JUDGMENT OF THE COURT (Fourth Chamber)
26 September 1996 *

In Case C-230/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

Renate Enkler

and

Finanzamt Homburg

on the interpretation of Articles 4(1) and (2), 6(2)(a) and 11A(1)(c) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization 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 COURT (Fourth Chamber),

composed of: C. N. Kakouris, President of the Chamber, P. J. G. Kapteyn and H. Ragnemalm (Rapporteur), Judges,

Advocate General: G. Cosmas,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— Renate Enkler, by Hans-Jürgen Enkler, tax consultant in Firkel,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Finance, acting as Agent,

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent,

— the Commission of the European Communities, by Jürgen Grunwald, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Renate Enkler, represented by Hans-Jürgen Enkler, the Finanzamt Homburg, represented by Hans-Werner Klein, Regierungsoberrat, acting as Agent, and the Commission, represented by Jürgen Grunwald, at the hearing on 15 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 28 March 1996,

gives the following

Judgment

1 By order of 5 May 1994, received at the Court on 11 August 1994, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of

Articles 4(1) and (2), 6(2)(a) and 11A(1)(c) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization 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, hereinafter 'the Sixth Directive').

2 Those questions were raised in proceedings between Renate Enkler and the Finanzamt (Tax Office) Homburg ('the Finanzamt') concerning her status as a trader and the calculation of the taxable amount in respect of a motor caravan which she owns.

3 In accordance with 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 value added tax.

4 According to Article 4 of the Sixth Directive:

'(1) "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph (2), whatever the purpose or results of that activity.

(2) The economic activities referred to in paragraph (1) shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

5 Article 6 provides:

'(1) "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

(...)

(2) The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible (...).'

6 With regard to the transactions referred to in Article 6(2), Article 11 provides that the taxable amount is to be the full cost to the taxable person of providing the services.

7 Mrs Enkler is employed in her husband's tax consultancy firm. On 15 September 1984 she notified her local authority and the Finanzamt that she was carrying on the business of hiring out motor caravans. On 28 September 1984, she purchased a motor caravan for DM 46 249, plus turnover tax ('VAT') of DM 6 474.89.

8 In her VAT return for 1984, Mrs Enkler deducted the sum of DM 7 270.77, when she had used the motor caravan for private purposes only.

9 In her return for 1985, she declared turnover of DM 2 535, of which DM 2 205 represented payments received for the hire of the motor caravan to her husband.

10 Finally, in her return for 1986, she declared turnover of DM 1 728 of which DM 868 again came from payments received for hire of the motor caravan to her husband.

11 Mr Enkler paid the sum of DM 90 a day to his wife for that hire. In addition, he contributed to the cost of purchasing and maintaining the vehicle by paying her DM 42 321 in 1984, DM 8 270 in 1985 and DM 8 751 in 1986.

12 During those three financial years Mrs Enkler twice hired the vehicle out to third parties. According to the information supplied by her, the motor caravan was used as follows:

total use	250 days	distance covered	25 781 km,
use for private purposes	79 days	distance covered	13 100 km,
husband's use	40 days	distance covered	5 239 km,
hire to third parties	18 days	distance covered	3 236 km,
journeys for repairs	113 days	distance covered	4 206 km.

13 The order for reference also shows that the motor caravan was covered by private third-party insurance. Moreover, when the vehicle was hired out to a third party, Mrs Enkler took out third-party insurance for hired vehicles and handed the insurance policy over to the customers. Under an agreement with the insurer, Mr Enkler was entitled to use the vehicle without having to take out additional cover.

14 Lastly, it appears that Mrs Enkler did not advertise in daily newspapers that the motor caravan was available for hire. When it was not out on hire, the vehicle was kept in a covered parking area near the building where Mr and Mrs Enkler lived.

15 In 1986 Mrs Enkler stated that she was going to use the vehicle for private purposes only. She set the taxable amount at DM 19 000 and claimed a tax deduction of 80% on the ground that she was a small trader.

16 In a rectification notice of 3 April 1989 for the years 1984 to 1986, the Finanzamt took into account, in calculating the tax which she was liable to pay, only the amount corresponding to the turnover tax which she had separately charged the hirers. In so doing, the Finanzamt was working on the principle that Mrs Enkler owed the tax because she had invoiced that tax when she was not a trader.

17 Mrs Enkler's appeal was dismissed by the Finanzgericht (Finance Court) which found, *inter alia*, that she was not acting as a trader when she hired out her motor caravan. That court stated that the permanent activity required for recognition as a trader presupposed an intention to obtain income, which had to be established by reference to objectively verifiable criteria. According to the Finanzgericht, Mrs Enkler's activity was like a private activity, since:

— she had purchased only one vehicle which was by its nature intended for leisure, and had used it mainly for private purposes;

— her main activity was not that of hiring out vehicles;

— she did not have an office or facilities for keeping and maintaining the motor caravan;

— the motor caravan was essentially financed and maintained by her husband;

— the vehicle was insured as a hired vehicle only for the periods in which it was actually used for hire purposes, and

— its owner kept it even though running it caused her to incur a substantial loss.

18 Mrs Enkler appealed on a point of law to the Bundesfinanzhof. Considering that the relevant provisions of German law had to be interpreted in light of the corresponding provisions of the Sixth Directive, the Bundesfinanzhof decided to stay proceedings and refer the following four questions to the Court for a preliminary ruling:

'1. Is the hiring out of tangible property to be regarded

(a) as an activity of a person supplying services within the meaning of the first sentence of Article 4(2) of the Sixth Directive (77/388/EEC), or

(b) solely as the exploitation of tangible property for the purpose of obtaining income therefrom on a continuing basis within the meaning of the second sentence of Article 4(2) of the Sixth Directive?

2. Is every grant of use of tangible property for consideration an economic activity within the meaning of the second sentence of Article 4(2) of the Sixth Directive or, in order for it to be an economic activity, must it be possible to distinguish it from a private activity?

Must a distinction from a private activity be made

— by reference to certain features (for example, economic importance, duration of grant of use, amount of consideration), or

— by comparison with the usual forms of the economic activity in question (in the present case, the commercial hiring out of motor caravans)?

3. Is the hiring out of a motor caravan to be deemed to be an economic activity for the purpose of obtaining income therefrom on a continuing basis if, over a period of more than two years, it is hired out to only two third parties for a few days and to the lessor's spouse for a total of approximately six weeks, for a total consideration of approximately DM 4 300?

4. If the answer to the third question is in the affirmative, must the taxable amount (Article 11A(1)(c) of the Sixth Directive) for the supply of services within the meaning of Article 6(2) of the Directive include the expenses incurred during the period in which the property for hire is available for the lessor's private use (unoccupied periods)?'

The first question

19 By its first question the national court is essentially asking the Court to state whether the hiring out of tangible property is to be regarded as an 'economic activity' within the meaning of the first sentence of Article 4(2) of the Sixth Directive or as falling solely under the second sentence of that provision.

20 First, a comparison of Article 4(2) with Article 4(3) of the Sixth Directive shows that the concept of economic activity referred to in both the first and second sentences of Article 4(2) does not include activities carried out on an occasional basis.

21 Next, the hiring out of tangible property must be regarded as 'exploitation' of such property within the meaning of the second sentence of Article 4(2) of the Sixth Directive (see Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655).

22 Accordingly, the answer to the first question must be that the hiring out of tangible property constitutes exploitation of such property which must be classified as an 'economic activity' within the meaning of Article 4(2) of the Sixth Directive if it is done for the purpose of obtaining income therefrom on a continuing basis.

The second and third questions

23 By its second and third questions, the national court is essentially asking in what circumstances the hiring out of tangible property such as a motor caravan is to be regarded as being done for the purpose of obtaining income therefrom on a continuing basis within the meaning of the second sentence of Article 4(2) of the Sixth Directive.

24 As far as this point is concerned, it must be remembered that it is for the person seeking deduction of VAT to establish that he meets the conditions for eligibility and, in particular, to prove that he satisfies the criteria for being considered to be a taxable person. Therefore Article 4 of the Sixth Directive does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence (see Case 268/83 *Rompelman*, cited above, paragraph 24). It follows that the administrative or judicial authorities called upon to give a decision on this question must evaluate all the specific circumstances of a given case in order to determine whether the purpose of the activity in question, in the present case the exploitation of property in the form of hiring it out, is to obtain income on a continuing basis.

25 On this point, as Article 4(1) of the Sixth Directive makes clear, the purpose or results of the activity are irrelevant as such for the purposes of determining the scope of the Sixth Directive.

26 In Case C-97/90 *Lennartz* v *Finanzamt München III* [1991] ECR I-3795, the Court ruled that one of the factors on the basis of which the tax authorities must consider whether a taxable person has acquired goods for the purposes of his economic activities is the nature of the goods concerned.

27 That criterion must also make it possible to determine whether an individual has used property in such a way that his activity is to be regarded as 'economic activity' within the meaning of the Sixth Directive. The fact that property is suitable only for economic exploitation will normally be sufficient to find that its owner is exploiting it for the purposes of his economic activities and, consequently, for the purpose of obtaining income on a continuing basis. On the other hand, if, by reason of its nature, property is capable of being used for both economic and private purposes, all the circumstances in which it is used will have to be examined in order to determine whether it is actually used for the purpose of obtaining income on a regular basis.

28 In the latter case, comparing the circumstances in which the person concerned actually uses the property with the circumstances in which the corresponding economic activity is usually carried out may be one way of ascertaining whether the activity concerned is carried on for the purpose of obtaining income on a continuing basis.

29 Although criteria based on the results of the activity in question cannot in themselves make it possible to determine whether the activity is carried on for the purpose of obtaining income on a continuing basis, the actual length of the period for which the property is hired, the number of customers and the amount of earnings are also factors which, forming part of the circumstances of the case as a whole, may be taken into account with others when that question is under consideration.

30 In the light of the foregoing, the answer to the second and third questions must be that in order to determine whether the hiring out of tangible property such as a motor caravan is carried on with a view to obtaining income on a continuing basis,

within the meaning of the second sentence of Article 4(2) of the Sixth Directive, it is for the national court to evaluate all the circumstances of the particular case.

The fourth question

31 By its fourth question, the national court asks whether Article 11A(1)(c) of the Sixth Directive is to be interpreted as meaning that the taxable amount for turnover tax on transactions treated as supplies of services under Article 6(2)(a) of the directive must include expenses which are incurred during a period in which the goods are at the taxable person's disposal in a way that he can actually use them at any time for non-business purposes.

32 First, Article 17(1) of the Sixth Directive provides that: 'The right to deduct shall arise at the time when the deductible tax becomes chargeable' and Article 17(2) allows the taxable person 'to deduct from the tax which he is liable to pay value added tax due or paid in respect of goods (...) supplied or to be supplied to him by another taxable person' in so far as the goods are used for the purposes of his taxable transactions.

33 Second, in order to prevent a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping payment of VAT when he takes those goods away from his business for private purposes and from thereby enjoying undue advantages over an ordinary consumer who buys the goods and pays VAT on them, Article 6(2) of the Sixth Directive provides that 'the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible' is to be treated as a supply of services for consideration (see Case C-20/91 *De Jong*

v *Staatssecretaris van Financiën* [1992] ECR I-2847, paragraph 15, concerning Article 5(6) of the Sixth Directive, which is based on the same principle).

34 In Case C-193/91 *Mohsche* [1993] ECR I-2615, paragraphs 13 and 14, the Court held that private use of goods is taxable only exceptionally and that, consequently, the words 'use of goods' in Article 6(2)(a) are to be interpreted strictly, as meaning only the use of the goods themselves. Accordingly, services supplied by third parties for the purpose of maintaining or using goods where the taxable person is unable to deduct the input tax paid are not covered by that provision.

35 As already pointed out in paragraph 33 above, the purpose of Article 6(2) of the Sixth Directive is to ensure equal treatment as between taxable persons and final consumers. Final consumers can use goods whenever they wish; so, in determining, in accordance with Article 11A(1)(c), the taxable amount for a transaction treated as a supply of services pursuant to Article 6(2), the periods in which goods are at the taxable person's disposal in a way that he can actually use them at any time for private purposes must be taken into account.

36 First, the extent to which those periods are to be taken into account when the taxable amount for VAT purposes is determined is limited by the requirement that only expenses which relate to the goods themselves, such as the writing-off of depreciation, or expenses incurred by the taxable person which entitle him to deduct VAT, may be taken into account.

37 Next, not all expenses of that kind are to be included in the taxable amount. It is characteristic of the periods in question that the goods concerned are at the taxable person's disposal not only for her private purposes but also, and at the same time, for her business purposes. Therefore, a portion of the expenses, proportionate to

the ratio between the total duration of actual use of the goods and the duration of actual non-business use must be taken into account.

38 Consequently, the answer to the fourth question must be that Article 11A(1)(c) of the Sixth Directive is to be interpreted as meaning that the taxable amount for turnover tax on transactions treated as supplies of services under Article 6(2)(a) of the directive must include expenses which are incurred during a period in which the goods are at the taxable person's disposal in a way that he can actually use them at any time for non-business purposes and which relate to the goods themselves or which the taxable person is entitled to deduct for VAT purposes. The portion of the expenses to be included must be proportionate to the ratio between the total duration of actual use of the goods and the duration of actual use for non-business purposes.

Costs

39 The costs incurred by the German and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof, by order of 5 May 1994, hereby rules:

1. **The hiring out of tangible property constitutes exploitation of such property which must be classified as an 'economic activity' within the meaning of Article 4(2) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, if it is done for the purpose of obtaining income therefrom on a continuing basis.**

2. **In order to determine whether the hiring out of tangible property such as a motor caravan is carried on with a view to obtaining income on a continuing basis, within the meaning of the second sentence of Article 4(2) of the Sixth Directive, it is for the national court to evaluate all the circumstances of the particular case.**

3. **Article 11A(1)(c) of the Sixth Directive is to be interpreted as meaning that the taxable amount for turnover tax on transactions treated as supplies of services under Article 6(2)(a) of the directive must include expenses which are incurred during a period in which the goods are at the taxable person's disposal in a way that he can actually use them at any time for non-business purposes and which relate to the goods themselves or which the taxable person is entitled to deduct for VAT purposes. The portion of the expenses to be included must be proportionate to the ratio between the total duration of actual use of the goods and the duration of actual use for non-business purposes.**

Kakouris Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 26 September 1996.

R. Grass C. N. Kakouris

Registrar President of the Fourth Chamber