Conclusions
OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 6 February 2003 (1)

Case C-442/01

KapHag Renditefonds
v
Finanzamt Charlottenburg

(Reference for a preliminary ruling from the Bundesfinanzhof (Germany))

((Sixth VAT Directive – Taxable transactions – Concept of economic activity – Admission of a new partner to a partnership in consideration of payment of a contribution in case))

1. In these preliminary reference proceedings, the doubts harboured by the Bundesfinanzhof (the highest German court with jurisdiction in tax matters) relate to the interpretation of Articles 2(1) and 19(2) of the Sixth Directive on value added tax (2) (the Sixth Directive).
2. The German court is seeking to ascertain whether the concept of consideration in the first of those provisions includes the admission of a new partner to a partnership in consideration for a contribution in cash. Should that first question be answered in the positive, the national court asks whether the transaction is one of the incidental transactions referred to in Article 19(2) of the Sixth Directive and may therefore be excluded from the deductible proportion of the tax.
I ? Facts, main proceedings and question referred to the Court
3. KapHag Renditefonds (KapHag) is a partnership whose partners are LOGOS Grundstücks-Treuhand GmbH, LOGOS Zweite Grundstücks-Treuhand GmbH (LOGOS 1 and LOGOS 2 respectively) and three natural persons, Dr Moegelin, Dr Tiemann and Dr Mehnert.
4. KapHag's object was to acquire a development right in respect of a plot in Berlin and to construct thereon and maintain certain buildings forming a unit within a shopping centre. The partnership is managed as a closed real investment fund.
5. In order to be admitted as a partner, it was necessary to pay DEM 38 402 000, plus 5% premium.
6. Initially, KapHag consisted of only two members, LOGOS 1 and LOGOS 2, which acquired the right to develop the site. Dr Moegelin and Dr Tiemann became partners later, on 2 August 1991.
7. On 12 November of that year, Dr Mehnert announced his intention to join the company in consideration for making the necessary contribution.
8. On 19 December 1991 Dr Severin, a lawyer, presented a fee note for DEM 75 000, plus DEM 10 500 value added tax (VAT), for providing legal advice.
9. KapHag deducted that tax in its 1991 VAT return but by decision of 17 February 1998 the Finanzamt Charlottenburg disallowed the deduction, in reliance on Articles 15(2) and 4(8)(f) of the Umsatzsteuergesetz 1991 (Law on value added tax; hereinafter the UStG). (3) That decision was

confirmed in administrative proceedings and then upheld by the Finanzgericht Berlin in judicial proceedings.
10. The Finanzgericht Berlin considered that, by means of an exchange of services, KapHag transferred to the new partner a share in the partnership, a transaction which, under Article 4(8)(f) of the UStG, was exempt from tax, and took into account the case-law of the Bundesfinanzhof, which has held that the admission of partners to a partnership open to the public is an exempt transaction. In its view, the partial deduction referred to in Article 15(4) of the UStG (4) is not applicable, since the services provided by the lawyer related solely to the acquisition of new partners.
11. KapHag did not agree with that decision and appealed to the Bundesfinanzhof on a point of law. In support of its claim, it submitted that it is not a partnership open to the public, so that the admission of Dr Mehnert as a partner is a taxable transaction, and that the services supplied by the lawyer were not intended exclusively to bring about the admission of that new member but were also used for the subsequent leasing activities, which are taxable.
12. The Bundesfinanzhof considers that when a partnership is formed or when it admits a new partner in consideration of payment of a contribution in cash or in kind, it makes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive. However, it believes that in the circumstances of the case before it, that approach may be open to question if account is taken of the fact that the partner did not join the partnership under a bilateral agreement concluded with the partnership but under a partnership agreement concluded between the members. In order to dispel that doubt, the Bundesfinanzhof, by order of 27 September 2001, referred the following question to the Court:Where a partnership admits a partner on payment of a capital contribution in cash, does it effect a supply to him for consideration within the meaning of Article 2(1) of Directive 77/388/EEC?
13. If that question should be answered in the positive, the Bundesfinanzhof considers that the supply should be exempt, pursuant to Article 13(B)(d)(5) of the Sixth Directive, thus raising the question whether it constitutes an incidental transaction within the meaning of the second sentence of Article 19(2) of that directive. In order to resolve the uncertainty, the Bundesfinanzhof requests the Court to rule on the following question:Is [the transaction] an incidental transaction for the purposes of the second sentence of Article 19(2) of Directive 77/388/EEC, and is the taxable person entitled to rely on that provision, according to which such incidental transactions do not exclude deduction of input tax?
II ? Procedure before the Court
14. The Commission and KapHag presented written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice.
15. None of the parties who participated in the written procedure sought to present oral observations, but the German Government, which did not participate in the written procedure, sought leave to present oral argument and the Court therefore decided to hold a hearing.
16. The hearing took place on 15 January 2003. The German Government and the Commission presented their observations.
III ? The relevant provisions of the Sixth Directive
17. Article 2 defines the taxable event: The following shall be subject to value added tax:1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;2. ...
18. Article 4(1) defines taxable person as follows:... any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.
19. Those economic activities are, pursuant to Article 4(2):... 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.
20. Article 13 of the Sixth Directive regulates the exemptions relating to internal transactions. For

the purposes of the present question, the relevant provision is Article 13(B)(d)(5), which provides that the following are exempt from tax: transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding:
?documents establishing title to goods,
?the rights or securities referred to in Article 5(3)
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21. Article 17 defines the circumstances in which the right to deduct VAT arises and the scope of that right:
1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.
2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;(b) ...
3. Member States shall also grant to every taxable person the right to a deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of: ...(c) any of the transactions exempted under Article 13B(a) and (d), paragraphs 1 to 5, when the customer is established outside the Community or when these transactions are directly linked with goods intended to be exported to a country outside the Community....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 value added tax is deductible, and for transactions in respect of which value added tax 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....
22. Article 19, under the heading Calculation of the deductible proportion, provides: 1. The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:
?as numerator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3),
?as denominator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which value added tax is not deductible. The Member States may also include in the denominator the amount of subsidies, other than those specified in Article 11A(1)(a). The proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next unit.2. By way of derogation from the provisions of paragraph 1, there shall be excluded from the calculation of the deductible proportion, amounts of turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business. Amounts of turnover attributable to transactions specified in Article 13B(d), in so far as these are incidental transactions, and to incidental real estate and financial transactions shall also be excluded. Where Member States exercise the option provided under Article 20(5) not to require adjustment in respect of capital goods, they may include disposals of capital goods in the calculation of the deductible proportion....
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IV ? Analysis of the questions
A. First question
23. The Bundesfinanzhof wishes to know whether admission to a partnership in consideration of payment of a contribution in cash is a taxable transaction, since otherwise the tax charged by the lawyer, Dr Severin, (5) will not be deductible, under the provisions to the contrary set out in Article 17(1) of the Sixth Directive.
24. The Court's answer must proceed from a premiss which, although obvious, must not be forgotten: what the Community legislature intended was that all supplies of goods and all supplies

of services effected for consideration within each Member State by persons exercising the economic activities referred to in Article 4(2) of the Sixth Directive should be subject to VAT, since the latter is a general tax on consumption. (6)

25. In order to determine the transactions subject to VAT, it is necessary to define the concept of taxable person, a task which, given the philosophy of the Sixth Directive, requires a definition of the concept of economic activity. (7)

26. The concept is a very wide one. (8) It encompasses all stages of the production and distribution of goods and also the supply of services, (9) irrespective of who carries them out (10) and of their legal form. The decisive factor is that the purpose is to obtain income on an ongoing basis, irrespective of the results. The objective nature (11) of the concept is a requirement of the principle of the neutrality of the common system of VAT. (12) This double concept of the wide application and the objectivity of the definition has recently been reiterated by the Court in its judgments on the tolls charged for the use of toll roads. (13)

27. The concept has also been defined negatively. Thus, the mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity. (14) For that reason, the Community case-law does not recognise that the mere acquisition and the mere holding of shares constitute an economic activity, since they do correspond to the exploitation of an asset for the purpose of obtaining a income therefrom on an ongoing basis, since any dividend yielded by that holding is merely the result of ownership of the property. (15) Exceptionally, where the holding is accompanied by direct or indirect involvement in the management of the company, without prejudice to the rights inherent in the capacity of shareholder or partner, the transaction may be taxable. (16)

28. If the acquisition of shares does not constitute an economic activity, nor does the transfer of shares. (17)

29. The concept of a reciprocal exchange of services is fundamental (18) and brings out the full meaning of the case-law of the Court which I have just cited. For example, the grant to a third party of a surface right by the owner of land is taxable provided that the right is transferred for consideration. (19)

30. For the same reason, a holding company which restricts its activity to acquiring shares in other undertakings is not entitled to deduct input VAT, since it is not a taxable person in the sense that, in the absence of consideration, it does not carry out an economic activity within the meaning of the Sixth Directive; (20) nor is it a taxable person when it receives dividends, which therefore fall outside the system of deductions provided for in the Community rules. (21) In such situations the only activity consists in the administration of an asset. The same applies to the acquisition and holding of obligations, (22) and also to the purchase and transfer of shares and other titles with the aim of maximising dividends and returns on capital, which are intended to encourage medical research. (23)

31. Even where, in addition to participating in a company and being for that reason entitled to receive the dividends or benefits resulting from its exploitation, the person concerned is directly or indirectly involved in its management, there is not an economic activity within the meaning of Article 4(2) of the Sixth Directive if the return on the amounts invested in the undertaking is not consideration for the management, that is to say, if there is not a direct relationship between the activity and the sums received. (24) On the other hand, where there is such a link, where the placements which attract interest originate in funds provided by clients in the context of a supply of services for payment, which are therefore taxable (the management of immoveable property), the interest falls within the scope of VAT. (25)

32. Consequently, in order to dispel the mystery as requested by the referring court, the Court will have to examine the legal nature of the relationship which is established between a partnership and the new partner when, in order to acquire that capacity, the new partner makes an economic contribution to the partnership which he is joining.

33. I have not the slightest doubt that the future partner performs an act involving the disposal of his assets, of which becoming a member of the partnership is not the counterpart. Or, in other

words, the fact of joining a partnership does not constitute a supply of services whereby the partnership confers an economic advantage on the new partner.
34. I do not agree with the case-law of the Bundesfinanzhof cited in the order for reference, according to which, since the founding member of a partnership obtains rights in consideration for his contribution, (26) the new partnership makes a supply for consideration, which would be subject to VAT.
35. The formation of a partnership (the partnership agreement being the founding act) or the incorporation within a partnership of new partners who subsequently join (variation of the agreement) constitute an agreement whereby various persons (natural or legal) form an organisation which the law recognises as having legal personality, and extend or amend its subjective basis. It is true that in the agreement the partners undertake to make contributions in common, which may consist of goods or services, in order to attain a shared objective, generally that of making a profit. No matter how widely it may be interpreted, however, that objective does not contain the notion of consumption in exchange for consideration, within the framework of a bilateral legal relationship, which is the basis of the Community rules on VAT. (27) At most, as the case-law of the Court which I have cited makes abundantly clear, there is an expectation of obtaining advantages, which are the consequence of the ownership of a share in the partnership acquired by means of the disposal of assets but do not constitute payment for that share.
36. In short, I propose that the Court, in answer to the first of the questions referred to it by the Bundesfinanzhof, should rule that when a partnership admits a partner in consideration for a contribution in cash, it is not making a supply for consideration within the meaning of Article 2(1) of the Sixth Directive. That is to say, it is not carrying out a taxable transaction. (28)
37. Nor is that assertion undermined by the fact that Article 13(B)(d)(5) of the Sixth Directive states that, among other transactions, those in interests in companies are exempt from VAT, an exception which assumes that they were previously taxable transactions. It is not to be inferred from that provision that the acquisition of an interest in a company is always, and in every case, subject to VAT.
38. A transaction is exempt where it satisfies the conditions laid down to be subject to tax but it is not taxable by decision of the legislature. If those requirements are not satisfied a transaction is not exempt; it is simply not a taxable transaction. That is to say, the exemption provided for in Article 13(B)(d)(5) of the Sixth Directive does not assume that all the classes of transactions in respect of securities to which it refers will be taxable, since transactions in those securities, which are taxable because they satisfy the conditions laid down in Article 2(1) in conjunction with Article 4(2) of the Sixth Directive, are exempt from tax.
39. There is no inconsistency, therefore, between the solution which I propose and the terms of Article 13(B)(d)(5) of the Sixth Directive. That has been decided by the Court, which considers that there are transactions in shares, interests in companies or associations, debentures and other securities which may fall within the scope of VAT, (29) but nothing more, just as, I would add, there are other transactions, such as the transaction in the main proceedings, which remain outside its scope.
40. I am unable to understand the argument based on Article 5(8) of the Sixth Directive which the representative of the German Government put forward at the hearing. In his submission, that provision supports the theory that transactions relating to companies such as that in the main proceedings are taxable, since it allows the Member States to take the view that transfers in the form of a contribution to a company are not supplies of goods. What I have said in respect of Article 13(B)(d)(5) of the Sixth Directive applies to Article 5(8) too. The fact that Member States may exclude the transactions concerned from that concept does not mean that every contribution to a company is in every case and inevitably a supply of goods within the meaning of Article 2(1) of the Sixth Directive.
41. Nor is the German Government's position supported by the judgment in *Heerma* , (30) where the Court held that a partner who leases immovable property to the partnership of which he is a member carries out an independent activity for the purposes of Article 4(1) of the Sixth Directive. It

does not follow from that assertion that the incorporation of a new partner in a partnership in exchange for a contribution in cash is a taxable transaction. There are two distinct activities with nothing in common; one is accession to the partnership and the other is an act for the administration of the immovable asset, the only singular feature of which is that the person transferring the use and enjoyment of the asset is not a third party but a member of the partnership who, in such a case, acts for that purpose as a stranger.

B. Second question

42. Should the Court follow my suggestion in regard to the first question referred by the Bundesfinanzhof, there will be no need to examine the second question.

43. However, even if it considers that admission to a partnership in consideration for a contribution in cash is subject to VAT, there will still be no need to examine the second question, since, as the Bundesfinanzhof itself states in the order for reference, the transaction will be exempt under Article 13(B)(d)(5) of the Sixth Directive.

44. Consequently, the question whether the transactions in the main proceedings constitute incidental transactions referred to in the second sentence of Article 19(2) of the Sixth Directive has no bearing on the outcome of the dispute and the question referred by the German court is devoid of purpose.

45. The principle of neutrality which governs the Community rules on VAT requires that the taxable person deduct the amounts of VAT paid in respect of the acquisition of goods and services which are used for the purposes of the taxable transactions. (31) It requires that when paying the tax the taxable person is allowed to deduct the VAT already charged on those goods or services. (32) The first consequence of the application of that principle to the deductions is that its objective content must be coextensive with that of the activity of the taxable person. In other words, the deduction system must be applied in such a way that its scope corresponds ... to the sphere of the taxable person's business activity. (33)

46. Consequently, where a taxable person acts as a final consumer and acquires goods or uses services for private purposes he is not entitled to deduct (34) and where he uses them for the purposes of his taxable transactions the right to deduct arises only to the extent to which they are used for those purposes. (35)

47. The foregoing considerations explain Article 17(5) of the Sixth Directive. As regards goods and services used by the taxable person in order to effect both transactions giving rise to the right to deduct and transactions not giving rise to that right, the VAT borne may be deducted only in proportion to the amount of the former transactions. The allocation is calculated by means of a fraction whose numerator is the total turnover for the fiscal year, excluding VAT, in respect of transactions giving rise to the right to deduct and the denominator is the total amount for the same period, also excluding VAT, of all transactions carried out by the taxable person, including those not giving rise to the right to deduct. However, according to Article 19(2), incidental transactions are not taken into account in either of the parts of the fraction. That provision is also designed to ensure the neutrality of the common system of VAT. (36)

48. In short, the provision to which the second question relates forms part of the system of deductions provided for in the Sixth Directive. In order for it to apply, the right to deduct must have arisen and, in accordance with Article 17(1) and (2), that event comes about only when the tax is payable in respect of the acquisition of goods and services used for the purposes of the taxable transactions. (37) If, on the other hand, they are connected with transactions which are not taxable or are taxable but exempt, there is no payment and the right to deduct does not arise. (38) The right to deduct arises only where there is a tax obligation to which it can be applied. (39) The proof is to be found in Article 17(3)(b) and (c), which, exceptionally, permit deduction of the VAT charged in respect of the acquisition of goods and services used for the purposes of certain exempt transactions, including that in Article 13(B)(d)(5) when they are directly connected with goods to be exported to a country outside the Community or when the recipient is established outside the Community.

49. In its judgment in *BLP Group* , (40) the Court held that, except in the cases expressly provided

for by the First and Sixth Directives, where a taxable person supplies services to another taxable person who uses them for an exempt transaction, the latter person is not entitled to deduct the input VAT paid, even if the ultimate purpose of the transaction is the carrying out of a taxable transaction.

50. On the basis of the foregoing reasoning, I can assert that the admission of a partner into a partnership in consideration for a contribution in cash falls in any event outside the scope of VAT, so that in the main proceedings there is no need to deduct the VAT paid in respect of the supply of services placed at the disposal of the partnership. Consequently, the pro rata rule and the rule in the second sentence of Article 19 of the Sixth Directive are not applicable to the dispute and the second question referred by the Bundesfinanzhof is thus devoid of purpose.

V ? Conclusion

51. In the light of the foregoing considerations, I propose that the Court should:

(1) Answer the first question as follows: Where a partnership admits a partner in exchange for a contribution in cash, it is not making a supply for consideration within the meaning of Article 2(1) 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 and, accordingly, it is not carrying out a taxable transaction.

(2) Not answer the second question, as it is devoid of purpose.

1 – Original language: Spanish.

2 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes ? Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

3 – BGBl. 1991 I, p. 351. Article 4(8)(f) provides that transactions, including the negotiation of transactions, in interests in companies and other associations are to be exempt from tax. Article 15(2) provides that [t]here is no deduction of tax in respect of supplies of goods and the import of goods, and in respect of supplies of services, which the business uses for effecting ... exempt transactions.

4 – According to that provision, If a business uses any goods supplied or imported for the purposes of its business, or a service supplied to it, only in part for effecting transactions which exclude the right to deduct, then there shall not be deducted such part of the input tax as is to be attributed economically to transactions which result in the exclusion of the right to deduct. The business is entitled to make a fair estimate of the non-deductible parts.

5 – The discussion as to whether the fees charged by Dr Severin were in respect of his services relating to the admission of the new partner or whether, more widely, they also included other services in respect of the formation and operation of the partnership must remain outside the limits of the question. The German court seeks to know whether the tax charged by Dr Severin is deductible and, for that purpose, it seeks to ascertain whether the admission of a new partner to a partnership is a supply subject to VAT. When the Court has provided an answer, the national court will have to determine the dispute in the light of the answer it receives and of the factual background to the case, in respect of which the Community Court has nothing to say.

6 – See Case C-384/95 *Landboden-Agrardienste* [1997] ECR I-7387, paragraph 13.

7 – Advocate General Léger has recently performed that task in his Opinion of 12 September 2002 in Case C-77/01 *EDM* , in which judgment has not thus far been delivered.

8 – See Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 17.

9 – See the judgment cited in the previous footnote (same paragraph); see also the judgment in Case C-80/95 *Harnas & Helm* [1997] ECR I-745, paragraph 13.

10 – It will be remembered that the Court regarded the exercise of public functions by notaries as an economic activity for the purposes of the Sixth Directive, since they supply services to individuals on a permanent basis and in consideration for remuneration (see Case C-235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 9).

11 – See paragraph 8 of the judgment in *Commission* v *Netherlands* , cited above.

12 – See *Van Tiem* , cited above, paragraph 18, and *Harnas & Helm* , also cited above, paragraph

14. Reference may also be made to Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111, paragraph 12.
13 – Case C-276/97 *Commission* v *France* [2000] ECR I-6251, paragraph 31; Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 29; Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 41; Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraph 25; and Case C-260/98 *Commission* v *Greece* [2000] ECR I-6537, paragraph 26.
14 – See Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 32.
15 – See *Polysar Investments Netherlands* , cited above, paragraph 13. Reference may likewise be made to the judgments in Case C-333/91 *Sofitam* [1993] ECR I-3513, paragraph 12; *Harnas & Helm* , cited above, paragraph 15; Case C-142/99 *Floridienne and Berginvest* [2000] ECR I-9567, paragraph 17; and Case C-16/00 *Cibo Participations* [2001] ECR I-6663, paragraph 19. See also, on this point, order of 12 July 2001 in Case C-102/00 *Welthgrove* [2001] ECR I-5679, paragraph 14.
16 – See *Polysar Investments Netherlands* , paragraph 14; *Floridienne and Berginvest* , paragraph 18; and *Cibo Participations* , paragraph 20. See also the order in *Welthgrove* , paragraph 15.
17 – See *Wellcome Trust* , paragraph 33.
18 – See Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14.
19 – Judgment in *Van Tiem* .
20 – Judgment in *Polysar Investments Netherlands* .
21 – Judgment in *Sofitam* .
22 – Judgment in *Harnas & Helm* .
23 – Judgment in *Wellcome Trust* .
24 – Judgment in *Floridienne and Berginvest* ; judgment in *Cibo Participations* .
25 – Case C-306/94 *Régie Dauphinoise* [1996] ECR I-3695.
26 – To my mind, it is irrelevant whether payment is in cash or in kind.
27 – It will be recalled that, according to the first paragraph of Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967 (I), p. 14), [t]he principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.
28 – I must confess that I am unable to understand the Bundesfinanzhof's reference in the order for reference to Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), since it is irrelevant to the outcome of the dispute whether the transaction in issue may be subject to tax of this kind, since the fact that it is subject to that tax does not determine that it is subject to VAT, as that directive merely does not preclude the charging of VAT (see Article 12(1)(f)).
29 – See *Wellcome Trust* , paragraph 35, and *Harnas & Helm* , paragraph 16.
30 – Case C-23/98 [2000] ECR I-419.
31 – As stated in paragraph 2 of Article 17 of the Sixth Directive. On the system of deductions as a means of ensuring the neutrality of the tax, see Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case 50/87 *Commission* v *France* [1988] ECR 4797, paragraph 15; Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 44; and Case C-78/00 *Commission* v *Italy* [2001] ECR I-8195, paragraph 30.
32 – See Case C-318/96 *Spar* [1998] ECR I-785, paragraph 23.
33 – See Case 165/86 *Intiem* [1988] ECR 1471, paragraph 14. See also, to the same effect, *Sofitam* , cited above, paragraph 11.
34 – See Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 9.
35 – See Case C-291/92 *Ambrecht* [1995] ECR I-2775, paragraph 27.

36 – See *Régie Dauphinoise* , cited above, paragraph 21.
37 – In reality, the right to deduct arises as a consequence of two factors: the amount of the deductible tax and the use of the goods or services for the purposes of the taxable transactions (see P. Alguacil Marí and G. Orón Moratal, La deducción en el IVA español y su adecuación a la Sexta Directiva, in *Noticia/C.E.E.* , Nos 67 and 68, August/September 1990, p. 96.
38 – As I have already stated in footnote 3, Article 15(2) of the UStG precludes the right to deduction of tax in respect of supplies of goods and services used for effecting exempt transactions. The Spanish Law on Value Added Tax (Law 37/1992 of 28 December 1992; *Boletín Oficial del Estado* , 29 December 1992, p. 44247, is quite clear on that point; Article 94(1)(1)(a) of that law provides that the taxable person may deduct the amounts of VAT paid on the acquisition or import of goods and services used for transactions which are *taxable and not exempt* from VAT (emphasis added).
39 – See P. Alguacil Marí and G. Orón Moratal, *op. cit.* , p. 101. S. Colmenar Valdés, in El derecho a la deducción en el IVA, in *Revista de Derecho Financiero y Hacienda Pública* , No 157, 1982, p. 327, states that, as the deduction of the input tax is linked to the output tax, it appears that where there is no tax obligation there can be no right to deduct the input tax, since the ultimate reason on which the right to deduct was based no longer exists.
40 – Case C-4/94 [1995] ECR I-983.