Conclusions
OPINION OF ADVOCATE GENERAL
JACOBS
delivered on 23 October 2003(1)

Case C-137/02

Finanzamt Offenbach am Main-Land
v
Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR

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1. Under Articles 5(8) and 6(5) of the Sixth VAT Directive, (2) Member States may consider that, where 'a totality of assets or part thereof' is transferred, no supply of goods or services has taken place and the recipient is to be treated as the successor to the transferor.
2. Germany has exercised that option and, in the present reference for a preliminary ruling, the Bundesfinanzhof (Federal Finance Court) seeks guidance on the application of the rule to a particular type of civil-law partnership (*Vorgründungsgesellschaft GbR*) created for the sole purpose of setting up – but not operating – the business of a limited company yet to be formed and transferring that as yet non-operational business to it once formed. The issue to be resolved is whether – and if so, on what basis – either the partnership itself or the limited company enjoys a right to deduct input tax paid by the partnership on supplies received in the course of setting up the business.

Relevant legislation

Community VAT provisions

3. The essence of the VAT system is set out in Article 2 of the First VAT Directive: (3)
'The 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.
On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods and services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.'
4. That system thus envisages a chain of transactions in which the net amount payable in respect of each link is a specified proportion of the value added at that stage. When the chain comes to an end, the total amount levied will have been the relevant percentage of the final price. More detailed rules are contained in the Sixth Directive.
5. Under Article 2 of that Directive, a supply of goods or services effected for consideration by a taxable person acting as such is subject to VAT. A taxable person is defined in Article 4(1) as one who carries out an economic activity, whatever its purpose or result. Economic activities are

‘all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions’, together with the ‘exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis’. Under Articles 5 to 7, taxable transactions are supplies of goods, supplies of services or imports.

6. Article 5(1) defines a supply of goods as the transfer of the right to dispose of tangible property as owner. However, under Article 5(8):

‘In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax.’

7. Under Article 6(5), Article 5(8) applies in like manner to the supply of services – defined in Article 6(1) as any transaction which does not constitute a supply of goods.

8. The essentials of the right to deduct are set out in Article 17 of the Sixth Directive. Article 17(2) states: ‘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 …’ That entitlement arises, in accordance with Article 17(1), at the time when the deductible tax becomes chargeable.

9. Certain transactions are however exempted from VAT under Articles 13 to 16. No VAT is chargeable on any exempted transaction, and it follows furthermore from Article 17(2), which limits the right of deduction to tax on supplies used for the purposes of taxable transactions, that the supplier is precluded from deducting any input tax on supplies used for the purposes of such transactions made within the Community. (4)

10. Where, as is often the case, the exempt transaction is the final link in the chain (private consumption), the effect is simply to reduce the VAT burden by the amount which would have been levied on the last value added. However, the impossibility of deduction in those circumstances persists even if an exempt transaction constitutes a cost component of a subsequent taxable supply. Input tax may thus in some situations become ‘locked’ in the value of the supply with the result that, contrary to the normal operation of the system, the value on which VAT is charged at later stages *includes* the tax charged at earlier stages. It might be said that the chain of transactions is broken off, and a new chain commences with a higher net value. A similar situation may occur where goods are bought by a taxable person in a private capacity (not ‘acting as such’ within the meaning of Articles 2 and 4(1)) but are then transferred into the sphere of his economic activity. (5)

The Court’s interpretation of the Community provisions

11. The Court has on a number of occasions considered in what circumstances supplies are used ‘for the purposes of’ taxable output transactions, thereby giving rise to a right to deduct under Article 17(2) of the Sixth Directive.

12. Of relevance to the present case are the judgments in *Rompelman*, (6) *INZO*, (7) *Ghent Coal Terminal*, (8) *Gabalfrisa*, (9) *Schloßstraße* (10) and *Breitsohl*, (11) to the effect that whenever a person has the intention, confirmed by objective evidence, to commence an economic activity and acquires initial taxed supplies for that purpose, he must be regarded as a taxable person acting in that capacity and as having the right immediately to deduct the VAT on supplies acquired for the purposes of his intended taxable transactions, without having to wait for the actual exploitation of the business to begin and even if it does not in fact begin.

13. In only two previous cases, however, has the Court been asked to consider the deductibility of input tax in relation to a ‘transfer … of a totality of assets or part thereof’ where a Member State has exercised the option in Article 5(8): *Abbey National* (12) and *Zita Modes*. (13)

14. *Abbey National* concerned the sale between unrelated companies of a building operated as a rental business subject to VAT. It was sold as a going concern which was one part of the transferor’s overall business. A major issue in the case was whether the transferor could deduct

input tax on (essentially legal) services acquired in order to effect the transfer.

15. The Court noted that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, ensuring complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. However, to give rise to the right to deduct, the goods or services acquired must have a direct and immediate link with a taxable output transaction – they must form part of the costs of that transaction. (14)

16. If a Member State has opted not to regard the transfer of a totality of assets or part thereof as a supply of goods then under Article 2 of the Sixth Directive such a transfer is not subject to VAT, and cannot constitute a taxable transaction within the meaning of Article 17(2). The fact that it would have been a taxable transaction if the option had not been exercised is irrelevant. Nor is there a direct and immediate link with the transferee's taxable output transactions. Deduction is only possible where the output transactions are those of the taxable person seeking to deduct; in any event, costs involved in effecting the transfer do not directly burden the cost components of the transferee's taxable transactions, as required by Article 2 of the First Directive. (15)

17. However, those costs form part of the transferor's overheads, and as such are cost components of the products of his business. Where a taxable person transfers a totality of assets and no longer effects transactions thereafter, the costs of services needed for that transfer must be regarded as part of the economic activity of the business as a whole before the transfer. Any other interpretation of Article 17 of the Sixth Directive would be contrary to the principle that the VAT system must be completely neutral as regards the tax burden on all the economic activities of a business provided that they are themselves subject to VAT, and would make the economic operator liable to pay VAT in the context of his economic activity without giving him the possibility of deducting it. An arbitrary distinction would thus be drawn between, on the one hand, expenditure incurred for the purposes of a business before it is actually operated and during its operation and, on the other hand, expenditure incurred in order to terminate its operation. Thus in principle services used by the transferor for the purposes of the transfer of a totality of assets or part thereof have a direct and immediate link with his whole economic activity. (16)

18. The questions in *Zita Modes* focus on the definition of a 'transfer of a totality of assets' and on the need – or otherwise – for the transferee to carry on the same business as that previously pursued by the transferor. Judgment has not yet been delivered in that case.

German law

19. The Community provisions set out above are implemented in German law by the Umsatzsteuergesetz (Turnover Tax Law – 'UStG') 1993.

20. Paragraph 1(1a) of that Law provides: 'Transactions in the context of the transfer of a business (*Geschäft*) to another trader (*Unternehmer*) for the purposes of his undertaking (*Unternehmen*) are not subject to turnover tax. A transfer of a business takes place where an undertaking or a separately managed business unit forming part of an undertaking is in its entirety transferred, whether for consideration or not, or brought in as a contribution to a company. The recipient trader takes the place of the transferor.'

21. For those purposes, 'trader' and 'undertaking' are defined in Paragraph 2: 'A trader is any person who independently carries out a commercial or professional activity. An undertaking comprises the whole of a trader's commercial or professional activity. Commercial or professional activity means any sustained activity carried out for the purpose of obtaining income, even where there is no intention to make a profit or an association carries out its activities only in relation to its members.'

22. Paragraph 15 concerns the right to deduct. Under Paragraph 15(2)(1), no deduction may be made in respect of tax for supplies used by a trader to carry out, inter alia, exempt transactions.

23. Certain aspects of German company law are also relevant to this case. The referring court explains them as follows.

24. An *Aktiengesellschaft* (company limited by shares – 'AG') does not acquire legal personality until it is entered in the commercial register. A necessary preliminary stage is the *Vorgesellschaft*

(pre-registration company), a *sui generis* association of persons which always comes into existence when the company statutes are established. The *Vorgesellschaft* may itself be preceded by a *Vorgründungsgesellschaft* based on an agreement between the founders of the company to cooperate with a view to its formation, usually in the form of a civil-law partnership (*Gesellschaft bürgerlichen Rechts* – 'GbR'), the purpose being to regulate the liability of the persons involved. Where a *Vorgründungsgesellschaft* is set up to prepare a company's subsequent activities, its assets, rights and duties are not automatically transferred to the *Vorgesellschaft* and subsequently to the company when it is formed; if such a transfer is to take place it must be effected by a separate legal transaction.

The main proceedings

25. Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR ('Faxworld GbR') was set up on 1 October 1996 for the sole purpose of preparing for the establishment of Faxworld Telefonmarketing AG ('Faxworld AG'). To that end, it rented and equipped office premises, acquired fixed assets, sent introductory mailshots and engaged in advertising for the future AG. Once Faxworld AG was formed by notarial deed on 28 November 1996, Faxworld GbR ceased its activities and, in performance of its object, transferred all previously acquired assets to the AG for consideration on 1 December 1996. Faxworld AG was immediately able to take up its commercial activities in the office premises which had been rented, equipped and furnished by Faxworld GbR.

26. The transfer price of DEM 87 495.29 was the book value of the assets acquired, that is to say the cost of their acquisition excluding VAT. Thus the amount of VAT paid by Faxworld GbR on its acquisitions was not passed on to Faxworld AG in the transfer price.

27. Faxworld GbR subsequently sought to deduct – that is to say, in the circumstances, obtain reimbursement of – the input tax incurred on the supplies it had acquired and transferred. The tax authority refused the deduction on the ground that the claimant's only output transaction was a transfer of a business, which is not to be treated as a taxable transaction, and that Faxworld GbR was therefore not a trader (taxable person). Faxworld GbR challenged that refusal before the competent tax court, which allowed its claim on the basis of the principle of the neutrality of VAT; input tax could be deducted even though the claimant never intended to use its input supplies to carry out taxable transactions itself, since it had acquired them for the purposes of the business to be carried on by Faxworld AG.

28. The tax authority has appealed on a point of law to the Bundesfinanzhof, which has stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Is a partnership which has been established for the sole purpose of forming a limited company entitled to deduct input tax paid on goods and services procured by it if, after that company has been formed, that partnership effects by formal act a transfer for consideration of the procured goods and services to the subsequently founded limited company and, from the outset, did not intend to carry out any other output transactions and if, in the Member State concerned, a transfer of a totality of assets is not deemed to be a supply of goods or services (first sentence of Article 5(8) and Article 6(5) of the [Sixth Directive])?'

29. The Bundesfinanzhof also indicates that, if the partnership has no right to deduct in those circumstances, any need for a further reference could be obviated if the Court were further to rule whether the limited company instead could have such a right.

The differing points of view put forward

30. The Bundesfinanzhof states that it is inclined to favour the claim for deduction. The right to deduct arises at the time when the deductible tax becomes chargeable, namely when the input supplies are acquired. In the present case, those supplies were acquired solely for the purpose of taxable output transactions. If Faxworld GbR had itself effected those transactions, the input tax would have been deductible. It follows from *Abbey National* that in the case of a transfer of a totality of assets the transferor may deduct input tax only from tax on his own output transactions. However, it is only because of procedural requirements in German company law that in the present case there is a difference in identity between the person acquiring the input supplies and

the person effecting the taxable output transactions. The principle of the neutrality of VAT must mean that the right to deduct is not determined by national differences in legal form.

31. In its observations to the Court, Faxworld GbR argues essentially that it and Faxworld AG constitute a single economic unit (in accordance with the so-called *Fußstapfentheorie* apparently applied by the Bundesfinanzhof, derived from the law of succession and expressing the idea that the recipient follows in the footsteps of the transferor – equivalent to the English idea of 'stepping into the transferor's shoes'). Since the goods and services acquired by Faxworld GbR were to be used for the purposes of Faxworld AG's taxable transactions, Faxworld GbR is entitled to deduct the input tax on those goods and services. Moreover, it submits, in *Breitsohl* (17) the Court held that the right to deduct the VAT paid on supplies acquired with a view to the realisation of a planned economic activity still exists even where the tax authority is aware, from the time of the first tax assessment, that the economic activity envisaged, which was to give rise to taxable transactions, will not be taken up. That ruling applies *a fortiori* where, as here, the economic activity was taken up.

32. The approach taken by the tax authority before the Bundesfinanzhof and by the German Government before the Court is by contrast that Faxworld GbR and Faxworld AG are two separate persons, and that Faxworld GbR is not a taxable person, never having carried out or had the intention to carry out either any economic activity within the meaning of Article 4 of the Sixth Directive or any taxable transaction within the meaning of Articles 5 or 6. There can thus be no question of any right to deduct since, essentially, there is no person who could enjoy such a right and no transaction within the VAT system from which a deduction could be made. The German Government relies significantly on *Abbey National* in that regard.

33. At the hearing, the German Government raised an objection to the alternative question alluded to by the Bundesfinanzhof, as to whether Faxworld AG, rather than Faxworld GbR, might enjoy a right to deduct. That question, it considers, is purely hypothetical and can have no bearing on the outcome of the proceedings brought by Faxworld GbR; national courts are not entitled to raise such questions in the context of the system set up by Article 234 EC.

34. The Commission considers that the acquisition of goods and services by Faxworld GbR falls clearly within the definition of economic activity and thus within the scope of the VAT system. However, since those goods and services were not used by that partnership for – and can have no direct and immediate link with – any taxable output transactions of its own, Faxworld GbR has no right to deduct the input tax thereon. On the other hand, in the Commission's view, Faxworld AG, as 'successor' to Faxworld GbR within the meaning of Article 5(8) of the Sixth Directive, and having used the same goods and services for its taxable outputs, does have a right to deduct. Such a solution is not contrary to the judgment in *Abbey National*, which dealt only with the transferor's right to deduct, and not the transferee's.

Assessment

35. On a preliminary matter, the German Government's objection to the Bundesfinanzhof's alternative question cannot in my view be accepted. The Bundesfinanzhof has expressly refrained from referring that question as such but included it in the order for reference in order to identify an issue which the Court may find relevant to its analysis. It does not in any event seem to me possible, in a situation covered by Article 5(8) of the Sixth Directive, to consider the position of the transferor in isolation from that of the transferee.

36. Next, I should state that the result favoured by the German authorities appears to me to be inconsistent with the principle of the neutrality of VAT, in so far as it denies any right to deduct the input tax in issue, whether for Faxworld GbR or for Faxworld AG.

37. From an economic point of view, it seems clear, a single business has been set up, going through various preparatory stages before becoming operational. The continuity of the business from preparatory to operational stages – the continuity of its identity *as a business* – does not appear to be in any doubt. The normal operation of the VAT system requires that input tax on supplies acquired by a business at both preparatory and operational stages be deductible from its output tax. (18)

38. Any deviation from that normal operation, and therefore from the principle of neutrality, can in my view be accepted only where there is clear authorisation in the legislation, as interpreted where appropriate by the Court.

39. In the present case, from a legal point of view the preparatory and operational stages were carried out by two separate entities, a partnership and a limited company. (19) It is on that separation that the German authorities base their arguments.

40. The partnership was not set up for the purpose of effecting taxable output transactions, it did not effect any and there was at no stage any intention that it should do so. Its sole actual or intended output transaction was to sell the embryo, as yet non-operational, business to the limited company. By virtue of the German legislation implementing Article 5(8) of the Sixth Directive, that transaction was not taxable. (20)

41. None the less, I agree with the Commission that Faxworld GbR falls within the definition of taxable person in Article 4(1) of the Sixth Directive. Its activities were undoubtedly economic in nature and neither the purpose nor the result of those activities is relevant. In that context, I consider the German Government to be mistaken in its reference to *Lennartz*, (21) a case which concerned acquisition for private use of goods subsequently used for taxable transactions. In the present case it is not questioned that the input supplies were acquired for business purposes and not for private consumption.

42. Furthermore, the right to deduct is not lost because no taxable output supplies were in fact made – see *INZO* (22) and *Ghent Coal Terminal* (23) – but it is necessary according to that same case-law for there to have been an intention to make such supplies, and Faxworld GbR appears to have had no intention to make such supplies itself.

43. None the less, although the partnership and the limited company in the present case are two separate legal persons, there is not only a perceptible economic continuity between them but also a degree of legal continuity.

44. Article 5(8) requires that, if no supply is considered to have taken place, the recipient should be treated as the 'successor' to the transferor. In the German version of Article 5(8), the comparable word '*Rechtsnachfolger*' is used. The German implementing legislation speaks of '*an die Stelle treten*' (taking the place of) while German law also appears to recognise a '*Fußstapfentheorie*'. (24) The French and some other language versions of Article 5(8) speak of 'continuing the personality' of the transferor.

45. As I said in my Opinion in *Zita Modes*, (25) the various formulations clearly recall the notion of universal succession, in which one person takes over all of the rights and obligations of another (limited in this context to all of the VAT rights and obligations in relation to the business transferred), so that the transferee acquires, with the business, any outstanding VAT debts and the right to deduct any input tax not already deducted against output tax on taxable transactions. (26) In *Abbey National* (27) I suggested, using the common metaphor of a chain of transactions for VAT purposes, that whilst one link in the chain is deemed not to exist, the result is not – as would be the case for an exempt transaction – a break and a recommencement of the chain but rather a continuing sequential relationship between the links on either side.

46. In that light, is it possible to attribute Faxworld AG's intention to make taxable supplies also to Faxworld GbR, so that the conditions for the latter to enjoy a right to deduct are met?

47. Certain provisions of the legislation and indications in the case-law might appear to militate against such attribution. Under Article 17(1) of the Sixth Directive, the right to deduct arises at the time when the deductible tax becomes chargeable – that is to say when input supplies are acquired – and the Court stated in *Lennartz* (28) that 'only the capacity in which a person is acting at that time can determine the existence of the right to deduct'. At the time of acquisition, Faxworld GbR was acting as a taxable person, (29) but the supplies were not intended for taxable outputs of its own.

48. None the less, I am of the view that the 'succession' provision in Article 5(8) not only justifies but requires the drawing of a significant distinction between the situation with which it is concerned and other, more usual situations.

49. It must be borne clearly in mind that the effect of applying the option in Article 5(8) of the Sixth Directive cannot be to create an exempt transaction. (30) Had that been the legislator's intention, the provision would have been included in Title X of the Directive, concerning exemptions, and not in Title V, on the definition of taxable transactions. An indication of the actual purpose is given in the explanatory memorandum to the Commission's Proposal for a Sixth Directive, (31) in which the option was described as being available 'in the interests of simplicity and so as not to overburden the resources of the undertaking'. The point is thus to avoid often large sums of tax being invoiced, paid to the State and then recovered by way of deduction of input tax. A further advantage is to protect the revenue authorities from loss of tax if the transferor is insolvent. (32)

50. If input VAT borne by the assets of a transferred business could not be deducted, there would be not inconsiderable distortion of competition, in comparison with other businesses. And, as the Court reiterated in *Abbey National*, (33) the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, ensuring complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT.

51. In the present case, the assets transferred were acquired by Faxworld GbR for the future purposes of taxable output transactions to be made by Faxworld AG, and thus form cost components of those transactions. There is, moreover, a direct and immediate link between the input supplies and the taxable output transactions which give rise to the right to deduct (34) since, by the operation of Article 5(8), no intervening transaction is deemed to have taken place between the acquisition of those supplies and their use for the purposes of the output transactions. Faxworld AG is the successor – or 'continues the person' – of Faxworld GbR. At the time when the right to deduct arose – that is to say, when the input tax became chargeable – Faxworld GbR was acting as a taxable person within the meaning of Article 4(1) of the Sixth Directive. The conditions for deduction are thus in my view met.

52. That being so, it seems obvious that the best *modus operandi* from a practical point of view is that, where national law allows, the consideration for the transfer should always in such circumstances cover the full value of the assets transferred, including any input VAT which has not yet been deducted. Indeed in most cases it will be difficult if not impossible to isolate the presence (or absence) of such an element in the price.

53. In some cases, however, national law may impose other requirements – that all outstanding input tax must be deducted before the transfer, for example. In the present case, while there does not appear to have been any such requirement, it seems clear that the tax can be identified as not having been passed on.

54. Here, therefore, a distinction must be drawn between the transferor and the transferee. The objective of ensuring the neutrality of VAT would not be achieved if the tax paid could be deducted by a person other than the one who bore the economic burden of it. Even if in this case the partners or shareholders of both entities are in fact the same – so that the same 'pockets' will ultimately be affected – that will not always be so. Where the transfer price of the business is the book value of the assets excluding VAT, to allow the transferee rather than the transferor to deduct would – as the German Government pointed out at the hearing – give the former an unjustified financial advantage; it would also leave the latter with an irrecoverable tax burden. Where on the other hand the burden of input VAT is passed on in the transfer price, the right to deduct must vest in the transferee. To proceed otherwise would again entail distortion of competition, an outcome which, in addition to being inconsistent with the principles of the VAT system and Community law in general, is specifically referred to in Article 5(8) as worthy of prevention.

55. In the present case, therefore, it is Faxworld GbR and not Faxworld AG which must enjoy the right to deduct.

56. It might be questioned whether the view I have reached is wholly compatible with the Court's judgment in *Abbey National*. At paragraphs 32 to 35 of that judgment, it will be recalled, the Court stated that a taxable person may deduct only the VAT on the goods and services used

for the purposes of his own taxable transactions, and that the amount of VAT paid by the transferor on the costs incurred for the services acquired in order to carry out a transfer of a totality of assets or part thereof does not directly burden the various cost components of the transferee's taxable transactions. None the less, such costs form part of the overheads of the transferor's business and as such are cost components of the products of that business; the transferor thus enjoys a right to deduct on that basis.

57. I view that reasoning however as specific to the circumstances of *Abbey National*. The tax in issue in that case was payable on services acquired for the purposes of effecting the transfer, and not on the assets actually transferred. Those latter assets, in issue in the present case, clearly do form cost components of the transferee's transactions, and the continuity of personality as between the transferor and his successor, the transferee, justifies treating input VAT on their acquisition as giving rise to a right to deduct on that basis.

58. In order to respect the principle of the neutrality of VAT and to avoid any distortion of competition, that right should vest in the person, whether transferor or transferee, who actually bears the economic burden of the tax, in circumstances where Article 5(8) of the Sixth Directive applies. It would only be in wholly exceptional – and difficult to imagine – circumstances that those aims could still be achieved by allowing the other party to the transfer the right to deduct.

Conclusion

59. I am therefore of the opinion that the Court should give the following answer to the question raised by the Bundesfinanzhof:

Where

–a Member State has made use of the option in Articles 5(8) and 6(5) of the Sixth VAT Directive, so that a transfer of a totality of assets is treated as not being a supply of goods or services, and

–goods and/or services are acquired by one natural or legal person (the transferor) for the sole purpose of setting up but not operating a business, and of transferring the assets of that business to another natural or legal person (the transferee) who intends to use those assets to carry out taxable transactions,

the right to deduct VAT paid or payable on the goods and/or services acquired vests in principle in

–the transferor where the burden of the tax has not been passed on to the transferee in the transfer price, and

–the transferee where the burden of the tax has been passed on to him in the transfer price.

1 – Original language: English.

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 ('the Sixth Directive').

3 – 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, p. 14.

4 – This situation is to be distinguished from an exemption with reimbursement of input VAT, or zero-rating.

5 – See Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraphs 8 and 9 of the judgment.

6 – Case 268/83 [1985] ECR 655.

7 – Case C-110/94 [1996] ECR I-857.

8 – Case C-37/95 [1998] ECR I-1.

9 – Joined Cases C-110/98 to C-147/98 [2000] ECR I-1577.

10 – Case C-396/98 [2000] ECR I-4279.

11 – Case C-400/98 [2000] ECR I-4321.

12 – Case C-408/98 [2001] ECR I-1361.

13 – Case C-497/01, Opinion delivered on 26 September 2002.

14 – Paragraphs 24 to 29 of the judgment, citing *Rompelman*, cited in note 6, paragraph 19; *Ghent Coal Terminal*, cited in note 8, paragraph 15; *Gabalfrisa*, cited in note 9, paragraph 44; and Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraphs 19, 20, 24, 29 and 30.

15 – Paragraphs 30 to 34.

16 – Paragraphs 35 and 36.
17 – Cited in note 11.
18 – See in particular the case-law cited in paragraph 12 above.
19 – Although it seems plausible that the two partners in the partnership are also the (only) two shareholders in the company.
20 – It may be noted that under the German legislation such transactions ‘are not subject to turnover tax’ whereas Article 5(8) authorises Member States to ‘consider that no supply … has taken place.’ It is important none the less that a distinction be drawn between exempt supplies and those which are deemed not to have taken place (see paragraph 10 above and paragraph 49 below).
21 – Cited in note 5.
22 – Cited in note 7, paragraphs 19 and 20 of the judgment.
23 – Cited in note 14, paragraphs 17 and 24 of the judgment.
24 – See paragraph 31 above.
25 – At paragraphs 46 and 49.
26 – It appears however that the VAT rules in some Member States require the transferor to settle all outstanding VAT accounts prior to the transfer, so that the ‘succession’ in such cases is confined to adjustments pursuant to Article 20 of the Sixth Directive.
27 – At paragraph 38 of the Opinion.
28 – Cited in note 5, at paragraph 8 of the judgment.
29 – See paragraph 41 above.
30 – In paragraph 10 I have outlined the undesirable effects which such transactions may entail
31 – .*Bulletin of the European Communities*, Supplement 11/73, at p. 10; what is now the first sentence of Article 5(8) was Article 5(4) in the original proposal.
32 – See, for a somewhat fuller consideration, paragraphs 19 to 32 of my Opinion in *Zita Modes*.
33 – Cited in note 11; paragraph 24 of the judgment.
34 – See *Abbey National*, paragraph 25 of the judgment, and the case-law cited there.