JUDGMENT OF THE COURT (Third Chamber)
4 December 1990 *

In Case C-186/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Third Chamber of the Hoge Raad der Nederlanden (Netherlands Supreme Court) for a preliminary ruling in the proceedings pending before that Court between

W. M. van Tiem

and

Staatssecretaris van Financiën,

on the interpretation of Articles 4(2) and 5(3)(b) 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,

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida, President of Chamber, F. Grévisse and M. Zuleeg, Judges,

Advocate General: W. Van Gerven
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

the Government of the Kingdom of the Netherlands, by J. J. Heinemann, acting Secretary-General in the Ministry of Foreign Affairs,

* Language of the case: Dutch.

the United Kingdom, by J. A. Gensmantel, Treasury Solicitor's Department,

the Commission, by D. Calleja and B. J. Drijber, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by T. Heukels, acting as Agent, and of the Commission, at the hearing on 28 June 1990,

after hearing the Opinion of the Advocate General at the sitting on 25 September 1990,

gives the following

Judgment

1 By a judgment of 24 May 1989, which was received at the Court on 29 May 1981, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 4(2) and 5(3)(b) 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 (Official Journal 1977 L 145, p. 1, hereinafter referred to as 'the Sixth Directive').

2 Those questions were raised in proceedings between Mr van Tiem and the Netherlands Secretary of State for Finances following an assessment to turnover tax.

3 It appears from the file that on 29 September 1980 Mr van Tiem bought a building plot in a private transaction. In respect of that acquisition the sum of HFL 10 677.97 was invoiced to him by way of turnover tax.

4 On the same date Mr van Tiem granted to Tiem's Electro Technisch Installatiebureau BV building rights over the plot for a period of 18 years subject to the annual payment of HFL 3 000 (inclusive of turnover tax). Under the terms of Articles 758, 759 and 765 of the Netherlands Civil Code, 'a building right is a right *in rem* to have buildings, works and plant on ground belonging to another person'.

5 On 20 October 1980 Mr van Tiem requested the national tax authorities to exclude him with effect from 29 September 1980 from the exemption from turnover tax in respect of the grant of a building right *in rem*.

6 On 18 December 1980 the Inspector granted that request on the basis that it concerned the letting of the immovable property in question.

7 In his turnover tax declaration relating to the first quarter of 1981 Mr van Tiem deducted the turnover tax charged to him upon the purchase of the land.

8 The Inspector disallowed that deduction by raising an assessment to turnover tax in the amount of HFL 10 678, that is to say the amount of tax paid by Mr van Tiem on the purchase of the plot.

9 The Arnhem Gerechtshof, to which Mr van Tiem appealed, confirmed the assessment on the ground that Mr van Tiem had not been acting as a trader, within the meaning of Article 7 of the 1968 Wet op de Omzetbelasting (Netherlands law on turnover tax), upon the creation of the building right and hence was not entitled to deduct the turnover tax invoiced on the purchase of the plot.

10 Mr van Tiem appealed against the Gerechtshof's judgment to the Hoge Raad. That court considered that the grant of the building right was deemed, under

Article 7(2)(b) of the Netherlands legislation, to be the exploitation of a tangible asset for the purpose of obtaining income therefrom on a continuing basis, so that Mr van Tiem fell to be regarded as a trader and was entitled to claim the deduction.

11 In its judgment making the reference to the Court of Justice, the Hoge Raad observes, on the one hand, that the expression 'exploitation of tangible or intangible property', used in the Netherlands legislation, is borrowed from Article 4(2) of the Sixth Directive and, on the other, that the Netherlands legislature availed itself of the option provided for in Article 5(3) of the Sixth Directive to consider rights *in rem* giving the holder thereof a right of user over immovable property to be tangible property, by providing that the creation of a right *in rem* over immovable property is to constitute a supply of goods in Article 3(2) of the Wet op de Omzetbelasting.

12 In those circumstances the Hoge Raad decided to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'(1) Must the second sentence of Article 4(2) of the Sixth Directive be interpreted as meaning that the relinquishment by the owner of immovable property of the use of that property in favour of another person for a specified period in return for a sum to be paid periodically, by the grant to that person for such a period and in return for such payment of a right *in rem* to use the immovable property, such as building rights, constitutes exploitation of tangible property for the purpose of obtaining income therefrom on a continuing basis, within the meaning of that provision of the directive?

(2) In so far as a Member State has made use of the possibility provided for in Article 5(3)(b) of the Sixth Directive to consider rights *in rem* giving the holder thereof a right of user to be tangible property, must Article 5(1) be interpreted as meaning that the term "transfer" used in that provision also covers the creation of such a right?

(3) Is the answer to the first question different if and in so far as the second question is answered in the affirmative?'

13 Reference is made to the Report for the Hearing for a more detailed account of the facts and the legal background to the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

14 In its first question the national court is essentially seeking to ascertain whether the grant of a building right over immovable property by the owner of that property conferring on another person a right of user over the immovable property for a given period in return for a consideration must be deemed to be an economic activity as defined in Article 4(2) of the Sixth Directive.

15 Under Article 4(2) economic activities comprise 'all activities of producers, traders and persons supplying services . . .'. Under the terms of the second sentence of that provision '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'.

16 In order to reply to the question raised it is therefore necessary to ascertain whether the grant of building rights over immovable property may be deemed to be an 'exploitation' of that property within the meaning of those provisions.

17 In that respect it should first of all be underlined that Article 4 of the Sixth Directive confers a very wide scope on value added tax, comprising all stages of production, distribution and the provision of services (see the judgments of the Court in Case 235/85 *Commission* v *Netherlands* [1987] ECR 1487, paragraph 7, and in Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 10).

18 Secondly, in accordance with the requirements of the principle that the common system of value-added tax should be neutral, the term 'exploitation' refers to all

transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis.

19 Therefore, the grant by an owner of immovable property to a third party of a building right over that property must be deemed to be an exploitation of the property if that right is granted in return for a consideration for a specified period. That condition must be deemed to be satisfied when, as is the case in the main proceedings, the building rights are granted for a period of 18 years in return for an annual consideration.

20 Consequently, the reply to the first question must be that the grant by an owner of immovable property to another person of building rights in respect of that property, by authorizing that person to use the immovable property for a specified period in return for a consideration, must be regarded as an economic activity involving 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.

The second question

21 The second question raised by the Hoge Raad seeks to ascertain whether, where a Member State has availed itself of the possibility afforded by Article 5(3)(b) of the Sixth Directive to consider rights *in rem* giving the holder thereof a right of user over immovable property to be tangible property, the reference to transfer in the first paragraph of that article also includes the creation of a right *in rem* to use the immovable property.

22 Article 5(1) of the Sixth Directive defines one of the taxable transactions, namely the supply of goods. That is constituted by 'the transfer of the right to dispose of tangible property as owner'. Paragraph 3 of that article provides that the Member States may consider 'rights *in rem* giving the holder thereof a right of user over immovable property' to be tangible property.

23 The option thus afforded to the Member States enables the creation of a right of user over the immovable property to be considered to be a transfer within the meaning of Article 5(1) of the Sixth Directive.

24 The reply to the second question must therefore be that, where a Member State has availed itself of the possibility afforded by Article 5(3)(b) of the Sixth Directive to consider rights *in rem* giving the holder thereof a right of user over immovable property to be tangible property, the reference to transfer in the first paragraph of that article must be interpreted as including the creation of such a right *in rem*.

The third question

25 In accordance with the purpose of the Sixth Directive, which is *inter alia* to found a common system of VAT upon a uniform definition of 'taxable persons', that status must be assessed solely on the basis of the criteria set forth in Article 4 of the Sixth Directive.

26 Accordingly, the scope of Article 4 of the Sixth Directive cannot be altered by the fact that a Member State has or has not exercised the option of assimilating the creation of a building right to the supply of goods, as provided for in Article 5(3) of the Sixth Directive.

27 Consequently, the reply to the third question must be that the reply to the first question does not depend on the reply to the second question.

Costs

28 The costs incurred by the Netherlands, the United Kingdom and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by judgment of 24 May 1989, hereby rules:

(1) The grant by the owner of immovable property to another person of building rights in respect of that property, by authorizing that person to use the immovable property for a specified period in return for consideration, must be regarded as an economic activity involving 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) In so far as a Member State has made use of the possibility provided for in Article 5(3)(b) of the Sixth Directive to consider rights *in rem* giving the holder thereof a right of user over immovable property to be tangible property, the term 'transfer' used in Article 5(1) must be interpreted as also covering the creation of such a right.

(3) The reply to the first question does not depend on the reply to the second question.

Moitinho de Almeida Grévisse Zuleeg

Delivered in open court in Luxembourg on 4 December 1990.

J.-G. Giraud
Registrar

J. C. Moitinho de Almeida
President of the Third Chamber