Case C-25/03

Finanzamt Bergisch Gladbach

v

HE

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Sixth VAT Directive – Construction of a dwelling by two spouses forming a community which does not itself perform an economic activity – Use of one room by one of the co-owners for business purposes – Status of taxable person – Right to deduct – Rules governing exercise of that right – Invoicing requirements)

Opinion of Advocate General Tizzano delivered on 11 November 2004

Judgment of the Court (Second Chamber), 21 April 2005.

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Taxable persons – Definition – Person having acquired a building in order to live in it with his family, but using a part of it for the purposes of carrying out an economic activity and allocating that part to the assets of his business – Included*

(Council Directive 77/388, Arts 2, 4 and 17)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Acquisition of a capital item by a marital community – Classification of co-owning spouses as recipients of the transaction implying a right to deduct for each of them taken individually*

(Council Directive 77/388, Art. 17)

3. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Acquisition of a capital item by two spouses forming a community by marriage – Use of part of the item by one of the co-owners for the purposes of his business – Right of that co-owner to deduct all the tax attributable to that part – Condition – Amount deducted not exceeding the limits of the taxable person's interest in the co-ownership of that item*

(Council Directive 77/388, Art. 17)

4. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Obligations of the taxable person – Holding of an invoice containing certain information – Acquisition of a building by two spouses forming a community by marriage – Use of part of the building by one of the co-owners for business purposes – Requirement for the latter to hold an invoice issued in his name and stating the proportions of the payments and tax corresponding to his interest in the property held in co-ownership – None*

(Council Directive 77/388, Arts 18(1)(a) and 22(3))

1. Where a person purchases a house, or has a house built, in order to live in it with his family he is acting as a taxable person, and is thus entitled to make deductions under Article 17 of Sixth Directive 77/388, both in its original version and following its amendment by Directive 91/680, in so far as he uses one room in that building as an office for the purposes of carrying out an economic activity, albeit an ancillary one, within the meaning of Articles 2 and 4 of the directive and allocates that part of the building to the assets of his business.

(see para. 52, operative part)

2. Where a marital community which does not have legal personality and does not itself carry out an economic activity within the meaning of Sixth Directive 77/388, both in its original version and following its amendment by Directive 91/680, places an order for a capital item, the co-owners forming that community are to be regarded as recipients of the transaction for the purposes of the directive.

Given that the community is not a taxable person and, on that account, cannot deduct input tax, any such entitlement to deduct must, in accordance with the principle of neutrality, be granted to the spouses taken individually in so far as they have the status of taxable person.

(see paras 57-58, operative part)

3. Where spouses forming a community by marriage purchase a capital item, part of which is used exclusively for business purposes by one of the co-owning spouses, that spouse is entitled to deduct in respect of all the input value added tax attributable to the share of the item which he uses for the purposes of his business, in so far as the amount deducted does not exceed the limits of the taxable person’s interest in the co-ownership of the item.

If the operator in question could deduct only a proportion of the tax which he has paid in respect of the part which is used entirely for his taxable transactions – a proportion calculated by reference to his interest in the co-ownership of the building as a whole – he would not be relieved entirely of the burden of the tax relating to the item which he uses for the purposes of his economic activity, contrary to the requirements of the principle of neutrality.

(see paras 71, 74, operative part)

4. Articles 18(1)(a) and 22(3) of Sixth Directive 77/388, both in its original version and following its amendment by Directive 91/680, do not require, in order to be able to exercise the right to deduct, a taxable person who has acquired in community with his spouse a building, part of which is used for business purposes, to hold an invoice issued in his name and stating the proportions of the payments and value added tax corresponding to his interest in the property held in co-ownership. An invoice issued to the co-owning spouses without distinguishing between them and without reference to such apportionment is sufficient for that purpose.

(see para. 83, operative part)

JUDGMENT OF THE COURT (Second Chamber)

21 April 2005 (*)

(Sixth VAT Directive – Construction of a dwelling by two spouses forming a community which does not itself perform an economic activity – Use of one room by one of the co-owners for business purposes – Status of taxable person – Right to deduct – Rules governing exercise of that right – Invoicing requirements)

In Case C-25/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 29 August 2002, received at the Court on 23 January 2003, in the proceedings

Finanzamt Bergisch Gladbach

v

HE,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, R. Schintgen (Rapporteur), G. Arestis and J. Klu?ka, Judges,

Advocate General: A. Tizzano,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2004,

after considering the observations submitted on behalf of:

– the Finanzamt Bergisch Gladbach, by A. Eich, acting as Agent,

– HE, by C. Fuhrmann, Rechtsanwalt, and K. Korn, Steuerberater,

– the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2004,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2, 4, 17, 18 and 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), both in their original version and following their amendment by 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) (hereinafter ‘the Sixth Directive’).

2 The reference was made in proceedings between the Finanzamt Bergisch Gladbach (‘the

Tax Office') and HE, and seeks to ascertain whether, and if so to what extent, HE, who with his spouse co-owns a residential building in which he alone uses one of its rooms exclusively for business purposes, is entitled to deduct the value added tax ('VAT') charged on the construction of the building.

Legal framework

Community legislation

3 Article 2, which forms Title II, entitled 'Scope', of the Sixth Directive, provides:

'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;

2. the importation of goods.'

4 Article 4, which forms Title IV, entitled 'Taxable persons', of the directive, provides:

'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.

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. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

…'

5 Article 5, 'Supply of goods', in Title V, entitled 'Taxable transactions', of the Sixth Directive provides in paragraph 1:

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

6 Article 17, 'Origin and scope of the right to deduct', which forms part of Title XI, entitled 'Deductions', of the Sixth Directive, provides:

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

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

…

6. Before a period of four years at the latest has elapsed from the date of entry into force of this directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value added tax. Value added tax shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Until the above rules come into force, Member States may retain all the exclusions provided for

under their national laws when this directive comes into force.

…’

7 Directive 91/680 was adopted during the period at issue in the main proceedings. Article 3 thereof required the Member States to adapt their value added tax systems to the provisions laid down by the directive and to take the measures necessary for those adaptations to enter into force on 1 January 1993. Article 17(2), as amended by Directive 91/680, provides:

‘2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country;

…’

8 Article 18, entitled ‘Rules governing the exercise of the right to deduct’ and likewise forming part of Title XI of the Sixth Directive, is worded as follows:

‘1. To exercise his right to deduct, the taxable person must:

(a) in respect of deductions under Article 17(2)(a), hold an invoice drawn up in accordance with Article 22(3);

…’

9 Under Article 22, ‘Obligations under the internal system’, in Title XIII, entitled ‘Obligations of persons liable for payment’, of the Sixth Directive:

‘…

3.(a) Every taxable person shall issue an invoice, or other document serving as invoice, in respect of all goods and services supplied by him to another taxable person, and shall keep a copy thereof.

…

(b) The invoice shall state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions.

(c) The Member States shall determine the criteria for considering whether a document serves as an invoice.

…

8. … Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

…’

10 Article 22 was amended as follows by Directive 91/680:

‘…

3.(a) Every taxable person shall issue an invoice, or other document serving as invoice, in respect of goods and services which he has supplied or rendered to another taxable person or to a non-taxable legal person. … A taxable person shall keep a copy of every document issued.

…

(b) The invoice shall state clearly the price exclusive of tax and the relevant tax at each rate as well as any exemptions.

…

(c) Member States shall lay down the criteria that shall determine whether a document may be considered an invoice.

…

8. 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.

…'

National legislation

11 The relevant provisions of the German Law on turnover tax (Umsatzsteuergesetz, 'the UStG'), in the versions applicable during the tax years 1991 to 1993 (see BGBl. 1991 I, p. 351, and BGBl. 1993 I, p. 566, respectively), at issue in the main proceedings, were worded as follows:

'Paragraph 14

Issue of invoices

1. When a taxable person supplies goods or services which are taxable under Paragraph 1(1), points 1 and 3, he may, and to the extent to which he is carrying out these transactions for the purposes of the undertaking of another taxable person must, at the latter's request, issue invoices which show separately the amount of the tax. The invoices must contain the following information:

1. the name and address of the taxable person making the supply of goods or services;

2. the name and address of the recipient of the supply of goods or services;

3. the amount and the usual commercial description of the goods sold or the nature and extent of the services supplied;

4. the date of the supply of goods or services;

5. the sum paid for the supply of goods or services (Paragraph 10), and

6. the amount of tax on the sum paid (point 5).

…

Paragraph 15

Deduction of input tax

1. A taxable person may deduct the following amounts of input tax:

1. the tax shown separately on invoices within the meaning of Paragraph 14 issued by other taxable persons for supplies of goods or services made for the purposes of his undertaking. When the amount of the tax shown separately relates to payment for transactions of that kind before completion, it is deductible from the time when the invoice is issued and payment has been made;

…'

12 Since the Bundesfinanzhof (Federal Finance Court) mentioned in its reference the relevant legal situation in the Republic of Austria, it should be stated that in Austria Paragraph 12(2), point 2, of the 1994 Law on turnover tax (Umsatzsteuergesetz, BGBl. 663/1994) provides as follows:

'The following supplies of goods and services and imports are not treated as made for the purposes of the undertaking:

(a) those in respect of which the consideration is not principally expenses (costs) which are deductible for the purposes of Paragraph 20(1), points 1 to 5, of the 1988 Law on income tax (Einkommensteuergesetz, BGBl. 100/1988)

…'

13 The latter provision is worded as follows:

'The following may not be deducted from individual receipts:

…

2. …

(d) costs or expenses relating to a home office and to its equipment as well as to fixed installations in the home. If a home office is the centre for all the undertaking's business and for the taxable person's professional activity, the costs and expenses relating to it, including fitting out costs, are deductible.'

The case before the national court and the questions referred for a preliminary ruling

14 It appears from the case-file in the main proceedings that during 1990 HE and his spouse acquired co-ownership of a plot of land. Ownership was shared as to one quarter for the husband and three quarters for his spouse. The spouses subsequently commissioned various undertakings to construct a dwelling on their plot of land. At the hearing before the Court, HE's lawyer stated that ownership of the building was likewise shared as to one quarter for the husband and three quarters for the spouse. All the invoices relating to construction were addressed to Mr and Mrs HE and made no distinction by reference to the share of each of the co-owners.

15 It is not disputed that HE used one room in that house as an office in order to pursue, in parallel with his paid employment, an ancillary activity as a specialist writer.

16 In his VAT returns for the period covering the tax years 1991, 1992 and 1993, HE deducted, on the basis of the invoices relating to construction of the building, proportionate amounts in

respect of which he took the deductible proportion to be 12%, corresponding to the ratio between the area of the office and the total living area of the house.

17 The Tax Office refused those deductions, however, on the ground that the owner of the building and the recipient of the construction services was the community comprising both spouses and not HE alone.

18 HE's appeal against the decision refusing to allow the deductions succeeded in part at first instance before the Finanzgericht (Finance Court).

19 According to that court, as a matter of civil law HE was the customer and recipient of the construction work attributable to the office only in respect of one quarter. In the absence of any other factors, the court based its finding on the division as between the spouses of ownership of the building. In view of the fact that his spouse owned a three-quarter share, the Finanzgericht found that HE was entitled to deduct input VAT attributable to the office only to the extent of one quarter, in other words one quarter of 12% of the total input tax. In that court's view, the fact that the invoices were made out to both spouses without differentiating between them was immaterial in that context.

20 Both the Tax Office and HE appealed on a point of law against the judgment to the Bundesfinanzhof.

21 The Tax Office maintains that a distinction must be drawn according to whether the supplies at issue in the main proceedings were made to the community formed by the spouses or to just one of the co-owners. If the identity of the customer is not clear from the order made for the work, the community is deemed to be the recipient of the work. The way in which ownership of the building is shared between HE and his spouse is irrelevant in this regard. In any event, the fact that there was no apportionment of the input VAT between the spouses and the fact that the invoices were issued to both spouses without distinction between them preclude HE from any entitlement to deduction.

22 By contrast, HE submits that since he alone has a right of user over the part of the building used as an office, he must be regarded as the sole customer so far as the construction work in relation to that part of the building is concerned. In his submission, to refuse the deduction purely on the basis of national civil law is incompatible with the common system of VAT. Contrary to the finding of the court at first instance, the right to deduct should extend to all the VAT relating to construction of the office, that is to say 12% of all the VAT relating to the house.

23 The Bundesfinanzhof notes that, under German law, when an order is placed by a number of persons acting not as an autonomous legal person – a partnership or company – but simply as a de facto community, each member of the community is the recipient of the supply to the extent of the proportion stipulated as his. For the purposes of VAT, in the case at issue in the main proceedings the community as such did not act and therefore the two spouses must be regarded as the recipients of the supply concerned.

24 The Bundesfinanzhof also notes that, according to the findings of the Finanzgericht, only HE carried on a business activity in the office located in the building which the spouses had jointly built. Under its case-law, where property is acquired in common, each party who has acquired an asset in order to use it for business purposes is entitled to make a deduction not exceeding his interest in the community. In a case in which spouses had rented business premises but only one spouse used the premises for business purposes, the Bundesfinanzhof relied, in the absence of any other factors, on Paragraph 742 of the German Civil Code (Bürgerliches Gesetzbuch), under which the rights and obligations are to be divided as to half between the members of the

community, and consequently held that the member using the asset for business purposes was entitled to deduct only to the extent of one half of the total input tax.

25 That was also the conclusion reached in this instance by the Finanzgericht, which rightly held that that reasoning was not called into question by the fact that the invoices had been made out to the two spouses.

26 The Bundesfinanzhof is none the less in doubt as to whether that result is compatible with the Sixth Directive.

27 First of all, it observes, it is not possible to conclude with certainty either that the supplies relating to the construction of a residential building, in which an office has been fitted out, were obtained by HE 'as a taxable person' and 'for the purposes of his taxable transactions' within the meaning of Article 17(2) of the Sixth Directive, or that they were obtained for private residential purposes, a fortiori because, for example, the Austrian authorities exclude the right to deduct in such a case.

28 In that context, it is also necessary to ascertain whether or not expenditure on the construction of a home office is 'strictly business expenditure': if not, it is itself ineligible for deduction by virtue of the second sentence of Article 17(6) of the Sixth Directive.

29 If there is in principle a right to deduct in such a case, it is then necessary to decide how that right is to be exercised under Community law where a community by undivided shares or a marital community, which does not itself act as a taxable person, acquires a capital item.

30 Finally, there is some doubt as to how the conditions set out in Articles 18(1)(a) and 22(3)(a) and (c) of the Sixth Directive should be applied, in the light of national case-law according to which the requirements relating to the additional particulars to be given on the invoice as regards the respective shares are of little importance.

31 It was in those circumstances that the Bundesfinanzhof decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a person who purchases or builds a house for his own residential purposes acting as a taxable person in the purchasing or building of that residence if he intends to use one of its rooms as a "home office" for engaging in an ancillary activity as a self-employed person?

(2) If Question 1 is answered in the affirmative:

Where a community by undivided shares or a marital community which does not itself operate as a business places an order in common for a capital item, should it be assumed that the purchase concerned is made by a non-taxable person who is not entitled to deduct the value added tax charged on the purchase as input tax, or are the members of that community the recipients of the transaction?

(3) If Question 2 is answered in the affirmative:

Where spouses in a community by undivided shares purchase a capital item but that item is used by only one of them for the purposes of his business:

(a) is that spouse entitled to effect only a pro rata deduction in respect of the input tax attributable to his share as purchaser, or

(b) is that spouse entitled under Article 17(2)(a) of the Sixth Directive to deduct as input tax the

proportion attributable to his business use of the item as a whole (subject to the invoicing requirements set out in Question 4)?

(4) For that spouse/co-owner to exercise his right to deduct in accordance with Article 18 of the Sixth Directive, must he hold an invoice, as provided for under Article 22(3) of the directive, which has been issued to him alone and states the proportion of the payments and corresponding tax attributable to him, or is it sufficient for the spouses/co-owners to be issued with the invoice without any such apportionment of the amounts due?'

Preliminary observations

32 It should be noted at the outset that the documents before the Court show that:

– the spouses HE acquired a plot of land as co-owners, on which they built a dwelling house for themselves which they also co-owned;

– in the community thus formed by them as a result of their marriage, the husband's share in both the land and the house is one quarter and that of his spouse three quarters;

– as well as his salaried employment, HE has an ancillary activity as a self-employed specialist author;

– for the purpose of that activity, he has exclusive use of one room in the house as an office; it is not disputed that that room represents 12% of the total living area of the building;

– his spouse does not carry out an economic activity within the meaning of the Sixth Directive and at no time makes use of the office;

– nor does the community formed by the spouses HE as a result of their marriage carry out an economic activity within the meaning of the Sixth Directive: it does not have legal personality, nor does it have any independent power to act;

– since they do not have the status of taxable persons, neither the wife nor the community is entitled to make deductions under the Sixth Directive;

– the invoices relating to the construction of the house were made out to the spouses without distinguishing between them and did not state the proportions of the price and VAT corresponding to the share of ownership of each of the spouses;

– HE claims deduction of input VAT in respect of the whole of the office used by him exclusively for business purposes, namely 12%, whereas he holds a 25% share in the ownership of the property.

33 It is in the light of those particular features of the case before the national court that the questions referred for a preliminary ruling must be answered.

34 It should be added that, for the purpose of those answers, there is no need to distinguish between Articles 17 and 22 of the Sixth Directive as originally enacted and those articles as amended by Directive 91/680, as their scope is to be regarded as identical in substance for the purpose of the interpretation which the Court is required to give in the present case.

The first question

35 By this question the referring court is essentially asking whether, where a person acquires a

house, or has a house built, in order to live in it with his family, he is acting as a taxable person and is therefore entitled to make deductions under Article 17 of the Sixth Directive in so far as he uses one room in that building as an office for the purposes of carrying on, as an ancillary activity, an economic activity within the meaning of Articles 2 and 4 of the directive.

36 In that regard, it is to be remembered first of all that the Sixth Directive establishes a common system of VAT based, inter alia, on a uniform definition of taxable transactions (see Case C?305/01 *MKG?Kraftfahrzeuge?Factoring* [2003] ECR I?6729, paragraph 38).

37 It follows from Article 2 of the directive, which defines the scope of VAT, in conjunction with Article 4 thereof, that only activities of an economic nature, provided that they are carried out within the territory of the Member State by a taxable person acting as such, are subject to VAT.

38 Under Article 4(1) of the Sixth Directive, 'taxable person' means any person who independently carries out one of the economic activities mentioned in Article 4(2).

39 'Economic activity' is defined in Article 4(2) as encompassing 'all' activities of producers, traders and persons supplying services including the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis. 'Exploitation' in that context refers, in accordance with the requirements of the principle that the common system of VAT should be neutral, to all those transactions, whatever their legal form may be (see Case C?8/03 *BBL* [2004] ECR I?0000, paragraph 36).

40 It is settled case-law that Article 4 of the Sixth Directive thus gives VAT a very wide scope, comprising all stages of production, distribution and the provision of services (see, inter alia, Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 17, and *MKG-Kraftfahrzeuge-Factoring*, cited above, paragraph 42).

41 On the basis of the criteria set out in Article 4 of the directive, which are the sole point of reference for assessing a person's status as a taxable person (see *Van Tiem*, paragraph 25, and *BBL*, paragraph 36), a person such as HE must be regarded as a taxable person.

42 According to the documents before the Court, at the material time, which stretches from 1991 to 1993, HE did in fact independently carry out an economic activity – albeit an ancillary one – for the purposes of Article 4 of the directive.

43 Furthermore, it follows from Article 17(2) of the Sixth Directive that, in so far as the taxable person, acting as such, uses the asset for the purposes of his taxable transactions, he is entitled to deduct VAT due or paid in respect of the asset. Conversely, where the asset is not used for the taxable person's economic activities within the meaning of Article 4 of the directive but is used by him for private consumption, no right to deduct can arise (see, to that effect, Case C?97/90 *Lennartz* [1991] ECR I?3795, paragraphs 8 and 9).

44 On that point, it appears from the documents before the Court that, at the material time, for the purpose of carrying out his independent economic activity as a specialist author HE had exclusive use of one room in the building which he and his spouse had had built and of which he is a co-owner.

45 The fact that in this instance HE used only a part of that building for the purpose of his economic activity is irrelevant.

46 The Court has consistently held that where a capital item is used both for business and for private purposes the taxpayer has the choice, for the purposes of VAT, of (i) allocating that item

wholly to the assets of his business, (ii) retaining it wholly within his private assets, thereby excluding it entirely from the system of VAT, or (iii) – as in the case before the national court – integrating it into his business only to the extent to which it is actually used for business purposes (see, to that effect, Case C?415/98 *Bakcsi* [2001] ECR I?1831, paragraphs 24 to 34, and Case C?269/00 *Seeling* [2003] ECR I?4101, paragraphs 40 and 41).

47 In the latter case, it must therefore be held that, to the extent to which the item was used for business purposes, the person concerned acted as a taxable person in the purchasing or construction of the building, which, to that extent, must be regarded as being used for the purposes of that person's taxable transactions under Article 17(2)(a) of the Sixth Directive.

48 That interpretation is borne out by the principle of neutrality, by virtue of which the person concerned must bear the burden of VAT only when it relates to goods or services which are used by him for his private consumption and not for his taxable business activities.

49 As the Commission has rightly pointed out, the doubts expressed by the referring court as to whether a transaction such as that at issue in the main proceedings is within the scope of the Sixth Directive are groundless.

50 The fact that another Member State (as in this instance the Republic of Austria) excludes the right to deduct in the case of a home office is irrelevant, in the light of the common nature of the system of VAT and the fact that it seeks to achieve harmonisation, as a result of which derogations to the right to deduct are permitted only in the cases expressly laid down by the Sixth Directive with a view to ensuring that they are applied in the same way throughout the Member States.

51 Furthermore, in so far as the referring court relies on Article 17(6) of the Sixth Directive, it must be stated, first, that there is as yet in Community law no Council measure which excludes from the right to deduct expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment. Further, the German legislation applicable when the directive entered into force did not exclude the right to deduct for home offices. Finally, the Federal Republic of Germany has not been authorised to introduce any special measures for derogation from the directive under Article 27 thereof.

52 In the light of the foregoing considerations, the answer to the first question must be that where a person purchases a house, or has a house built, in order to live in it with his family he is acting as a taxable person, and is thus entitled to make deductions under Article 17 of the Sixth Directive in so far as he uses one room in that building as an office for the purposes of carrying out an economic activity, albeit an ancillary one, within the meaning of Articles 2 and 4 of the directive and allocates that part of the building to the assets of his business.

The second question

53 The essential issue raised by this question is whether, where a marital community which does not have legal personality and does not itself carry out an economic activity within the meaning of the Sixth Directive places an order for a capital item, the co-owners forming the community must be regarded as recipients of the transaction for the purposes of the directive.

54 In that regard, according to the documents available to the Court the community formed by the spouses HE as a result of their marriage did not itself carry out an economic activity either as a civil-law partnership with its own legal personality or in a form which, although without legal personality, was in fact able to act independently. The spouses merely acted jointly in fact in purchasing the land and building the property.

55 Thus, for the purposes of VAT the community did not act in the transactions at issue in the main proceedings and cannot therefore be regarded as a taxable person within the meaning of the Sixth Directive.

56 In those circumstances and in the absence of any other relevant factors, it must be held that the spouses HE, in their capacity as co-owners of the capital item, are recipients of the supply of that item for the purposes of the Sixth Directive.

57 That result is also in keeping with the principle of neutrality. Given that the community formed by the spouses is not a taxable person and, on that account, cannot deduct input tax, any such entitlement to deduct must be granted to the spouses taken individually in so far as they have the status of taxable person.

58 Therefore, the answer to the second question must be that where a marital community which does not have legal personality and does not itself carry out an economic activity within the meaning of the Sixth Directive places an order for a capital item, the co-owners forming that community are to be regarded as recipients of the transaction for the purposes of the directive.

The third question

59 By this question, the referring court is asking in substance whether, where spouses in a community by marriage purchase a capital item, part of which is used exclusively for business purposes by one of the co-owning spouses, that spouse is entitled to deduct in respect of all the input VAT attributable to the share of the item which he uses for the purposes of his business or only in respect of the proportion of input VAT corresponding to his share as purchaser.

60 In order to reply to that question, it must be borne in mind that the national court at first instance held that, from the point of view of German civil law, HE was a recipient of the construction work attributable to the office only in respect of one quarter. It took as its basis for that finding the division of ownership of the land between the co-owning spouses, the husband’s interest amounting to only a 25% share of ownership. That court therefore held that HE was entitled to deduct only one quarter of the input tax relating to the office used for the purposes of the business, in other words one quarter of 12% of the total input VAT.

61 HE contends that he is entitled under the Sixth Directive to deduct the amount of input VAT corresponding to the share represented by his business use of the item in its entirety, namely 12% of the total amount of input tax.

62 In that regard, it must be observed at the outset that, as the title itself shows, the Sixth Directive seeks to establish a common system of VAT by defining in a uniform manner, and in accordance with Community rules, taxable transactions (see paragraph 36 of this judgment and the case-law cited).

63 Furthermore, it is settled case-law that the terms of a provision of the Sixth Directive which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, in order to prevent differences from one Member State to another in the way the VAT system is applied (see Case C?497/01 *Zita Modes* [2003] ECR I?0000, paragraph 34).

64 As regards more specifically Article 5(1) of the Sixth Directive, by virtue of which the transfer of the right to dispose of tangible property as owner is regarded as a supply of goods, it follows from the case-law of the Court that ‘supply of goods’ does not refer to the transfer of ownership in

accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property. The purpose of the directive might be jeopardised if the requirements for there to be a supply of goods, which is one of the three taxable transactions, were to differ according to the civil law of the Member State concerned (see, to that effect, Case C?320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I?285, paragraphs 7 and 8; Case C?291/92 *Armbrecht* [1995] ECR I?2775, paragraphs 13 and 14; and Case C?185/01 *Auto Lease Holland* [2003] ECR I?1317, paragraphs 32 and 33).

65 Consequently, the Court cannot accept either the position taken by the national court of first instance, which bases its reasoning on the rules of ownership under German civil law, or that adopted by the Commission in its written observations, according to which HE's claim could not be upheld if, under the national rules concerning the system of matrimonial property, he was not entitled to dispose of the capital item in its entirety.

66 Moreover, the question as to which of the co-owners in fact settled the invoices relating to the construction of the building is irrelevant for the purposes of replying to the question referred to the Court, since it is clear from Article 11.A(1)(a) of the Sixth Directive that consideration may also be provided by a third party.

67 In order to reply to the third question, it is necessary instead to bear in mind that in this instance the home office is used by HE personally and wholly for the purposes of his business and that he has decided to allocate this room entirely to his business. Hence it is evident that he in fact disposes of this room as owner and therefore fulfils the condition deriving from the case-law referred to at paragraph 64 of this judgment.

68 It should be added that HE is seeking to deduct input VAT in an amount equivalent to that relating to the share in the item which he uses exclusively for business purposes and which he has decided to treat as an asset of the business.

69 Moreover, in circumstances such as those of the main proceedings, the office is not liable to give rise to an entitlement to deduct on the part of any operator other than HE and consequently there is unlikely to be any fraud or abuse in the present case.

70 HE's claim for deduction of all the VAT attributable to the office must, in those circumstances, be regarded as in conformity with the deduction system, which is 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 VAT thus ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, inter alia, *Zita Modes*, cited above, paragraph 38).

71 It follows that an operator who, like HE, has allocated the whole of the room used as an office to the assets of his business must be entitled to deduct all the VAT directly attributable to the cost of the various constituents of the price of that part of the building. If the operator could deduct only a proportion of the VAT which he has paid in respect of that room, which is used entirely for his taxable transactions – a proportion calculated by reference to his interest in the co-ownership of the building as a whole – he would not be relieved entirely of the burden of the tax relating to the item which he uses for the purposes of his economic activity, contrary to the requirements of the principle of neutrality.

72 That interpretation is also in keeping with the principle of equal treatment, the corollary of the principle of neutrality.

73 Thus, two taxable persons who objectively are in the same situation in that each of them has exclusive use of the same percentage of a building as an office which he has allocated to his business are treated in the same way, since they are entitled to deduct the same amount of input VAT. However, account is taken of the difference inherent in their situation – one having sole ownership of the building whilst the other owns only a share in it – by virtue of the fact that the first person is entitled to deduct 100% of the input VAT as long as he chooses to integrate the mixed-use building in its entirety into his business, whilst the second person can never be relieved of VAT in excess of the amount which he has actually borne, namely the amount relating to his share in the co-ownership (25% in the main proceedings).

74 In the light of all of those considerations, the answer to the third question must be that where spouses forming a community by marriage purchase a capital item, part of which is used exclusively for business purposes by one of the co-owning spouses, that spouse is entitled to deduct in respect of all the input VAT attributable to the share of the item which he uses for the purposes of his business, in so far as the amount deducted does not exceed the limits of the taxable person's interest in the co-ownership of the item.

The fourth question

75 This question seeks in essence to ascertain whether Articles 18(1)(a) and 22(3) of the Sixth Directive require a taxable person, in order to be able to exercise the right to deduct in circumstances such as those of the case before the national court, to hold an invoice issued in his name stating the proportions of the payments and VAT corresponding to his interest in the property held in co-ownership, or whether an invoice issued to the co-owning spouses without distinguishing between them and without reference to such apportionment is sufficient for that purpose.

76 In that regard, it follows in particular from Article 22(3)(b) of the Sixth Directive, both in its original version and following its amendment by Directive 91/680, that for the purposes of exercising the right to deduct the invoice must state clearly the price exclusive of tax and the corresponding tax at each rate as well as, where appropriate, any exemptions.

77 It follows that, apart from those minimum requirements, the Sixth Directive does not prescribe any other obligatory particulars, such as those referred to in the fourth question referred to the Court.

78 Under Article 22(3)(c) of the Sixth Directive, the Member States are of course permitted to determine the criteria for considering that a document serves as an invoice and, under paragraph 8 of the same article, they have the power to impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

79 The Federal Republic of Germany has used that option. Thus, in Germany, the UStG provides that invoices must include the name and address of the recipient of the transaction and the quantity and the usual commercial description of the goods supplied or the nature and extent of the services supplied, as well as the consideration for the transaction.

80 However, as the Commission has observed, it is settled case-law that the requirement of particulars on the invoice other than those set out in Article 22(3)(b) of the Sixth Directive, as a condition for the exercise of the right to deduct, must be limited to what is necessary to ensure the correct levying of VAT and permit supervision by the tax authorities. Moreover, such particulars must not, by reason of their number or technical nature, render the exercise of the right to deduct practically impossible or excessively difficult (Joined Cases 123/87 and 330/87 *Jeunehomme and EGI*

[1988] ECR 4517, paragraph 17). Thus, the measures which the Member States may adopt under Article 22(8) of the directive in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than what is necessary to attain such objectives. They may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation (Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 52, and Case C?454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I?6973, paragraph 59).

81 In a case such as that in the main proceedings, there is no risk of fraud or abuse, since the case concerns a very specific type of community of property, namely co-ownership in fact as between spouses, a community which does not itself have the status of taxable person and within which only one of the spouses carries out an economic activity. Thus, there is no possibility of the invoices, even if they are issued to 'Mr and Mrs HE' without stating the proportions of the price and the VAT corresponding to the interest of each of the spouses in the property they co-own, being used by the spouse who is not a taxable person, or by the community, in order to obtain a further deduction of the same amount of VAT.

82 In those circumstances it would be incompatible with the principle of proportionality to deny the spouse who is a taxable person the right to deduct on the sole ground that the invoices do not contain the particulars prescribed by the applicable national law.

83 It follows that the answer to the fourth question must be that Articles 18(1)(a) and 22(3) of the Sixth Directive do not require the taxable person, in order to be able to exercise the right to deduct in circumstances such as those at issue in the main proceedings, to hold an invoice issued in his name and stating the proportions of the payments and VAT corresponding to his interest in the property held in co-ownership. An invoice issued to the co-owning spouses without distinguishing between them and without reference to such apportionment is sufficient for that purpose.

Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

1. **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, both in its original version and following amendment by 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, is to be interpreted as follows:**

– **where a person purchases a house, or has a house built, in order to live in it with his family he is acting as a taxable person, and is thus entitled to make deductions under Article 17 of the Sixth Directive in so far as he uses one room in that building as an office for the purposes of carrying out an economic activity, albeit an ancillary one, within the meaning of Articles 2 and 4 of the directive and allocates that part of the building to the assets of his business;**

– **where a marital community which does not have legal personality and does not itself carry out an economic activity within the meaning of the Sixth Directive places an order for a capital item, the co-owners forming that community are to be regarded as recipients of**

the transaction for the purposes of the directive;

– **where spouses forming a community by marriage purchase a capital item, part of which is used exclusively for business purposes by one of the co-owning spouses, that spouse is entitled to deduct in respect of all the input value added tax attributable to the share of the item which he uses for the purposes of his business, in so far as the amount deducted does not exceed the limits of the taxable person's interest in the co-ownership of the item;**

– **Articles 18(1)(a) and 22(3) of the Sixth Directive do not require the taxable person, in order to be able to exercise the right to deduct in circumstances such as those at issue in the main proceedings, to hold an invoice issued in his name and stating the proportions of the payments and value added tax corresponding to his interest in the property held in co-ownership. An invoice issued to the co-owning spouses without distinguishing between them and without reference to such apportionment is sufficient for that purpose.**

[Signatures]

* Language of the case: German.