

OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER

delivered on 16 December 1999 *

1. The Bundesfinanzhof (Federal Finance Court, Germany) has referred to the Court for a preliminary ruling two questions concerning the interpretation of the 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 assessment¹ (hereinafter the 'Sixth Directive').

2. The first of these two questions concerns whether a right to deduct Value Added Tax (hereinafter 'VAT') on 'setting up' expenditure exists where, at the time the first tax assessment is made, the tax authority is already aware that the economic activity leading to taxable transactions will not be taken up. If the answer is in the affirmative, the national court also wishes to know whether, in the case of a supply of buildings or parts thereof and of the land on which they stand, the option for taxation can be restricted to the buildings and parts thereof.

* Original language: Spanish.

1 — OJ 1977 L 145, p. 1. The wording of this repeatedly amended directive shows how right F. Pérez Royo was when he observed that 'studying value added tax is almost as painful as having to pay it' (Foreword to the book by Ramírez Gómez, S., *El Impuesto sobre el Valor Añadido*, Civitas, Madrid, 1994).

I. Facts and main proceedings

3. In 1989, Mrs Breitsohl applied to a car manufacturer for a dealership. By letter of 14 April 1989, the latter informed her that her application had been accepted subject to certain conditions. In February 1990, Mrs Breitsohl gave notice of the commencement of a business for the 'sale and repair of motor vehicles' and acquired for the sum of DEM 62 670 (without VAT) a vacant plot of land on which the business notified was to be conducted. In April 1990, she commissioned a building company to build a workshop on that plot. By the middle of May, the excavations were complete, the foundations were laid and part of the floor slab was finished. Payments amounting to DEM 173 655.50 were due for the work.

4. At the planning stage, the total cost of the building works was estimated at DEM 1 400 000. When it became apparent that the price was likely to rise by a further DEM 230 000, the bank was not prepared to finance the additional cost. At the end of May 1990, the building company stopped work because of the uncertainty surrounding the financing.

5. Considering herself no longer in a position to complete the building work on the land and commence business, in a settlement dated 22 November 1990, Mrs Breitsohl undertook to pay the building company a total amount of DEM 100 000 and to sell the building works already completed to a third party for DEM 50 000 (comprising DEM 43 859.65 plus DEM 6 140.35 VAT). In December 1990, she sold the land to the same buyer for DEM 61 905, with no mention of VAT.

6. In her annual VAT return for 1990, Mrs Breitsohl declared as taxable transactions the sale of the parts of the building (basis of assessment: DEM 43 859). She claimed DEM 13 900.11 as deductible payments of input tax (lawyers' and tax accountants' fees and building accounts). All this resulted in a surplus in her favour of DEM 7 759.90.² In her preliminary returns she had not claimed the deductions of input tax.

7. In its tax notice, the Finanzamt Goslar (Tax Office, Goslar) initially took account of deductible payments of input tax amounting only to DEM 95.20, on the grounds that the transactions to which those payments related were for the pur-

pose of the tax exempt sale of land. The tax due was assessed at DEM 6 045.³

8. When Mrs Breitsohl appealed against that notice, the Finanzamt reasoned that in the absence of any continuing business activity she had not become a trader and was thus not entitled to deduct input tax. However, she owed the tax itemised in the bill issued to the purchaser of the works already completed.

9. Mrs Breitsohl then brought an action before the Finanzgericht (Finance Court), which was successful on most counts. Referring to the judgment of the Court in the *INZO* case,⁴ the Finanzgericht held that Mrs Breitsohl had already been engaged in trading by reason of the preparatory acts and had therefore been entitled to deduct the amounts of tax charged in the building accounts. It also held that Mrs Breitsohl could have opted to waive the tax exemption on the supply of the property, limited to the separable part of those building works which had been completed (excavations, foundations, floor). The right to deduct tax could be refused only in relation to the notary's fees, which concerned the sale of the land.

2 — The difference (to within a few pfennigs) between the payments deductible and the VAT on the selling price of the parts of the building.

3 — The difference (to within a few pfennigs) between the deductible payments accepted by the tax office and the VAT on the selling price of the parts of the building.

4 — Case C-110/94 *INZO v Belgian State* [1996] ECR I-857.

10. The Finanzamt then appealed on a point of law (Revision in German) to the Bundesfinanzhof, the referring court, claiming that there had been a breach of the 1980 Umsatzsteuergesetz (the Turnover Tax Law; hereinafter 'the UStG'). According to the Finanzamt, the UStG does not permit a waiver of the tax exemption on the supply of land to be restricted to buildings. In its opinion, the same conclusion must be drawn from the first paragraph of Article 13 C read in conjunction with Article 13 B(g) of the Sixth Directive.

principle, be withdrawn retroactively on account of certain events having or having not occurred (principle of legal certainty). This also applies to the deductions relating to the investment transactions.

II. The questions referred for a preliminary ruling

According to those principles, is the right to deduct tax (Article 17 of Directive 77/388/EEC) on "setting up" expenditure to be accorded on the basis of the intention to take up economic activity leading to taxable transactions even where the tax authority is already aware, when the first tax assessment is made, that the intended economic activity leading to taxable transactions was not actually taken up?

11. Since it had doubts as to the interpretation of the relevant provisions of the Sixth Directive, the Bundesfinanzhof referred the following questions to the Court for a preliminary ruling:

If the answer to Question 1 is in the affirmative:

- '1. According to the case-law of the Court of Justice of the European Communities (Case C-110/94 *INZO v Belgian State* [1996] ECR I-857), even the very first investment expenditure incurred for the purposes of a business may be regarded as an economic activity within the meaning of Article 4 of Directive 77/388/EEC. The tax authority has to take account of the business person's declared intention in this regard. The status of taxable person accorded on that basis cannot, in
2. In the case of a supply of buildings or parts thereof and of the land on which they stand, can the option for taxation be restricted to the buildings and parts thereof?'

III. Observations submitted during the referral proceedings

14. Article 4 of the Sixth Directive defines what is meant by a taxable person:

12. The German and Greek Governments and the Commission submitted written observations within the time-limit prescribed by Article 20 of the EC Statute of the Court of Justice.

'1. "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.

IV. First question referred for a preliminary ruling

A. *The Community provisions applicable*

2. 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.'

13. According to Article 2 of the Sixth Directive:

15. Article 17 of the Sixth Directive lays down the rules relating to the origin and scope of the right to deduct:

'The following shall be subject to value added tax:

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

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. the importation of goods.'

2. In so far as the goods and services are used for the purposes of his taxable trans-

actions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

- (a) valued added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person.’

commercial or occupational activity of the trader. An industrial, commercial or occupational activity shall mean any permanent activity carried out for the purpose of obtaining income, even where there is no intention to make a profit or a group of persons carries out its activities only in relation to its members.’

17. According to Paragraph 15(1) of the UStG:

...⁵

‘A trader may deduct the following taxes:

B. *The national regulations*

16. Under Paragraph 2(1) of the UStG:

- 1. Taxes separately stated in invoices, within the meaning of paragraph 14, in respect of supplies of goods or other services performed for his business by other businesses’.

‘A trader is anyone a person who independently carries out an industrial, commercial or occupational activity. The undertaking comprises the whole of the industrial,

C. *Brief review of the case-law*

18. On several occasions, decisions of the Court of Justice have confirmed the right to deduct VAT on preparatory transactions carried out for the purpose of pursuing a taxable economic activity.

⁵ — Version of Article 17 of the Sixth Directive in force at the material time. Paragraph 2 was subsequently amended by Article 1(22) of Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and by Article 1(10) of Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18).

19. In the *Rompelman* case,⁶ the Court was asked whether someone who had acquired the future title to business premises under construction with a view to letting such premises and effecting taxable supplies and services was acting, during the preparatory stage, as a taxable person with the right to deduct VAT.

20. The Court concluded that the deduction system was meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of value added tax therefore ensured that all economic activities, whatever their purpose or results, provided that they were themselves subject to VAT, were taxed in a wholly neutral way. In the same judgment the Court held that the economic activities referred to in Article 4(1) might consist in several consecutive transactions and that the preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, must themselves be treated as constituting economic activity. Any other interpretation of Article 4 of the Sixth Directive would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it in accordance with Article 17 and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of immovable

property and expenditure incurred during exploitation.⁷

21. A few years later, within the context of an action under Article 169,⁸ the Court again stressed the importance of the right to deduct and declared that: 'in the absence of any provision empowering the Member States to limit the right of deduction granted to taxable persons, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs. Such limitations on the right of deduction have an impact on the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in the cases expressly provided for in the directive'.⁹

22. As early as 1991, the Court had held¹⁰ that 'pursuant to Article 17(1) of the Sixth Directive, which is entitled "Origin and scope of the right to deduct", the right to deduct arises at the time when the deductible tax becomes chargeable. Consequently, only the capacity in which a person is acting at that time can determine the existence of the right to deduct. By virtue of Article 17(2), in so far as a taxable person, acting as such, uses the goods for the purposes of his taxable transactions, he is entitled to deduct the tax due or paid in

7 — Paragraphs 19, 22 and 23.

8 — Case 50/87 *Commission v France* [1988] ECR 4797.

9 — Paragraphs 16 and 17.

10 — Case C-97/90 *Lennartz v Finanzamt München* [1991] ECR I-3795.

6 — Case 268/83 *Rompelman v Minister van Financiën* [1985] ECR 655.

respect of those goods'. The Court added that 'consequently, it is the acquisition of the goods by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 and the extent of any adjustments in the course of the following periods'.¹¹

23. In the *INZO* judgment,¹² the scope of which will need to be determined in the present case, the Court had to decide whether its findings in the *Rompelman* case also applied when the envisaged economic activity for which investment expenditure had been incurred was not finally taken up.

24. The Court held that such investment expenditure should be regarded as 'economic activities' for the purposes of the Sixth Directive and concluded that, where the tax authority had accepted that a company which had declared its intention to begin an economic activity giving rise to taxable transactions had the status of a taxable person for the purposes of VAT, the carrying out of a study into the technical and economic aspects of the activity envisaged might be regarded as an economic activity within the meaning of Article 4 of the directive. It added that VAT paid in respect of such a profitability study might in principle be deducted in accordance with

Article 17 of the directive, even if it was subsequently decided, in view of the results of that study, not to move to the operational phase, but to put the company into liquidation, with the result that the economic activity envisaged did not give rise to taxed transactions.¹³

25. The Court based its conclusion on two principles:¹⁴

- (a) The principle of legal certainty, according to which the rights and obligations of taxable persons should not depend on facts, circumstances or events which occurred after the tax authority made a finding in respect of those rights and obligations. It follows that, once the tax authority has accepted, on the basis of information provided by a business, that it should be accorded the status of a taxable person, that status cannot, in principle, subsequently be withdrawn retroactively on account of the fact that certain events have or have not occurred.
- (b) The principle of neutrality of VAT as regards the tax burden on a business. According to the Court, any other interpretation of the directive would be liable to create, as regards the tax treatment of the same investment activities, unjustified differences between

11 — Paragraphs 8 and 15.

12 — Judgment previously cited in footnote 4.

13 — Paragraphs 18 to 20.

14 — Paragraphs 21 and 22.

businesses already carrying out taxable transactions and other businesses seeking by investment to commence activities which would in future be a source of taxable transactions. Likewise, arbitrary differences would be established between the latter businesses, in that final acceptance of the deductions would depend on whether or not the investment resulted in taxable transactions.

transactions. A supply of investment goods during the adjustment period, where such occurred, might give rise to an adjustment of the deduction under the conditions set out in Article 20(3) of the Sixth Directive.¹⁷

D. Observations of the parties

26. The Court added that it was for the person applying to deduct VAT to show that the conditions for deduction were met, and that Article 4 did not preclude the tax authority from requiring objective evidence in support of the declared intention to commence economic activities which would give rise to taxable transactions.¹⁵

27. The Court arrived at the same conclusion in its judgment in *Ghent Coal Terminal*.¹⁶ In that judgment, it stated that Article 17 of the Sixth Directive must be construed as allowing a taxable person acting as such to deduct the VAT payable by him on goods or services supplied to him for the purpose of investment work intended to be used in connection with taxable transactions. The right to deduct remained acquired where, by reason of circumstances beyond his control, the taxable person had never made use of those goods or services for the purpose of carrying out taxable

28. In the view of the German and Greek Governments, the Court's decision handed down in the *INZO* judgment is not applicable in the present case. They consider that that judgment is based on the principle of legal certainty, according to which the rights and obligations of taxable persons should not depend on circumstances arising after they have been accorded the status of a taxable person by the tax authority. In the present instance, contrary to what happened in the *INZO* case, the tax authority had not yet accorded the status of taxable person to Mrs Breitsohl when she lodged her VAT return. Accordingly, she cannot rely upon the principle of protection of a legitimate expectation of being able to deduct VAT.

29. Both governments also consider that there was no breach of the principle of VAT neutrality. That principle, they submit, applies only when taxable transactions are effected, which was not the case since Mrs

¹⁵ — Paragraph 23.

¹⁶ — Case C-37/95 *Belgian State v Ghent Coal Terminal* [1998] ECR I-1.

¹⁷ — Paragraph 24.

Breitsohl had not been accorded the status of a taxable person. In addition, the German Government draws attention to the risk of abuse that any other interpretation might involve.

E. Reply to the first question

30. The Commission arrives at exactly the opposite conclusion. After pointing out that the facts as described by the referring court do not constitute evidence of the existence of abuse or fraud, it asserts that, under Article 4(1) of the Sixth Directive, the acquisition of the status of taxable person does not depend on a statement to that effect by the tax authority.

31. According to the Commission, the status of taxable person is acquired *ipso jure* simply as a result of carrying out an economic activity. If that activity never reaches the operational stage and remains in the preparatory phase, the determining factor is, in accordance with the *INZO* judgment, the existence, during that preparatory phase, of an intention to arrive at the operational stage and, hence, to effect taxable transactions. The Commission claims that that intention does not have to be declared immediately to the tax authority but, as in the present instance, can be expressed tacitly by incurring investment expenditure.

32. The answer to the first question depends on the harmonised concept¹⁸ of a 'taxable person'.

33. As already noted, under Article 4 of the Sixth Directive a 'taxable person' means any person who independently carries out any economic activity for the purpose of supplying goods or services. On the other hand, neither that article nor any other provision of the Sixth Directive makes acquisition of the status of taxable person dependent on the fulfilment of any additional formal conditions, such as formal acknowledgement by the tax authority.

34. Thus, the directive establishes a direct link between the concept of chargeable event and that of taxable person and the execution of the taxable transaction defines the precise moment at which the chargeable event and the taxable person make their

¹⁸ — As the Court pointed out in its judgment of 5 May 1982 in Case 15/81 *Schul v Invoerrechten en Accijnzen* [1992] ECR 1409, paragraphs 11 and 12, the Sixth Directive harmonised the concepts of chargeable event, taxable person, chargeability of tax and taxable amount. These concepts must be interpreted uniformly in the Member States.

appearance in the field of tax law and the entire VAT machinery is set in motion.¹⁹

35. Specifically, with regard to investment expenditure incurred with a view to commencing a taxable economic activity, the *Rompelman*, *INZO* and *Ghent Coal Terminal* judgments show that the trader acquires the status of taxable person and hence the right to deduct at the moment at which his suppliers deliver the goods or perform the service, even if the economic activity envisaged is never carried out. In those circumstances, the only condition that the party concerned must satisfy is that he should have actually intended to carry out that taxable economic activity.

36. It is not for the Court but for the national revenue and, where appropriate, judicial authorities to determine whether there was an actual intention to carry out a taxable activity.

37. Nevertheless, it follows from the facts set out in the order for reference that Mrs

Breitsohl did, in fact, intend to set up a business for the sale and repair of motor vehicles, a business which, most certainly, is subject to VAT. Subsequently, due to various financial vicissitudes beyond her control, she had to give up the project and sell the building works that had been completed and on which she had paid VAT to a third party. The conclusion must be that at the time at which the sale took place Mrs Breitsohl had already acquired the status of a taxable person, even though that status had not yet been formally acknowledged by the tax authority.

38. Is Mrs Breitsohl entitled to deduct the amounts she has paid by way of VAT?²⁰

39. As I have already pointed out, under Article 17 of the Sixth Directive, the right to deduct VAT — an essential part of the VAT system — arises immediately,²¹ as

20 — I have left aside the question of whether it was possible to separate the parts of the building from the land in opting for taxation, which is the subject of the second question referred for a preliminary ruling.

21 — Provided that the person concerned meets certain requirements, in particular: (1) is a taxable person; (2) obtained the goods or services for consideration in his capacity of taxable person; and (3) has complied with the formalities laid down in Article 18 of the Sixth Directive and fulfilled any obligations imposed by national law on the basis of Article 22(8) of the directive (see Joined Cases 123/87 and 330/87 *Jeunehomme and Others v Belgian State* [1988] ECR 4517; Case C-217/94 *Eismann Atto Adige v Ufficio IVA di Bolzano* [1996] ECR I-5287; Case C-85/95 *Reisdorf v Finanzamt Köln-West* [1996] ECR I-6257). With respect to the obligation upon Member States to observe the principle of proportionality in imposing these formal requirements, see the judgment in Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others v Belgian State* [1997] ECR I-7281, together with the Opinion of Mr Advocate General Saggio in Joined Cases C-110/98 to C-147/98 *Gabalfria and Others v AEAT* [2000] ECR I-1577, at page I-1579, paragraphs 32 and 33).

19 — Frequent references to the link between the chargeable event and the taxable person can be found in the legal literature. Thus, Sainz de Bujanda writes: 'the taxable person is the person who assumes liability with respect to the fiscal obligation as the author of the chargeable event' (Sainz de Bujanda, F., *Notas de Derecho financiero*, tome I, vol. 2, Publicaciones de la Facultad de Derecho de Madrid, Madrid, 1967, p. 608, quoted by Menéndez Moreno, A., *Comentarios a la Ley General Tributaria y líneas para su reforma — Homenaje a Fernando Sainz de Bujanda*, Instituto de Estudios Fiscales, Madrid, 1991, p. 502).

soon as the deductible tax becomes chargeable, that is to say, in accordance with Article 10(2) of the Sixth Directive, when the goods are delivered or the services are performed.

40. Above all, it should be noted that there is nothing in the order for reference to suggest that Mrs Breitsohl had failed to satisfy any of the essential formal conditions which, if not fulfilled, might have resulted in her losing the right to deduct.

41. As the Commission rightly says, Article 18 of the UStG²² allowed Mrs Breitsohl to avail herself of the right of deduction immediately in one of her monthly tax returns. If she had proceeded in this way, the tax authority would have had to acknowledge her status as a taxable person and accept the deduction made on her return.

42. Instead, Mrs Breitsohl waited for her annual return to exercise her right of deduction, by which time the tax authority was already aware that the economic activity envisaged could not be taken up. That, however, has no bearing on the above analysis. Mrs Breitsohl was a taxable person for the purposes of VAT and, in accordance with the national regulations applicable, she was entitled, if she so wished, to wait until the end of the year to exercise her right of deduction.

22 — This article lays down the procedural rules for the fiscal management of VAT.

43. I therefore consider that Mrs Breitsohl was entitled to deduct the sums she had paid by way of VAT on the goods and services supplied to her and still retained that right when she lodged her annual return, even though at that time it was already clear that she would not be able to take up the economic activity she had originally envisaged.

44. That is consistent with the Court's findings in *INZO*.

45. For the German Government, and much of its reasoning is based on this premise, the principle of legal certainty cited by the Court in *INZO* has no bearing on the present case because the tax authority did not, at any time, accord Mrs Breitsohl the status of a taxable person.

46. On the other hand, the German Government barely mentions the other principle on which the Court based its *INZO* judgment, namely, the principle of VAT neutrality.²³ In *INZO*, the Court stated that that principle forbade the creation, as regards the tax treatment of the same

23 — The German Government merely asserts that, as the tax authority had not accorded Mrs Breitsohl the status of a taxable person, she had not acquired that status and therefore could not carry out taxable economic activities, with the result that, according to the German Government, the principle of tax neutrality was not applicable.

investment activities, of unjustified differences between businesses already carrying out taxable transactions and other businesses seeking by investment to commence activities which would in future be a source of taxable transactions. Likewise, if the principle were disregarded, arbitrary differences would be established between the latter businesses, in that final acceptance of the deductions would depend on whether or not the investment resulted in taxable transactions.

it proposes would be to open the way to abuse, since any end consumer acquiring capital goods (such as land or a motor vehicle) could then claim the status of a taxable person and take advantage of the right of deduction simply by declaring his intention to commence an economic activity. According to the German Government, the tax authority would then have to rule on the basis of a purely subjective declaration of intent and not on the basis of genuine, objectively verifiable information.

47. It is my opinion that, *a fortiori*, the same principle prohibits any discrimination with respect to those latter businesses based on the time at which they requested the deduction of tax — before or after it became apparent that the economic activity envisaged was not going to materialise — or on whether or not the tax authority had formally accorded them the status of a taxable person at the time at which they asked for VAT to be deducted.

48. As the principle of neutrality is one of the pillars of the VAT system, it would be impossible to accept a solution that was contrary to its requirements and not based on an express provision of Community law.

49. This analysis would not be complete if I failed to examine the German Government's contention that giving a reply to the first question other than the one which

50. I share the German Government's concern with regard to the risk of tax fraud. Nevertheless, the Member States are not devoid of means of providing against and combating such fraud. In that connection, it may be appropriate to recall, firstly, that Articles 18 and 22 of the Sixth Directive require the taxable person to comply with a series of formalities — statements, invoices and accounts — and that these formalities can be supplemented by additional measures that Member States deem it necessary to adopt in order to ensure that the tax is properly collected and fraud prevented.²⁴ Secondly, Member States have broad discretion to decide, in each specific case, what is the actual intention of the person concerned. Finally, in the event of fraud or

24 — According to Article 22(8), in the version introduced by Article 28(h) of Directive 91/680, cited in footnote 5 above, Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

abuse, the tax authority can withdraw the status of taxable person and amend the preliminary tax notice issued.²⁵

‘During the transitional period referred to in paragraph 4,²⁶ Member States may:

51. For those reasons, I consider that my reply to the first question referred for a preliminary ruling must be that Articles 4 and 17 of the Sixth Directive should be interpreted as meaning that the right to deduct VAT on transactions effected with a view to taking up a projected economic activity subsists even where the tax authority is already aware, when the first tax assessment is made, that the economic activity leading to taxable transactions will not be taken up.

...

(b) continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned;

V. Second question referred for a preliminary ruling

(c) grant to taxable persons the option for taxation of exempt transactions under the conditions set out in Annex G.’

A. *The Community provisions applicable*

...’

52. In accordance with Article 28(3) of the Sixth Directive:

25 — In the *Ghent Coal Terminal NV* judgment, the Court held that: ‘... in cases of fraud or abuse, in which the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations’ (judgment cited in footnote 16, paragraph 21). In German law, this possibility is provided for in Article 164 of the *Abgabenordnung* (Tax Code), according to which the tax notice is issued without prejudice to any subsequent verification and the taxpayer must be informed that the notice is provisional and subject to change.

53. Annex F, point 16 covers ‘supplies of those buildings and land described in Article 4(3)’.

26 — The transitional period was initially fixed at five years as from 1 January 1978. Nevertheless, it must be considered to have been extended indefinitely since the Council has still to take a decision on the possible abolition of these derogations.

54. Under Article 4(3) of the Sixth Directive: (b) the supply of building land.

'3. Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2 and in particular one of the following:

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

55. Annex G, point 1, reads as follows:

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

...

'1. The right of option referred to in Article 28(3)(c) may be granted in the following circumstances:

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

(b) in the case of transactions specified in Annex F:

Member States which provisionally maintain the right to exempt such supplies may grant taxable persons the right to opt for taxation.'

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

56. Finally, Article 20(3) of the Sixth Directive, entitled 'Adjustments of deductions', provides as follows:

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

However, in the latter case, Member States may waive the requirement for adjustment in so far as the purchaser is a taxable person using the capital goods in question solely for transactions in respect of which value added tax is deductible.

...'

B. *The national regulations*

57. According to Paragraph 4 of the UStG:

'Among the transactions referred to in Article 1(1), points 1 to 3, the following shall be exempt from VAT:

...

judgment not on the server

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9. (a) transactions which fall under the *Grunderwerbsteuergesetz* (Law on Real Property Transfer Tax).'

58. Nevertheless, under Paragraph 9 of the UStG:

'1. A trader may treat a supply exempted under Paragraph 4... (9) as taxable where the supply is made to another trader for the purposes of his business.'

C. *Observations of the parties*

59. The German Government points out, firstly, that the Federal Republic of Germany has made use of the power conferred upon it by Article 13 C of the Sixth Directive to allow its taxpayers a right of option for taxation on the supply of buildings and the land on which they stand.

60. The German Government considers that, since Article 13 C of the Sixth Directive expressly allows Member States to restrict the scope of the right of option and fix the details of its use, the question whether the taxable person can use his right of option when separating the supply of the building from the supply of the land is one for national law. In fact, Article 13 C of the Sixth Directive does not preclude national regulations from authorising the exercise of the option solely for the building or solely for the land any more than it precludes national regulations from requiring that the right of option be exercised for the property as a whole.

D. Reply to the second question

62. I agree with the Commission that the exemption granted under German law is not based on Article 13 B(g) of the Sixth Directive, according to which: '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: (g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);'.

63. As already pointed out, Article 4(3)(a) refers to 'the supply *before first occupation* of buildings or parts of buildings and the land on which they stand'.²⁷

61. The Commission observes that the exemption granted under German law is not based on Article 13 B(g) of the Sixth Directive but on Article 28(3)(b), read in conjunction with Annex F, point 16, and Article 4(3), adding that the right of option is not based on Article 13 C but on Article 28(3)(c), read in conjunction with Annex G, point 1(b), of the Sixth Directive. The Commission deduces from these provisions that a supply of buildings or parts thereof and the land on which they stand can only be exempted from tax in its totality. The same applies to the right of option for taxation.

64. The parts of buildings supplied in the present case were supplied before first occupation. Thus, the exemption and the right of option can only be based on Article 28(3)(b), read in conjunction with Annex F, point 16, and Article 4(3), as the

²⁷ — Emphasis added.

referring court rightly points out and contrary to what the German Government contends in its observations.

65. This point having been clarified, I can now go on to examine the actual question referred for a preliminary ruling.

66. In the order for reference, the Bundesfinanzhof indicates that the German regulations should be interpreted as meaning that the exemption or, as the case may be, the right to opt for taxation should apply to the whole of the immovable property, that is to say both the buildings or parts thereof and the land on which they stand. It adds that there is nothing in its previous case-law to contradict that interpretation. Nevertheless, it asks the Court whether, thus interpreted, the German regulations are consistent with the Sixth Directive.

67. The analysis of the national court's second question must begin with an interpretation of the legal concept of 'supply before first occupation of buildings or parts of buildings and the land on which they stand', in Article 4(3)(a) of the Sixth Directive.

68. First of all, subject to the right to define the concept of 'the land on which they

stand'²⁸ accorded to Member States in the second part of the first sentence of Article 4(3)(a) of the Sixth Directive, this legal concept must be interpreted uniformly in all the Member States; otherwise the purpose of the directive, namely 'to determine the basis of assessment of value added tax in a uniform manner according to Community rules', could not be achieved.²⁹

69. The Court has accepted the division of real property for the purposes of VAT in two different judgments, neither of which, in my opinion, provides an answer to the question raised.

70. The first of these is the *Armbrecht* judgment,³⁰ to which the German Government, the Commission and the national court itself refer.

71. In that case, the national court asked the Court of Justice whether a taxable person who sold a hotel which he had used for both business and private purposes and, in so doing, waived the exemption from VAT for which the sale would otherwise qualify under Article 13 B(g) of the Sixth Directive, had to pay tax on the part of the selling price that corresponded to the

28 — As the Commission points out, the Federal Republic of Germany has never exercised this right.

29 — Case 139/84 *Van Dijk's Boekhuis v Staatssecretaris van Financiën* [1985] ECR 1405, paragraph 19).

30 — Case C-291/92 *Finanzamt Velzen v Armbrecht* [1995] ECR I-2775.

portion of the hotel used for private purposes.

72. In its observations on the *Armbrecht* case, the German Government pointed out that Mr Armbrecht's property formed a single entity in German civil law and was entered as such in the land register. It therefore considered that it should be treated as a single entity for the application of the Directive.

73. To this argument the Court replied as follows:

'It is true that Article 5(1) of the Directive does not define the extent of the property rights conferred, which must be determined in accordance with the applicable national law, but the Court has held that the objective of the Directive, which is to base the common system of VAT on a uniform definition of taxable transactions, would be jeopardised if the preconditions for a supply of goods, which is one of the three taxable transactions, varied from one Member State to another. Consequently, the national law applicable in the main proceedings cannot provide the answer to the question raised, which concerns not the civil law applicable to supply but whether the transaction is subject to tax'.³¹

74. In that respect, the *Armbrecht* judgment clearly sets a precedent for the present case. The fact that, as the Bundesfinanzhof has stressed, a building and the land on which it stands are inseparable under German civil law (Articles 93 and 94 of the Civil Code) and cannot be the object of separate rights does not mean that, for the application of VAT, the land and the building cannot be treated differently, provided, of course, that the correct application of the Sixth Directive requires that they be separated.

75. To return to the *Armbrecht* judgment, the Court held it to be consistent with Community law that when a property is sold the taxable person should pay VAT only on that part of the property which he had used for business purposes because the sale of the part used for private purposes did not fall within the scope of the Sixth Directive.

76. The Court stated that 'apportionment between the part allocated to the taxable person's business activities and the part retained for private use must be based on the proportions of private and business use in the year of acquisition and not on a geographical division. The taxable person must, moreover, throughout his period of ownership of the property in question,

³¹ — Paragraphs 13 and 14.

demonstrate an intention to retain part of it among his private assets'.³²

it to be occupied by him thereby applied goods forming part of his business assets for his private use within the meaning of Article 5(6) of the Sixth Directive.

77. There can be no doubt that in the present case the situation is different.

78. Thus, the property sold by Mrs Breitsohl, which consisted of parts of a building and the land on which they stood, was always used for business purposes. Accordingly, it was never put to any private use that might have justified an apportionment along the lines of the *Armbrecht* judgment. Both the sale of the land and the sale of the parts of the building were effected by a taxable person acting as such.

79. The second occasion on which the Court considered it necessary for the constituent parts of a property to be treated differently for the application of VAT was in the *De Jong* case.³³

80. The national court had asked whether a taxable person — in this case, a building contractor — who acquired a plot of land solely for private purposes but then, in pursuit of his business, built a dwelling on

81. The Netherlands Government had contended that the construction of a dwelling on land made available to the undertaking for that purpose gave rise, for the purposes of turnover tax, to a new unit of real estate comprising the building and the surrounding land. Consequently, it was that unit resulting, in that form, from the pursuit of the taxable person's business activity that the latter had applied for his private use.

82. The Court rejected that contention. After reaching the conclusion that, regardless of whether the land and the building were inseparable under national legislation, it was necessary to distinguish between the taxation of land which a taxable person owns in his private capacity and the taxation of a building which the taxable person has erected on that land in pursuit of his business, the Court added that: 'As regards the taxation of land which a building contractor owns in his private capacity and on which, in pursuit of his business, he has built a dwelling for himself that land never formed part of the assets of the business and consequently could not have been applied for private use within the meaning of Article 5(6) of the Sixth Directive. The basis of assessment will be, in

³² — Paragraph 21.

³³ — Case C-20/91 *De Jong v Staatssecretaris van Financiën* [1992] ECR I-2847.

accordance with Article 11 A(1)(b) of the Sixth Directive, the value of the building alone and not that of the land'.³⁴

comprising the building and the land on which it stands.

83. In my opinion, the *De Jong* case also differs considerably from the case at issue here.

87. The very wording of this article and, in particular, the use of the copulative conjunction 'and' seem to confirm the Commission's view. Moreover, the different language versions coincide in this respect.³⁵

84. Firstly, in *De Jong*, the person concerned acquired the land for private purposes whereas, as already pointed out, Mrs Breitsohl acquired hers in order to pursue a business activity. Secondly, in *De Jong*, the dwelling was built by the company of the person concerned, who intended to occupy it himself, whereas Mrs Breitsohl entrusted the construction of the building to a third party and that building was to be used for taxable activities.

88. My analysis of the provisions of the Sixth Directive dealing with the taxation of supplies of immovable property confirms this interpretation.

85. I therefore conclude that the reply to the Bundesfinanzhof's question cannot be found in the case-law of the Court but must be sought directly in the provisions of the Sixth Directive.

89. Thus, the Sixth Directive makes a distinction between land which has not been built on, building land and land which has been built on:

- supplies of *land which has not been built on other than building land* are exempt from VAT, although Member States may allow taxpayers a right of option for taxation;³⁶

86. The Commission, basing its argument on a literal interpretation of Article 4(3)(a), concludes that this provision concerns the supply of a unit of real estate inseparably

35 — Thus, in the Spanish version: 'la entrega anterior a su primera ocupación de edificios o partes de edificios y de la porción de terreno sobre la que éstos se levanten'; in the English version: 'the supply before first occupation of buildings or parts of buildings *and* the land on which they stand'; in the German version: 'die Lieferung von Gebäuden oder Gebäudeteilen *und* dem dazugehörigen Grund und Boden, wenn sie vor dem Erstbezug erfolgt'; and in the Italian version: 'la cessione, effettuata anteriormente alla prima occupazione, di un fabbricato o di una frazione di fabbricato e del suolo attiguo' (emphasis added).

36 — Article 13 B(h) and Article 13 C(b).

34 — Paragraphs 19 and 20.

— supplies of *building land* are subject to tax, although, during the transitional period, Member States may continue to exempt them or grant to taxable persons the option for taxation;³⁷

they stand are exempt from VAT, although, here too, Member States may allow taxpayers a right of option for taxation.³⁹

— as regards *land which has been built on*, the directive makes a distinction between the first supply and subsequent supplies:

(a) the *supply before first occupation* of buildings or parts of buildings and the land on which they stand is subject to VAT. 'A building' is taken to mean any structure fixed to or in the ground. Nevertheless, during the transitional period, Member States may continue to exempt these supplies or grant taxable persons the option for taxation;³⁸

90. Clearly, the Sixth Directive establishes different rules for the application of VAT to supplies of land only in so far as the latter has not been built on. On the other hand, once it has been built on, and in the absence of specific provisions concerning the separate taxation of the land and the building,⁴⁰ for the application of VAT the value of the land must be considered as being incorporated in the construction, so that the 'immovable property' inseparably comprises the land and the building erected on it.⁴¹

(b) *subsequent supplies* of buildings or parts thereof and of the land on which

91. At this point, it might be useful to mention the *Kerrutt* judgment.⁴² In that case the Court was asked whether supplies of goods and services, other than the supply of the building land, under a parcel of contracts for work and services in connection with the construction of a building were subject to VAT by virtue of Arti-

37 — Article 28(3)(b), read in conjunction with Article 4(3)(b) and Annex F, point 16, and Article 28(3)(c), read in conjunction with Annex G, point 1(b).

38 — Article 28(3)(b), read in conjunction with Article 4(3)(a) and Annex F, point 16, and Article 28(3)(c), read in conjunction with Annex G, point 1(b).

39 — Article 13 B(g) and Article 13 C(b).

40 — My analysis is restricted to legal acts relevant to the present case, that is to say, to the transfer of the right of ownership in the developed land.

41 — As already noted in connection with the *Armbricht* and *De Jong* judgments, I refer here to the situation in which both the building and the land are supplied by a taxable person acting as such, as in the present case.

42 — Case 73/85 *Kerrutt v Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219.

cle 2(1) of the Sixth Directive, or whether they qualified for the exemptions in respect of the 'supply of buildings or parts thereof and the land on which they stand' provided for in Article 13 B(g) and Article 28(3)(b), in conjunction with point 16 of Annex F to the Sixth Directive.

stand" that such a single transaction can be said to have taken place only where the two categories of goods supplied, namely the building and the land, are, for the purposes of the law governing the sale of property, the subject of a single delivery inasmuch as the delivery is of land which has been built on.⁴³

92. The Court considered that the applicability of those provisions in a case such as that which was the subject of the main proceedings depended on whether the supplies of goods and services in question for the construction of a building, together with the land transaction, constituted a single property transaction which could be regarded as falling within the scope of the expression 'supply of buildings and the land on which they stand' because of the economic connection between the partial transactions concerned and their common aim, which was the construction of the building on the land purchased.

93. In that connection, the Court held that:

94. The Court concluded that: 'supplies of goods and the services of contractors and building workers under a scheme such as the "*Bauherrenmodell*", which are transactions legally separate from the land transaction which was completed with another contractor, cannot be regarded as forming, together with that transaction, a unity capable of being classified as a single "supply of buildings or parts of buildings and the land on which they stand"⁴⁴.

95. In the Kerrutt case the essence of the problem was whether the contracts for work and services in connection with the construction of a building could be regarded, together with the land transaction, as

'It is clear from the words "supply of buildings... and the land on which they

43 — Paragraph 13. In his Opinion on this case, Advocate General Darmon stated that: 'The structure of Article 4(3) of the directive confirms that analysis. Article 4(3)(a) refers to "the supply before first occupation of buildings or parts of buildings and the land on which they stand", and that is a single financial and legal transaction inasmuch as it involves the transfer of ownership of land which has been built on' (emphasis added).

44 — Paragraph 15.

the supply before first occupation of a building and the land on which it stood. There is no relation between this problem and that which confronts us in the present case. Nevertheless, it seems to me that the expressions 'single transaction' and 'single delivery' used by the Court in referring to the legal concept now at issue confirm the interpretation that I propose.

ber States may restrict the scope of this right of option and shall fix the details of its use' and goes on to assert that the directive does not prevent national regulations from limiting the right of option to the building or to the land.

96. Thus, the words 'supply before first occupation of buildings or parts of buildings and the land on which they stand' must be regarded as referring to a single transaction which, for the application of the Sixth Directive, should be treated as a whole. Accordingly, the exemption and the right of option which Member States apply, where appropriate, on the basis of Article 28(3), must relate to the immovable property as a whole, without it being possible to separate the supply of the buildings or parts thereof, on the one hand, from the supply of the land, on the other.

98. First of all, I should point out that this assertion has no bearing on the present case. The Federal Republic of Germany has made no use of any such supposed authority to limit the right of option in the way suggested.

99. Moreover, it should again be stressed that Article 13 C concerns supplies of buildings or parts of buildings and the land on which they stand which are not the first supply of the immovable property. In contrast, Article 28(3)(c), in conjunction with Annex G, point 1(b), which deals with the right of option that can be exercised in connection with the first supply of immovable property and is applicable in the present case, does not include a provision similar to that cited by the German Government.

97. Nevertheless, the German Government cites the last sentence of Article 13 C of the Sixth Directive, according to which 'Mem-

100. Finally, I believe it would be incompatible with the objective of harmonising

the VAT system for Member States to be able to adjust the right of option in such a way as to distort, for the supplies in question, the uniform tax treatment sought by the Sixth Directive.

immovable property, she would have had the right to deduct the VAT paid to her suppliers — including that on the fees charged by her lawyers for transferring the land. However, the basis of assessment would be the total amount of the consideration, including the value of the land.⁴⁶

101. To return to the present case, Mrs Breitsohl had a choice between (1) claiming total exemption for the transaction or (2) exercising the right of option for taxation of the supply of immovable property comprising the parts of the building and the land.

104. As pointed out by the Bundesfinanzhof in its order for reference, this might have led to double taxation.

102. If Mrs Breitsohl had opted for total exemption, she would have had to adjust her deductions under the terms of Article 20(3) of the Sixth Directive and use the simplified adjustment procedure laid down in Paragraph 15(a), subparagraph 5, of the UStG.⁴⁵

105. In its reply to a question put to it by the Court, the Commission acknowledged the existence of this risk, which it explained as follows:

103. If, on the other hand, Mrs Breitsohl had opted for taxation of the supply of

— A sells to B, free of VAT, a plot of undeveloped land whose price includes VAT previously paid in connection with certain excavation work.

⁴⁵ — Under this article of the UStG, which was adopted on the basis of Article 20(4) of the Sixth Directive, the deduction may also be adjusted upon disposal of the capital goods item in the course of the calendar year in which it is first used.

⁴⁶ — According to Article 11 A(1): 'The taxable amount shall be: (a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, 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'.

- B erects a building on the land and pays VAT on the building work.

vices for which the Sixth Directive provides.⁴⁷ In neither case are the companies concerned authorised to deduct VAT. Accordingly, they seek to pass the tax on to their customers by increasing their prices. In the next stage of the chain, this passing on of the VAT in the price results in double taxation proportional to the tax borne by the enterprises.

- B sells the property (comprising land and building) to C and exercises his right of option for taxation.

- If this right of option can be exercised only on the property as a whole, that is to say on the land plus the building, there will be double taxation inasmuch as the land will have been twice subject to VAT.

For the Commission, in the present case, the only way of avoiding this hypothetical double taxation would be to calculate the taxable amount on the basis of the value of the building and exclude the price of the land. It adds, however, that this solution must be rejected inasmuch as it is incompatible with the principle of inseparability of building and land for the application of VAT, a principle laid down in both national legal systems and the Sixth Directive.

106. According to the Commission, this risk of double taxation exists, in general, when exemption from VAT arises at an intermediate stage of the taxation chain. It cites as an example the exemption for insurance transactions and financial ser-

107. The exemptions for which the VAT system provides are known to disrupt the deduction mechanism and can result in taxable persons passing on in their prices the sums paid by way of VAT which they have not been able to deduct. If, moreover,

⁴⁷ — Article 13 B(a) and (d).

the exemption is granted at an intermediate stage, the risk of its leading to double taxation is increased.

108. Nevertheless, there is an important difference between the transactions mentioned by the Commission and first supplies of immovable property. The Community legislature decided that, for reasons of general policy common to the Member States,⁴⁸ insurance transactions and financial services should be exempt from VAT. On the other hand, under the system established by the Sixth Directive, the supply before first occupation of both building land and land which has been built on is subject to VAT. Member States were allowed to continue exempting such supplies or grant the right of option for taxation only during a transitional period. Accordingly, after that transitional period expires, there will no longer be any possibility of double taxation occurring in connection with the first supply of immovable property because the acquisition of building land will always be subject to VAT.⁴⁹

109. The provisions of the Sixth Directive do not appear to offer a solution to any

problem of double taxation which might arise in this case. Mrs Breitsohl cannot rely on Article 28(3)(f) of the Sixth Directive since, as has been shown, she did not acquire the building land *for the purpose of resale*.⁵⁰ Nor, as I have already pointed out, is it possible to separate the value of the land from that of the building for the purpose of calculating the taxable amount. There is therefore a risk of double taxation, which is incompatible with the principle of neutrality.

110. This is not the first time that the Court has had to consider the risk of double taxation without the Sixth Directive being able to provide a solution. I am thinking of the case-law relating to the application of VAT to second-hand goods and, in particular, of the judgment in *Oro Amsterdam Beheer and Concerto*.⁵¹

111. According to Article 32 of the Sixth Directive: 'The Council, acting unanimously on a proposal from the Commission, shall adopt before 31 December 1977

48 — See the justification for the proposed Sixth Directive which the Commission submitted to the Council on 29 June 1973, *Official Journal of the European Communities*, Supplement 11/73, p. 16.

49 — At least, if one leaves aside the problems that might result from the fact that the legislature departed from the Commission's proposal and instead of itself defining the concept of 'building land', decided to leave that task to the Member States [see Article 4(3)(b) of the Sixth Directive].

50 — According to this provision, during the transitional period, Member States may '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'.

51 — Case C-165/88 *Oro Amsterdam Beheer and Concerto v Inspecteur der Ouzetbelasting* [1989] ECR 4081.

a Community taxation system to be applied to used goods, works of art, antiques and collectors' items. Until this Community system becomes applicable, Member States applying a special system to these items at the time this Directive comes into force may retain that system'.

Twelve years after the time-limit indicated in that provision, a Community tax regime applicable to second-hand goods had still not been adopted.

112. In the abovementioned case, the *Gerrechtshof* (Regional Court of Appeal), Amsterdam, asked the Court whether, under the conditions which it had described, it was in conformity with Community law, and in particular with the Sixth Directive, for national tax legislation not to allow the amount of tax included in the price of goods bought for resale from non-taxable individuals to be taken into account for calculating the VAT payable by way of turnover tax on the supply of second-hand goods.

113. The Court replied that: 'On the whole the Community system of VAT is the result

of a gradual harmonisation of national legislation pursuant to Articles 99 and 100 of the Treaty. 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'.⁵²

114. Thus, the fact that, during the transitional period, Member States are allowed to maintain in force tax provisions which deviate from the common VAT system can produce undesirable effects that will only disappear when that period ends. In any event, the double taxation situations which might arise, as in the present case, cannot justify giving the Community provisions an interpretation contrary to that which follows from both their wording and their intended purpose.

⁵² — Paragraphs 21 to 23.

Conclusion

115. In the light of the above, I propose that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Bundesfinanzhof:

- (1) Articles 4 and 17 of the 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 are to be interpreted as meaning that the right to deduct VAT on transactions effected with a view to taking up a projected economic activity continues to exist even where the tax authority is already aware, when the first tax assessment is made, that the economic activity leading to taxable transactions will not be taken up.
- (2) Article 4(3)(a) of the Sixth Directive should be interpreted as meaning that in the case of a supply of buildings or parts thereof and of the land on which they stand, the option for taxation must be exercised inseparably in respect of the immovable property as a whole, including both the buildings or parts thereof and the land on which they stand.