OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 22 September 2005 [1]

I — Introduction

1. This case, a reference from the Vestre Landsret (Western Regional Court), Denmark, raises the question whether, in a case where a car sale-and-leaseback business purchases second-hand cars, leases them out and eventually re-sells them, such resale (1) should qualify as a delivery exempted from VAT within the meaning of Article 13.B of the Sixth VAT Directive, [2] or (2) falls within the special regime for resale of second-hand goods set out in Article 26a of the Sixth VAT Directive.

1 — Original language: English.

2 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes, OJ 1977 L 145 of, p. 1.

II — Legal framework

A — *Community law*

The Sixth VAT Directive

2. Article 2 of the Sixth VAT Directive defines its substantive scope. Article 2(1) of the Directive makes subject to VAT the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.

3. Article 11 of the Sixth VAT Directive outlines how to calculate the taxable amount for the supply of (non-imported) goods and services falling within the Directive's scope. The general rule for this calculation is contained in Article 11.A(1), namely, 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.

4. Title X of the Sixth VAT Directive contains a list of exemptions from VAT, that is, supplies which are sold to the buyer without any VAT being applied to the sale. Article 13 sets out exemptions applicable within the territory of the country, comprising two lists. The first, Article 13.A, lists standard exemptions for certain 'public interest' activities. The second, Article 13.B, lists a number of additional exemptions. The relevant part of this article provides that,

'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, or of goods on the acquisition or production of which, by virtue of Article 17(6), value added tax did not become deductible ... '

5. Article 17 of the Sixth VAT Directive deals with the origin and scope of the right for non-consumers to deduct input tax. Article 17(6) provides that,

'Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value added tax ...

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force'.

6. The Council has not, to date, drawn up more detailed rules on expenditure eligible for deduction of relevance to the present case.

7. Article 28(3)(b) provides that Member States may, during the transitional period for implementation of the Sixth VAT Directive, continue to exempt the activities set out in Annex F to the Directive under conditions existing in the Member State concerned.

Directive 94/5

8. Directive 94/5 [3] was adopted pursuant to Article 32 of the Sixth VAT Directive, which provided that the Council was to adopt a Community taxation system to be applied to used goods, works of art, antiques and collectors' items. [4] This Directive set out special arrangements for second-hand goods, works of art, collectors' items and antiques, inserting in particular a new Article 26a into the Sixth VAT Directive.

9. Essentially, this article provides for a so-called 'margin scheme' which second-hand goods dealers may, in certain circumstances, opt to apply in place of the normal VAT arrangements. While under normal VAT arrangements the amount on which VAT is charged is the full consideration received by the dealer from the customer, less the amount of VAT relating to this consideration, if the margin scheme is applied the amount on which VAT is charged is the profit margin. The following is an overview of the most important provisions of Article 26a of relevance to the present case.

10. By Article 26a.A(d), second-hand goods are defined as 'tangible movable property that is suitable for further use as it is or after repair, other than works of art, collectors' items or antiques and other than precious metals or precious stones as defined by the Member States'.

11. By Article 26a.B(1), Member States shall apply special arrangements for taxing the profit margin made by a taxable dealer in respect of supplies of second-hand goods, works of art, collectors' items and antiques effected by taxable dealers (i.e., the 'margin scheme'). Article 26a.B(2) provides that this margin scheme shall only apply where the goods in question were supplied to the taxable dealer by certain defined persons within the Community, namely:

'by a non-taxable person,

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

4 — This Article was removed from the Sixth VAT Directive by Directive 94/5.

or

— by another taxable person, in so far as the supply of goods by that other taxable person is exempt in accordance with Article 13.B(c),

or

— by another taxable person in so far as the supply of goods by that other taxable person qualifies for the exemption provided for in Article 24 and involves capital assets,

or

— by another taxable dealer, in so far as the supply of goods by that other taxable dealer was subject to value added tax in accordance with these special arrangements'.

12. In each of these cases, the dealer would, in the absence of the margin scheme, be obliged to charge VAT on the full consideration received from its customer but would not be able to deduct any VAT.

13. Article 26a.B(3) defines the taxable amount of the supplies of goods under the margin scheme as, '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'.

14. Article 26a.A(e) defines '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 ...'.

15. Article 26a.B(6) states that goods supplied by a taxable dealer under these special arrangements do not give rise to a right of deduction of VAT by taxable persons.

16. Article 26a.B(11) provides that a taxable dealer may apply the normal value added tax arrangements to any supply covered by the special arrangements pursuant to Article 26a.B, paragraph 2 or 4.

B — *Danish law*

General VAT provisions

17. Paragraph 4(1)(1) of the Danish VAT Law (see, most recently, Consolidating Law No 703 of 8 August, 2003) provides that, 'Tax is payable on goods and services supplied for consideration in Denmark'.

18. Paragraph 13(1) of the Danish VAT Law lists goods and services that are exempt from VAT, which correspond to those listed in Article 13(A) of the Sixth VAT Directive.

19. Paragraph 13(2) of the Danish VAT Law provides that

'The supply of goods applied solely in connection with a business that is exempted from tax under subparagraph (1) or the supply of goods the acquisition or use of which has been excluded from the right to deduct under Chapter 9, is exempt from tax.'

20. Chapter 9 of the Danish VAT Law contains the following paragraph of relevance to the present case:

'§ 42. Undertakings cannot deduct tax on purchases etc that relate to ...

(7) the acquisition and operation of personal motor vehicles that are equipped to carry not more than nine persons (see, however, subparagraphs 4, 6 and 7); ...

Subparagraph 6. Undertakings which deal in or lease motor vehicles or which operate schools of motoring may, notwithstanding the provision in subparagraph 1.7, deduct the tax on purchases etc. for those purposes'.

21. Paragraph 42(1)(7) is thus based on the standstill provision of Article 17(6) of the Sixth VAT Directive which enables Member States to retain all exclusions provided for under national laws when the Directive came into force, until the promulgation of rules by the Council to harmonise deduction rights.

22. The effect of paragraph 13(2) is thus that, as businesses falling under paragraph 42 (1)(7) are excluded from the right to deduct, these businesses do not declare tax on the sale of vehicles falling under the latter paragraph.

VAT provisions for second-hand goods

23. Denmark implemented Directive 94/5 in paragraphs 69 to 71 of the 1994 VAT law (Law No 375 of May 18, 1994) using, for all purposes relevant to the present case, similar terms to those set out in the Directive.

III — Factual and procedural background

24. Jyske Finans A/S ('Jyske Finans') operates a car leasing business, as part of which it purchases private cars with so-called 'white plates' (that is, ordinary Danish number plates) from traders, and subsequently leases the same cars back to these traders ('sale-and-leaseback').

25. In addition, as part of this business, Jyske Finans purchases second-hand cars with white plates from traders, and leases out these cars to other traders. At the end of these leases, Jyske Finans resells these second-hand cars.

26. The main proceedings relate to the resale by Jyske Finans of 145 second-hand cars between 1 January 1999 and 31 May 2001. In each case, the vendors of these second-hand cars to Jyske Finans had not declared VAT on the sale. As set out in paragraph 13(2) of the Danish VAT Law, this was because these businesses had previously acquired these cars without the right to deduct the input VAT, meaning these sales were VAT-exempt.

27. In May 2001, the Danish tax authorities (Told-og Skatteregion Horsens) requested that Jyske Finans pay them VAT on the price of resale of these cars, to the amount of DKK 2 236 413.

28. On 22 January 2003, Jyske Finans brought an action before the Vestre Landsret disputing its liability to VAT on this amount on the basis, inter alia, that it was at variance with the Sixth VAT Directive, in that

payment of the VAT would mean double taxation. Such double taxation would arise because, although Jyske Finans would enjoy a right under paragraph 42(6) of the Danish VAT Law to deduct VAT on its purchases of second-hand cars, it would be unable to exercise this right as no VAT had in fact been paid on these cars by their vendors at the time of sale.

29. In this context, the Vestre Landsret decided to refer the following questions to the Court:

'(1) Must Article 13.B(c), in conjunction with Articles 2(1) and 11.A(1)(a), of the Sixth VAT Directive 77/388/EEC be construed as precluding a Member State from maintaining a legal situation under its law on value added tax pursuant to which a taxable person who has introduced capital goods to a significant extent into his business assets is, in contrast to second-hand car dealers and other traders who sell second-hand cars, liable to VAT on the sale of those capital items, even in the case where the items were purchased from taxable persons who did not declare tax on the price of the items, with the result that there was no possibility of deducting VAT at the time of acquisition?

(2) Must Article 26a(A)(e) of the Sixth VAT Directive be construed as meaning that the term "taxable dealer" covers only persons whose principal activity consists in the purchase and sale of second-hand goods in cases where the second-hand goods in question are acquired with the sole or principal purpose of obtaining a financial profit on their resale, or does that term also cover persons who normally dispose of those goods by sale at the end of a leasing period as a subsidiary link in the overall economic leasing activity under the circumstances outlined above [in the Order for Reference]?'

30. In accordance with Article 23 of the Statute of the Court of Justice, written observations were lodged in the present proceedings by Jyske Finans, Nordania Finans A/S and BG Factoring A/S, the Skatteministeriet and the Kingdom of Denmark, the Hellenic Republic, the Republic of Poland, and the Commission of the European Communities. An oral hearing was held on 7 July 2005, at which all of the above-listed interveners, with the exception of the Republic of Poland, made submissions.

IV — Analysis

A — *On the first question*

31. By its first question, the Vestre Landsret essentially asks whether it is contrary to Article 13.B(c) of the Sixth VAT Directive for a national VAT law to provide that a taxable person in Jyske Finans' position – namely, a sale-and-leaseback company reselling second-hand cars – is liable to VAT on these resales, notwithstanding that it cannot deduct input VAT on the price of these cars.

32. As a preliminary matter, I note that the Danish Government and the interveners in the main proceedings, Nordania Finans, have raised the question whether the cars purchased and leased by Jyske Finans constitute capital goods within the meaning of the Sixth VAT Directive. This issue has arisen due to a separate case on a provision of Danish VAT law pending before the Højesteret (Danish Supreme Court) and is a result of the phrasing of the Vestre Landsret's first question referred to the Court in the present case. [5]

5 — In particular, the use of the phrase 'a taxable person who has introduced capital goods to a significant extent into his business assets'

33. On this point, I would note that the issue was not raised by the national court in its Order for Reference, and no other interveners to the current procedure have put forward substantial arguments on the matter. The Court must, therefore, confine itself to answering the questions posed by the Vestre Landsret. In particular, it cannot rule on the validity under Danish law of a premiss on which these questions rest. It is, as a result, neither necessary nor appropriate for me to address this issue further here.

34. Turning to the substance of the first question, as set out above, Article 13.B(c) provides for an exemption from VAT in two cases.

35. The first concerns 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 ...'.

36. The second concerns goods on the acquisition or production of which, by virtue of Article 17(6), VAT was not deductible.

37. It is clear that neither of these cases applies to the resale of second-hand cars by Jyske Finans, for two reasons.

38. In the first place, the goods being supplied by Jyske Finans – second-hand cars – are not, on the information provided to us by the Vestre Landsret, to be used wholly for an activity exempted under Article 13 (whether public-interest activities or otherwise). Nor is Article 28(3)(b), a transitional provision, applicable to the present case. Such supplies are thus in principle taxable under the general rule set out in Article 2 of the Directive.

39. In the second place, paragraph 42(6) of the Danish VAT Law explicitly gives Jyske Finans a right, as an undertaking dealing in or leasing motor vehicles, to deduct VAT charged on purchases made for these purposes. As recognised by the referring court in its Order for Reference, the reason why no deduction took place in the present case was simply that there was no input tax to deduct. This was due to the fact that Jyske Finans had purchased the second-hand cars from commercial operators which did not, pursuant to paragraphs 13(2) and 42 of the Danish VAT law, charge VAT on the sale.

40. As a result, a precondition for VAT exemption of Jyske Finans' resale under Article 13.B(c) of the Sixth VAT Directive, which requires that no right to deduction should exist on Jyske Finans' part, is not fulfilled.

41. It follows that, on any natural reading of the general VAT scheme set out in the Sixth VAT Directive, and in particular Article 13.B (c) thereof, Jyske Finans is liable to VAT on the resale of cars as described in the Order for Reference.

42. As is accepted by the Danish Government, such a result means that, as Jyske Finans must pay VAT on its resales without being able to deduct any input VAT, it suffers from double taxation.

43. In Jyske Finans' submission, such a conclusion goes against the aim of the Sixth VAT Directive, in that VAT is essentially a tax on the final consumer and its burden should not fall on an economic operator in the commercial chain leading to this final consumer. In its view, VAT should be neutral for all such operators acting in this chain, save in the case of an explicit exception from this principle provided for in the Sixth VAT

Directive. For this reason, Jyske Finans submits that the first question should be answered in the affirmative.

44. I am not convinced by this submission.

45. It is true that, as I discuss further below, where the wording of a provision of the Sixth VAT Directive is susceptible to more than one interpretation, the provision should, where possible, be interpreted in a manner that realises most effectively the aims of the Directive. It is also true that one of the aims of the Directive is the maintenance of tax neutrality between, and the avoidance of double taxation of, taxable persons.

46. Nonetheless, the wording of Article 13.B (c) clearly, on a natural reading, requires that a taxable person in Jyske Finans' position should pay VAT on its supply of cars by way of resale. There is no scope, in my view, for a contrary interpretation of this article.

47. This is particularly so given that, as exceptions to the general VAT regime of the Sixth VAT Directive, the scope of Article 13 exemptions should as a rule be interpreted strictly. [6]

48. In such a case, it is not possible to interpret Article 13 in a sense that avoids the double taxation of a taxable person in a position such as that of Jyske Finans. The aim of avoidance of double taxation cannot 'trump' the explicit wording of one of the Directive's provisions. [7]

49. The answer to the Vestre Landsret's first question should, therefore, be that Article 13. B(c), read in conjunction with Articles 2(1) and 11.A(1)(a) of the Sixth VAT Directive, should not be construed as precluding a Member State from maintaining a legal situation under its law on value added tax pursuant to which a taxable person is liable to VAT on the resale of second-hand cars used in its business, even where that person cannot deduct VAT paid on acquiring the cars because no such VAT was in fact paid.

6 — See, for example, Case C-428/02 *Fonden Marselisborg*, judgment of 3 March 2005, not yet reported in the ECR, and Case C-8/01 *Taksatorringen* [2003] ECR I-13711.

7 — See, for an example of unrelieved double taxation irremediable by the Court, Case C-165/88 *ORO Amsterdam Beheer and Concerto v Inspecteur der Omzetbelasting Amsterdam* [1989] ECR 4081, which I discuss further below.

B — *On the second question*

50. By its second question, the Vestre Landsret essentially asks whether a taxable person reselling second-hand cars that it has used in its car-leasing business qualifies as a 'taxable dealer' and thus falls within the VAT regime for second-hand goods set out in Article 26a of the Sixth VAT Directive.

51. It is not disputed that, on the facts in the main proceedings, the second-hand cars at issue qualify as 'second-hand goods' within the meaning of Article 26a(A)(d), nor that the cars were purchased from persons falling within the definition set out in Article 26a(B)(2).

52. The crucial issue determining whether, on the facts in the main proceedings, it is open to Jyske Finans to apply the margin scheme in levying its VAT is thus whether it comes within the definition of taxable dealer in Article 26a(A)(e), namely, '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'.

53. If I were to reason solely on the basis of the official English text of the Directive, it is evident that Jyske Finans would fall within this definition, in that it purchased the cars 'for the purposes of his undertaking'. The criterion of 'with a view to resale' does not, in this version, on its face amount to a necessary condition for qualification as a taxable dealer.

54. This would not, however, be an acceptable mode of reasoning, because the other linguistic versions differ crucially from the English text on this point.

55. Rather, certain other linguistic versions of Article 26a define a taxable dealer as one who 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. [8] In other words, in such other versions it is clear that a necessary requirement to qualify as a taxable dealer is that the goods were purchased or acquired with a view to resale.

8 — Thus a taxable dealer is defined in the French version as, 'l'assujetti qui, dans le cadre de son activité économique, achète ou affecte aux besoins de son entreprise ou importe, en vue de leur revente, des biens d'occasion, des objets d'art, de collection ou d'antiquité ...', and in the Dutch version as, 'de belastingplichtige die in het kader van zijn economische activiteit gebruikte goederen, kunstvoorwerpen, voorwerpen voor verzamelingen of antiquiteiten koopt, voor bedrijfsdoeleinden bestemt dan wel invoert met het oog op wederverkoop ...'.

56. The interpretation of the phrase 'with a view to resale' is thus central to analysis of the Vestre Landsret's second question.

57. As observed in the Order for Reference, this phrase is, on a natural reading, open to a range of possible interpretations in the context of the facts at issue in the main proceedings. In particular, one could conceivably read it as applying to taxable persons purchasing second-hand cars where:

— the principal activity of the taxable person is the (purchase and) resale of second-hand cars;

— the principal activity of the taxable person is the (purchase and) resale of second-hand cars, and the particular cars at issue were purchased with the sole object of reselling; or

— at the time of purchase, the taxable person intended that the cars be resold at a later point in time after first using them for his own business purposes.

58. There is no indication that, in passing Directive 94/5, the Community legislature gave any view on, or expressly considered, which of these interpretations was correct and whether the term 'taxable dealer' extended to facts such as those of the present case.

59. Indeed, as I observed in my opinion in *France* v *Council and Parliament*, it is inherent in the nature of legislation that lawmakers cannot foresee, and provide for in its wording, all possible factual applications of a legislative act. [9] This would be impractical and, moreover, impossible. In the commercial and tax fields, for example, lawmakers evidently cannot predict and explicitly provide for all potential business models or forms of commercial organisation, which evolve continuously.

60. As a result, it falls to the Court to indicate, within the limits of the wording of Article 26a, which of the possible interpretations is the most consistent with the aim of the special arrangements for second-hand goods and which thus best realises the intention of the Community legislature.

9 — See Opinion of 17 March 2004 in Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, at paragraphs 74 and 75.

61. This aim is expressed as essentially twofold in the preamble to Directive 94/5, namely,

— The avoidance of double taxation; and

— The avoidance of distortions of competition between taxable persons.

62. Thus, the preamble emphasises the need for the adoption of 'Community rules with the purpose of avoiding double taxation and distortion of competition between taxable persons' and observes that, 'the Court of Justice has, in a number of judgments, noted the need to attain a degree of harmonisation which allows double taxation in intra-Community trade to be avoided'. [10]

63. The preamble further underlines the need to avoid 'the application of very different (VAT) systems which cause distortion of competition and deflection of trade both internally and between Member States'. [11]

64. These aims have been noted most recently by Advocate General Stix-Hackl in her Opinion in *Förvaltnings AB Stenholmen* v *Riksskattverket*. [12] That case concerned the possible application of Directive 94/5 to a horse which is purchased from a private individual, trained and then sold as a riding horse. In concluding that the Directive was applicable, the Advocate General observed that such a result was consistent with the objectives of avoiding double taxation and distortion of competition pursued by Article 26a:

'It is the objective of Article 26a of the Sixth Directive and the intention of the Community legislature to avoid such distortion, as can be seen from Directive 94/5, which introduced these special arrangements'. [13]

65. The Court expressly agreed with the Advocate General on this issue, rejecting a restrictive interpretation of the relevant Article 26a term in the definition of second-hand goods on the ground that,

'... to exclude those supplies from the special arrangements applicable to second-hand

10 — Preamble, paragraphs 3 and 5.

11 — Preamble, paragraph 2.

12 — Case C-320/02 *Förvaltnings AB Stenholmen* v *Riksskatteverket*, Opinion of 10 July, 2003, [2004] ECR I-3509.

13 — Ibid., paragraphs 60 and 61. See also, the Opinion of Advocate General Kokott of 24 February 2005 in Case C-305/03 *Commission* v *United Kingdom*, not yet reported in the ECR, at paragraph 59 and, on the background to the Commission proposals leading eventually to Directive 94/5, Case 16/84 *Commission* v *Netherlands* [1985] ECR 2355.

goods would be contrary to the express intention of the legislature to avoid double taxation'. [14]

66. This aim clearly underlies, for example, the definition in Article 26a(B)(2) of the sellers from which a reseller must have purchased second-hand goods in order to come under the Article 26a scheme. As I observed above, in each case, in the absence of the margin scheme the reseller would be obliged to charge VAT on the full consideration received, but would not be able to deduct any input VAT.

67. As a result, in cases where a number of plausible interpretations of Article 26a exist, it is the interpretation that best realises the aims of avoidance of double taxation and distortion of competition which should be preferred.

68. Returning to the three potential interpretations of the term 'taxable dealer' that I summarised above, it is common ground that the aim of avoidance of double taxation would be best achieved by adoption of the broadest of these interpretations, that is, the one which would extend to taxable persons purchasing second-hand cars with the intention to resell these cars at a later point.

14 — Judgment of 1 April 2004 in Case C-320/02 *Förvaltnings AB Stenholmen* v *Riksskatteverket* [2004] ECR I-3509, at paragraph 25.

69. As observed by the referring court, if Jyske Finans were entitled to apply the margin scheme in calculating the amount upon which VAT is charged, double taxation would be minimised if not eliminated. This is because there would likely be little, if any, profit upon resale on which VAT could be charged, due to amortisation of the cars' value.

70. In contrast, the adoption of either of the other interpretations I outlined above – requiring that the principal activity of a taxable person be the (purchase and) resale of second-hand cars, and that the particular cars at issue were purchased with the sole object of reselling – would exclude taxable persons such as Jyske Finans from the scope of Article 26a. As noted by the Vestre Landsret in the Order for Reference, this would result in double taxation upon resale of the second-hand cars at issue, as the cars would be fully taxed once again upon resale, without any right to deduction by the reseller.

71. Moreover, if taxable persons in Jyske Finans' position fell outwith the special arrangements for second-hand goods set out in Article 26a, this would distort competition in the sector for second-hand car resale. As taxable persons such as Jyske Finans would be forced to pass on the VAT burden to purchasers in the form of higher resale prices, those second-hand car dealers whose principal activity was car resale would,

as falling under Article 26a, enjoy a competitive advantage in this sector. The interest of tax neutrality between taxable persons thus also militates in favour of interpreting Article 26a as extending to operators in Jyske Finans' position. [15]

72. I would add that I am not convinced by the Danish Government's assertion that there is little or no substitutability between resales from pure second-hand car dealers on the one hand, and from sale-and-lease-back companies such as Jyske Finans on the other.

73. In any event, it is not clear to me how a workable distinction can be made in all cases between taxable persons whose 'principal' activity is the resale of second-hand goods (for example used-car dealers), and those such as Jyske Finans who use these goods for other activities (in this case leasing) in addition to resale.

74. In the present case, for example, it would seem from the Order for Reference, as well as from Jyske Finans' submissions, that resale of the cars constitutes an integral part of its business plan. Thus, its car rental contracts are concluded for a specific time period with explicit provision for resale upon expiry of the contract (albeit subject to certain conditions). Further, it calculates the fixed monthly leasing charge based on the balance of the amount originally paid for the car minus the likely resale price of the car. As a result, it is clear to my mind that resale of the cars can be considered an aim, though not the sole aim, of Jyske Finans upon their purchase.

75. For all of these reasons, I do not agree with the Danish Government's argument that the Article 26a notion of 'taxable dealer' should be interpreted as referring only to undertakings whose principal activity consists in purchasing and selling second-hand goods, and whose essential aim when purchasing these goods is to realise a profit upon resale. Nor do I accept the contention of the Polish Government that such a narrow interpretation should be adopted because the special arrangements of Article 26a for second-hand goods constitute an exception to the general VAT regime for goods and services.

15 — I note that, in a reply of 20 December, 2002 to the Association of Danish Finance Companies, the Commission (Directorate-General for Taxation and Customs Union) stated that there was nothing in the definition of 'taxable dealer' in Article 26a(A)(e) which would make it possible to limit those arrangements to taxable persons who exclusively or principally carry on the business of purchasing and dealing in second-hand goods.

76. It follows that the concept of 'taxable dealer' should in my view be interpreted as encompassing taxable persons purchasing second-hand cars with the intention to resell these cars at a later point, even if such resale does not comprise the sole or principal object of the purchase.

77. In its arguments against such a conclusion, the Danish Government raises two additional points.

78. First, it relies on certain observations of Advocate General Saggio in his Opinion in the *Bakcsi* case. [16] That case did not directly concern Article 26a. Rather, in the section relied upon by the Danish Government, it raised the general question of the VAT liability, under the principles of Article 2(1) of the Sixth Directive, of a taxable person who acquired goods from a private individual for business purposes with no right of deduction, and subsequently disposed of them. The central issue was the distinction, for VAT deduction purposes, between (partial) assignment of goods to business assets, and withdrawal of these goods from business assets.

79. In concluding that a taxable person who has chosen to incorporate a good into his business assets should, if he falls merely within the general Article 2(1) principles, be fully liable to VAT, the Advocate General observed that, in his view, Article 26a did not apply. He added that, '[the Article 26a] system is reserved exclusively for taxable dealers; that is to say, those whose principal activity is buying and selling second-hand goods'. [17]

80. This passage is not, in my view, sufficient to alter the force of the above conclusion that taxable persons such as Jyske Finans fall within the concept of 'taxable dealer', for the following reasons.

81. To begin, the remark was clearly obiter dictum to that case, which, as stated above, concerned a very different issue. There is no indication that substantial arguments were raised before the Court on the necessity, for the application of Article 26a, that resale be the sole or principal activity of a taxable person (as opposed to an important but ancillary activity of the taxable person).

16 — See Opinion of 13 April 2000 in Case C-415/98 *Bakcsi*, [2001] ECR I-1831.

17 — Ibid., paragraph 34.

82. Furthermore, the Court in its judgment neither referred to this dictum nor expressly considered the possible application of the Article 26a scheme.

83. Second, the Danish Government relies on the Court's judgment in *ORO*, and in particular the Court's statement that,

'On the whole the Community system of VAT is the result of a gradual harmonisation of national legislation pursuant of Articles 99 and 100 of the Treaty. The Court has consistently held that this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is still only partial.

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.

That objective has not yet been achieved, however, as is clear from Article 32 of the Sixth Directive, 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'. [18]

84. In the Danish Government's view, this reasoning applies in a similar manner to the present case. The fact that Jyske Finans would, on its interpretation of the term 'taxable dealer', be subject to double taxation is, in its submission, due to a simple lacuna in the present VAT system, flowing from the current solely partial state of harmonisation.

85. On this point, it suffices to observe that while the *ORO* case did indeed concern the tax treatment of second-hand goods, it was decided before the entry into force of the special Article 26a regime. As a result, the Court was charged not with interpretation of the scope of a pre-existing special VAT scheme, but with the question whether the existence of double taxation, as a result of the national VAT law applicable in that case, was in itself contrary to the general principles of the Sixth Directive. The Court's reasoning is thus not conclusive to the present case.

18 — Case C-165/88 *ORO*, footnote 7 above, paragraphs 21 to 23.

86. The answer to the second question should, therefore, be that the term 'taxable dealer' under Article 26a(A)(e) of the Sixth VAT Directive should not be construed as referring only to a taxable person whose principal activity consists in the purchase and sale of second-hand goods in cases where these goods are acquired with the sole or principal purpose of making a profit on their resale. Rather, the term extends to a person who, at the time of purchase, intended that the goods be resold at a later point in time after first using them for his own business purposes.

V — Conclusion

87. For the above reasons, I am of the view that the Court should give the following response to the questions referred by the Vestre Landsret:

(1) Article 13B(c), in conjunction with Articles 2(1) and 11.A(1)(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 (the 'Sixth VAT Directive') should not be construed as precluding a Member State from maintaining a legal situation under its law on value added tax pursuant to which a taxable person is liable to VAT on the resale of second-hand cars used in its business, even where that person cannot deduct VAT paid on acquiring the cars because no such VAT was in fact paid.

(2) The term 'taxable dealer' under Article 26a(A)(e) of the Sixth VAT Directive extends to a taxable person who, at the time of purchase, intended that the goods be resold at a later point in time after first using them for his own business purposes.