasonable accuracy. That the method works less well where goods do not depreciate or where they appreciate may be illustrated by adapting slightly the above example.

42. A lawyer working in Munich purchases a new limited production sports car for DM 100 000 plus VAT. He puts the car to 50% business use. After five years he sells it for an increased price of DM 150 000 plus VAT to another taxable person, whose business use amounts to 50%.

43. According to the *Lennartz* method, the lawyer introduces the motor car into his business, deducts the tax paid on the purchase and accounts for his private use during his five years of ownership by means of an annual charge. He then sells the car and charges the purchaser VAT on the full selling price. It will be noted first that the lawyer accounts for tax twice in respect of part of the private element: once by way of annual charges for private use and again — since the car does not depreciate in value — on the resale of the car. Secondly, the charge for private use imposed on the purchaser is based on his purchase price of DM 150 000, whereas if he had purchased the car from a private individual his (indirect) VAT burden would be limited to the VAT paid by the vendor on the original purchase price of DM 100 000.

44. Such a result is inconsistent with the principle underlying the Court's judgments in *Kühne* and *Mohsche*, according to which a taxable person should be placed in the position in which he would have been if the goods or services in question had remained in the private domain.

45. The deficiencies of the method when applied to goods which do not depreciate in value in a foreseeable manner are exacerbated by the German rules relating to the private use of immovable property. As already explained, by treating the private occupation of an immovable property as an exempt supply and applying the rules on the adjustment of deductions in Article 20(2) of the Sixth Directive, the German legislation effectively depreciates an immovable property over ten years. The effect of the German legislation is thus to tax in full the sale of the property each time the property is sold after ten years of ownership without any refund of the tax borne by the vendor on the privately occupied parts. Moreover, the tax charge for private use borne by the purchaser is based on the selling price charged by the last vendor rather than the original vendor's purchase price.

46. It is clear therefore that, unless a taxable person purchases an immovable property with an unusually short life, he will either incur more tax himself, or cause his purchaser to incur more tax, than he would if he occupied separate residential premises whose sale was not subject to tax.

47. That result is of course in keeping with the logic of the German arrangements, which equate a taxable person who occupies privately immovable property belonging to the business with a lessee under an exempt lease. However, as already noted, the German legislation is based on an understanding of the notion of fiscal neutrality which is contrary to the Court's case-law.

The solution to the present case

48. It is therefore necessary to seek a solution which is consistent with the objective of fiscal neutrality as understood by the Court. It is clear that in some cases the *Lennartz* method may allow private use to be accounted for more accurately. However, it does not do so in all circumstances, particularly in the form in which it is applied to immovable property by the German rules.

49. Accordingly, I share Advocate General Van Gerven's view that a taxable person should be able to choose whether or not to bring the privately used portion of an asset into his business. If he opts to bring the goods wholly into the business, he must account for his private use under the provisions of Article 6(2)(a). The advantage for the taxable person of opting for this method is that it will take account of any reduction in the proportion of private use in later years. If, on the other hand, the taxable person opts to keep part of the asset out of the business he bears tax definitively on the private element as determined in the year of acquisition. It may be noted however that, if in any subsequent year the proportion of private use exceeds the proportion in the year of acquisition, he will be deemed to make a supply in that year under Article 6(2)(a) in respect of the additional use, in so far as he puts to private use assets forming part of the business. That option may be favoured by a taxable person who considers that his degree of private use of goods is unlikely to vary significantly and would prefer administrative simplicity or who acquires an asset that does not depreciate over a useful life which can be accurately estimated. It may be noted that the fact of giving a choice to the taxable person will not lead to tax avoidance. On the contrary, it will allow private use to be accounted for in accordance with the principle that the tax burden should resemble as closely as possible that which would have been borne if the goods had remained in the taxable person's private domain.

50. As already noted (at paragraph 39), I do not consider it necessary or appropriate to

make a distinction between immovable property and other categories of assets or between different assets according to whether they lend themselves to a geographical division of business use and private use. Immovable property is not the only category of asset which may be ill suited to the *Lennartz* method. Moreover, there seems to be no reason why a taxable person should not be able to apply to any category of goods the simpler method of excluding goods partly from the business; it is for him to weigh up the advantages and disadvantages taking account of the nature of the asset and his intended use. A division into private and business portions can readily be made on the basis of the proportions of business and private use in the year of acquisition. Allocation to private use on the basis of a fixed geographical division of the property may moreover lead to double taxation. Suppose, for example, that a hotelier purchased a hotel comprising a main building and an annex. Initially the hotelier occupies privately three rooms in the main building. Subsequently, alterations are carried out to the main building and for a year he moves his private dwelling to the annex. He then returns to another part of the main building after completion of the alterations. Under a geographical division the three rooms initially occupied would enter definitively into private use and additional charges for private use (or, under the German system, adjustment of deductions) would arise in respect of the new accommodation. In other words, he would have borne tax definitively on rooms he no longer occupies. It is clear therefore that only an apportionment based on the percentage of private use can achieve a rational result. Such an apportionment could be applied equally to other categories of assets such as motor cars or computers since it is based on the use to which the asset is put.

51. I conclude therefore that the answer to be given to Question 1 is that a taxable person who, on the acquisition of an asset, elects to exclude a proportion of the asset from his business, does not act as a taxable person for the purposes of Article 2(1) of the Sixth Directive upon the disposal of the private proportion.

Questions 2 and 3

52. The answers to Questions 2 and 3 follow from the answer to Question 1. Question 2 asks whether an immovable property put to mixed use is to be regarded as being used wholly for the purposes of transactions of the business for the purposes of Article 17(2) of the directive. The answer to that question depends on whether the taxable person elects to keep part of the property outside the business. If he does, then the privately occupied parts never belong to the assets of the business, with the result that he cannot be regarded as putting business assets to private use for the purposes of Article 6(2)(a). He is not therefore deemed to make a supply of

services in respect of the privately occupied parts under that provision. Such parts are therefore not used for making taxable business supplies. They fall outside the VAT system and must be disregarded.

53. Similar considerations apply to Question 3. The purpose of the rules on adjustment of deductions in Article 20(2) is to allow the initial deduction to be adjusted to take account of the variations in the degree of taxable use of capital goods. If the taxable person elects to keep the privately occupied parts of an immovable property out of the VAT system, he bears tax on those parts definitively. They cannot be the subject of adjustment under Article 20(2). In such a case Articles 20(2) applies solely to the business portion of the property.

Conclusion

54. Accordingly, I am of the opinion that the questions referred should be answered as follows:

(1) Where a taxable person disposes of an asset and, on the acquisition of the asset, elected to exclude a portion of it from his business, he does not act as a taxable person for the purposes of Article 2(1) of the Sixth VAT Directive (77/388/EEC) in respect of the disposal of the private portion.

(2) In such circumstances only the portion of the asset assigned to the business is used for the purpose of business transactions within the meaning of Article 17(2) of the directive.

(3) In such circumstances any adjustment of the input-tax deduction under Article 20(2) of the directive is limited to the portion of the asset assigned to the business.