OPINION OF ADVOCATE GENERAL

BOT

delivered on 13 December 2007 1(1)

Case C?98/07

Nordania Finans A/S,

BG Factoring A/S

v

Skatteministeriet

(Reference for a preliminary ruling from the Højesteret (Denmark))

(VAT – Deductible proportion – Sale of vehicles by a leasing company on termination of leasing contracts – Notion of ‘capital goods used by the taxable person for the purposes of his business’)

1. The purpose of this reference for a preliminary ruling is to determine the right to deduct value added tax (VAT) enjoyed by a leasing company which carries on two activities, namely leasing of cars, on the one hand, and the provision of financial services, on the other.

2. In so far as only the first of these activities is subject to VAT, the company concerned can deduct the tax paid by it on acquisition of the goods and services necessary for carrying on its professional activities only in the proportion represented by the amount of the turnover of its taxable activities as against its total turnover.

3. In the case in the main proceedings, the question is whether the amount of the turnover corresponding to the sale of vehicles at the end of the leasing contracts is to be taken into account in the calculation of the deductible proportion.

4. This issue arises from the fact that Article 19 of Sixth Council Directive 77/388/EEC, (2) which lays down the detailed arrangements for calculating that deductible proportion, provides, in paragraph 2, that amounts of turnover attributable to supplies of capital goods used by the taxable person for the purposes of his business are to be excluded from this calculation.

5. The national court is therefore asking the Court of Justice whether the notion of ‘capital goods’ referred to in Article 19(2) of the Sixth Directive is to be construed as covering goods which a leasing undertaking purchases with a view to both lease and subsequent resale upon termination of the corresponding leasing contracts.

6. In this Opinion I shall demonstrate that this notion must, in my view, be interpreted as not covering goods which a leasing undertaking purchases with a view to both lease and subsequent

resale, where the sale of the goods upon termination of the corresponding leasing contracts forms an integral part of the company's usual economic activity.

I – **Legal background**

A – *The Sixth Directive*

7. VAT is a tax on consumption which is intended to apply generally to goods and services. The Community system of VAT consists in applying to goods and services a tax that is exactly proportionate to their price, payable on any transaction entered into as part of the production or distribution circuit, the burden of which falls on the end consumer only.

8. In order to ensure that taxable persons responsible for recovering the VAT do not carry the burden thereof, the Sixth Directive provides for a deduction mechanism intended to ensure tax 'neutrality' in regard to them. Taxable persons are thus allowed to deduct from the tax recovered by them from their customers, and in respect of which they are liable towards the Member State, the input tax which they themselves paid when they purchased the goods and services necessary for carrying on their business.

9. However, the right to deduct presupposes that the taxable person uses the goods or services for activities that are themselves subject to VAT. The Sixth Directive contains various provisions intended to guarantee the application of this system in the case where a taxable person uses the same goods or service for both his taxable and exempt activities. These provisions give effect to the objective laid down in the 12th recital in the preamble to the Sixth Directive, which states that the rules governing deductions should be harmonised to the extent that they affect the actual amounts collected and that the deductible proportion should be calculated in a similar manner in all the Member States.

10. Article 17(5) of the Sixth Directive thus provides that, where a taxable person uses goods and services for taxable transactions, in respect of which VAT is deductible, and for exempt transactions, in respect of which VAT is not deductible, the deduction is available only for such proportion of the VAT as is attributable to the former transactions. That article also provides that the proportion is to be determined for all the transactions carried out by the taxable person in accordance with Article 19 of the Sixth Directive.

11. Article 19(1) of the Sixth Directive provides as follows:

'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 …

– 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 proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next unit.'

12. Article 19(2) of the Sixth Directive, which is at the heart of the present reference for a preliminary ruling, provides as follow:

'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.'

13. Article 20 of the Sixth Directive lays down the rules on adjustments of deductions. It provides as follows:

'1. The initial deduction shall be adjusted according to the procedures laid down by the Member States …

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

…

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

3. In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. …

4. For the purposes of applying the provisions of paragraphs 2 and 3, the Member States may:

– define the concept of capital goods,

…

5. If in any Member State the practical effect of applying paragraphs 2 and 3 would be insignificant, that Member State may, subject to the consultation [of the VAT committee], forego application of these paragraphs having regard to the need to avoid distortion of competition, the overall tax effect in the Member State concerned and the need for due economy of administration.

…'

B – *National law*

14. Articles 17(5) and 19(1) and (2) of the Sixth Directive were transposed into Danish law by Article 38(1) of the Law of 18 May 1994. That article is worded as follows:

'In respect of goods and services which a registered undertaking uses both for purposes giving rise to entitlement to a deduction under Article 37 and for other purposes in its business, a deduction may be made in respect of that part of the tax which is proportionate to the turnover in the part of the business which must be registered. There shall be excluded from the assessment of turnover amounts of turnover attributable to the supplies of capital goods used for the purpose of the business. Machinery, equipment and similar business assets, the sales price of which, excluding tax under this Law, exceeds DKK 50 000 [from 1996, DKK 75 000], shall be regarded as

capital goods …’

II – **The facts of the dispute in the main proceedings**

15. Over the period 1995 to 1998, BG Erhvervsfinans A/S, (3) to which Nordania Finans A/S and BG Factoring A/S are the successors in law, operated a substantial leasing undertaking in the form of hire purchase, primarily of cars. It also provided financial services.

16. The leasing operations consisted in leasing vehicles for a period of typically 36 months and the sale of the cars upon termination of the lease contracts. The anticipated turnover upon the sale was taken into account in setting the lease fees, and the purchase and sale of the vehicles were organised professionally and systematically. Thus, in 1998, Erhvervsfinans leased 4 500 vehicles and sold more than 600.

17. The leasing and sale of vehicles are transactions subject to VAT. Financial services, by contrast, are exempt from VAT under Article 13B(d) of the Sixth Directive.

18. Over the period 1995 to 1998, Erhvervsfinans incurred general costs relating to its business premises, its office equipment, its computer equipment, its telephone, auditing of its accounts and so on, on which it paid VAT. It therefore had to calculate the proportion of its right to deduction for VAT purposes in accordance with Articles 17(5) and 19(2) of the Sixth Directive.

19. In making this calculation, Erhvervsfinans included the turnover attributable to the sales of vehicles in its annual turnover, as it took the view that those sales ought to be regarded as normal sales of goods.

20. By decision of 17 November 1999, the Danish tax authorities determined that the vehicles sold at the end of the leasing contract should be treated as ‘capital goods used by the taxable person for the purposes of his business’, with the result that the turnover attributable to the sale thereof ought to be excluded from the deductible proportion. That decision led to a reduction in that proportion.

21. Erhvervsfinans challenged that decision before the Landsskatteret (National Tax Tribunal), which upheld its application. That tribunal found that the leased vehicles were purchased with a view to being leased and sold at the end of the leasing contract, to third parties or possibly to the lessee. From this it concluded that the sale of the leased vehicles had to be regarded as forming a natural part of Erhvervsfinans’ business activities, with the result that those vehicles could not be treated as ‘capital goods’ within the meaning of Article 19(2) of the Sixth Directive.

22. Skatteministeriet (the Danish Ministry of Fiscal Affairs) appealed against this decision to the Østre Landsret (Eastern Regional Court), which declared the appeal to be well founded, taking the view that the leased vehicles did constitute capital goods within the meaning of the abovementioned provision.

23. Nordania Finans A/S and BG Factoring A/S, successors in law to Erhvervsfinans, thereupon appealed to the Højesteret (Supreme Court) against the decision of the Østre Landsret.

24. It was in this context that the Højesteret decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the expression “capital goods used by the taxable person for the purposes of his business” contained in Article 19(2) of the [Sixth Directive] to be interpreted as covering goods which a leasing undertaking purchases with a view to both leasing and resale upon termination of the respective leasing contracts?’

III – **Analysis**

25. By its question, the national court is seeking to determine whether or not the turnover attributable to the ordinary sale of goods such as the vehicles leased out by Erhvervsfinans ought to be included in the calculation of the deductible proportion.

26. The implications of the reply to this question are very obvious. If the Court takes the view that such turnover must be included in that calculation, it must be added to the numerator and the denominator of the fraction used to determine the proportion, which will have the effect of increasing the end figure and therefore the taxable person’s right to deduct.

27. The Danish Government, which is opposed to that outcome, considers that goods purchased by a leasing company with a view to leasing and reselling them must be regarded as ‘capital goods used by the taxable person for the purposes of his business’ within the meaning of Article 19(2) of the Sixth Directive for the reasons that follow.

28. According to that government, Article 19(2) must be read in conjunction with Article 20(4) of the Sixth Directive, which states that the Member States may define the concept of ‘capital goods’. That concept, it is agreed, must therefore have the same content in the whole of the Directive, as the reference to Article 20(5) in the last sentence of Article 19(2) confirms. The Member States may therefore define the concept of ‘capital goods’ both in the context of Article 19 and in the context of Article 20 of the Directive.

29. This analysis, the Danish Government continues, is supported by the judgment in *Verbond van Nederlandse Ondernemingen*, (4) in which the Court interpreted the concept of ‘capital goods’ in Article 17 of Second Council Directive 67/228/EEC. (5) It held that the decisive factors in regard to this concept were the durability of the use of the goods in issue and the rules applicable to writing off of the acquisition costs, and that the Member States enjoyed a certain margin of discretion in defining the content of each of those criteria.

30. The Danish Government maintains that the vehicles leased in the main proceedings in the present case meet those criteria. It also claims that there is no need to make any further distinction, as requested by Nordania Finans A/S and BG Factoring A/S, between such capital goods and other goods.

31. Finally, the Danish Government argues that its position is consistent with Article 19(2) of the Sixth Directive and with the preparatory material which led to the adoption of that provision.

32. Accordingly, Article 19(2) of the Sixth Directive, it is submitted, is intended to guarantee that the sale of assets with a high value and durable nature does not distort the deductible proportion. Even if it has already been decided at the time when such assets are purchased that they will be sold when they have been used, the inclusion of the sale price in the calculation of the deductible proportion is liable to distort that proportion.

33. The sales of such assets, the argument goes on, are isolated transactions which affect the company’s resources to a limited extent in relation to its day-to-day business. If a significant amount were to be included as the sale price in the calculation of the deductible proportion, after

the asset in question had been used in the undertaking for several years, that would distort the deductible proportion, since the amount of the sale would not reflect the actual effect of the transaction on the company's financial assets.

34. According to the Danish Government, the preparatory material relating to Article 19(2) of the Sixth Directive shows that it was the specific intention of the Commission of the European Communities that all amounts of turnover relating to capital goods be disregarded, irrespective of whether the sales of capital goods form part of the business usually carried on by the taxable person.

35. I do not share that analysis. Like the appellants in the main proceedings and the Commission, I am of the view that the notion of 'capital goods used by the taxable person for the purposes of his business' in Article 19(2) of the Sixth Directive does not cover assets acquired by an undertaking for the purposes of leasing them and then selling them, where the sale at the end of the leasing contracts is an integral part of the taxable person's usual economic activity.

36. I base my view on the scheme of the system for deductions, of which Article 19(2) is a part, as well as on the purpose of that provision.

37. As a preliminary point it must be noted that the question referred by the national court cannot be answered on the basis of a reading of the words 'capital goods used by the taxable person for the purposes of his business' referred to in Article 19(2) of the Sixth Directive.

38. It is also common ground that the concept of capital goods is not defined in that article or in any other provision of the Sixth Directive.

39. Article 20(4) of the Directive does, admittedly, provide that the Member States may define the concept of capital goods for the application of Article 20(2) and (3). However, unlike the Danish Government, I take the view that the reference in the third sentence of Article 19(2) of the Sixth Directive to the provisions of Article 20(5) does not allow Article 20(4) of the Directive to be interpreted in a manner contrary to its wording.

40. It is solely for the application of Article 20(2) and (3) of the Sixth Directive relating to the adjustment of deductions that Article 20(4) entrusts each Member State with the task of defining the concept of capital goods. That possibility cannot therefore be extended to the context of Article 19 of the Sixth Directive, which relates to calculation of the deductible proportion, without infringing the clear and precise wording of Article 20(4).

41. Such an extension of the scope of the latter provision would also run counter to the objective pursued by Article 19 of the Sixth Directive, as set out in the 12th recital in the preamble thereto, which states that the deductible proportion should be calculated in a similar manner in all the Member States.

42. Furthermore, the right of the Member States to define the concept of capital goods in the system for adjusting deductions, provided for in Article 20 of the Sixth Directive, is not deprived of usefulness or even called into question by the fact that the concept of 'capital goods' referred to in Article 19 of that Directive must have an autonomous and uniform content throughout the European Community.

43. The purpose of Article 20 of the Sixth Directive is to make possible the correction of mistakes in the calculation of the deductions from which the taxable person has benefited. That article is applicable in particular where changes in the factors initially taken into consideration to determine the amount of the deductions occurred after the declaration made by the taxable

person. (6) Such may be the case, for example, where the taxable person who has acquired goods to carry out a taxable activity and deducted all the VAT on the purchase of the goods subsequently uses them in whole or in part for an exempt activity.

44. The likelihood of such a change in the use of goods is greater with regard to capital goods since they are intended to be used by the taxable person for several years. That is why Article 20 of the Sixth Directive establishes a specific system of adjustments for them.

45. Thus, Article 20(2) provides that the deduction initially made may be adjusted over a 5-year period for movable property and over a maximum of 20 years for immovable property. It also defines the arrangements for calculating the adjustment. In addition, Article 20(3) covers the case where the capital item in question is removed from the taxable person's assets before the end of the applicable period by replacing annual adjustment with a single adjustment based on presumed use of the item during the remaining period.

46. It may be supposed with regard to the argument of the Danish Government that, in the provisions of national law dealing with the adjustment of deductions adopted to transpose Article 20 of the Sixth Directive, goods such as vehicles purchased by the taxable person are considered to be capital goods. That classification, which applies when deductions are adjusted, is not called into question by taking account, in the calculation of the deductible proportion provided for in Article 19 of the Directive, of the turnover relating to the routine sale of vehicles at the end of their lease.

47. The fact that vehicles acquired to be leased and then sold in the context of the taxable person's ordinary business are excluded from the concept of 'capital goods' in Article 19 of the Sixth Directive does not preclude the Danish tax authorities from adjusting the deduction of the VAT on vehicles acquired by the taxable person should it transpire that those vehicles, during the time when they were part of the undertaking and contrary to what was intended at the time of their purchase, were no longer wholly used for leasing, which is taxable, but for an exempt activity.

48. In other words, the fact that vehicles purchased for the purpose of being leased and then sold in the context of the taxable person's usual business are excluded from the concept of 'capital goods' in Article 19 of the Sixth Directive has no effect on the classification of 'capital goods' within the meaning of Article 20 of that directive with regard to vehicles which have been subject to a change of use.

49. Finally, the question of application of the adjustment of the deductions to vehicles acquired by the taxable person to be sold at the end of the lease contract does not in principle arise since such vehicles have been used by the taxable person for carrying on a taxable activity only.

50. It follows that the system for adjusting deductions provided for in Article 20 of the Sixth Directive and the right of the Member States to define the concept of capital goods within the context of that system are not compromised by the fact that the concept of 'capital goods' in Article 19 of the Sixth Directive must be given an autonomous and uniform interpretation in the Community.

51. Nor, likewise, does the Member States' right under the final sentence of Article 19(2) of the Sixth Directive to include the proceeds of sale of capital goods in the calculation of the deductible proportion in the case where they exercise the right provided for in Article 20(5) of that directive seem to me to contradict that analysis.

52. Article 20(5) provides for a right to derogate from the rule that the turnover relating to the sale of capital goods is not to be taken into account in the calculation of the deductible proportion.

It cannot be allowed to extend the scope of the first and second sentences of Article 19(2) of the Sixth Directive, which refers to transactions the proceeds of which must be excluded from the calculation of the deductible proportion.

53. Finally, unlike the Danish Government, I am of the view that the interpretation of the concept of ‘capital goods’ in Article 17 of the Second Directive given by the Court in *Verbond van Nederlandse Ondernemingen* is not relevant to the reply to be given to the question at issue here.

54. That interpretation may, admittedly, be transposable to the context of Article 19 of the Sixth Directive, regard being had to the common points which connect that provision to Article 17 of the Second Directive. Article 17 provided that the Member States had the option to ‘exclude … capital goods’ from the deductions regime laid down in Article 11 of the Second Directive, which provided that any taxable person was entitled to deduct the input tax paid for goods and services acquired by him for the purposes of his business.

55. Article 17 of the Second Directive, like Article 19 of the Sixth Directive, therefore laid down the circumstances in which capital goods were to be taken into consideration in the deduction regime intended to ensure the neutrality of the VAT system for a taxable person. (7) None the less, the implications of the request to interpret the concept of capital goods submitted to the Court in the case which gave rise to the judgment in *Verbond van Nederlandse Ondernemingen* were very different to those in the present case.

56. In *Verbond van Nederlandse Ondernemingen*, the national court was faced with the Netherlands legislation adopted under Article 17 of the Second Directive, according to which the Kingdom of the Netherlands had provided that only 67% of the VAT paid on the purchase of ‘business assets’ could be deducted. The Netherlands Government, as is clear from the account of the grounds for those rules, therefore wanted to exclude all goods, including small items of equipment, used for the business to function from the right to deduct by including them in the concept of ‘the business assets of the company’.

57. The Verbond van Nederlandse Ondernemingen, taking the view that the concept of ‘business assets of the company’ was broader than that of ‘capital goods’ in Article 17 of the Second Directive, deducted the VAT paid on purchase of a letter holder and reply cards for attendance at meetings.

58. The national court was therefore faced with the question whether or not such goods ought to be regarded as capital goods liable to be excluded from the right to deduct. To this end it asked the Court to state whether that concept ought to be understood as referring to goods the cost of which is not accounted for as current expenditure but is spread over more than one financial year.

59. It was in this context that the Court replied that the concept of capital goods ‘covers goods used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but are written off over several years’. (8) It is also in this context that it added that the Member States have a certain margin of discretion as regards the requirements to be satisfied in regard to durability and value of the goods and as regards the rules on writing off to be applied. (9)

60. In *Verbond van Nederlandse Ondernemingen*, therefore, the national court was permitted to determine whether office equipment of low value could be treated as capital goods liable to be excluded from the right of deduction from VAT provided for by the Second Directive. In that judgment the Court was not faced with goods such as those in the main proceedings in the present case, which are purchased in order to be leased for a certain period and then habitually

disposed of at the end of the lease.

61. In other words, although, under the criteria set out by the Court in *Verbond van Nederlandse Ondernemingen,* vehicles purchased by an undertaking in order to carry on its economic activities may be capital goods within the meaning of Article 19 of the Sixth Directive, it cannot be inferred from those criteria that such vehicles are to be so categorised if the sale thereof at the end of the leasing contracts forms an integral part of the taxable person's regular activity.

62. That is why I take the view that the interpretation of the concept of capital goods given by the Court in the *Verbond van Nederlandse Ondernemingen* judgment does not enable an answer to be given to the question referred by the Højesteret.

63. In the absence of any conclusive guidance in the Sixth Directive or the case-law, in order to resolve the dispute in the main proceedings the meaning and scope of the concept of capital goods must, under settled case-law, be determined having regard to the scheme of the system of deductions, of which the concept of capital goods forms part, and to the objective thereof. (10)

64. It is settled case-law that the deduction system established by the Sixth Directive is intended to ensure the neutrality of the common system of VAT. Thus this system is meant to relieve the trader entirely of the burden of VAT payable or paid in the course of his activities, provided they are themselves subject to that tax. (11)

65. Where a taxable person acquires goods and services to carry on both taxable and exempt activities, Articles 17(5) and 19 of the Sixth Directive seek to enable him to deduct wholly the portion of the VAT paid on the purchase of those goods and services which is deemed to correspond to the proportion in which they are used for taxable activities.

66. By establishing the system of the deductible proportion in Articles 17(5) and 19 of the Sixth Directive, the Community legislature presumed that the degree to which those goods and services assigned to mixed use are used respectively for taxable and exempt activities is in proportion to the turnover of each of those two categories of activity.

67. Thus, Article 19(1) of the Sixth Directive provides that the deductible proportion of VAT on the purchase of the goods and services is made up of a fraction consisting of a numerator represented by the turnover relating to taxable transactions and of a denominator represented by the total turnover.

68. The exclusion, in the context of this calculation, of the turnover attributable to the sale of 'capital goods used by the taxable person for the purposes of his business' provided for in Article 19(2) of the Sixth Directive then assumes its full meaning. The proceeds of the sale of such goods must be excluded from that calculation because such a sale is in principle exceptional or at least unusual. Consequently, it does not require mixed use of the goods and services in a way that is proportionate to the turnover which it generates. Inclusion of that turnover in the calculation of the deductible proportion would therefore distort the resultant figure in the sense that it would no longer reflect the division of use of goods and services assigned to mixed use as between taxable and exempt activities respectively.

69. This analysis is confirmed by the judgment in the case of *Régie Dauphinoise*, (12) in which the Court explained the reasons why Article 19(2) of the Sixth Directive also provides that, in order to calculate the deductible proportion, the amount of the turnover relating to incidental real estate or financial transactions must be disregarded. As the Court ruled, if all receipts from a taxable person's financial transactions linked to a taxable activity were to be included in the denominator of the fraction used to calculate the adjustment, even where the creation of such receipts did not

entail the use of goods or services subject to VAT or, at least, entailed only their very limited use, calculation of the deduction would be distorted.

70. The exclusion of turnover relating to the sale of capital goods in the same way as turnover generated by ancillary operations is therefore justified by the fact that such transactions do not form part of the taxable person's normal business.

71. As the appellants in the main proceedings point out, that justification also found unambiguous expression in the statement of reasons for the proposed Sixth Council Directive, submitted by the Commission on 29 June 1973. (13)

72. The concept of 'capital goods', mentioned in Article 19 of the Sixth Directive, may not therefore include goods the acquisition and subsequent sale of which form an integral part of the taxable person's normal business activity liable for VAT. When such acquisition and sale form part of that usual activity, they require goods and services to be used that have been acquired by the taxable person for carrying on his taxable activities. The turnover relating to disposal of such goods must therefore be taken into account in calculating the deductible proportion in order that the latter can reflect the normal activities of the taxable person and, thus, the share of use for taxable activities of the goods and services assigned to mixed use. Failing that, that share of use would not enable the taxable person to obtain the VAT refund which it is entitled to claim and the objective of ensuring the neutrality of the Community system of VAT would not be met.

73. In the main proceedings in the present case, the information provided by the national court indicates clearly that the purchase and sale of leased vehicles were organised professionally and systematically and that the expected sales proceeds were taken into account in determining the amount of the rental. It follows that the sale of those vehicles was not in the nature of an incidental activity but constituted a usual and regular activity. The number of vehicles sold by Erhvervsfinans in 1998, as the Commission points out, confirms that analysis.

74. Under those circumstances, it appears to be beyond dispute that the overall expenses incurred by that undertaking for its business premises, its office equipment, its computer equipment, its telephone, the auditing of its accounts, and so on, likewise served in bringing about those sales. It therefore appears justified that the turnover relating to them should be taken into account in calculating the deductible proportion, in order for the taxable person to be relieved of the portion of VAT relating to the overall costs incurred in connection with the performance of that taxable activity.

75. That is why my proposed reply to the question under consideration is that the expression 'capital goods used by the taxable person for the purposes of his business' in Article 19(2) of the Sixth Directive must be interpreted as not including goods purchased by a leasing undertaking with a view, first of all, to leasing them and, subsequently, to reselling them at the end of the leasing contracts, in the case where the sale of the goods at the end of the lease forms an integral part of the usual business activities of that undertaking.

IV – **Conclusion**

76. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Højesteret:

The expression 'capital goods used by the taxable person for the purposes of his business' in Article 19(2) 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 not including goods purchased by a leasing

undertaking with a view, first of all, to leasing them and, subsequently, to reselling them at the end of the leasing contracts, in the case where the sale of the goods at the end of the lease contracts forms an integral part of the usual business activities of that undertaking.

1 – Original language: French.

2 Directive 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 Hereinafter ‘Erhvervsfinans’.

4 – Case 51/76 [1977] ECR 113.

5 – Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, *English Special Edition 1967, p. 16) (‘the Second Directive’). Under Article 17 of that directive the Member States were able wholly or partly to exclude, for a transitional period, capital goods from the system of deductions.*

6 – Case C-184/04 *Uudenkaupungin Kaupunki* [2006] ECR I?3039, paragraph 25.

7 – See also, to this effect, Case C-63/04 *Centralan Property* [2005] ECR I?11087, paragraph 55.

8 – Paragraph 12.

9 – Paragraph 17.

10 – See, inter alia, Case C-321/02 *Harbs* [2004] ECR I?7101, paragraph 28 and case?law cited therein. For a recent application, see Case C-174/06 *CO.GE.P* [2007] ECR I-0000, paragraph 30.

11 – Case C-333/91 *Sofitam* [1993] ECR I?3513, paragraph 10.

12 – Case C-306/94 [1996] ECR I?3695, paragraph 21.

13 – Proposal for a Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (*Bulletin of the European Communities*, supplement 11/73). Under that proposal, Article 19(2) was justified in the following terms:

‘The factors mentioned in this paragraph must be excluded from the calculation of the proportion lest, being unrepresentative of the taxable person’s business activity, they should deprive the amount of any real significance. Such is the case with sales of capital items and real estate and financial transactions which are only ancillary operations, that is to say are only of secondary importance in relation to the total turnover of the business. These factors are only excluded if they are not part of the usual business activity of the taxable person’ (p. 19).