Case C-460/07

Sandra Puffer

v

Unabhängiger Finanzsenat, Außenstelle Linz

(Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Sixth VAT Directive – Article 17(2) and (6) – Right to deduct input tax – Construction costs of a building allocated to a taxable person's business – Article 6(2) – Private use of part of the building – Financial advantage compared to non-taxable persons – Equal treatment – State aid under Article 87 EC – Exclusion from right to deduct)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Capital goods allocated in their entirety or in part to a taxable person's private assets*

(Council Directive 77/388, Art. 17)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Construction of a mixed-use building*

(Council Directive 77/388, Arts 6(2)(a) and 17(2)(a))

3. *State aid – Meaning*

(Art. 87(1) EC)

4. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Exclusions from the right of deduction – Option for Member States to retain exclusions existing on entry into force of the Sixth Directive*

(Council Directive 77/388, Art. 17(6))

1. Where a taxable person chooses to treat an entire building as forming part of the assets of his business and uses part of that building for private purposes he is both entitled to deduct the input value added tax paid on all construction costs relating to that building and subject to the corresponding obligation to pay value added tax on the amount of expenditure incurred to effect such use. By contrast, if a taxable person chooses, when acquiring capital goods, to allocate them entirely to his private assets or to allocate only part of them to his business activities, no right to deduct can arise in relation to the part allocated to his private assets. On that hypothesis, subsequent use for business purposes of the part of the goods allocated to private assets is not capable of giving rise to a right to deduct, because Article 17(1) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes lays down that the right to deduct is to arise at the time when the deductible tax becomes chargeable. There is no adjustment mechanism to that effect under Community legislation as it stands.

(see paras 42-44)

2. Articles Articles 6(2)(a) and 17(2)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes do not infringe the general principle of equal treatment under Community law by conferring on taxable persons, by means of a full and immediate right to deduct input value added tax on the construction of a mixed-use building and the subsequent staggered imposition of that tax on the private use of the building, a financial advantage compared with non-taxable persons and with taxable persons who use their building only as a private residence.

In that connection, with regard to the private use of mixed-use capital goods, it is possible that Article 6(2)(a) of the Sixth Directive does not ensure, on its own, the same treatment of taxable persons and non-taxable persons or of other taxable persons who acquire goods of the same kind on a private basis and are, as a result of that fact, bound to pay immediately and in full the value added tax imposed. It cannot be ruled out that the objective of relieving the taxable person entirely, by the mechanism laid down in Article 17(1) and (2) and Article 6(2)(a) of the Sixth Directive, of the burden of value added tax payable or paid in the course of all their economic activities, including any financial charge encumbering the property during the period between the initial investment expenditure and the commencement of actual business use, can give rise to a financial advantage with regard to the private use of those goods by those taxable persons. Thus, the possible difference of treatment of taxable and non?taxable persons results from the application of the principle of fiscal neutrality, the primary purpose of which is to ensure the equal treatment of taxable persons. That potential difference results, also, from the pursuit by those persons of their economic activities as defined in Article 4(2) of the Sixth Directive. Finally, it is linked to the specific status of taxable persons provided for in the Sixth Directive, which results inter alia in the fact that, in accordance with Article 21 of that directive, they are liable to value added tax and must collect it. Since those characteristics distinguish the position of taxable persons from that of non-taxable persons who do not exercise such economic activities, a possible difference in treatment results from the application of different rules to different situations, thus not giving rise to any infringement of the right to equal treatment. The same applies to a taxable person who has allocated the capital goods, in their entirety, to his private assets, since he does not intend to use those goods to pursue his economic activities, but to use them for private purposes. Nor can a different view be reached as regards a taxable person who carries out only exempt operations, since such a taxable person is subject to the same value added tax burden as a non-taxable person and his status thus largely similar to the latter.

(see paras 55-59, 62, operative part 1)

3. Article 87(1) EC must be interpreted as not precluding a national measure which transposes Article 17(2)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes and which provides that the right to deduct input value added tax payable is confined to taxable persons carrying out taxable transactions, to the exclusion of those carrying out only exempt transactions, in so far as that national measure may confer a financial advantage only on taxable persons carrying out taxable transactions.

The restriction of the right to deduct input tax payable to only taxable transactions is an integral part of the value added tax system set up by Community legislation which must be implemented in the same way by all Member States. Consequently, the condition of intervention by the State is not met, meaning that Article 87(1) EC cannot apply.

(see paras 70-71, operative part 2)

4. Article 17(6) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that the derogation it contains does not apply to a provision of national law which amends legislation existing when that directive entered into force, which is based on an approach which differs from that of the previous legislation and which laid down new procedures. In that regard, it is irrelevant whether the national legislature amended the previous national legislation on the basis of a correct or incorrect interpretation of Community law. The question whether such an amendment of a provision of national law also affects, with regard to the applicability of the second subparagraph of Article 17(6) of Sixth Directive 77/388, another provision of national law depends on whether those provisions of national law are interdependent or autonomous, which is a matter for the national court to determine.

(see para. 98, operative part 3)

JUDGMENT OF THE COURT (Third Chamber)

23 April 2009 (*)

(Sixth VAT Directive – Article 17(2) and (6) – Right to deduct input tax – Construction costs of a building allocated to a taxable person's business – Article 6(2) – Private use of part of the building – Financial advantage compared to non-taxable persons – Equal treatment – State aid under Article 87 EC – Exclusion from right to deduct)

In Case C?460/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Verwaltungsgerichtshof (Austria), made by decision of 24 September 2007, received at the Court on 11 October 2007, in the proceedings

Sandra Puffer

v

Unabhängiger Finanzsenat, Außenstelle Linz,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J.N. Cunha Rodrigues, J. Klu?ka, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 16 October 2008,

after considering the observations submitted on behalf of:

– S. Puffer, by F. Schubert and W.-D. Arnold, Rechtsanwälte, and by C. Prodinger, tax consultant,

– the Unabhängiger Finanzsenat, Außenstelle Linz, by T. Krumenacker, acting as Agent,

– the Austrian Government, by J. Bauer, acting as Agent,

– the Commission of the European Communities, by K. Gross and D. Triantafyllou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2008,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 17 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; 'the Sixth Directive'), and its compatibility with the general principle of equal treatment under Community law.

2 That reference was made in proceedings between Ms Puffer and the Unabhängiger Finanzsenat, Außenstelle Linz (the Linz Division of the Independent Tax Tribunal; 'the Unabhängiger Finanzsenat'), with regard to the right to deduct input value added tax ('VAT') paid for the years 2002 and 2003 on the building costs of a building treated as forming, in its entirety, part of the assets of Ms Puffer's business, but which is partly in private use.

Legal framework

Community legislation

3 Under Article 2 of the Sixth Directive 'the following shall be subject to [VAT]: … the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.

4 Article 4(1) and (2) of the Sixth Directive state:

'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 6(2)(a) of the Sixth Directive treats the following as a supply of services for consideration: 'the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the [VAT] on such goods is wholly or partly deductible'.

6 Under Article 11A(1)(c) of the Sixth Directive, the taxable amount is to be : 'in respect of

supplies referred to in Article 6(2), the full cost to the taxable person of providing the services'.

7 According to Article 13B(b) of the Sixth Directive, the Member States are to exempt 'the leasing or letting of immovable property', subject to certain exceptions which are not relevant in the present case.

8 Article 17 of the Sixth Directive, as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) 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) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person:

…

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which [VAT] is deductible, and for transactions in respect of which [VAT] is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the 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 [VAT]. [VAT] 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.

…'

9 Article 20 of the Sixth Directive, as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18), provides:

'1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted …

2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one-fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in

which the goods were acquired or manufactured.

By way of derogation from the preceding subparagraph, Member States may base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years.'

National legislation

10 Paragraph 12(2)(1) and 12(2)(2)(a) of the 1994 Law on Turnover Tax (Umsatzsteuergesetz 1994, BGBl. 663/1994; 'the UStG 1994'), in the version in force when the Republic of Austria acceded to the European Union, that is 1 January 1995, was worded as follows:

'1. Supplies or other services connected with the acquisition, construction or maintenance of buildings shall be regarded as being carried out for business purposes in so far as the consideration given for them constitutes operating costs or business expenses under the rules governing income tax.

2. Supplies or services shall not be regarded as being carried out for business purposes:

(a) where the consideration does not consist principally of deductible expenses (costs) within the meaning of Paragraph 20(1), points (1) to (5), of the 1988 Law on Income Tax (Einkommensteuergesetz [1988], BGBl. 400/1988) or of Paragraphs 8(2) and 12(1), points (1) to (5) of the 1988 Law on Corporation Tax (Körperschaftsteuergesetz [1988], BGBl. 401/1988)'.

11 According to the order for reference, because Paragraph 20(1), points 1 to 5 of the 1988 Law on Income Tax excluded the deduction of living expenses, including those for accommodation, from taxable income, the effect of Paragraph 12(2)(1) and 12(2)(2)(a) of the UStG 1994 was that the VAT deduction was granted only in respect of the part of a building used for business purposes and not that used as a private residence.

12 Pursuant to the Tax Amendment Law of 1997 (Abgabenänderungsgesetz 1997, BGBl. I, 9/1998 ; 'the AbgÄG 1997'), first, Paragraph 12(2)(1) of the UStG 1994 was amended so that mixed-use buildings could be treated as forming, in their entirety, part of the assets of the business. Secondly, it was laid down in Paragraph 6(1)(16), in conjunction with Paragraph 6(2) and Paragraph 12(3), of the UStG 1994 that the use of parts of the building as a private residence was to constitute an 'exempt transaction' within the meaning of Article 13B(b) of the Sixth Directive, thus excluding deductions.

13 According to the order for reference, by means of those amendments, the Austrian legislature wished to retain the exclusion of the VAT deductions for the parts of buildings used as a private residence, while recognising the possibility, deriving from Case C-269/00 *Seeling* [2003] ECR I?4101, of treating a mixed-use building as forming, in its entirety, part of the assets of the business.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Over the period from November 2002 to June 2004, Ms Puffer built a single-family house with a swimming pool. From 2003, she used the house as a private residence, with the exception of one part, covering approximately 11% of the building, which she let for business purposes.

15 Ms Puffer treated the building as forming, in its entirety, part of her business and claimed the deduction of the full amount of input taxes charged on the construction of the building.

16 Pursuant to amended VAT assessment notices for the years 2002 and 2003, the Finanzamt (Tax Office), first, refused to take into account for deduction purposes the taxes paid on construction of the swimming pool. Second, in relation to the other building costs, it allowed a deduction of the input tax paid only to the extent of the use of the building for business purposes, that is, 11%.

17 Ms Puffer lodged an objection to those notices which was rejected by the Unabhängiger Finanzsenat on the ground, in particular, that when the Sixth Directive entered into force in Austria, the national legislation excluded the right to deduct input VAT payable in respect of the building costs of the parts of buildings used for private residential purposes and that the national legislature had not waived the option, provided for in Article 17(6) of the Sixth Directive, to retain that exclusion.

18 Ms Puffer then appealed against that decision to the Verwaltungsgerichtshof (Administrative Court). She claims, first, that the treatment of an asset as forming, in its entirety, part of the assets of the business confers a right, pursuant to the case-law of the Court, to the full deduction of VAT and, second, that the conditions set out in Article 17(6) of the Sixth Directive, allowing the Member States to retain an exclusion of the deductions existing when the Sixth Directive came into force, are not satisfied in the present case.

19 Having found that, contrary to Article 17(2) of the Sixth Directive, the Austrian legislation does not allow the full and immediate deduction of VAT on the building costs of a mixed-use building treated as forming, in its entirety, part of the assets of a business, the national court questions whether that provision is compatible with the general principle of equal treatment under Community law.

20 In that regard, the national court points out that the full and immediate deduction of VAT on the building costs of such a mixed-use building and the subsequent imposition of VAT on the expenses pertaining to the part of the building used as a private residence, spread over 10 years, have the effect of granting the taxable person, in respect of that period, an ‘interest-free loan’ not available to a non-taxable person.

21 Consequently, it asks whether the resulting financial advantage, quantified by it at 5% of the net costs of construction of the part of the building used for private purposes, gives rise to the unequal treatment of taxable and non-taxable persons and, within the category of taxable persons, between those who construct a building for purely private purposes and those who construct it, in part, for their business.

22 In addition, the national court asks whether that financial advantage, which is offered to taxable persons carrying out taxable transactions and not to those carrying out only exempt transactions, can constitute a State aid under Article 87 EC in so far as it results from a national measure transposing the Sixth Directive and those two categories of taxable persons are in competition with each other.

23 Finally, the national court raises the question whether, notwithstanding the amendments made by the AbgÄG 1997, the national legislation excluding the deduction of input VAT is covered, as the Austrian tax administration claims, by Article 17(6) of the Sixth Directive.

24 In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and to

refer the following questions to the Court for a preliminary ruling:

‘1. Does [the Sixth Directive], in particular Article 17 thereof, infringe fundamental rights under Community law (the Community-law principle of equal treatment) because it has the effect of enabling taxable persons to acquire ownership of residential properties for their own private residential purposes (consumption) for approximately 5% less than other EU citizens, with the final value of that advantage rising indefinitely in line with the level of acquisition and construction costs of the residential property in question? Does such an infringement arise also as a result of the fact that taxable persons can acquire ownership of residential properties used for their own private residential purposes – where such properties are used, even minimally, in connection with their business – for approximately 5% less than other taxable persons who do not use their private dwellings, even minimally, in connection with their business?

2. Does national legislation transposing the Sixth Directive, in particular Article 17 thereof, infringe Article 87 EC because, while the legislation does allow taxable persons who carry out taxable transactions the advantage referred to in Question 1 in respect of properties which they use for private residential purposes, that advantage is not available to taxable persons whose transactions are exempt?

3. Does Article 17(6) of the Sixth Directive continue to have effect if the national legislature amends a national provision for the exclusion from the right to deduct (in this case, Paragraph 12(2)(1) of the UStG 1994), which is based on Article 17(6) of the Sixth Directive, with the express intention of retaining that exclusion from the right to deduct, and the national law would indeed result in the retention of an exclusion from the right to deduct, but – owing to an error in the interpretation of Community law (in the present case Article 13B(b) of the Sixth Directive) which was only subsequently identified – the national legislature introduced a provision which, viewed in isolation, would, under Community law (according to the interpretation given of Article 13B(b) of the Sixth Directive in *Seeling*) allow a deduction to be made?

4. If the answer to Question 3 is in the negative, could the effect of an exclusion from the right to deduct (Paragraph 12(2)(2)(a) of the UStG 1994) which is based on the “standstill clause” laid down in Article 17(6) of the Sixth Directive be restricted if the national legislature amends one of two overlapping national provisions excluding deductions (Paragraph 12(2)(2)(a) of the UStG 1994 and Paragraph 12(2)(1) of the UStG 1994) and subsequently does not proceed further because it finds that it has erred in law?’

The questions referred for a preliminary ruling

The first question, concerning the compatibility of Article 17(2)(a) of the Sixth Directive with the general principle of equal treatment under Community law

25 By its first question, the referring court asks, essentially, whether Articles 17(2)(a) and 6(2)(a) of the Sixth Directive infringe the general principle of equal treatment under Community law by conferring on taxable persons, by means of a full and immediate right to deduct input VAT payable on the construction of a mixed-use building and the subsequent staggered imposition of that tax on the private use of the building, a financial advantage compared to non-taxable persons and to taxable persons who use their building only as a private residence.

Observations submitted to the Court

26 Ms Puffer claims that a trader may choose to treat mixed-use goods as forming, in their entirety, part of the assets of the business in order to maintain the possibility of deducting input VAT when the business use of those goods subsequently becomes more significant.

27 According to her, where the asset is initially allocated, even in part, to private use and is thereafter reallocated to business use, the Sixth Directive clearly no longer allows the deduction of the input tax. The immediate and full deduction of VAT and the subsequent staggered imposition of VAT on the private use of the goods follow from the scheme of the Sixth Directive and the Court has borne the implications of that scheme in mind in its case-law. Therefore, there is no reason to doubt the compatibility of that system with the general principle of equal treatment under Community law.

28 The Unabhängiger Finanzsenat points out that Article 17(2)(a) of the Sixth Directive allows the deduction of input VAT only in so far as the goods and services are used for the purposes of the trader's taxable transactions. It follows that the Sixth Directive does not confer a right to deduct in respect of the proportion of private use of the goods.

29 According to it, in accordance with the clear wording of Article 17(2)(a) of the Sixth Directive, the extent of the deduction permitted on the basis of the use of the goods for taxable transactions must first of all be established. Only thereafter is it necessary to verify whether private use of a part of goods initially allocated for use in taxable transactions must be treated as a supply of services for consideration under Article 6(2)(a) of the Sixth Directive.

30 Consequently, according to the Unabhängiger Finanzsenat, neither the treatment of an asset as part of the assets of the business nor the status of trader can alone establish a right to deduct input VAT payable. Those are only two conditions among others which have to be met.

31 In particular, if those two conditions were sufficient, that would create circular reasoning and systemic inconsistencies. In that regard, the Unabhängiger Finanzsenat points out that traders who carry out only exempt transactions and who, therefore, may not deduct, as a rule, any input tax, could nevertheless claim deductions for goods subject to mixed use to the extent of their use for private purposes.

32 The Unabhängiger Finanzsenat also observes that traders carrying out partly exempt transactions and partly taxable transactions may deduct VAT from their taxable transactions only on a proportionate basis, in accordance with Article 17(5) of the Sixth Directive. That proportion may differ considerably from the relative proportions of private and business use.

33 The Austrian Government concurred, at the hearing, with the interpretation of Article 17(2)(a) of the Sixth Directive supported by the Unabhängiger Finanzsenat. That government takes the view that the wording of that provision authorises deductions only in respect of the part of a building intended for use in taxable transactions and not in respect of the part intended for private use. In short, it is not necessary, according to that government, to answer the first question, since, applying that interpretation, no problem of unequal treatment would arise.

34 The Commission states that the possibility for the taxable person to treat mixed-use goods, in their entirety, as forming part of the assets of the business, is based on the principle of fiscal neutrality which serves to guarantee the free and unhindered exercise of economic activities. The corresponding obligation, on the taxable person, to pay VAT on the expenses incurred in private use of the goods, treated as a service provided for consideration, aims precisely to ensure the equal treatment of taxable persons and non-taxable persons.

35 The slight financial advantage which taxable persons may retain under that system, first, is the result of their economic activity and their legal status which means that they collect and pay VAT to the tax authorities and, second, is the corollary of the fact that the business use of a mixed-use asset may increase in time. Thus, the existence of that advantage cannot permit the inference that there has been an infringement of the general principle of equal treatment under Community law.

36 It is only where any business use is ruled out at the outset, be it for objective reasons or because the taxable person himself has excluded such use, that allocation to business assets and the related deduction of input VAT are excluded.

37 In addition, the Commission considers that the principle of equal treatment is not infringed by the fact that a taxable person who has not elected to treat goods as forming part of the assets of his business cannot deduct input VAT payable, since the taxable person had that opportunity and did not use it. As the taxable person did not exercise that option, he cannot claim to have suffered unequal treatment.

38 Finally, the difference in treatment of taxable persons carrying out taxable transactions and those carrying out exempt transactions results, according to the Commission, in short, from the principle of neutrality with allows VAT to be deducted only in respect of taxable transactions.

Answer of the Court

39 First, it must be pointed out that it is settled case-law that, where capital goods are used both for business and for private purposes the taxpayer has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes (Case C-434/03 *Charles and Charles-Tijmens* [2005] ECR I?7037, paragraph 23 and case-law cited, and Case C-72/05 *Wollny* [2006] ECR I?8297, paragraph 21).

40 Should the taxable person choose to treat capital goods used for both business and private purposes as business goods, the input VAT due on the acquisition of those goods is, in principle, immediately deductible in full (*Charles and Charles-Tijmens*, paragraph 24, and *Wollny*, paragraph 22).

41 However, it follows from Article 6(2)(a) of the Sixth Directive that when the input VAT paid on goods forming part of the assets of a business is wholly or partly deductible, their use for the private purposes of the taxable person or of his staff or for purposes other than those of his business is treated as a supply of services for consideration. That use, which is therefore a ‘taxable transaction’ within the meaning of Article 17(2) of that directive is, under Article 11A(1)(c) thereof, taxed on the basis of the cost of providing the services (*Charles and Charles-Tijmens*, paragraph 25, and *Wollny*, paragraph 23).

42 Consequently, where a taxable person chooses to treat an entire building as forming part of the assets of his business and uses part of that building for private purposes he is both entitled to deduct the input VAT paid on all construction costs relating to that building and subject to the corresponding obligation to pay VAT on the amount of expenditure incurred to effect such use (*Wollny*, paragraph 24).

43 By contrast, if the taxable person chooses, when acquiring capital goods, to allocate those goods entirely to his private assets or to allocate only part of them to his business activities, no

right to deduct can arise in relation to the part allocated to his private assets (see, to that effect, Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraphs 8 and 9, and Case C-25/03 *HE* [2005] ECR I-3123, paragraph 43).

44 Equally, on that hypothesis, subsequent use for business purposes of the part of the goods allocated to private assets is not capable of giving rise to a right to deduct, because Article 17(1) of the Sixth Directive lays down that the right to deduct is to arise at the time when the deductible tax becomes chargeable. There is no adjustment mechanism to that effect under Community legislation as it stands, as the Advocate General states in point 50 of her Opinion.

45 In the case of capital goods the mixed use of which varies over time, the interpretation of Article 17(1) and (2) of the Sixth Directive supported by the Unabhängiger Finanzsenat and the Austrian Government could lead to the taxable person being denied deduction of VAT input tax payable for subsequent taxable business uses, despite the taxable person's initial wish to treat the goods in question, in their entirety, as forming part of the assets of the business, with future transactions in mind.

46 In such a situation, the taxable person is not relieved entirely of the burden of the tax relating to the item which he uses for the purposes of his economic activity and the taxation of his business activities would lead to double taxation contrary to the principle of fiscal neutrality inherent in the common system of VAT, of which the Sixth Directive forms part (see, to that effect, Case C-415/98 *Bakcsi* [2001] ECR I?1831, paragraph 46, and *HE*, paragraph 71).

47 In addition, even supposing that, after actual use for business purposes of the part of the building initially used for private purposes, a refund of the input tax due on the building costs was provided for, a financial charge would encumber the property during the period, which may sometimes be considerable, between the initial investment expenditure and the commencement of actual business use. The principle of the neutrality of VAT with regard to the taxation of the business requires that the investment expenditure incurred for the needs and objectives of a business be regarded as economic activities giving rise to an immediate deduction of input VAT due. The deduction system is meant to relieve the taxable person entirely of the burden of the VAT payable or paid in the course of all his taxable economic activities (see, to that effect, Case 268/83 *Rompelman* [1985] ECR 655, paragraphs 19 and 23).

48 Finally, contrary to what is contended by the Unabhängiger Finanzsenat and the Austrian Government, the interpretation of Article 17(2) of the Sixth Directive deriving from the case-law does not give rise either to circular reasoning, as pointed out by the Advocate General in point 46 of her Opinion, nor to systemic inconsistencies.

49 Taxable persons who carry out only exempt transactions cannot deduct, under that provision, any input tax and also, therefore, cannot claim deductions concerning the use for private purposes of mixed-use goods.

50 Equally, with regard to taxable persons carrying out both exempt transactions and taxable transactions, there is no conflict between the proportions of private and business use and the proportionate deduction provided for in Article 17(5) of the Sixth Directive.

51 It follows from the scheme of Article 17 of that directive that if the taxable person chooses, when acquiring capital goods, to treat them, in their entirety, as forming part of the assets of his business, the immediate deduction of input VAT payable is permitted in relation to the part of the VAT which is proportionate to the amount relating to his taxable transactions. In so far as that proportion may subsequently vary over time, Article 20 of the Sixth Directive provides for an adjustment mechanism. However, if the application of Articles 17 and 20 of that directive results in

the right to a partial deduction of VAT, the taxable person, like any person carrying out only taxable transactions, cannot avoid the staggered imposition of VAT on his private use of those goods.

52 Second, it should be borne in mind that, according to settled case-law, infringement of the general principle of equal treatment under Community law can arise through the application of different rules to comparable situations or the application of the same rule to different situations (see Case C-390/96 *Lease Plan* [1998] ECR I?2553, paragraph 34, and Case C-156/98 *Germany* v *Commission* [2000] ECR I?6857, paragraph 84).

53 It should also be borne in mind that the principle of fiscal neutrality is the reflection, in matters relating to VAT, of the principle of equal treatment (Case C-106/05 *L.u.P*. [2006] ECR I?5123, paragraph 48 and case-law cited, and Case C-309/06 *Marks & Spencer* [2008] ECR I?0000, paragraph 49).

54 Moreover, the Court has already held that, by treating the private use of goods treated by the taxable person as forming part of the assets of his business as a supply of services for consideration, Article 6(2)(a) of the Sixth Directive aims, first, to ensure equal treatment as between a taxable person, who was able to deduct the VAT on the acquisition or construction of those goods, and a final consumer, by preventing the former from enjoying an advantage to which he is not entitled by comparison with the latter who buys the goods and pays VAT on them, and, second, to ensure fiscal neutrality by ensuring a correspondence between deduction of input VAT and charging of output VAT (see, to that effect, *Wollny*, paragraphs 30 to 33).

55 However, with regard to the private use of mixed-use capital goods, it is possible, as the national court has pointed out, that that provision does not ensure, on its own, the same treatment of taxable persons and non-taxable persons or of other taxable persons who acquire goods of the same kind on a private basis and are, as a result of that fact, bound to pay immediately and in full the VAT imposed. It cannot be ruled out that the objective stated in paragraph 47 of this judgment of relieving the taxable person entirely, by the mechanism laid down in Article 17(1) and (2) and Article 6(2)(a) of the Sixth Directive, of the burden of VAT payable or paid in the course of all their economic activities, including any financial charge encumbering the property during the period between the initial investment expenditure and the commencement of actual business use, can give rise to a financial advantage with regard to the private use of those goods by those taxable persons (see, by analogy, *Wollny*, paragraph 38).

56 Thus, the possible difference of treatment of taxable and non-taxable persons results from the application of the principle of fiscal neutrality, the primary purpose of which is to ensure the equal treatment of taxable persons. That potential difference results, also, from the pursuit by those persons of their economic activities as defined in Article 4(2) of the Sixth Directive. Finally, it is linked to the specific status of taxable persons provided for in the Sixth Directive, which results inter alia in the fact that, in accordance with Article 21 of that directive, they are liable to VAT and must collect it.

57 Since those characteristics distinguish the position of taxable persons from that of non-taxable persons who do not exercise such economic activities, a possible difference in treatment results from the application of different rules to different situations, thus not giving rise to any infringement of the right to equal treatment.

58 The same applies to a taxable person who has allocated the capital goods, in their entirety, to his private assets, since he does not intend to use those goods to pursue his economic activities, but to use them for private purposes.

59 Nor can a different view be reached as regards a taxable person who carries out only exempt operations, since such a taxable person is subject to the same VAT burden as a non-taxable person and his status thus largely similar to the latter.

60 Finally, with regard to taxable persons carrying out both exempt and taxable transactions, the conclusions reached in paragraph 50 of the present judgment show that they are treated, in respect of each category of their economic activities and in relation to the private use of their mixed-use goods, in exactly the same way as persons who exclusively pursue activities connected with one of those categories of activities or use.

61 It follows from the above that Article 17(2)(a) and Article 6(2)(a) of the Sixth Directive do not infringe the general principle of equal treatment under Community law.

62 In the light of the foregoing, the answer to the first question is that Article 17(2)(a) and Article 6(2)(a) of the Sixth Directive do not infringe the general principle of equal treatment under Community law by conferring on taxable persons, by means of a full and immediate right to deduct input VAT on the construction of a mixed-use building and the subsequent staggered imposition of that tax on the private use of the building, a financial advantage compared with non-taxable persons and with taxable persons who use their building only as a private residence.

The second question, concerning the classification as State aid of a financial advantage resulting from national measures transposing Article 17(2)(a) of the Sixth Directive

63 By its second question, the national court asks, essentially, whether Article 87 EC precludes a national measure transposing Article 17(2)(a) of the Sixth Directive and which provides that the right to deduct input VAT payable is confined to taxable persons carrying out taxable transactions, to the exclusion of those carrying out only exempt transactions, in so far as that national measure may confer a financial advantage, such as that noted in the context of the first question, only on taxable persons carrying out taxable transactions.

Observations submitted to the Court

64 Ms Puffer considers that taxable persons carrying out only taxable transactions, those carrying out both exempt transactions and taxable transactions and those carrying out only exempt transactions are, in reality, in the same situation. They may all opt for their mixed-use goods to be treated, in their entirety, as forming part of the assets of the business and for the subsequent staggered payment of VAT for the private use of the goods. Therefore, according to her, there is no infringement of Article 87 EC.

65 The Unabhängiger Finanzsenat submits that, since the Sixth Directive does not confer a right to deduct the input VAT payable on mixed-use goods to the extent that it is used for private purposes, there has been no infringement of Article 87 EC.

66 The Commission observes that classification as ‘State aid’ within the meaning of Article 87(1) EC requires that there be inter alia State intervention which favours certain undertakings over others. In the present case, those two conditions are not met, since the right to deduct input VAT payable derives directly from the Sixth Directive and the advantage granted to the beneficiaries of that deduction results from the general scheme of the VAT system.

Answer of the Court

67 Under Article 87(1) EC, ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain

undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

68 According to settled case-law, classification as 'State aid' for the purposes of Article 87(1) of the Treaty requires that all the conditions set out in that provision are fulfilled. Thus, first there must be intervention by the State or through State resources; second, the intervention must be liable to affect trade between the Member States; third, it must confer an advantage on the recipient; and fourth, it must distort or threaten to distort competition (Joined Cases C-341/06 P and C?342/06 P *Chronopost and La Poste* v *Ufex and Others* [2008] ECR I?0000, paragraphs 121 and 122, and case-law cited).

69 The right to deduct VAT input tax payable, and the possible related financial advantage for taxable persons carrying out taxable transactions, derives directly from Article 17(2)(a) of the Sixth Directive, which the Member States are bound to transpose in their national law.

70 As pointed out by the Advocate General in point 70 of her Opinion, the restriction of the right to deduct input VAT payable to only taxable transactions is an integral part of the VAT system set up by Community legislation which must be implemented in the same way by all Member States. Consequently, the condition of intervention by the State is not met, meaning that Article 87(1) EC cannot apply.

71 In those circumstances, and without it being necessary to examine the other three conditions, the answer to the second question is that Article 87(1) EC must be interpreted as not precluding a national measure transposing Article 17(2)(a) of the Sixth Directive and which provides that the right to deduct input VAT payable is confined to taxable persons carrying out taxable transactions, to the exclusion of those carrying out only exempt transactions, in so far as that national measure may confer a financial advantage only on taxable persons carrying out taxable transactions.

The third and fourth questions, concerning the conditions for the application of Article 17(6) of the Sixth Directive

72 By its third and fourth questions, which should be examined together, the national court asks, essentially, whether the derogation provided for under Article 17(6) of the Sixth Directive applies where the national legislature amends one of the two national overlapping provisions excluding deductions of VAT input tax payable, by legislation which, according to the express intention of the national legislature, was intended to retain that exclusion in force, but which, viewed in isolation, would allow deductions, owing to an error in the interpretation of Community law made by the national legislature.

Observations submitted to the Court

73 Ms Puffer considers that, since the former provisions concerned the exclusion of deductions, whereas the new provisions concern the allocation or non-allocation of goods to a business, the AbgÄG 1997 introduced a completely different legislative approach from the previous one, in form, functioning and effects. Therefore, the conditions of Article 17(6) of the Sixth Directive are not fulfilled.

74 In that regard, the fact that Paragraph 12(2)(2)(a) of the UStG 1994 was not formally amended by the AbgÄG 1997 is irrelevant, since the interpretation recommended by the referring court differs substantially from the meaning previously given to that provision.

75 The Unabhängiger Finanzsenat considers that, since the Sixth Directive does not confer a

right to deduct input VAT payable on mixed-use goods in respect of the proportion of private use, Austrian law does not further restrict the right to deduct VAT input tax payable, meaning that Article 17(6) of the Sixth Directive is not relevant in the present case.

76 The Austrian Government contended at the hearing that the derogation provided for under Article 17(6) of the Sixth Directive applies both to Paragraph 12(2)(1) and to Paragraph 12(2)(2)(a) of the UStG 1994.

77 First of all, it maintains that those two provisions each independently provide for the exclusion of deductions of VAT input tax payable in respect of the parts of buildings intended for private use.

78 Second, the Austrian Government points out that no amendment has been made to Paragraph 12(2)(2)(a) of the UStG 1994 since the entry into force of the Sixth Directive.

79 Finally, it is of the view that the amendments made by the AbgÄG 1997 to Paragraph 12(2)(1) of the UStG 1994 have no effect on the applicability of Article 17(6) of the Sixth Directive, because the national legislature intended to retain the pre-existing situation where deductions of the VAT input tax payable were excluded in respect of the parts of buildings intended for private residential use.

80 The Commission maintains that the amendments introduced by the AbgÄG 1997 do not extend or restrict the exclusion of the deduction of VAT contained in the earlier legislation, but lead to the same result, that is the exclusion of the deduction of VAT in relation to the construction of mixed-use buildings to the extent that they are used for private purposes.

81 However, the old and new legislative approaches which enable the same result to be achieved differ. Since the basis of the new approach is different from that of the old one, it cannot be maintained that ‘existing legislation’ within the meaning of Article 17(6) of the Sixth Directive has been retained. In that regard, the possibility of an error by the national legislature regarding the compatibility of the new approach with the Sixth Directive is of no relevance.

Answer of the Court

82 It must be borne in mind that Article 17(2) of the Sixth Directive lays down in express and clear terms the principle of deduction of amounts charged as VAT for goods delivered or services provided to a taxable person, in so far as the goods or services are used for the purposes of his taxable transactions.

83 The principle of the right to deduct VAT is none the less subject to the derogation set out in Article 17(6) of the Sixth Directive, and in particular the second subparagraph. In that regard, since none of the proposals made by the Commission to the Council under the first paragraph of Article 17(6) have been adopted by the latter, it remains open to the Member States to retain their existing legislation as at the date of entry into force of the Sixth Directive in regard to exclusion from the right of deduction (Case C-345/99 *Commission* v *France* [2002] ECR I-4493, paragraph 19, and Case C-409/99 *Metropol and Stadler* [2002] ECR I-81, paragraph 44).

84 While it is, in principle, for the national court to determine the content of the legislation which existed on a date laid down by a Community measure, the Court can provide guidance on interpreting the Community concept which constitutes the basis of a derogation from Community rules for national legislation existing on a particular date (C-157/05 *Holböck* [2007] ECR I-4051, paragraph 40).

85 In that context, the Court has held that any national measure adopted after a date thus fixed is not, by that fact alone, automatically excluded from the derogation laid down in the Community measure in question (*Holböck*, paragraph 41). Where, after the entry into force of the Sixth Directive, the legislation of a Member State is amended so as to reduce the scope of existing exemptions and thereby brings itself into line with the objective of the Sixth Directive, that legislation must be considered to be covered by the derogation in the second subparagraph of Article 17(6) of the Sixth Directive and is not in breach of Article 17(2) of that directive (see *Commission* v *France*, paragraph 22, and *Metropol and Stadler*, paragraph 45).

86 On the other hand, national legislation does not constitute a derogation permitted by the second subparagraph of Article 17(6) of the Sixth Directive, and infringes Article 17(2) of the directive, if its effect is to increase, after the entry into force of the Sixth Directive, the extent of existing exclusions, thus diverging from the objective of that directive (Case C-40/00 *Commission* v *France* [2001] ECR I-4539, paragraph 17, and *Metropol and Stadler*, paragraph 46).

87 Consequently, it must be held that a provision which is, in substance, identical to the previous legislation, or limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, will be covered by the derogation provided for in Article 17(6) of the Sixth Directive. By contrast, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the date fixed in the Community measure in question (see, to that effect, Case C-155/01 *Cookies World* [2003] ECR I?8785, paragraph 63, and, by analogy, *Holböck*, paragraph 41).

88 The Sixth Directive entered into force for the Republic of Austria on the date of accession of that State to the European Union, that is 1 January 1995. It is therefore that date which is relevant for the purposes of the application of the second subparagraph of Article 17(6) of that directive to that Member State.

89 The referring court has explained that, on the date of entry into force of the Sixth Directive for the Republic of Austria, the effect of Paragraph 12(2)(1) and 12(2)(2)(a) of the UStG 1994 was that the deduction of VAT was granted only in respect of the part of a building used for business purposes and not in respect of that used as a private residence.

90 In particular, according to that court, under Paragraph 12(2)(1) of the UStG 1994, when that legislation entered into force, services connected with the construction of the buildings were considered as being carried out for business purposes only in so far as the consideration given for them constituted operating costs or business expenses.

91 Consequently, it appears that, when the Sixth Directive entered into force, Austrian law restricted, in essence, the possibility of allocating a mixed-use building to the assets of the business to those parts of the building used for business purposes alone.

92 The national court has also stated that the AbgÄG 1997, first, amended Paragraph 12(2)(1) of the UStG 1994 so that mixed-use buildings can be treated in their entirety as forming part of the assets of the business and, second, laid down in Paragraph 6(1)(16), in conjunction with Paragraphs 6(2) and 12(3), of the UStG 1994 that the use of parts of the building for private residential purposes constitutes an ‘exempt transaction’ within the meaning of the first subparagraph of Article 13B(b) of the Sixth Directive, excluding deductions.

93 Therefore, it must be held that, even if it cannot be ruled out that they achieve results which, in essence, are identical, the approach of the old and new legislation differs and that they have laid

down different procedures, meaning that the new legislation cannot be treated as if it was legislation existing when the Sixth Directive entered into force.

94 In that regard, it is irrelevant, as stated by the Advocate General in point 77 of her Opinion, whether the national legislature amended the previous national legislation on the basis of a correct or incorrect interpretation of Community law.

95 Finally, with regard to the question whether the amendment of Paragraph 12(2)(1) of the UStG 1994 by the AbgÄG 1997 also affects the applicability of the second subparagraph of Article 17(6) of the Sixth Directive to Paragraph 12(2)(2)(a) of the UStG 1994, which has not been subject to legislative amendment, it must be held that the answer depends on whether those provisions of national law are interdependent or autonomous.

96 If Paragraph 12(2)(2)(a) of the UStG 1994 cannot be applied independently from Paragraph 12(2)(1) of that law, the effect would be that if Paragraph 12(2)(1) were to be incompatible, that incompatibility would consequently also affect Paragraph 12(2)(2)(a). If the provision concerned can, however, be applied autonomously, existed when the Sixth Directive entered into force and was not subsequently amended, then the derogation contained in the second subparagraph of Article 17(6) of the Sixth Directive applies to that provision.

97 It is for the national court to determine the scope of the national provisions in question.

98 In the light of the foregoing, the answer to the third and fourth questions is that Article 17(6) of the Sixth Directive must be interpreted as meaning that the derogation it contains does not apply to a provision of national law which amends legislation existing when that directive entered into force, which is based on an approach which differs from that of the previous legislation and which laid down new procedures. In that regard, it is irrelevant whether the national legislature amended the previous national legislation on the basis of a correct or incorrect interpretation of Community law. The question whether such an amendment of a provision of national law also affects, with regard to the applicability of the second subparagraph of Article 17(6) of the Sixth Directive, another provision of national law depends on whether those provisions of national law are interdependent or autonomous, which is a matter for the national court to determine.

Costs

99 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 (Third Chamber) hereby rules:

1. **Article 17(2)(a) and Article 6(2)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment do not infringe the general principle of equal treatment under Community law by conferring on taxable persons, by means of a full and immediate right to deduct input value added tax on the construction of a mixed-use building and the subsequent staggered imposition of that tax on the private use of the building, a financial advantage compared to non-taxable persons and to taxable persons who use their property only as a private residence.**

2. **Article 87(1) EC must be interpreted as not precluding a national measure which transposes Article 17(2)(a) of Sixth Directive 77/388 and which provides that the right to deduct input value added tax payable is confined to taxable persons carrying out taxable transactions, to the exclusion of those carrying out only exempt transactions, in so far as that national measure may confer a financial advantage only on taxable persons carrying**

out taxable transactions.

3. **Article 17(6) of Sixth Directive 77/388 must be interpreted as meaning that the derogation it contains does not apply to a provision of national law which amends legislation existing when that directive entered into force, which is based on an approach which differs from that of the previous legislation and which laid down new procedures. In that regard, it is irrelevant whether the national legislature amended the previous national legislation on the basis of a correct or incorrect interpretation of Community law. The question whether such an amendment of a provision of national law also affects, with regard to the applicability of the second subparagraph of Article 17(6) of the Sixth Directive, another provision of national law depends on whether those provisions of national law are interdependent or autonomous, which is a matter for the national court to determine.**

[Signatures]

* Language of the case: German.