OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 13 April 2000 [1]

1. By an order for reference dated 24 September 1998, the Bundesfinanzhof (Federal Finance Court) (Germany) referred to the Court two questions for a preliminary ruling on the interpretation of 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 (hereinafter 'the Sixth Directive'). [2] These questions have been raised in proceedings in which Mr Bakcsi (hereinafter 'the appellant') claims that the disposal of a vehicle which he acquired from a private individual and used partly for business purposes and partly for personal use should not be subject to VAT.

The Sixth VAT Directive

2. The Sixth Directive on the harmonisation of the laws of the Member States relating to turnover taxes provided for the completion of the introduction of VAT in the European Community, defining in detail the rules governing the basis of assessment.

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

4. Article 4 defines what is meant by a taxable person. The first two paragraphs state that '"Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity' and that 'The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

1 — Original language: Italian.
2 — OJ 1977 L 145, p. 1.

5. Article 5 of the Sixth Directive concerns the concept of the supply of goods. Article 5(6) defines the cases in which the application of goods from the business assets for use by the trader is considered to be equivalent to a supply made for consideration. It states: '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.'

6. Article 6 of the Sixth Directive defines the supply of services, for the purposes of the basis of assessment. According to Article 6(2)(a), the following are to be treated as supplies 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.'

7. Article 10(1)(a) defines a chargeable event as '.... the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.'

8. Article 11 of the Sixth Directive concerns the identification of the taxable amount. Article 11.A(1)(a) states that this is '... in respect of supplies of goods and services... everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies...'.

9. On exemptions, Article 13.B states: 'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(c) supplies of goods used wholly for an activity exempted under this Article or under Article 28(3)(b) when these

goods have not given rise to the right to deduction...'. [3]

10. Concerning deductions, Article 17(1) establishes that 'The right to deduct shall arise at the time when the deductible tax becomes chargeable.'

11. Finally, Article 32, first paragraph, of the original version of the directive (repealed by Directive 94/5/EC) [4] stated: 'The Council, acting unanimously on a proposal from the Commission, shall adopt before 31 December 1977 a Community taxation system to be applied to used goods, works of art, antiques and collectors' items.'

This article was only implemented in February 1994 by way of Directive 94/5. Article 1(3)(e) of that directive (now Article 26a of the Sixth Directive) defines a 'taxable dealer' as a taxable person who:

'in the course of his economic activity, purchases or acquires for the purposes of his undertaking, or imports with a view to resale, second-hand goods and/or works of art, collectors' items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale.'

In addition, part B of that article provides:

'1. In respect of supplies of second-hand goods, works of art, collectors' items and antiques effected by taxable dealers, Member States shall apply special arrangements for taxing the profit margin made by the taxable dealer, in accordance with the following provisions.

2. The supplies of goods referred to in paragraph 1 shall be supplies, by a taxable dealer, of second-hand goods, works of art, collectors' items or antiques supplied to him within the Community:

— by a non-taxable person,

...

3 — For the sake of completeness, I should add that Article 28 introduces a transitional period during which the Member States, as laid down in Article 28(3)(f), can 'provide that for supplies of buildings and building land purchased for the purpose of resale by a taxable person for whom tax on the purchase was not deductible, the taxable amount shall be the difference between the selling price and the purchase price.'

4 — Council Directive 94/5/EC of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388 — Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques (OJ 1994 L 60, p. 16).

3. The taxable amount of the supplies of goods referred to in paragraph 2 shall be the profit margin made by the taxable dealer, less the amount of value added tax relating to the profit margin. That profit margin shall be equal to the difference between the selling price charged by the taxable dealer for the goods and the purchase price.'

National law

12. The relevant German rules referred to in the main proceedings can be found in the Umsatzsteuergesetz (Law on Turnover Taxes) (hereinafter 'the 1980 UStG'). Under the first sentence of Paragraph 1(1)(1) thereof, all supplies effected for consideration by a trader in Germany in the course of his business are subject to VAT. Under the first sentence of Paragraph 10(1) of that Law, turnover is to be assessed on the basis of the consideration passing.

Facts of the case and questions referred for a preliminary ruling

13. In 1990 the appellant was self-employed as a haulage contractor. In that business he used a Mercedes 300 D motor vehicle, which, as stated in the order for reference, was used to the extent of 70% for business purposes and 30% for private purposes.

14. The appellant had acquired that vehicle from a private individual. This prevented him from deducting the VAT from the price paid for the purchase. In 1989 he carried out repairs to the vehicle, deducting VAT in respect of the costs incurred. Finally, in May 1990, the appellant sold the Mercedes for DEM 19 000, without showing the amount of VAT separately from the price of the vehicle on the invoice.

15. Following the sale, and on the basis of the national provisions on turnover tax, the German tax authorities, in the tax assessment for 1990, held that the disposal of the vehicle was subject to VAT, identifying as the taxable amount the sale price (DEM 19 000) less the VAT contained therein (DEM 2 334). The tax authorities accordingly informed the appellant, by notice of assessment dated 24 May 1994, that payment of the aforementioned tax was due.

16. The appellant appealed against that assessment through administrative channels and, following the rejection of his appeal, brought an action before the Finanzgericht (Finance Court). It allowed the claim only in part, reducing the percentage for taxable value relating to the private use of the vehicle by the amount of the costs and expenses in respect of which the appellant had been unable to deduct VAT.

However, in principle, the Finanzgericht considered that the disposal was taxable inasmuch as the appellant had, in 1989, claimed deduction of the VAT paid for repairs to the vehicle in question. Thus, according to the Finanzgericht, the appellant had expressed the wish to allocate it to his business.

17. The appellant appealed against this decision on a point of law to the Bundesfinanzhof (the highest court for taxation cases), seeking its annulment and consequently the reduction of VAT assessed for 1990 by DEM 2 334.

18. In the order for reference the Bundesfinanzhof notes first that, on the basis of the national law on VAT, the disposal of the vehicle by the appellant must be considered to be taxable if it occurred 'in the course of his business'. However, the referring court is uncertain whether in this case the disposal did take place 'in the course of the business.' So far as goods intended for mixed use are concerned, it can be deduced from national case-law, in particular from a judgment by the Bundesfinanzhof of 25 March 1988, that German law does not exclude the possibility that a vehicle, even if used both for business and private purposes, may be allocated, as a whole, to the personal assets of the taxable person. The Bundesfinanzhof goes on, however, to state that there are doubts as to whether this possibility is compatible with the Sixth Directive as interpreted by the case-law of the Court of Justice.

19. The national court also asks whether, if the vehicle under discussion were considered to be part of the assets of the business, its disposal must still be subject to VAT. On this point the appellant pointed out in the main proceedings that such a situation not only leads to double taxation, but also points to a contradiction in the rules laid down by the Sixth Directive. Article 5(6) of this directive provides that the application of goods forming part of his business assets by a taxable person for his personal use is subject to VAT only where the VAT on the goods in question was wholly or partly deductible. Consequently, to tax the sale of a vehicle purchased from a private individual without that tax being deductible would involve an unjustified difference in treatment between the systems governing supplies and charges which, also according to the appellant, should be resolved by treating the supply of used vehicles as non-taxable.

Finally, the Bundesfinanzhof considers that, even though Article 13 and Article 26a of the Sixth Directive provide for cases where supplies by a taxable person of goods whose purchase had been excluded from

the right to deduction are not subject to tax, those applications do not include the case here under discussion.

20. Given that the solution to the dispute depends on the interpretation of the provisions of the Sixth Directive, the Bundesfinanzhof has therefore referred the following questions to the Court for a preliminary ruling:

'(1) May a trader allocate goods used for mixed purposes (business and non-business) wholly to his private assets, regardless of the extent to which they are used in his business?

(2) Where a person has acquired goods from a private individual for the purposes of his business with no right to deduct input tax and subsequently disposes of them, is that disposal fully liable to turnover tax in accordance with Articles 2(1) and 11.A(1)(a) of Directive 77/388/EEC?'

The first question

21. In its first question, the national court is essentially asking whether, in the light of the provisions of the Sixth VAT Directive, a taxable person can allocate goods used for mixed purposes, or used partly for business and partly for private purposes, exclusively to his private assets.

22. According to the Commission there is no such possibility because, while acknowledging that the taxable person has the right to choose whether and in what proportion he may allocate goods to his personal assets or to the company, the Commission considers that such a choice is made through the use to which the goods are put. Consequently, when the taxable person uses the goods wholly or partly for business purposes he is in fact choosing to allocate them to his business, whether in whole or in part.

23. The German Government, however, argues that the mere fact that a taxable person uses goods, exclusively or partly, for business purposes does not necessarily mean that he wishes to allocate these goods to the business, wholly or as a percentage. Allocation of the goods, in fact, depends entirely on the wishes of the taxable person, who expresses that wish by exercising the right to deduction which the Sixth Directive reserves exclusively for the purchase of goods for business purposes. Where that possibility does not exist, as in the present case, the choice of the taxable person could be apparent from other circumstances, still relating to the exercise of the right to deduct, such as, for example, the deduction of VAT paid for costs relating to the goods.

24. First, it should be stated that in both the order for reference and the observations made by the parties it is clear that the first question does not cast any doubt on the principle by which a taxable person, when he acquires goods, is free to choose whether to allocate them to his private assets or to his business. I do not believe that there can be any doubt as to the existence of this freedom. It is true that the aforementioned question concerns the criteria to be followed to establish what the choice of the taxable person actually was. The reply to the referring court will be negative or positive according to whether one considers, as the Commission does, that the use of the goods determines the assets to which they belong (thus excluding a priori the possibility that goods for mixed use can be exclusively part of the private assets of the trader) or, as the German Government argues, that the fact that goods belong to particular assets is evidenced by factors other than the use of the goods, in particular the exercise of the right to deduct input tax (making it possible for a trader to include goods which he uses for mixed purposes in his own personal assets).

25. As a matter of principle, I agree with the position taken by the German Government. Nothing in the Sixth Directive supports the argument of the Commission concerning the existence of a link between the use of goods and the assets to which they should be allocated. Rather, as the German Government also contended during the hearing, there is indirect evidence to support the opposite argument in the wording of Article 6(2) of the Sixth Directive. [5] That article defines the system applicable to the private use of company goods by the taxable person, and confirms that, for the purposes of application of the Sixth Directive, the assets to which goods belong do not necessarily depend on the use for which the goods are intended.

26. This solution is confirmed in the case-law of the Court, which states, in principle, that '... whether, in a particular case, a taxable person has acquired goods for the purposes of his economic activity within the meaning of Article 4 of the Sixth Directive is a question of fact which must be determined in the light of all the circumstances of the case...'. [6] It is hardly necessary to add that this assessment is a matter for the national court, which has available all the necessary elements of fact. In addition, concerning more specifically goods used for mixed purposes, the Court has stated that a taxable person has the freedom to choose '... whether or not to integrate into his business for the purposes of applying the Directive, part of an asset which is given over to his private use' and that, consequently, '... 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.' [7]

5 — See point 6 of this Opinion.

6 — Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 21. Also see Case C-230/94 *Enkler* [1996] ECR I-4517, paragraphs 26 to 29.

7 — Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraph 20.

It therefore seems to me that from the case-law, in particular the case just mentioned, it is quite clear that, in the system of value added tax, there is no direct and necessary link between the use of goods and the assets to which they belong. As indicated by the referring court, it is true that the Court has never ruled specifically in a case involving goods for mixed use allocated wholly to the private assets of the trader, but I do not see any reason to exclude that possibility.

27. In the light of what has been considered up to now, and to reply more directly to the question put by the national court, I consider that there are no doubts as to the fact that the freedom of a taxable person to choose the assets to which goods acquired are to be allocated means that he can decide to allocate goods which he uses partly for business purposes wholly to his own private assets.

28. Once this is established, however, I believe that it is also appropriate to add some comments regarding the criterion, pointed out by the German Government, which relates to exercising the right to deduction. For reasons which I shall now explain, I believe that, among the various factors to be taken into account in interpreting the conduct of the trader concerning the choice of assets to which goods are to be allocated, this is of particular importance.

As we know, the VAT system is characterised by the fact that it is designed to tax final consumers and the main persons subject to the tax (that is, those who must comply with the formalities laid down by the legislation) are the taxable persons. In order to ensure that the system functions and, in particular, that taxable persons do not bear the burden while collecting and paying VAT, a mechanism of impositions and deductions was set up to make the tax 'neutral' with regard to them. In the Community VAT system, therefore, the position of the taxable person differs from that of the final consumer inasmuch as only the former can make use of that mechanism. It follows that, when a person exercises his freedom of choice by allocating goods to his business or to his own private assets, he is at the same time choosing whether to introduce the goods into the tax system, bringing them into the mechanism of impositions and deductions described above, or whether to act as a final consumer, thereby abandoning that system entirely. It seems to me, therefore, that the fact that a person exercises the right to deduct tax paid at the time of purchase of goods can be regarded as a perfectly good reason to consider that he has decided to allocate the goods to his business.

Although in the case under discussion here it was not possible to recover the VAT paid

on the purchase of the vehicle as the seller was a private individual, I consider that the above point can be extended to the appellant's choice to deduct the tax paid in respect of repairs to the vehicle. This factor, therefore, in my view, represents conclusive proof which excludes the possibility that he allocated the goods under discussion wholly to his private assets.

29. In conclusion, as regards the first question, I take the view, to complete what has been stated above, that a trader can include in his private assets goods intended for mixed use. However, his intention to remove the goods entirely from the value added tax system must follow unambiguously from his conduct.

The second question

30. In its second question, the national court asks the Court of Justice whether the disposal of goods intended by the trader for business use should be subject to VAT even if, at the time of purchase, it was not possible to deduct VAT because the goods were purchased from a private individual not subject to that tax. Neither of the parties disputes the fact that such liability gives rise to double taxation which is contrary to the principles of value added tax, in particular the principle of fiscal neutrality. This is because the taxable person has to pay VAT both when he purchases the goods (as it cannot be deducted from the consideration) and when he disposes of them (as he must pay the amount contained in the sale price).

31. On this point, we must bear in mind that, according to the general system of the taxation of supplies as stated in Article 2(1) of the Sixth Directive, [8] the sufficient and necessary condition for a supply to be taxable is that it is effected for consideration by a taxable person acting as such. However, it is quite irrelevant that the goods supplied were subject to deduction of VAT at the time of purchase.

32. The only provisions of the Sixth Directive which state that taxation is subject to a previous deduction are in Article 5(6), concerning the system of application, and Article 6(2), relating to the private use of goods for business purposes. [9] This is justified by the fact of being strictly used for the particular objective of these articles. As stated by the Court in relation to the system of applications, but with reasoning which can also be extended to the use of business goods for private purposes, '... the purpose of Article 5(6) of the Sixth Directive is to ensure equal treatment as between a taxable person who applies goods forming part of the assets of his business for

8 — See point 3 of this Opinion.

9 — See points 5 and 6 respectively of this Opinion.

private use and an ordinary consumer who buys goods of the same type. In pursuit of that objective, that provision prevents a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping the payment of VAT when he transfers to business use those goods from his business for private purposes and from thereby enjoying advantages to which he is not entitled by comparison with an ordinary consumer who buys the goods and pays VAT on them.' [10] In other words, the provisions under discussion govern particular cases in which the existence of a deduction of VAT represents the necessary condition for determining the risk of tax evasion which the two rules seek to avoid.

In the light of the above, therefore, I think it is necessary to regard as unfounded the appellant's argument that the difference created between the system of imposition and supply when the goods supplied were purchased from a private individual not subject to tax would lead to a difference in treatment which should be resolved by excluding the supply of second-hand goods from taxation. [11] In the first place, the two systems do not cause any difference in treatment because, as shown by the above comments, they are based on different requirements and conditions. Second, if the suggestion made by the appellant were followed, this would extend the condition of the existence of a deduction of tax paid on purchase of the goods to the normal system of supplies. However, this would clearly be contrary to Article 2(1) of the Sixth Directive.

33. It must also be borne in mind that the supply which is the subject of the main proceedings does not come within the exemptions from the tax laid down in Article 13 of the Sixth Directive, in particular those set out in Article 13.B(c). [12] As the national court rightly points out, these exemptions, which have the specific aim of preventing double taxation, [13] do not specifically envisage the case of goods acquired from private individuals without the right of deduction. In addition, as we know, these provisions, which consist of exemptions, cannot be interpreted broadly. [14]

34. Finally, the present case does not even come within the scope of the rules established by Directive 94/5 supplementing the common system of value added tax by establishing special arrangements applicable to second-hand goods, works of art,

10 — Case C-20/91 *De Jong* [1992] ECR I-2847, paragraph 15. See also *Enkler*, cited above, and Case C-48/97 *Kuwait Petroleum* [1999] ECR I-2323, paragraph 21. For the extension to Article 6(2) of the reasoning with regard to Article 5(6), see in particular Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 25.

11 — See point 20 of this Opinion.

12 — See point 9 of this Opinion.

13 — In this regard, see Case C-45/95 *Commission* v *Italy* [1997] ECR I-3605, paragraph 15.

14 — See, *inter alia*, Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 20, Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 17, and Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 12.

collectors' items and antiques.[15] This source introduces into the Sixth Directive the new Article 26a, on the arrangements applicable to second-hand goods, in order to avoid double taxation and the distortion of competition between taxable persons.[16] However, this system is reserved exclusively for 'taxable dealers', that is to say, those whose principal activity is buying and selling second-hand goods. Given that the appellant does not fall within this category, the special arrangements set out in Article 26a of the Sixth Directive are not applicable to this case.

35. On the basis of the above arguments, the conclusion ought, in my view, to be drawn that, in the light of the rules set out in the Sixth Directive, the supply of goods by a taxable person who is acting as such, but not as a taxable dealer within the meaning of Article 26a of the Sixth Directive, comes within the scope of Article 2(1) and is therefore taxable even if the goods supplied did not give rise to deduction as they were purchased from a private individual.

36. There remains the fact that this situation gives rise to double taxation which, as stated by the Court, is '... 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.'[17] However, this problem has already been dealt with by the Court in the *Oro Amsterdam* case of 1989.[18] In that case also, the Court was required to rule on the legitimacy of taxing the supply of goods which had been acquired from a private individual without the right to deduction. The only difference with regard to the present case is that in 1989 the rules governing the arrangements applicable to second-hand goods were not in force. At the time, Article 32 of the Sixth Directive, which provided that, by 31 December 1977, the Council would adopt a Community taxation system to be applied to used goods, works of art, antiques and collectors' items, had not yet been implemented.[19]

37. In the *Oro Amsterdam* case the Court concluded that the double taxation affecting a trader who sold a second-hand item was unavoidable, as it could not be considered that, in the absence of Community provisions, the State was obliged to provide, in its own national legislation, a special system applicable to this type of goods. First of all the Court ruled that '... if the Council fails to adopt measures falling within the exclusive competence of the European Communities, there can be no fundamental objection in certain cases to Member States' maintaining or introdu-

15 — Cited above.

16 — As stated in particular in the fifth recital in the preamble to Directive 94/5.

17 — Case 50/88 *Kühne* [1989] ECR 1925, paragraph 10.

18 — Case C-165/88 *Oro Amsterdam Beheer and Concerto* [1989] ECR 4081.

19 — See point 11 of this Opinion.

cing, pursuant to the duty to cooperate imposed on them by Article 5 of the Treaty [now Article 10 EC], national measures designed to achieve Community objectives'; however, it went on to hold that 'no general principle requiring the Member States to act in the place of the Council whenever it fails to adopt measures falling within its province can be inferred' from this. [20]

38. In addition, the Court stated that 'on the whole, the Community system of VAT is the result of a gradual harmonisation of national legislation...' and that 'this harmonisation, as brought about by successive directives, and in particular by the Sixth Directive, is still only partial.' The Court also found that 'the harmonisation is designed in particular to preclude double taxation, so that the deduction of input tax at each stage of taxation is an integral part of the system of VAT', but added that 'that objective has not yet been achieved, however,... and nowhere in the common system of value added tax, as it stands at present, are to be found the necessary bases for determining and laying down detailed rules for applying a common system of taxation enabling double taxation to be avoided in trade in second-hand goods.' The Court came to the conclusion that 'until the Community legislature has taken action, it is therefore necessary to continue to apply Article 32 of the Sixth Directive, which merely authorises Member States that apply a special system of VAT to second-hand goods to retain that system, but does not impose on them any obligation to introduce such a system if none exists.' [21]

39. I consider, at least in principle, that the reasoning of the Court is also applicable to the present case. Although the Council has, in the meantime, adopted the directive on the arrangements for second-hand goods, the present case does not, as I have already pointed out, come under that legislation. It is therefore clear that in the current VAT system a gap continues to exist which the harmonisation process has not yet dealt with.

40. Therefore, while on the basis of Article 5 of the EC Treaty (now Article 10 EC) national provisions to eliminate this gap could, in principle, be allowed, provided that they are seen to be consistent with the principles of Community VAT, [22] we cannot, however, argue that there are obligations to introduce these provisions. In other words, Member States are not obliged to

20 — *Oro Amsterdam*, cited above, paragraph 15.

21 — *Oro Amsterdam*, paragraphs 21 to 24.

22 — See on this point, and also concerning the limits encountered by the States, Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, paragraphs 21 to 23, and Joined Cases 47/83 and 48/83 *Pluimveeslachterijen* [1984] ECR 1721, paragraphs 22 and 23.

introduce into their own legislation on value added tax provisions to exclude from that tax the supply of second-hand goods effected by a trader who does not fall within the category of taxable dealers, within the meaning of Article 26a of the Sixth Directive, in order to avoid double taxation.

Conclusion

41. In view of the above considerations, I propose that the Court reply as follows to the questions referred by the Bundesfinanzhof:

(1) A trader can legitimately include in his own private assets goods intended for mixed use (that is, partly for business and partly for private purposes), irrespective of the respective percentages of the two types of use, provided that his conduct unequivocally indicates that he wishes to exclude the aforementioned goods entirely from the system of value added tax.

(2) The supply of goods which a vendor intended for business use after acquiring them from a private individual, without the deduction of VAT paid as input tax, is subject in full to VAT, within the meaning of Article 2(1) and Article 11.A(1)(a) of Directive 77/388/EEC.