Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 26 April 2012 [1]

**Case C-33/11**

**A Oy**

(Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland))

(Sixth VAT Directive — Exemption under Article 15(6) — Concept of aircraft used by airlines operating for reward chiefly on international routes — Supply of an aircraft to an operator which does not itself operate chiefly on international routes but which assigns the right to use the aircraft to an airline — Charter airlines)

## I – Introduction

1. In this case, the Korkein hallinto-oikeus (Supreme Administrative Court of Finland) has referred to the Court of Justice for a preliminary ruling three questions concerning the interpretation of the Sixth Directive [2] in connection with the VAT exemption applicable to the supply of aircraft to be 'used by airlines operating for reward chiefly on international routes'.

2. The national court's doubts as to interpretation stem principally from three facts. First of all, the company which acquired the aircraft is not an airline of the kind referred to in the provision in issue, although it assigned the right to use the aircraft under a lease to another undertaking which does have that status. Secondly, the airline in question is a charter airline. Lastly, there is a rather complex structure linking the natural person who holds the shares in the company which owns the aircraft, the latter company and the airline itself.

3. The applicability of the exemption laid down in Article 15(6) of the Sixth Directive in circumstances of the kind referred to is a question which has not previously been addressed in case-law and which is of considerable economic importance in view of the large number of fleets of leased aircraft which appear to exist in the European airline sector. According to the data provided by the applicant, a significant number of Member States have been granting the right to the exemption in cases like the present one, but the matter is far from being uncontroversial. Thus, the Commission has taken action against that broad interpretation of the scope of the exemption.

4. Further, it seems to me that it is necessary to point out that the facts of the present case are particularly complex. The different contractual and corporate relationships surrounding the acquisition and use of the aircraft could possibly give rise to the suspicion of fraud, but it should be noted that the assessment of those facts falls exclusively to the national court.

1 — Original language: Spanish.

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 — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

## II – Legal framework

### A – *European Union law: the Sixth VAT Directive*

5. The present case is caught by the provisions of the Sixth Directive, Article 2(1) of which 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 to be subject to VAT.

6. Article 15 of the Sixth Directive reads, in part, as follows:

'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 such exemptions and of preventing any evasion, avoidance or abuse:

…

6. the supply, modification, repair, maintenance, chartering and hiring of aircraft used by airlines operating for reward chiefly on international routes, and the supply, hiring, repair and maintenance of equipment incorporated or used therein'.

### B – *National law*

7. The Sixth Directive was implemented in Finland by the Arvonlisäverolaki (Law on VAT of 20 December 1993; 'AVL'), the relevant provisions of which, in the version applicable to the facts of the main proceedings, are the following.

8. Under Paragraph 1(1)(3) of the AVL, VAT is payable to the State on an intra-Community acquisition of goods which takes place in Finland within the meaning of Paragraph 26a. Under Paragraph 2b of the AVL, the person liable for tax in the case of an intra-Community acquisition of goods within the meaning of Paragraph 1(1)(3) is the person who made the acquisition.

9. Chapter 6 (Paragraphs 70 to 72n) of the AVL concerns exemptions related to international trade. Under Paragraph 70(1)(6) of the AVL, tax is not payable on the sale of an aircraft, its spare parts or equipment for use by an operator which operates for reward mainly on international routes.

10. Paragraph 72f(1) of the AVL provides that tax is not payable on an intra-Community acquisition of goods if tax is also not payable on the importation of the goods. Under Paragraph 94(1)(9) of the AVL, the importation of vessels within the meaning of Paragraph 58(1) and of aircraft, spare parts and equipment within the meaning of Paragraph 70(1)(6) is exempt from tax.

## III – The main proceedings and the questions referred for a preliminary ruling

11. In 2002 and 2004 respectively, the Finnish company A Oy acquired two jet aircraft from the same French manufacturer. A Oy was registered as the owner of the aircraft while B Oy, a company which operates an international charter airline, was registered as their user. All of the share capital in A Oy is owned by natural person X. For its part, A Oy owns 25% of C Oy, while B Oy is 78% owned by C Oy.

12. The French vendor declared both transactions as intra-Community sales. In Finland, A Oy did not declare the acquisition of the aircraft as intra-Community acquisitions of goods. In 2003 and 2005 respectively, A Oy sold the aircraft to a Cypriot-registered undertaking at a price that was lower than the purchase price.

13. Under the contract concluded between the two companies, B Oy was entitled to lease the aircraft from A Oy for its own commercial purposes and to invoice the latter company for maintenance work on the aircraft and for flights. [3]

14. A Oy's total turnover for the accounting periods from 1 January to 31 December 2002, on the one hand, and from 1 January 2003 to 30 June 2004, on the other, consisted entirely of accounting entries made on the basis of sales invoices addressed to X, with the sole exception of the invoice addressed to the Cypriot undertaking which purchased the aircraft. Those invoices addressed to X, the owner of A Oy, were based on the invoices which B Oy issued to A Oy for use of the aircraft. Likewise, the expenditure entries relating to the aircraft primarily concerned the invoices issued by B Oy for the maintenance of the aircraft and flights. The tax inspection found that the invoices had been passed on to X virtually unchanged.

15. On 4 November 2005, the competent tax office issued A Oy with two additional assessments regarding the VAT on the intra-Community acquisition of the aircraft. The tax office also found that A Oy was not entitled to any deduction or to the refund of that VAT.

16. By decision of 26 May 2008, the Helsingin hallinto-oikeus (Administrative Court, Helsinki) dismissed the appeal brought by A Oy. The court stated that the acquisition of the aircraft constituted a taxable intra-Community acquisition of goods which A Oy had failed to declare, and that A Oy did not operate on international routes within the meaning of Paragraph 70(1)(6) of the AVL, but rather that it acted in practice as the owner of C Oy, which was engaged in international oil product trading. According to a statement made by B Oy about its activities, that company did not use the aircraft on international routes within the meaning of Paragraph 70(1)(6) of the AVL. The agreement between the two companies was aimed exclusively at taking care of the personal transport needs of X. Accordingly, the administrative court concluded that A Oy was not entitled to a deduction or refund of the VAT payable on the intra-Community acquisition of goods.

17. A Oy appealed against that decision to the Korkein hallinto-oikeus, claiming that it was not required to pay VAT on the acquisition of the aircraft because those aircraft were used by an airline which operated for reward chiefly on international routes, namely B Oy. The Finnish tax authorities claim, on the other hand, that that fact is completely immaterial since it was A Oy which acquired the aircraft.

18. The Korkein hallinto-oikeus took the view that there are doubts as to the interpretation of the concept 'airlines operating for reward chiefly on international routes' in Article 15(6) of the Sixth Directive and also as to whether that provision precludes the exemption from VAT of a company which buys aircraft but does not operate them itself on international routes, and therefore it stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 15(6) of the Sixth VAT Directive 77/388/EEC to be interpreted as meaning that the concept "airline operating for reward chiefly on international routes" also refers to a commercial airline operating for reward chiefly on international charter routes for the requirements of companies and private persons?

3 — In its pleadings, A Oy explains that B Oy took care of 'management, maintenance and repairs, dealt with the ground staff and crew, was responsible for the necessary permits and corresponding documents and for the schedules, and also for marketing and selling under its own name the air transport services supplied by means of those aircraft'. A Oy goes on to state that, in addition to the two aircraft concerned, B Oy operates a large number of other aircraft which form part of its fleet and which make international flights.

(2) Is Article 15(6) of the Sixth VAT Directive 77/388/EEC to be interpreted as meaning that the exemption provided therein only applies to that supply of aircraft which takes place directly to airlines operating for reward chiefly on international routes, or does this exemption also apply to the supply of aircraft to a operator which does not itself operate for reward chiefly on international routes, but which in turn supplies the aircraft for the use of such an operator?

(3) Having regard to the reply given to the second question above, is it of significance that the owner of the aircraft in turn makes a charge for the use of the aircraft to a private person who is its shareholder, who uses the procured aircraft for his own business and/or private use, taking into account the fact that the airline has also been able to use the aircraft for other flights?'

## IV – The procedure before the Court of Justice

19. The reference for a preliminary ruling was lodged at the Registry of the Court of Justice on 21 January 2011.

20. Written observations were lodged by A Oy, the Finnish Government and the Commission.

21. At the hearing, which was held on 8 February 2012, oral argument was presented by the representative of A Oy, the Commission and the Republic of Finland.

## V – Analysis of the questions

22. For practical reasons, I believe that it is preferable to leave until last the reply to the first question referred for a preliminary ruling.

### A – *The second question*

23. By its second question, the referring court seeks to establish whether the exemption provided for in Article 15(6) of the Sixth Directive applies solely to the supply of aircraft which takes place directly to airlines operating for reward chiefly on international routes or whether it also applies when the acquisition is made by another operator which does not itself operate on international routes but which assigns the right to use the aircraft to such a company.

24. An initial examination of the wording of the provision concerned does not completely answer that question because, while in most of the language versions of the Sixth Directive the exemption is based explicitly on the criterion of use of the aircraft by an airline operating on international routes,[4] the Finnish version refers to the supply of aircraft to an airline without mentioning that criterion, thereby giving grounds to regard the exemption as subjective and as applicable only when an airline operating on international routes purchases an aircraft directly.[5]

25. In the light of that divergence and according to settled case-law, the exemption must be interpreted by reference to the general scheme of the provision and the purpose of the legislation of which it forms part.[6]

4 — In that connection, the Spanish version states 'aeronaves utilizadas por las compañías de navegación aérea'; the French version states 'utilisés par des compagnies de navigation aérienne'; the English version states 'used by airlines'; the German version states 'die von Luftfahrtgesellschaften verwendet werden'; the Italian version states 'usati da compagnie di navigazione aerea'; and the Dutch version states 'die worden gebruikt door luchtvaartmaatschappijen'.

5 — This has changed in the Finnish version of Directive 2006/112/EC, Article 145 of which includes in all the language versions the criterion of use of the aircraft.

6 — See, for example, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14.

26. It should be noted that, in my opinion, a purposive interpretation of the provision leads to the conclusion that the exemption must apply if the aircraft is to be used by an airline which operates for reward chiefly on international routes both where that airline acquires the aircraft directly and where another operator does so with the aim of assigning the right to use it to the former (1). The basic principles on which the common system of VAT is founded, in particular the principle of neutrality in competition, bolster that conclusion (2), while the rather more restrictive case-law laid down in *Velker* [7] and *Elmeka* does not present an obstacle (3). [8]

1. The purposive interpretation of the exemption

27. It is common knowledge that the Court regards the exemptions laid down in the Sixth Directive as autonomous concepts of Union law which must be placed in the general context of the common system of VAT. Since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person, those exemptions are to be interpreted strictly. However, that requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive those exemptions of their intended effect. Their interpretation must, first, be consistent with the objectives pursued by those exemptions and must also comply with the requirements of the principle of fiscal neutrality. [9]

28. The Court has observed that the objective of the '[e]xemption of exports and like transactions and international transport' provided for in Article 15 of the Sixth Directive is 'to respect the principle that the relevant goods or services should be taxed at their place of destination'. [10]

29. In line with that objective, the Court has held, for example, that the exemption laid down in Article 15(5) of the Sixth Directive is applicable to the partial chartering of vessels used for navigation on the high seas and for international shipping (*Navicon*, paragraph 30), but not to the hiring of a vessel to charterers who intend to use the vessel strictly for private purposes, as final consumers (*Feltgen and Bacino Charter Company*, paragraph 17).

30. In the specific case of the exemptions relating to international transport, such transactions must be regarded as like transactions and the same tax treatment is applied to them as to exports because it is to be expected that consumption will take place abroad. [11]

31. In my view, all this confirms that the exemptions in Article 15 pursues an objective of a functional nature, intended to exempt the entire chain of transactions related to international transport until the point of final consumption. That functional nature is difficult to reconcile with the subjective element which the Commission and the Finnish Government seek to introduce into the interpretation of the exemption.

32. In the present case, there is no doubt that the exemption in Article 15(6) is applicable to the hiring of the aircraft by B Oy from A Oy because the hirer is an airline which puts the aircraft to the use required in that provision. The same logic must apply where an aircraft is sold by an intermediary, the exemption of which is perfectly compatible with the exemption of hiring.

7 — Case C-185/89 [1990] ECR I-2561.

8 — Joined Cases C-181/04 to C-183/04 [2006] ECR I-8167.

9 — Case C-89/05 *United Utilities* [2006] ECR I-6813, paragraphs 21 and 22; Case C-106/05 *L.u.P* [2006] I-5123, paragraph 24; Case C-284/09 *Temco Europe* [2004] I-11237, paragraph 17; Case C-434/05 *Horizon College* [2004] I-4793, paragraph 16; Case C-97/06 *Navicon* [2007] ECR I-8755, paragraph 22; and Case C-473/08 *Eulitz* [2010] ECR I-907, paragraph 27.

10 — *Navicon*, paragraph 29, and Case C-116/10 *Feltgen and Bacino Charter Company* [2010] ECR I-14187, paragraph 16.

11 — In that connection, see the Opinion of Advocate General Lenz in *Velker*.

2. The principle of neutrality in competition

33. The interpretation which I propose of the scope of the exemption at issue is confirmed by the requirements of the principle of fiscal neutrality inherent in the common system of VAT.

34. According to settled case-law, the common system of VAT is governed in particular by two principles: '[f]irst, each supply of goods and services effected for consideration by a taxable person is subject to VAT. Second, in accordance with the principle of fiscal neutrality, economic operators carrying out the same transactions may not be treated differently in relation to the levying of VAT'.[12] In reality, as academic writers have pointed out, those two views reflect the two main aspects or applications of the principle of fiscal neutrality.[13]

35. Of relevance for the present purposes is the second of those two aspects or definitions of the principle, which is none other than the reflection, in matters relating to VAT, of the principle of equal treatment.[14] While the principle of equality means, in general, that like situations should not be treated differently unless such different treatment is objectively justified,[15] its expression in the sphere of VAT 'precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes'.[16] In short, it refers to the principle of neutrality in competition, the infringement of which 'may be envisaged only as between competing traders', whereas infringement of the general principle of equal treatment 'may be established, in matters relating to tax, by other kinds of discrimination which affect traders who are not necessarily in competition with each other but who are nevertheless in a similar situation in other respects.'[17]

36. The principle of neutrality in competition must be protected and must be taken into account when interpreting the VAT exemptions. In particular, it is necessary to prevent the application of those exemptions from resulting in the different treatment for VAT purposes of the supply of similar goods or services which are therefore in competition with one another.

37. It is quite clear that the risk of unequal treatment of competing activities arises in a case such as the present one. The subjective interpretation of the exemption would benefit an airline which purchases an aircraft directly while, on the other hand, adversely affecting an undertaking which is not itself an airline operating on international routes and acquires an aircraft which it then leases to a company which does carry on that activity.

38. First of all, as regards a finding of unequal treatment, it is true that although a company which acquires aircraft but which is not an airline is not entitled to benefit from the exemption and must pay VAT, there is nothing to preclude that company from subsequently obtaining a refund of the VAT under Article 28f(1)(2)(d) of the Sixth Directive. However, without prejudice to the possibility of such a refund, the mere payment of VAT amounts to a cash advance the financial consequences of which may

12 — *Navicon*, paragraph 21.

13 — In that connection, see Martínez Muñoz, Y., 'El principio de neutralidad en el IVA en la doctrina del TJCE', *Revista española de Derecho Financiero,* 145, January-March 2010, p. 182. See also Guichard, M., '"L'Esprit des Lois" communautaires en matière de TVA: du principe de neutralité', *Revue de Droit Fiscal,* No 36, 2001, p. 1205, and Vanistendael, F., 'Neutrality and the limits of VAT', *Selected issues in European tax law,* 1999, p. 13.

14 — *L.u.P.*, paragraph 48.

15 — See, for example, Case 281/82 *Unifrex* [1984] ECR 1969, paragraph 30.

16 — Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20; Case C-267/99 *Adam* [2001] ECR I-7467, paragraph 36; Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 40; Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 20; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 41; Case C-246/04 *Turn-und Sportunion Waldburg* [2006] ECR I-589; Case C-169/04 *Abbey National* [2006] ECR I-4027, paragraph 56; *L.u.P.*, paragraph 32; and Case C-288/07 *Isle of Wight Council and Others* [2008] ECR I-7203, paragraph 42.

17 — Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 49.

be important, since that advance may be for a high amount. Accordingly, the choice as to whether to apply the exemption or to charge VAT on the transaction and then later grant the right to a refund is financially significant; the unequal treatment in question is given concrete expression in the cost of financing that cash advance.

39. Second, as regards the existence of a competitive situation between the terms of comparison, it could be argued that the principle of neutrality in competition does not apply in this case because the difference in treatment occurs between two companies (the owner of the aircraft and the airline) which do not carry on the same activity and are not in competition with each other. However, it is likely that the owner of the aircraft will pass on the financial costs of any cash advance which the VAT represents, thereby increasing the cost of leasing the aircraft. In that way, airlines which decide to establish all or part of their fleet by leasing aircraft are liable to be placed at a financial disadvantage vis-à-vis airlines which own their own aircraft, for strictly fiscal reasons unrelated to the different structure and different financial consequences of the legitimate and voluntary choice between purchasing and leasing.

40. Moreover, if the use of the aircraft concerned is immaterial and all that matters, as regards entitlement to the exemption, is the activity carried on by the acquiring undertaking, in other words, if for the purposes of eligibility for the exemption it is sufficient that the aircraft is purchased by an airline operating for reward chiefly on international routes, it is perfectly possible to envisage a situation where such a difference in treatment occurs between two companies which, ultimately, are operating as intermediaries in the purchase of an aircraft. Thus, for example, a financial institution which purchases an aircraft in order to lease it to an airline would not benefit from the exemption but the exemption could be granted to airline A which operates on international routes and which purchases an aircraft not for its own use but to assign it for consideration to another airline, B. The financial institution and airline A would be carrying out transactions which are, to all intents and purposes, comparable [18] but are nevertheless subject to different tax rules which, in the case of the financial institution, are more detrimental as a result of an erroneous subjective interpretation of the exemption.

### 3. The case-law on the supply of goods and services for vessels

41. Finally, I must refer to the *Velker* and *Elmeka* case-law, although, in my view, that case-law cannot invalidate the finding which results from the purposive interpretation of the exemption and the principle of neutrality in competition.

42. At first glance, there is an undeniable connection between the question referred by the Korkein hallinto-oikeus and the questions dealt with in the two cases cited. Both those cases concerned the supply of fuel for vessels. First of all, in *Velker* the Court was asked whether the supply of goods to an undertaking which does not itself use the goods for fuelling and provisioning vessels but supplies them to another undertaking which does use them for that purpose could be regarded as 'the supply of goods for the fuelling and provisioning of vessels' under Article 15(4) of the Sixth Directive. Second, in *Elmeka* the Court was asked the same question but this time in relation to the exemption laid down in Article 15(8), which exempts the supply of services 'to meet the direct needs of the sea-going

18 — In that connection, it should be recalled that, according to settled case-law, 'the identity of the manufacturer or the provider of the services and the legal form by means of which they exercise their activities are, as a rule, irrelevant in assessing whether products or services supplied are comparable'. See Joined Cases C-453/02 and C-462/02 *Linnweber and Akitidis* [2005] ECR I-1131, paragraphs 24 and 25, and *Turn-und Sportunion Waldburg*, paragraph 34.

vessels' referred to in paragraph 5.[19] In both cases, the Court held that those exemptions applied only to goods and services supplied directly to a vessel owner or operator to meet the direct needs of the vessel and therefore it was not possible to extend them to the supply of those goods or services 'effected at a previous stage in the commercial chain'.[20]

43. The Commission and the Finnish Government have argued that that case-law should be applied by analogy in the present case. However, I believe that it is not appropriate to do so because neither of the two main arguments which form the basis of the strict interpretation of the exemptions at issue in those judgments can readily be extended to the context of Article 15(6).

44. The first of those two arguments relates to the practical difficulties entailed in the application of the contrary approach: 'Extending the exemption to stages prior to the final supply of the goods to the vessel operator would require Member States to set up means of supervision and monitoring in order to be sure of the ultimate use of the goods supplied free of tax', means which 'would give rise to constraints for the Member States and the economic agents concerned which would be irreconcilable with the "correct and straightforward application of such exemptions" prescribed by the first sentence of Article 15 of the Sixth Directive'.[21]

45. Those arguments lose some of their weight when, as in the present case, the issue is not the supply of goods or services for fuelling and provisioning or to meet the direct needs of a vessel or an aircraft but rather the sale of that vessel or aircraft. Further, it should be borne in mind that in order for an aircraft to be used for the commercial transportation of cargo or passengers, it is necessary to obtain a number of specific permits which make it easier to establish that that aircraft will in fact be used by an airline.[22] From that point of view, it is difficult to compare the supply of fuel (such as the one at issue in *Velker* and *Elemka*) or other goods for the provisioning of a vessel, the use of which is in fact difficult to monitor in a straightforward and effective manner, with the supply of an aircraft or a vessel.

46. Accordingly, there is nothing to preclude the application of the exemption in those cases, provided that it is known at the time of purchase of the aircraft that that aircraft is to be used by an airline of the kind referred to in Article 15(6) of the Sixth Directive and proof of that fact is submitted to the tax authorities.[23] In my opinion, caution of that kind would not preclude 'the correct and straightforward application of such exemptions' required by the first sentence of Article 15 of the Sixth Directive, and would, in any event, be a more proportionate approach for the purposes of preventing fraud than the lack of entitlement to the exemption.

47. In *Velker* and *Elmeka* the Court also relied on a second argument concerning the general nature of VAT and the fact that exemptions from the tax must therefore be interpreted strictly.[24] Clearly, those requirements are applicable, at least as a matter of principle, to the exemption in Article 15(6). However, as stated above, the case-law also stipulates that the interpretation of the VAT exemptions must be consistent with the objectives pursued by those exemptions and must respect the requirements of the principle of fiscal neutrality, both of which are factors which, as concerns the exemption at issue in this case, point to the opposite conclusion to the one in *Velker* and *Elmeka*.

19 — Which in turn refers to paragraph 4(a) and (b).

20 — *Velker*, paragraph 22.

21 — *Velker*, paragraph 24, and *Elmeka*, paragraph 23.

22 — A Oy refers in its pleadings to the so-called AOC (Air Operation Certificate), stating how expensive it is to obtain and retain (according to A Oy, this entails an additional annual cost of between EUR 138 000 and EUR 195 000). That makes it unlikely that that certificate, which is not required where an aircraft is for private use, would be applied for and obtained fraudulently.

23 — A Oy states in its pleadings that the Belgian authorities have introduced caution of that kind into their internal administrative rules, while the Netherlands authorities regard as sufficient proof a declaration signed by the purchaser concerning the use of the aircraft.

24 — *Velker*, paragraph 19, and *Elmeka*, paragraph 15.

4. The reply to the second question

48. In the light of the foregoing considerations, it is my view that the wording of the provision (which, in the majority of the language versions, refers explicitly to the use of an aircraft), the objectives of the exemption and the principle of neutrality of VAT mean that there must be a purposive interpretation of the exemption in this case. Therefore, Article 15(6) of the Sixth Directive must be interpreted as meaning that the exemption provided for therein applies to the supply of aircraft to an operator which does not itself operate for reward chiefly on international routes but which in turn supplies those aircraft for the use of an airline which does carry on such an activity.

B – *The third question*

49. In its third question, which to a certain extent supplements the previous question, the referring court asks whether, having regard to the reply given to the second question, any of the facts of the instant case are significant, in particular, the fact that the company which owns the aircraft (A Oy) in turn makes a charge for the use of the aircraft to a private person (X) who is that company's shareholder and who uses the procured aircraft principally for his own business and/or private use, taking into account the fact that the airline has also been able to use the aircraft for other flights.

50. The applicant has disputed the accuracy of that statement of the facts. Nevertheless, it is my view that those facts set out in the order for reference are of no significance in relation to the reply to the second question and do not, in principle preclude the grant of the exemption concerned to an operator which assigns the right to use the procured aircraft to an airline operating on international routes.

51. As I pointed out above, it is clear from Article 15(6) of the Sixth Directive that the sole criterion for determining the applicability of the exemption is whether an aircraft is used by an airline operating for reward chiefly on international routes. Since the company which acquired the aircraft is able to prove that the aircraft are effectively used for commercial exploitation by an airline of that kind, any commercial or other relationship which may exist between the company which owns the aircraft, its majority shareholder and the airline itself should not have any effect as regards VAT. Thus, although there is partial use of the aircraft by the owner, which is responsible for meeting certain costs, and although the operation as a whole may be advantageous to the owner from a non-VAT tax perspective, none of those factors is of any significance for the purposes of the exemption if the airline exploits the aircraft commercially in the course of its ordinary activity.

52. Only if it can be established that the aircraft are not genuinely intended to be exploited commercially by the airline and that instead they are solely for private use — in short, final consumption — by a natural or legal person, will it be possible to refuse the exemption on the ground that the conditions laid down in Article 15(6) of the Sixth Directive are not satisfied. In any event, it is for the national court seised of the main proceedings to assess all those matters.

C – *The first question*

53. By its first question, the Korkein hallinto-oikeus asks the Court whether the concept 'airline operating for reward chiefly on international routes' in Article 15(6) of the Sixth Directive also refers to airlines operating chiefly on international charter routes.

54. Once again, the doubts as to the interpretation of the provision appear to be the result of differences between the language versions of the Sixth Directive.

55. A number of versions use language which could suggest that the airlines concerned must be scheduled airlines. That is the case, for example, of the English-language version, which refers to 'international routes', an expression which could indicate the existence of scheduled routes and flights. However, the majority of the language versions emphasise that the airline which uses the aircraft must operate chiefly on international routes, without any direct or indirect reference to whether that activity takes place via charter flights or scheduled flights.

56. The case-law clearly supports that broad interpretation. *Cimber Air*,[25] the only judgment to date concerning the exemption in Article 15(6) of the Sixth Directive, dealt with the problem of whether that exemption applies to the acquisition of aircraft used by airlines operating for reward chiefly on international routes but also operating domestic flights using those aircraft. In that judgment, the Court held that the decisive factor for the purposes of the application of the exemption is the nature of the activities chiefly carried on by the airline which uses the aircraft, rather than the specific use to which the particular aircraft is put.

57. Applying that same logic, the nature of the routes must also be irrelevant for the purposes of application of the exemption.

58. Finally, that approach is more consistent with the principle of fiscal neutrality, since there is no objective reason for treating differently for VAT purposes two airlines operating on international routes because one of them operates mainly by providing charter flights while the other provides scheduled flights or because the aircraft concerned is used either for charter flights or for scheduled flights.

59. In conclusion, I believe that Article 15(6) of the Sixth Directive must be interpreted as meaning that the concept 'airline operating for reward chiefly on international routes' also refers to a commercial airline operating for reward chiefly on international charter routes for the requirements of companies and private persons.

## VI – Conclusion

60. Accordingly, I propose that the Court of Justice should reply as follows to the questions referred for a preliminary ruling by the Korkein hallinto-oikeus:

(1) Article 15(6) of the Sixth Directive must be interpreted as meaning that the concept 'airline operating for reward chiefly on international routes' also refers to a commercial airline operating for reward chiefly on international charter routes for the requirements of companies and private persons.

(2) Article 15(6) of the Sixth Directive must be interpreted as meaning that the exemption provided for therein applies not only to that supply of aircraft which takes place directly to airlines operating for reward chiefly on international routes, but also to the supply of aircraft to an operator which does not itself operate for reward chiefly on international routes, but which in turn supplies the aircraft for the use of an airline which carries on that activity.

(3) The fact that the owner of the aircraft in turn makes a charge for the use of the aircraft to a private person who is its shareholder and who uses the procured aircraft principally for his own business and/or private use, taking into account the fact that the airline has also been able to use the aircraft for other flights, does not alter the conclusion reached in the reply given to the second question, with the sole proviso that those factors could indicate that the aircraft was not

25 — Case C-382/02 [2004] ECR I-8379.

really intended to be exploited commercially by the airline and instead was intended for the exclusive private use of a natural or legal person, a matter which it falls to the national court to determine.