OPINION OF ADVOCATE GENERAL LÉGER
delivered on 29 September 2005 [1]

1. This reference for a preliminary ruling essentially concerns the issue as to whether, and, if so under what circumstances, services supplied within the same legal entity are to be treated as supplies of services for consideration chargeable to value added tax [2] under the Sixth Council Directive 77/388/EEC. [3]

2. It arises from a dispute between the Italian VAT authorities and FCE Bank plc, [4] which is established in the United Kingdom, concerning management and staff-training services supplied by FCE Bank to its fixed establishment in Italy and the cost of which was recharged to that establishment. The parties to the main proceedings are in dispute as to whether those transactions, which took place within the same legal entity, fall to be treated as supplies of services effected for consideration and hence subject to VAT.

I — Relevant legislation

A — *Community law*

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

4. As defined in Article 4(1) of the Sixth Directive, a taxable person is any person who independently carries out an economic activity in any place, whatever the purpose or the results of that activity. Under Article 4 (4), the use of the word 'independently' in paragraph 1 excludes employed and other persons from the tax in so far as they are

1 — Original language: French.

2 — Hereinafter 'VAT'.

3 — 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), as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1, hereinafter the 'Sixth Directive').

4 — Hereinafter 'FCE Bank'.

bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

5. The place of the taxable transaction is determined, in the case of a supply of services, in accordance with Article 9(1) of the Sixth Directive, which is in the following terms:

'The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'

B — *National law*

6. In Italian law, the relevant VAT rules are set out in the Basic VAT Law (Presidential Decree No 633 of 26 October 1972, hereinafter 'the PD'). Article 1 of the PD provides that VAT is to apply to supplies of services effected within the State. Article 3 defines those services as services supplied for consideration.

7. Article 7 of the PD, which is entitled 'Territoriality of the Tax', provides at paragraph (3) that supplies of services 'shall be deemed to be effected within the State if the supplier is domiciled there, or is resident there and has not established domicile abroad, or is the fixed establishment in Italy of a person domiciled or resident abroad'.

II — Facts and procedure in the main proceedings

8. The objects of FCE Bank are to carry on financial activities which are exempt from VAT. It provides its branch offices with consultancy, management, staff-training and data-processing services as well as supplying and managing their application software, with the cost of those services being allocated among the branch offices.

9. According to the facts related by the Corte Suprema di Cassazione (Italy), FCE IT, a fixed establishment of FCE Bank in Italy, raised invoices to itself in respect of the above supplies and in respect of the years 1996 to 1999. After remitting the relevant VAT to the Italian tax administration, FCE IT claimed a refund of same on the basis that it lacked separate legal personality.

10. By failing to give any response, the relevant Italian tax administration implicitly rejected the claim, a decision against which FCE IT successfully appealed. A subsequent appeal by the Italian administration against that decision failed. The appeal court ruled that the supplies in question were internal transactions, effected within the same legal entity, and, as such, were not subject to VAT. It held that the parent enterprise's recharging of the cost of the services to the fixed establishment did not constitute consideration for a supply of services but simply an allocation of costs within the same company.

11. The Italian Ministry of Economic Affairs and Finance brought an appeal in cassation against that judgment. It relied on Article 7 of the PD and argued that because a fixed establishment has independent tax status, any payment made to the parent enterprise in respect of supplies received from the parent enterprise constitutes consideration and is therefore chargeable to VAT.

III — The questions referred

12. According to the national court, there are two issues which have to be resolved, the first as to whether the parent enterprise and its fixed establishment have a legal relationship for the purposes of VAT, and the second concerning the concept of 'supply for consideration'.

13. On the first issue, the question that arises, according to the national court, is whether, under national law and Article 2(1) of the Sixth Directive, a fixed establishment or branch situated in a different Member State from the parent enterprise can constitute an independent entity and accordingly be treated as the recipient of a supply of services chargeable to VAT, having regard to the case-law to the effect that a supply of services is taxable only if there is a legal

relationship between the provider of the service and the recipient. [5]

14. The Corte Suprema di Cassazione points out that under national law, while a non-resident enterprise setting up a fixed establishment in Italy must apply to have it registered in the register of businesses, such a fixed establishment does not have separate legal personality from its parent enterprise, in particular if set up by a banking enterprise. Its legal relations with third parties are imputed to the parent.

15. Yet in the area of direct taxation, the fixed establishments of non-resident companies are liable to income tax, and transactions effected through them must be accounted for separately from those of their parent organisation. The national court wonders whether the *Model Tax Convention on Income and Capital* issued by the Organisation for Economic Co-operation and Development (OECD), [6] in particular Article 7, [7] is relevant for VAT purposes. The national court observes that the OECD commentary on Article 7 specifically mentions supplies of services by a parent enterprise to its permanent establishment as a possible source of expenses which can be recharged to the establishment in question. It further points out that the double-taxation convention between Italy and the United Kingdom of Great Britain and Northern Ireland repeats the relevant provisions of the OECD model convention.

16. The national court also wonders whether the existence of a cost-sharing agreement, or any other legal arrangement attributing to the fixed establishment the cost of services

5 — The national court cites, in particular, Case C-16/93 *Tolsma* ([1994] ECR I-743), where the Court stated that the direct link between the service provided and the consideration received, without which there is no supply of services for consideration in terms of Article 2(1) of the Sixth Directive, must be in the nature of a legal relationship. The issue in that case was whether a musician performing on the public highway and receiving donations from passers-by is engaged in a supply of services for consideration in terms of Article 2(1) of the Sixth Directive. The Court held, using language reproduced in several subsequent judgments, that a supply is taxable only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. The Court found, on the facts of that case, that those conditions were not met because the donations received from passers-by were not in the nature of consideration for a service supplied. There was no agreement between the parties since the passers-by voluntarily made a donation, whose amount they determined as they wished. There was therefore no necessary link between the musical service and the payments to which it gave rise, because the passers-by had not requested music to be played for them and they paid sums which depended not on the musical service but on subjective motives.

6 — Updated as of 29 April 2000 by the OECD Committee on Fiscal Affairs, Volume I, hereinafter 'the OECD model convention'.

7 — Article 7(2) of the OECD model convention provides that 'where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment'. Paragraph (3) of the same article provides:
'In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere'.

supplied to it by the parent enterprise, could mean that there was a legal relationship between the parent and the establishment within the meaning of the case-law of the Court.

17. The question is then whether within one and the same legal entity there can exist a body having sufficient autonomy to allow the possibility of a legal relationship giving rise to a supply subject to VAT. If that is so, two further questions arise, namely, how sufficient autonomy for that purpose is to be established and whether the existence of a legal relationship within the meaning of the case-law of the Court falls to be appraised according to national law or according to Community law principles, as the judgment in *Town and County Factors* appears to suggest. [8]

18. As regards the concept of a 'supply for consideration', the national court wonders whether a recharging of the costs, or even part of the costs, without any mark-up, can constitute consideration in terms of the case-law.

8 — Case C-498/99 [2002] ECR I-7173, paragraphs 21 and 22.

19. In the light of those considerations, the Corte Suprema di Cassazione decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Articles 2(1) and 9(1) of the Sixth Directive be interpreted as meaning that the branch of a company established in another State (belonging to the European Union or otherwise), which has the characteristics of a production unit, may be regarded as an independent person and thus that a legal relationship between the entities can be said to exist with consequent liability for VAT in relation to supplies of services effected by the parent company? Can the "arm's length" standard laid down in Article 7 (2) and (3) of the OECD Model Convention on double taxation and the Convention of 21 October 1988 between Italy and the United Kingdom of Great Britain and Northern Ireland be used to define that relationship? Can a legal relationship be said to exist where there is a cost-sharing agreement concerning the supply of services to the subordinate entity? If so, what conditions must be satisfied for such relationship to be considered to exist? Must the notion of legal relationship be dealt with under national law or Community law?

(2) Can the passing on of the costs of such services to the branch concerned be regarded as consideration for the ser-

vices supplied for the purposes of Article 2 of the Sixth Directive, regardless of the proportion of the costs passed on and the resulting profit to the company, and if so to what extent?

(3) If the supply of services between the parent company and the branch are regarded in principle as being exempt from VAT because the recipient is not independent and consequently a legal relationship between the two entities cannot be said to exist, is a national administrative practice which considers that the supply is taxable in such a case contrary to the right of establishment laid down in Article 43 EC where the parent company is established in another Member State of the European Union?'

IV — Analysis

A — *Clarification of the questions referred for a ruling*

20. The terms employed in the reference may give rise to some ambiguity which needs to be dispelled in order to clarify what is meant and to provide useful answers to the national court.

21. Firstly, in the questions themselves as well as in the grounds of the order for reference, the Corte Suprema di Cassazione repeatedly used the term *'filiale'*, which could suggest that FCE IT is a company established under Italian law and hence a separate legal entity from FCE Bank.

22. It is clear, however, from the grounds of the order that the word 'filiale' is not meant in this literal sense but in the more general sense of 'secondary establishment'. The referring court states that FCE IT is a fixed establishment of FCE Bank [9] and that the issue in the main proceedings is whether and to what extent a legal relationship can exist within a single legal entity such as would make supplies subject to VAT. [10]

23. At the hearing, furthermore, FCE Bank stated that FCE IT is a 'branch' within the meaning of Article 1(3) of Directive 2000/12/EC of the European Parliament and of the Council, [11] which is aimed at giving effect to the internal market in the credit sector. According to the definition set forth in that provision, FCE IT is 'a place of business which forms a legally dependent part of a credit institution and which carries out

9 — See order for reference, paragraph 5.1.

10 — Ibid., paragraph 5.5.

11 — Directive of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1).

directly all or some of the transactions inherent in the business of credit institutions'.

24. It is for the national court to determine the exact legal nature of FCE IT. It appears clear, however, in the light of all of these factors, that it is indeed a secondary establishment which is not a separate legal entity from the parent body and that the question put by the national court in these proceedings is whether, and to what extent, VAT must be accounted for on services supplied within the same legal entity.

25. Secondly, the national court states, as noted above, that FCE IT is a fixed establishment of FCE Bank. By its first question, it seeks interpretation of Articles 2(1) and 9(1) of the Sixth Directive, the latter article providing, it will be recalled, that the place where a service is supplied is the place where the supplier has established his business or has *a fixed establishment from which the service is supplied.* [12]

26. The term 'fixed establishment' is not defined in the Sixth Directive but it is settled case-law that to constitute a fixed establishment a secondary establishment opened in a Member State by a non-resident company must have the human and technical resources necessary to provide the services offered by the company. [13] Since it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case the relevance of the questions which it submits to the Court, [14] it must be taken as given that FCE IT constitutes a fixed establishment within the meaning of Article 9(1) of the Sixth Directive.

27. I will therefore consider the first question referred on the premise that FCE IT is a secondary establishment of FCE Bank in Italy which is not a separate legal entity and which constitutes in that State a fixed establishment within the meaning of Article 9(1) of the Sixth Directive.

B — *The first question*

28. By its first question, the national court asks, in substance, whether on a proper

12 — Emphasis added.

13 — See Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 18, Case C-260/95 *DFDS* [1997] ECR I-1005, paragraph 20, Case C-190/95 *ARO Lease* [1997] ECR I-4383, paragraph 15, and Case C-390/96 *Lease Plan Luxembourg* [1998] ECR I-2553, paragraph 24.

14 — See, in particular, Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 27, and the cases cited there.

construction of Article 2(1) and Article 9(1) of the Sixth Directive, supplies of services by a non-resident parent enterprise to a secondary establishment in a Member State, which is not a separate legal entity and which constitutes a fixed establishment in that State within the meaning of the said Article 9(1), can constitute supplies chargeable to VAT if the cost of the services was recharged to the establishment in question.

29. By this question, the national court wishes to know whether a secondary establishment as described may be regarded as having sufficient autonomy vis-à-vis its non-resident parent enterprise for there to exist between them a legal relationship such that transactions within the same legal entity can be treated as supplies of services subject to VAT.

30. The referring court asks, in this regard, whether such autonomy may be deduced from the host State's criteria for the taxation of profits earned there by the enterprise concerned through its fixed establishment, which follow the OECD model convention, and from the existence of a 'cost-sharing agreement' whereby the cost of the services provided by the parent enterprise is charged against those profits. It also asks whether the concept of legal relationship falls to be considered in the light of national or Community law.

31. The Italian and Portuguese Governments submit that services provided by a parent enterprise to its fixed establishment must be held to be supplies subject to VAT because, according to them, the fixed establishment must be regarded as an autonomous taxable person in the host State.

32. The Italian Government bases this view on Article 9(1) of the Sixth Directive as well as on Article 1 of the Eighth Council Directive 79/1072/EEC, [15] which provides that '[f]or the purposes of this Directive, "a taxable person not established in the territory of the country" shall mean a person as referred to in Article 4(1) of [the Sixth] Directive who [...] has had in that country neither the seat of his economic activity, nor a fixed establishment from which business transactions are effected [...]'. The Italian Government infers from this that even if the parent enterprise and its branch are legally one and the same, they constitute separate entities for tax purposes and specifically for purposes of VAT.

33. The Portuguese Government, for its part, points out that VAT does not apply solely to entities having legal personality and that the concept of taxable person for VAT purposes, as defined in Article 4(1) of the Sixth Directive, must include entities which lack separate legal personality but which operate with a measure of independence. It

15 — Directive of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11).

further submits that the Court's definition of the concept of fixed establishment does not depend on criteria of Member State law but on the condition of the establishment concerned having the human and technical resources necessary to carry on business on a stand alone basis. It notes, finally, that despite its high degree of harmonisation, VAT remains a national tax and, accordingly, the question of whether or not an entity is taxable is solely a matter for the law of the Member State concerned. It concludes from these considerations that a fixed establishment, even if it is an integral part of a legal entity that is 'one and indivisible', must be regarded as a taxable person in its own right distinct from the parent enterprise.

34. I am not convinced by the arguments of the Italian and Portuguese Governments. Like FCE Bank, the United Kingdom Government, and the European Commission, I take the view that services provided within the same legal entity cannot constitute supplies of services chargeable to VAT, even if the cost of the services is apportioned among the various fixed establishments concerned. I base this view on the following arguments.

35. It is certainly the case that VAT is given very wide scope under the Sixth Directive, since it applies to all economic activities and to all stages of distribution and supply. [16] Article 2(1) of the directive covers every supply of goods or services effected for consideration within a Member State by a taxable person acting as such. In the instant case, it is not in dispute that services such as consultancy, management, staff-training and data-processing as well as the supply and management of application software can constitute taxable supplies under Article 6 (1) of the Sixth Directive if effected for consideration by a taxable person. [17]

36. The broad scope of the Sixth Directive also finds expression in Article 4(1), which defines a taxable person as 'any person' who independently carries out an economic activity in any place, irrespective of the purpose or the results of that activity. As the Portuguese Government rightly points out, the concept of taxable person is therefore not restricted to individuals and corporate bodies only but can also apply to an entity devoid of legal personality. [18]

16 — See Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 10.

17 — See, to this effect, Case C-142/99 *Floridienne et Berginvest* [2000] ECR I-9567, paragraph 19.

18 — See, in relation to a partnership under Netherlands law, Case C-23/98 *Heerma* [2000] ECR I-419, paragraph 8.

37. From the foregoing it also follows that the question as to whether or not an activity is taxable for VAT purposes is an objective one, since it does not depend on the purpose pursued by the supplier or on the results of the activity. Neither can it be made subject to criteria relating to the particular form or legal effects of an agreement between the supplier and recipient of the service, which are matters that may vary from one Member State to another. The Court has held, as the Italian Government noted, that the question as to whether or not there is a supply of services for consideration cannot turn on the enforceability of the provider's obligations, so that there is a legal relationship in the *Tolsma* sense even if the provider's obligations are unenforceable. [19]

38. I do not agree with the Italian and Portuguese Governments, however, that there can exist within the same legal entity persons sufficiently autonomous to be treated as two taxable persons in the Community VAT system. In the first place, it is difficult to see how a fixed establishment can be regarded as acting independently of its parent enterprise, as Article 4(1) of the Sixth Directive requires. In the second place, a fixed establishment within the meaning of Article 9(1) of the directive does not constitute a taxable person distinct from its parent enterprise.

39. On the first point, it will be recalled that in the Sixth Directive the concept of independence, as used in Article 4(1), which is a prerequisite of being a taxable person, is given only a negative definition in the first subparagraph of Article 4(4). According to that definition, independence is lacking in the case of an employer-employee relationship. The same provision sets out three criteria for determining whether such a relationship exists, pertaining to working conditions, remuneration, and liability.

40. Applying those criteria, the Court has held that notaries and bailiffs carry on their activities independently since they work on their own account and on their own responsibility, are free to arrange how they perform their work, and collect the emoluments which make up their income themselves. [20] It has also held that the activity carried on in Spain by tax collectors appointed by local authorities must be regarded as an economic activity that is carried on independently and is accordingly subject to VAT. [21] The Court ruled, in particular, that the relationship was not one of employer and employee with regard to remuneration, 'since [those] tax collectors [bore] the economic risk entailed in their

19 — See *Town and County Factors*, paragraph 21, where the issue was whether supplies for consideration are chargeable to VAT if the provider is bound in honour only to provide the services concerned.

20 — See Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 14.

21 — See Case C-202/90 *Ayuntamiento de Sevilla* [1991] ECR I-4247, paragraphs 11 to 15.

activity in so far as their profit depends not only on the amount of taxes collected but also on the expenses incurred on staff and equipment in connection with their activity'. [22]

41. It was on the basis of the same criteria that, in *Heerma*, the Court held that the individual concerned was a taxable person. The issue there was whether the letting of immovable property to a Dutch-law partnership by a member of that partnership was a transaction subject to VAT. The Netherlands Government argued that Mr Heerma could not be regarded as a taxable person within the meaning of Article 4(1) of the Sixth Directive because the letting in question took place purely within a closed circuit, as the lessor, being a member of the partnership, was jointly liable for the fulfilment of the lessee partnership's obligations under the lease.

42. The Court ruled that Mr Heerma and the lessee partnership did not stand in a relationship of employer and employee, as referred to in the first subparagraph of Article 4(4) of the Sixth Directive. In letting property to the partnership, Mr Heerma was acting in his own name, on his own behalf and under his own responsibility, even if he was at the same time manager of the lessee. It also found that the Dutch-law partnership, despite lacking legal personality, possesses the de facto independence of a company and carries on its economic activities independently, with the result that, in relation to those activities, it is the partnership which is the taxable person for VAT purposes. [23]

43. With regard to those criteria and the case-law on their application, it seems to me hardly conceivable that within the same legal entity, a fixed establishment could enjoy sufficient autonomy to act on its own behalf and under its own responsibility and to bear the entire economic risk of its activities. It is true, as the Portuguese Government pointed out, that an undertaking does not need to have legal personality in order to be a taxable person. However, that would not appear to be the decisive consideration in this case. What has to be determined is whether a fixed establishment which is an integral part of a legal entity having legal personality can be seen as independent vis-à-vis that entity, for the purposes of Article 4(1) of the Sixth Directive, on a par with any other VAT taxable person to whom the parent enterprise would supply services. It seems to me that, in this case, the secondary establishment's lack of legal personality in its own right stands in the way of its ability to act autonomously.

22 — Ibidem, paragraph 13.

23 — *Heerma* (paragraph 8).

44. There is authority for this view, I believe, in *DFDS*, where the Court considered the concept of independence in the context of the relationship between a Danish company carrying on business as a tour operator and its English subsidiary. The Court decided that the companies were not independent, despite the subsidiary having separate legal personality and owning its own premises, because it was apparent from a number of circumstances disclosed by the order for reference, in particular the fact that the subsidiary was wholly owned by DFDS and that various contractual obligations had been imposed on it by DFDS, that the subsidiary functioned as a mere auxiliary organ of its parent. [24]

45. If a subsidiary having separate legal personality must, in view of the nature of the relationship between it and its parent company, be regarded as a mere auxiliary organ of that company, then a fixed establishment which is an integral part of the company cannot, a fortiori, constitute an independent entity and be treated as a taxable person in its own right. As the Commission states, transactions carried out within a group between a parent enterprise and a secondary establishment which is not registered in the host State as a separate legal entity incorporated under the law of that State should not normally constitute supplies subject to VAT. [25]

46. The relationship between the parent enterprise and a branch such as FCE IT can also provide a good illustration of this principle. By definition, the branch is simply a place of business with no legal personality. It carries on business not on its own account but as a projection of the credit institution which, by virtue of the authorisation obtained in its State of origin is entitled, under Directive 2000/12, to carry on business through a branch in another Member State. [26] Nor does the branch have any assets of its own. [27] Similarly, if the liability test is applied, the conclusion must again be that the economic risks entailed in operating as a

24 — See *DFDS* (paragraph 26).

25 — The Commission adopts the same position in its Proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services (COM(2003) 822 final), since it proposes that the Council insert the following paragraph 6 into Article 6:
'Where a single legal entity has more than one fixed establishment, services rendered between the establishments shall not be treated as supplies'.
It may be of interest to note that the European Economic and Social Committee, in its opinion on the proposal, treats this point not as an amendment of the Sixth Directive but as a clarification of how it is to be applied (Opinion of the European Economic and Social Committee on the Proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services COM(2003) 822 final — 2003/0329 CNS (OJ 2004 C 117, p. 15)).

26 — The harmonisation of the authorisation and prudential supervision requirements for taking up and carrying on the business of credit institutions is intended to enable any credit institution authorised and supervised by the competent authorities of one Member State to carry on the activities covered by the authorisation in another Member State, by establishing branches or by providing services there (see fourteenth recital and Article 18 of Directive 2000/12).

27 — According to Article 13 of Directive 2000/12 the host Member State cannot even require a branch of an authorised credit to have endowment capital.

credit institution, the risk of a customer defaulting on a loan, for example, are not borne by the branch itself. It is the credit institution as a whole which bears that risk and which is, accordingly, subject to supervision in the Member State of origin as to its financial soundness and solvency.

47. Services provided by the parent enterprise to such an establishment must therefore, in my view, be construed as supplies which the enterprise has decided, as a matter of internal policy, to have its own staff provide to its various centres of operations. The fact that the centre of operations in question is located in another Member State does not alter the fact that these are services provided by an enterprise with its own staff and for its own purposes.

48. That last point leads me on to the second issue on which I disagree with the Italian and Portuguese Governments. Unlike them, I do not believe that a fixed establishment, within the meaning of Article 9(1) of the Sixth Directive, constitutes a taxable person in its own right, separate from its non-resident parent enterprise.

49. Article 9(1) of the Sixth Directive, read in conjunction with the seventh recital thereof, aims to establish a general criterion for determining the place of supply of services so as to avoid conflicts of jurisdiction between Member States and cases of double taxation or non-taxation to VAT. According to Article 9(1) of the Sixth Directive, as interpreted by the case-law, a supply of a service is taxable at the place where the supplier has established its business, unless that criterion does not lead to a rational result for tax purposes or creates a conflict with another Member State. [28] The Court inferred from this that services cannot be deemed to be supplied by an establishment of an enterprise other than its head office unless that establishment possesses a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the service in question. [29]

50. Accordingly, the purpose of attributing the supply of services to the fixed establishment is simply to give effect to the fundamental principle of the common VAT system according to which its application should accord as closely as possible with the actual economic situation. [30] Article 9(1) of the Sixth Directive is therefore intended, where a taxable transaction takes place across borders, to fix the place where the supply is effected, given the financial interest of the Member States in collecting VAT and the differences which may still exist in their respective laws in respect of rates and exemptions.

28 — See *Berkholz*, paragraph 17, Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraph 16, *ARO Lease*, paragraph 15, DFDS, paragraph 19, and *Lease Plan Luxembourg*, paragraph 24.

29 — See the cases cited in footnote 11.

30 — See, to that effect, *DFDS*, paragraph 23.

51. However, the fact that a fixed establishment thus possesses, on a ongoing basis, the various human and technical resources necessary to supply the services to the enterprise's customers, does not, to my mind, sustain the conclusion that it conducts its business independently of the parent enterprise, within the meaning of Article 4(1) and (4) of the Sixth Directive, and that it falls to be treated as a taxable person in its own right.

52. The Portuguese Government's argument to that effect is at odds with *DFDS*, from which it is clear that a fixed establishment is, by nature, a secondary establishment which is not independent vis-à-vis its parent enterprise. [31] That conclusion, which arose in relation to a subsidiary that had legal personality and was therefore a separate legal entity from its parent company but, in reality, operated as a mere auxiliary organ of the parent, seems to me to apply with even greater force in the case of a fixed establishment which does not have separate legal personality and is merely a place of business.

53. To accept the Portuguese Government's argument would, as the United Kingdom Government points out, make Article 9(1) redundant. If the fixed establishment were itself a taxable person in its own right, separate from the parent enterprise, it would suffice to apply the provisions of Article 22 of the Sixth Directive, according to which every taxable person must be registered in the State in which it carries on business.

54. Article 1 of Directive 79/1072 [32] seems to me to lend support to this analysis. That provision means, to my mind, that an enterprise having a fixed establishment in the host Member State is treated as a taxable person in that State. It therefore bears out, by contrary inference, the view that a fixed establishment does not constitute a taxable person in its own right, separate from the enterprise of which it is part, but allows that enterprise to be charged to tax in the host State. The Italian Government therefore seems to me to misconstrue this rule when it uses it as a basis for treating a fixed establishment as a taxable person in its own right. [33]

55. It also follows from all of these considerations that, as the United Kingdom Government argued at the hearing, the same legal entity can constitute only one taxable person.

31 — See paragraph 25 of the judgment.

32 — 'For the purposes of this Directive, "a taxable person not established in the territory of the country" shall mean a person as referred to in Article 4(1) of Directive 77/388/EEC who ... has had in that country neither the seat of his economic activity, nor a fixed establishment from which business transactions are effected ... .'

33 — The Commission notes, in this regard, that infringement proceedings are currently pending against the Italian Republic on the ground that the legislation of that Member State requires an enterprise having a fixed establishment in Italy to register anew in that State for supplies which it makes there directly from abroad (paragraph 21 of its written observations).

56. That view is supported in the first place by the second subparagraph of Article 4(4) of the Sixth Directive, which provides that, subject to consultation with the VAT committee provided for in Article 29 thereof, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links. As the United Kingdom Government notes, that provision can be read, a contrario, as meaning that the same legal entity can constitute one and only one taxable person.

57. The view is further supported by the fact that the Sixth Directive contains several provisions dealing with situations where a taxable person supplies goods or services for the purposes of its own undertaking. One such provision is Article 28a(5)(b), according to which 'the transfer by a taxable person of goods from his undertaking to another Member State' is to be treated as a supply of goods effected for consideration. I am inclined, like the Commission and unlike the Portuguese Government, to think that the fact the legislature inserted that provision shows, by contrary inference, that such a transfer does not constitute, prima facie, a supply of goods for consideration.

58. The same point can be made in the case of supplies of services since, under Article 6 (3) of the Sixth Directive, Member States may, in order to prevent distortion of competition and subject to consultation with the VAT committee, treat as a supply of services for consideration the supply by a taxable person of a service for the purposes of his undertaking where the VAT on such a service, had it been supplied by another taxable person, would not be wholly deductible.

59. That provision applies to the situation where, as is the case here, an undertaking engages in activities that are exempt from VAT. Where such activities are concerned, the undertaking does not add VAT to the price of the services that it supplies to its customers and is not entitled to reclaim the VAT paid on inputs to the exempt activity. The Community legislature accordingly provided, in Article 6(3) of the Sixth Directive, that a Member State may decide, subject to consultation with the VAT committee, to impose VAT on supplies of services by an undertaking for the purposes of a fixed establishment in order to prevent distortion of competition, since the undertaking could not have passed the VAT on to its own customers had it purchased the services from another taxable person.

60. The fact that the Sixth Directive contains several provisions expressly setting out the circumstances in which supplies of services effected by a taxable person for its own

professional or private purposes are to be treated as supplies of services for consideration tends to confirm, in my view, that outside of those specific cases such supplies are not chargeable to VAT.

61. Neither do I believe, finally, that this conclusion is open to question in the light of the rules governing the taxation of profits made in the host State through a permanent establishment that are set out in Article 7 of the OECD model convention. Those rules relate to direct taxes and have no bearing on the application of the common VAT system. Member States are sovereign in the field of direct taxation. They can therefore provide for the taxation of companies established in their territories even in respect of business profits made in another Member State. They can equally provide for the taxation of companies which carry on business in their territories through a fixed establishment.

62. Article 7(2) of the OECD model convention, the terms of which are repeated in Article 4(2) of Convention 90/436/EEC, adopted by the Member States to give effect to Article 293 EC, [34] is intended to allocate tax jurisdiction among Contracting States in order to avoid double taxation of the profits of enterprises that have international operations. Under the scheme ordained by Article 7(1), an enterprise's home State taxes all its profits unless it carries on business in another Contracting State through a permanent establishment. [35] In that event, the permanent nature of the secondary establishment in the host State brings the secondary establishment under the tax jurisdiction of that State. The profits made by the enterprise through the permanent establishment are therefore taxable by the State in which the establishment in question is situated. Article 7(2) of the OECD model convention provides for the attribution to the permanent establishment of the profits which it might be expected to make if it were 'a distinct and separate enterprise [...] dealing wholly independently with the enterprise of which it is a permanent establishment'.

63. It is clear from the terms of that provision that it applies only when the secondary establishment is not a distinct and separate enterprise dealing wholly independently with the parent enterprise. The object is therefore to attribute to the permanent establishment the portion of the enterprise's profits that were made through it, by notionally treating it as a self-standing enterprise. However, the fact that in the field

34 — Convention on the elimination of double taxation in connection with the adjustment of transfers of profits between associated undertakings (OJ 1990, L 225, p. 10).

35 — The term 'permanent establishment', used in the OECD model convention, is defined in Article 5 to mean a fixed place of business through which the business of an enterprise is wholly or partly carried on. It includes especially a place of management, a branch, an office, a factory, a workshop, etc.

of direct taxation the permanent establishment of a non-resident company is treated as an autonomous enterprise for the purposes of calculating tax on profits should not, I believe, lead to the conclusion that it constitutes an independent enterprise for the purposes of the common VAT system.

64. Firstly, that system is based on concepts, such as that of taxable person, that have been harmonised at Community level and the meaning of which cannot be allowed vary according to national provisions on the direct taxation of profits without undermining the purpose of the Sixth Directive. Secondly, the 'arm's length' principle enshrined in Article 7(2) of the OECD model convention is based on a legal fiction, since it consists of treating the permanent establishment as if it were an independent enterprise, which it is not. A fundamental criterion of the common VAT system, however, is that it is the actual economic situation that matters. [36] It is as a consequence of this principle, in particular, that the taxable amount for VAT purposes is the value actually received in consideration of the service supplied and not a value determined according to objective criteria. [37] It would therefore be contrary to the system to apply a legal fiction and to treat an internal transaction as if it had taken place between two independent entities.

65. Similarly, I am also of the opinion that the charging of the cost of the services in question against the profits made in the host Member State through the fixed establishment does not show the existence of a legal relationship in terms of the VAT case-law. The deduction of the cost of services rendered from the share of the enterprise's profits apportioned to its fixed establishment is the logical and just corollary, for the States concerned, of that apportionment of profits. It means that the overheads incurred by the enterprise in order to carry on its business are also apportioned between the States. Accordingly, Article 7(3) of the OECD model convention provides that in determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. The attribution to the permanent establishment of the cost of the services supplied to it is therefore simply part and parcel of the computation of profits taxable in the host State and once again does not show that the establishment in question is an independent entity vis-à-vis the parent enterprise.

36 — See *DFDS*, paragraph 23.

37 — See Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 16, Case C-33/93 *Empire Stores* [1994] ECR I-2329, paragraph 18, Case C-308/96 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 40, and Case C-380/99 *Bertelsmann* [2001] ECR I-5163, paragraph 22.

66. The national court asks, in this regard, about the possible relevance of a 'cost-sharing agreement'. However, it does not

specify what this term refers to in the circumstances of the main proceedings and, in particular, the nature of the arrangement denoted by the term 'agreement'. In any event, even if, as a matter of internal policy, the enterprise had formalized in writing the apportionment among its fixed establishments of the overhead for executive services and general administration as well as of the cost of providing services such as those at issue, that likewise would not show that those establishments were independent entities.

67. Finally, as the United Kingdom Government observed at the hearing, it is important for the common VAT system to be certain and predictable in its operation because of its potential financial consequences for businesses. The test as to whether or not a secondary establishment has separate legal personality would appear to satisfy those requirements. With it, companies from one Member State who wish to do business in another Member State will know that services traded with a secondary establishment will not, as a rule, be subject to VAT if they opt to exercise their right of establishment through a fixed establishment and not through a company registered as a separate legal entity according to the laws of the host State.

68. In the light of all of these considerations, I propose that the Court's answer to the first question referred should be that on a proper construction of Article 2(1) and Article 9(1) of the Sixth Directive, subject to the exceptions provided for by the Sixth Directive, supplies of services by a non-resident parent enterprise to a secondary establishment in a Member State, which is not registered in that State as a separate legal entity and which constitutes a fixed establishment in that State within the meaning of the said Article 9(1), are not capable of constituting transactions chargeable to VAT, even if the cost of those services was allocated to the establishment in question.

C — *The second question*

69. The second question referred for a ruling must be interpreted to the effect that the national court is asking whether, and if so to what extent, the recharging of the costs of those services to such a secondary establishment can be regarded as consideration, within the meaning of Article 2 of the Sixth Directive, regardless of how much of the cost is recharged and of whether or not a mark-up applies.

70. That question is relevant to the resolution of the dispute in the main proceedings only if it is decided that those services are subject to VAT. Since I have proposed that the Court should rule that those services are

not capable of constituting transactions chargeable to VAT, the question as to whether, and if so to what extent, the recharging of those expenses renders the transaction a supply for consideration does not arise. I am therefore of opinion that there is no need to examine this question.

D — *The third question*

71. By its third question, the national court asks, in substance, whether a practice of a Member State to charge VAT on services supplied to a fixed establishment by a parent enterprise headquartered in another Member State is contrary to the principle of freedom of establishment enshrined in Article 43 EC.

72. FCE Bank, the United Kingdom Government and the Commission propose that the question be answered in the affirmative. They take the view that such a practice constitutes discrimination contrary to the Treaty if, as seems to be the case here, it applies to the fixed establishments of non-resident companies and not to those of domestic companies. They also submit that, even if that practice were applied without distinction to the fixed establishments of resident and non-resident companies alike, it would constitute a restriction on the freedom of establishment which was not capable of justification on any grounds of general interest as the practice in question was contrary to the Sixth Directive.

73. The Italian and Portuguese Governments, for their part, argue that such a practice is not contrary to the Treaty as it is their position that it is consistent with the Sixth Directive.

74. For my part, I have the greatest doubts as to the admissibility of this question. I do not see how it is relevant to the resolution of the dispute in the main proceedings. Unlike direct taxation, VAT has been harmonized at Community level, inter alia by the Sixth Directive. Once a national law or practice is held contrary to that directive, there would appear to be no need to consider whether it is also contrary to the fundamental Treaty freedoms, such as freedom of establishment. Moreover, the national court failed to give any reasons as to why this question required examination.

75. I therefore take the view that there is no need to answer the third question referred.

V — Conclusion

76. In the light of the foregoing considerations, I am of opinion that the Court should answer the questions referred by the Corte Suprema di Cassazione as follows:

'On a proper construction of Article 2(1) and Article 9(1) of the 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, subject to the exceptions provided for by that directive, supplies of services by a non-resident parent enterprise to a secondary establishment in a Member State, which is not registered in that State as a separate legal entity and which constitutes a fixed establishment in that State within the meaning of the said Article 9(1), are not capable of constituting transactions chargeable to VAT, even if the cost of those services was allocated to the establishment in question.'