Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

16 September 2020 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Sixth Directive 77/388/EEC – Article 17(2)(a) – Deduction of input tax – Origin and scope of the right to deduct – Extension of a road belonging to a municipality – Entry in the accounts of the costs incurred by the works as part of the taxable person's general costs – Determination of the existence of a direct and immediate link with the economic activity of the taxable person – Supply made free of charge – Supply to be treated as a supply made for consideration – Article 5(6))

In Case C?528/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 13 March 2019, received at the Court on 10 July 2019, in the proceedings

Mitteldeutsche Hartstein-Industrie AG

v

Finanzamt Y,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský and N. Wahl (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mitteldeutsche Hartstein-Industrie AG, by O.-G. Lippross, Rechtsanwalt,

– the German Government, by J. Möller and S. Eisenberg, acting as Agents,

– the European Commission, by L. Lozano Palacios and L. Mantl, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 5(6) and 17(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 (OJ 1977 L 145, p. 1) (‘the Sixth Directive’).

2 The request has been made in proceedings between Mitteldeutsche Hartstein-Industrie AG and Finanzamt Y (Tax Office Y, Germany) concerning a refusal to deduct input value added tax (VAT) paid for carrying out works for the extension of a road belonging to a municipality.

Legal context

EU law

3 Under Article 2(1) of the Sixth Directive, ‘the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’ is to be subject to VAT.

4 Article 5(6) of that directive states:

‘The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the [VAT] on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person’s business shall not be so treated.’

5 Article 6(2) of that directive provides:

‘The following shall be treated as supplies of services for consideration:

(a) 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;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition.’

6 Article 17(2)(a) of the Sixth Directive provides:

‘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 in respect of goods or services supplied or to be supplied to him by another taxable person’.

German law

7 Paragraph 1 of the Umsatzsteuergesetz (Law on turnover tax; ‘the UStG’), entitled ‘Taxable transactions’, provides:

‘(1) The following transactions shall be subject to [VAT]:

1. supplies and other services which an undertaking performs for consideration on the domestic market in the course of its business.

…’

8 Under Paragraph 3 of the UStG:

‘(1) Supplies of goods by an undertaking are supplies by which it or a third party authorised by it enables a recipient or a third party on its behalf to dispose of goods in its own name (transfer of the power of disposal).

…

(1b) The following shall be treated as supplies made for consideration:

1. the application by an undertaking of goods forming part of its business assets for purposes other than those of its business;

2. the free-of-charge transfer of goods by an undertaking to its staff for its private use, except for small gifts;

3. any other free-of-charge transfer of goods except for gifts of small value and the giving of samples for business purposes.

The goods or the component parts thereof must have been wholly or partly deductible.’

9 Paragraph 15 of the UStG, entitled ‘Deductions’, provides:

‘(1) The undertaking may deduct the following as input tax:

1. the tax lawfully due on goods and services which have been effected by another undertaking for the purposes of its business.

…

(2) There shall be no deduction of tax relating to the supply, importation or intra-Community acquisition of goods, or to any other supplies, which the undertaking uses for the purposes of the following transactions:

1. exempt transactions;

…’

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

10 Mitteldeutsche Hartstein-Industrie, the applicant in the main proceedings, is a managing holding company. It forms a tax entity with its subsidiaries, A GmbH and B GmbH.

11 Following the Regional Council's decision to approve the redevelopment and operation of a limestone quarry ('the limestone quarry'), A GmbH was authorised, by decision of 16 February 2001, to operate that quarry subject to the development of access to it by way of a public road belonging to the municipality in which that quarry is located ('the municipal road in question'). That decision was amended in 2005, in order to specify that the authorisation to operate that quarry would expire if the extension of that road was not completed by 31 December 2006.

12 In so far as that extension was necessary for the purpose of extracting the limestone, an agreement relating to that extension was concluded between the municipality concerned and the predecessor in law to A GmbH, under which that municipality undertook, first, to plan and implement the extension of the municipal road in question and, second, if that road remained open to the public, to make it available to the predecessor in law to A GmbH without restriction. In return, it was provided that the latter would bear all of the costs relating to the extension of that road. During the course of 2006, A GmbH commissioned B GmbH to carry out that extension, as project manager, in accordance with the agreement entered into with that municipality. Following completion of the works, from December 2006 onwards, the section of road was used by the heavy goods vehicles of A GmbH, as well as by other vehicles.

13 In the context of the 2006 VAT declarations, the costs incurred by A GmbH for the works for the extension of the municipal road in question were not taken into account by the applicant in the main proceedings, but the latter deducted, as input tax, the amounts of VAT attaching to the input services received from B GmbH.

14 Following an inspection, Tax Office Y took the view that, by constructing the extension to the municipal road in question, the applicant in the main proceedings had provided the municipality concerned with free-of-charge work subject to VAT under number 3 of the first sentence of Paragraph 3(1b) of the UStG and, on 1 March 2012, it issued a tax adjustment notice in respect of 2006, increasing the taxable amount for VAT to a rate of 16%.

15 While the complaint brought by the applicant in the main proceedings was the subject of a rejection decision, the Hessisches Finanzgericht (Finance Court, Hesse, Germany) upheld in part the action brought by the applicant against that decision. It found that the conditions set out in the second sentence of Paragraph 3(1b) of the UStG had not been met for the works carried out on the municipal road in question to be subject to tax. By contrast, it found that VAT on input transactions and directly linked to those works should not be taken into account in so far as, according to the case-law of the Bundesfinanzhof (Federal Finance Court, Germany), an undertaking which, at the time when it receives input services, intends to apply those services exclusively and directly to a free-of-charge transfer, within the meaning of Paragraph 3(1b) of the UStG, is not entitled to deduct the VAT relating to those services.

16 The applicant in the main proceedings brought an appeal on a point of law ('*Revision*') before the referring court against the decision of the Hessisches Finanzgericht (Finance Court, Hesse).

17 The referring court states that, according to national law, that appeal is unfounded, since the applicant in the main proceedings was not entitled to deduct the VAT in question in the main proceedings. Thus, it is not possible to deduct VAT where the input services received from B GmbH were used to carry out a supply free of charge for the municipality concerned. However, the referring court has doubts as to whether that interpretation of the national legislation is compliant with EU law.

18 As regards the first question referred for a preliminary ruling, the referring court states that

the applicant in the main proceedings could claim a deduction of the VAT paid for the input services received in accordance with the judgments of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712), and of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:683).

19 As regards the second and third questions referred for a preliminary ruling, the referring court states that these seek to ascertain whether, in a situation where the applicant in the main proceedings could deduct input VAT, the right of deduction could be compensated with a VAT debt relating to supplies made for consideration or treated as supplies made for consideration, within the meaning of Article 5(6) of the Sixth Directive, in order to avoid, in particular, in accordance with the purpose of that latter provision, a final untaxed consumption by the municipality.

20 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) In circumstances such as those of the main proceedings, in which a taxable person carries out construction works on a municipal road on behalf of a municipality, is that taxable person, which has procured from other taxable persons services relating to the construction of the road that has been transferred to the municipality, entitled to deduct input tax in respect thereof pursuant to Article 17(2)(a) of the Sixth Directive …?

(2) If the answer to Question 1 is in the affirmative: In circumstances such as those of the main proceedings, in which a taxable person carries out construction works on a municipal road on behalf of a municipality, does a supply of goods for consideration exist when the authorisation to operate a quarry is the consideration for the supply of a road?

(3) If the answer to Question 2 is in the negative: In circumstances such as those of the main proceedings, in which a taxable person carries out construction works on a municipal road on behalf of a municipality, is the free-of-charge transfer of the public road to the municipality treated, in accordance with Article 5(6) of the [Sixth Directive], as a supply of goods made free of charge even though the transfer serves commercial purposes, in order to prevent an untaxed final consumption by the municipality?’

Consideration of the questions referred

The first question

21 By its first question, the referring court asks, in essence, whether Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that a taxable person is entitled to deduct input VAT paid for works for the extension of a municipal road carried out for the benefit of a municipality.

22 In that regard, it must be recalled, as a preliminary point, that Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which entered into force on 1 January 2007, repealed the Sixth Directive without making material changes in relation to that earlier directive. Accordingly, since the relevant provisions of the Sixth Directive have an essentially identical scope to those of Directive 2006/112, the Court’s case-law pertaining to the latter directive is also applicable to the Sixth Directive (judgment of 17 October 2018, *Ryanair*, C?249/17, EU:C:2018:834, paragraph 14).

23 With regard to the right to deduct laid down in Article 17(2)(a) of the Sixth Directive, that right is an integral part of the VAT scheme and in principle may not be limited. It is exercisable immediately in respect of all the taxes charged on input transactions (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 25

and the case-law cited).

24 The deduction system is intended 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 consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 26 and the case-law cited).

25 It follows from Article 17(2)(a) of the Sixth Directive that, in so far as the taxable person, acting as such at the time when he acquires goods or receives services, uses those goods or services for the purposes of his taxed transactions, he is entitled to deduct the VAT paid or payable in respect of those goods or services (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 27 and the case-law cited).

26 According to settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring those goods or services was a component of the cost of the output transactions that gave rise to the right to deduct (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 28 and the case-law cited).

27 A taxable person, however, also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct where the costs of the transactions in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person’s economic activity as a whole (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 29 and the case-law cited).

28 It follows that whether there is a right to deduct is determined by the nature of the output transactions to which the input transactions are assigned. Thus, there is a right to deduct when the input transaction subject to VAT has a direct and immediate link with one or more output transactions giving rise to the right to deduct. If that is not the case, it is necessary to examine whether the costs incurred in order to acquire the input goods or services are part of the general costs linked to the taxable person’s overall economic activity. In either case, whether there is a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities (judgment of 29 October 2009, *SKF*, C?29/08, EU:C:2009:665, paragraph 60).

29 In order to determine whether Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that a taxable person, such as the applicant in the main proceedings, must be recognised as being entitled to deduct input VAT for carrying out works for the extension of the municipal road in question, it is thus appropriate to determine whether there is a direct and immediate link between, on the one hand, those extension works and, on the other, a taxed output transaction carried out by the applicant or its economic activity.

30 It should be observed, in this respect, that, in the context of the direct-link test that is to be applied by the tax authorities and national courts, they should consider all the circumstances

surrounding the transactions concerned and take account only of the transactions that are objectively linked to the taxable person's taxable activity. The existence of such a link must thus be assessed in the light of the objective content of the transaction in question (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 31 and the case-law cited).

31 However, first, it is clear from the order for reference that, without the works for the extension of the municipal road in question, it would have been impossible to operate the limestone quarry, from both a practical and legal point of view. The extension of that road made it possible to adapt it to the heavy goods traffic generated by the operation of the quarry and, pursuant to the amendment, in 2005, of the decision of 16 February 2001 authorising the operation of that quarry, subject to improved access via the municipal road in question, the authorisation to operate that quarry was to expire if those extension works had not been completed by 31 December 2006.

32 It follows that the works for the extension of the municipal road in question were essential in order for the operation of the limestone quarry to come to fruition and that, without those works, the applicant in the main proceedings would not have been able to carry out its economic activity.

33 Second, the referring court has stated that the costs of the input services received, linked to the works for the extension of the municipal road in question, form part of the factors in the cost of the output transactions carried out by the applicant in the main proceedings.

34 Such circumstances are liable to establish the existence of a direct and immediate link between the works for the extension of the municipal road in question and the overall economic activity linked to the operation of the limestone quarry.

35 That finding cannot be called into question by the fact that that municipal road is open to the public free of charge.

36 It is, admittedly, true that, according to the case-law of the Court, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not come within the scope of VAT, no output tax can be collected or input tax deducted. In both cases, the direct and immediate link between the input expenditure incurred and the economic activities subsequently carried out by the taxable person is severed (judgment of 22 October 2015, *Sveda*, C?126/14, EU:C:2015:712, paragraph 32 and the case-law cited).

37 However, the fact that the public may use the municipal road in question free of charge is immaterial. It is apparent from the file before the Court that the works for the extension of that road were carried out not for the purposes of the municipality concerned or of public traffic but in order to adapt the municipal road in question to the heavy goods traffic generated by the operation of the limestone quarry by the applicant in the main proceedings. Moreover, that road was subsequently used both by those heavy goods vehicles and by other vehicles. In any event, the expenditure incurred by the applicant in the main proceedings for the extension of the municipal road in question may be linked, as is clear from paragraph 34 of this judgment, to its economic activity as a taxable person, with the result that, subject to the checks to be carried out by the referring court, that expenditure is not related to activities that are exempt or are outside the scope of VAT.

38 Finally, as regards the extent of the right to deduct, it is for the referring court to determine whether the works for the extension of the municipal road in question are, or are not, limited to what was necessary to ensure the operation of the limestone quarry by the applicant in the main proceedings. According to the case-law of the Court, if the works for the extension of that road were limited to what was necessary for that purpose, the right to deduct should be recognised for

all the costs resulting from those works. By contrast, if those works exceeded what was necessary to ensure the operation of that quarry, the existence of a direct and immediate link between those works and the economic activity of the applicant in the main proceedings would be partially broken, with the result that the right to deduct would have to be recognised only for the input VAT levied on that portion of the costs that was incurred for the works for the extension of the municipal road in question which was objectively necessary to allow the applicant in the main proceedings to carry out its economic activity (see, to that effect, judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraphs 37 to 39).

39 In the light of all of the foregoing considerations, the answer to the first question is that Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that a taxable person is entitled to deduct input VAT paid for the works for the extension of a municipal road carried out for the benefit of a municipality, where that road is used both by that taxable person in connection with its economic activity and by the public, in so far as those extension works did not exceed what was necessary to allow that taxable person to carry out its economic activity and the costs of those works are included in the price of the output transactions carried out by that taxable person.

The second question

40 By its second question, the referring court asks, in essence, whether, in the event that the first question is answered in the affirmative, the Sixth Directive must be interpreted as meaning that the authorisation to operate a quarry granted unilaterally by an authority of a Member State constitutes consideration received by a taxable person which carried out, without monetary consideration, works for the extension of a municipal road, with the result that those works constitute a transaction carried out for consideration, within the meaning of that directive.

41 The referring court has stated that, in the light of EU law, it was not certain that the applicant in the main proceedings carried out a supply for consideration for the benefit of the municipality concerned. However, it also has doubts as to whether it is possible to categorise the works for the extension of the municipal road in question as a supply made free of charge. Thus, it states that the authorisation to operate the limestone quarry issued by the Regional Council could constitute consideration for those works, with the result that those works should have been categorised as a service supplied for consideration, giving rise to a right to deduct but also entailing the obligation to pay the VAT relating to the works for the extension of that municipal road.

42 In that regard, it must be recalled that, under Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

43 It is also clear from the case-law of the Court that, in order for a transaction to be classified as a transaction for consideration as far as VAT is concerned, all that is required is that there should be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person. Such a direct link is established where there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting actual consideration for the service supplied to the recipient (judgment of 3 July 2019, *UniCredit Leasing*, C?242/18, EU:C:2019:558, paragraph 69 and the case-law cited).

44 The Court has also ruled that the consideration for a supply of goods may consist of a supply of services, and so constitute the taxable amount within the meaning of Article 11.A(1)(a) of the Sixth Directive, provided, however, that there is a direct link between the supply of goods and the supply of services and that the value of those services can be expressed in monetary terms. The same is true if a supply of services is performed in exchange for another supply of services,

as long as the same conditions are satisfied (judgment of 26 September 2013, *Serebryannay vek*, C?283/12, EU:C:2013:599, paragraph 38 and the case-law cited).

45 Lastly, it is clear from the case-law of the Court that barter contracts, under which the consideration is by definition in kind, and transactions for which the consideration is in money are, economically and commercially speaking, two identical situations (judgment of 26 September 2013, *Serebryannay vek*, C?283/12, EU:C:2013:599, paragraph 39 and the case-law cited).

46 In the first place, it must be held that there is a legal relationship between the municipality concerned and the applicant in the main proceedings. Thus, by the agreement for the development of the municipal road in question, on the one hand, that municipality had undertaken to plan and implement the extension of that road and to make the extension of the road available to the applicant in the main proceedings without restriction, in the event of possible expansions of the limestone quarry and, on the other hand, the applicant in the main proceedings had undertaken to bear all of the costs associated with that extension, without that agreement providing for any payment obligation on the part of that municipality.

47 Such an agreement cannot, however, constitute a legal framework pursuant to which reciprocal services, that is to say, the extension of the municipal road and the grant of the authorisation to operate the limestone quarry, are exchanged.

48 First, from the point of view of the VAT system, the works in question in the main proceedings were carried out on a road belonging to a municipality, whereas the authorisation to operate the limestone quarry was issued by the Regional Council.

49 Second, the decision to grant the authorisation to operate that quarry is a unilateral decision taken by the Regional Council on 16 February 2001. However, it follows from the case-law of the Court that a unilateral act by a public authority cannot, in principle, impose a legal relationship entailing reciprocal performance (see, to that effect, judgment of 11 May 2017, *Posnania Investment*, C?36/16, EU:C:2017:361, paragraphs 31 to 35).

50 Third, it is common ground that the works for the extension of the municipal road in question did not give rise to the payment of any monetary consideration.

51 Admittedly, the Court has ruled that consideration for a supply of goods or services may be consideration in monetary terms or in kind. However, in so far as, according to the unilateral decision of the Regional Council to authorise the operation of the limestone quarry, such an authorisation would have lapsed if the works for the extension of the municipal road had not been completed by 31 December 2006, those works are not consideration for the right to operate that quarry but a condition *sine qua non* for the exercise of that right.

52 In the light of those factors, no direct link can be established between the provision of the works for the extension of the municipal road in question to the municipality concerned and the grant to the applicant in the main proceedings of the authorisation to operate the limestone quarry, since that authorisation cannot be regarded as consideration for the works for the extension of that road.

53 In the second place, it must be pointed out that, in the judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments* (C?132/16, EU:C:2017:683), the Court has already recognised a taxable person’s right to deduct input VAT in respect of a supply of services which consisted of the construction or improvement of a property owned by a third party in the case where those services were used both by that taxable person and by that third party in the context of their economic activities, even though that third party enjoyed the results of those services free

of charge.

54 In the light of all of the foregoing considerations, the answer to the second question is that the Sixth Directive, in particular Article 2(1) thereof, must be interpreted as meaning that the authorisation to operate a quarry granted unilaterally by an authority of a Member State does not constitute consideration received by a taxable person which carried out, without monetary consideration, works for the extension of a road belonging to a municipality, with the result that those works do not constitute a transaction carried out for consideration within the meaning of that directive.

The third question

55 By its third question, the referring court seeks to ascertain, in essence, whether Article 5(6) of the Sixth Directive must be interpreted as meaning that works for the extension of a municipal road open to the public carried out, free of charge, by a taxable person for the benefit of a municipality constitute a transaction which must be treated as a supply of goods made for consideration, within the meaning of that provision.

56 As a preliminary point, it should be recalled that, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference. It is settled case-law that the Court does not have jurisdiction to interpret the internal law of a Member State (judgment of 17 March 2011, *Naftiliaki Etaireia Thasou and Amaltheia I Naftiki Etaireia*, C?128/10 and C?129/10, EU:C:2011:163, paragraph 40).

57 In the present case, it is apparent from the file before the Court that the referring court bases its third question on the premiss that, in accordance with Paragraph 3(4) of the UStG, the works for the extension of the municipal road in question constitute a supply of work to the municipality concerned, since the Federal Republic of Germany availed itself of the possibility, provided for in Article 5(5) of the Sixth Directive, of treating the handing-over of certain construction works as a supply of goods.

58 It is not for the Court to call such a premiss into question. However, since the applicant in the main proceedings submits that, by performing the works for the extension of the municipal road in question, it carried out a supply of services, with the result that Article 5(6) of the Sixth Directive is not applicable, and, moreover, that the wording of Article 5(6) and that of Article 6(2) of the Sixth Directive relating, respectively, to the supply of goods and to the supply of services, is fundamentally different, it will be for the referring court to determine that, under German law, the works for the extension of that road constitute a supply of work.

59 As regards Article 5(6) of the Sixth Directive, it should be recalled that that provision is intended to ensure equal treatment as between a taxable person who applies goods for his own private use or for that of his staff, on the one hand, and a final consumer who acquires goods of the same type, on the other (judgment of 11 May 2017, *Posnania Investment*, C?36/16, EU:C:2017:361, paragraph 40 and the case-law cited). Thus, the taxation of the applications referred to in the first sentence of Article 5(6) of the Sixth Directive is designed to prevent situations in which final consumption is untaxed (judgment of 30 September 2010, *EMI Group*, C?581/08, EU:C:2010:559, paragraph 18).

60 To that end, under that provision certain transactions for which no real consideration is received by the taxable person are treated as supplies of goods effected for consideration and subject to VAT (judgment of 17 July 2014, *BCR Leasing IFN*, C?438/13, EU:C:2014:2093, paragraph 23).

61 More precisely, Article 5(6) of the Sixth Directive treats as a supply of goods for consideration the application, by a taxable person, of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, where the VAT on those goods or on the component parts thereof was wholly or partly deductible (judgment of 11 May 2017, *Posnania Investment*, C?36/16, EU:C:2017:361, paragraph 41 and the case-law cited). However, that provision does not treat as a supply of goods made for consideration applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business.

62 It must also be stated that it follows from the answers to the first and second questions that the Sixth Directive must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the works for the extension of a municipal road are liable to give rise to a right to deduct and to be categorised as a transfer free of charge, with the result that certain conditions for the application of Article 5(6) of that directive are fulfilled.

63 Furthermore, the works for the extension of that road do not constitute gifts of small value or samples within the meaning of that provision.

64 Finally, since the works were delivered to the municipality concerned, it is common ground that the case of consumption for private use or for that of business staff is ruled out, as is that relating to the application for purposes other than those of the business, since those works were carried out for the purposes of the applicant in the main proceedings. That last factor does not, however, preclude the application of Article 5(6) of the Sixth Directive. According to the case-law of the Court, it is clear from the very wording of the first sentence of Article 5(6) of the Sixth Directive that that provision treats as a supply made for consideration, and therefore as subject to VAT, a taxable person's disposal, free of charge, of goods forming part of his business assets, where input VAT was deductible on those goods, it being in principle immaterial whether or not their disposal was for business purposes (judgment of 27 April 1999, *Kuwait Petroleum*, C?48/97, EU:C:1999:203, paragraph 22).

65 Similarly, the fact, stated by the referring court, that the municipal road in question is not used by the municipality concerned for private purposes but that it is, on the contrary, open free of charge to public traffic, does not, in principle, preclude the application of Article 5(6) of the Sixth Directive. Under that provision, the application of goods to be used for such purposes relates, in any event, to the application and use by the taxable person, in the present case the applicant in the main proceedings, and not by a third party, namely the municipality concerned. The works for the extension of that road were carried out to meet the needs of the applicant in the main proceedings and the result of those works, that is to say, the road developed in order to support the heavy goods traffic generated by the operation of the limestone quarry, is used primarily for the applicant's purposes.

66 However, the fact that the supply of the works for the extension of the municipal road in question to the municipality concerned, carried out free of charge by the applicant in the main proceedings, is not subject to VAT, is not liable to give rise to a situation of untaxed final consumption or to a breach of the principle of equal treatment, since such works do not constitute a transaction which must be treated as a supply of goods made for consideration, within the meaning of Article 5(6) of the Sixth Directive.

67 Even though the municipal road in question is open to public traffic, the actual end-use of that road should be taken into consideration. It follows from the answer to the first question that, subject to the checks to be carried out by the referring court, first, the works for the extension of that road benefit the applicant in the main proceedings and have a direct and immediate link with

its overall economic activity which gives rise to taxable transactions and, second, the costs of the input services received and linked to the works for the extension of that road form part of the factors in the cost of the output transactions carried out by the applicant in the main proceedings.

68 In the light of all of the foregoing considerations, the answer to the third question is that Article 5(6) of the Sixth Directive must be interpreted as meaning that works carried out, for the benefit of a municipality, for the extension of a municipal road open to the public but used, in connection with its economic activity, by the taxable person which carried out those works free of charge and by the public, do not constitute a transaction which must be treated as a supply of goods made for consideration within the meaning of that provision.

Costs

69 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 (Eighth Chamber) hereby rules:

1. **Article 17(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, must be interpreted as meaning that a taxable person is entitled to deduct input value added tax paid for the works for the extension of a municipal road carried out for the benefit of a municipality, where that road is used both by that taxable person in connection with its economic activity and by the public, in so far as those extension works did not exceed what was necessary to allow that taxable person to carry out its economic activity and the costs of those works are included in the price of the output transactions carried out by that taxable person.**

2. **Sixth Directive 77/388, in particular Article 2(1) thereof, must be interpreted as meaning that the authorisation to operate a quarry granted unilaterally by an authority of a Member State does not constitute consideration received by a taxable person which carried out, without monetary consideration, works for the extension of a road belonging to a municipality, with the result that those extension works do not constitute a transaction carried out for consideration within the meaning of that directive.**

3. **Article 5(6) of Sixth Directive 77/388 must be interpreted as meaning that works carried out, for the benefit of a municipality, for the extension of a municipal road open to the public but used, in connection with its economic activity, by the taxable person which carried out those works free of charge and by the public, do not constitute a transaction which must be treated as a supply of goods made for consideration within the meaning of that provision.**

[Signatures]

* Language of the case: German.