OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 25 September 1990 *

Mr President,
Members of the Court,

1. The legal question submitted to the Court by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) concerns Articles 4 and 5 of the Sixth VAT Directive.[1] The Court is asked to rule on whether the grant of a right *in rem* (in this case building rights) in respect of immovable property for a given period and subject to periodic payment may be regarded as an economic activity, so that the grantor of the right *in rem* is to be deemed to be a taxable person within the meaning of Article 4 of the directive, even where the abovementioned transaction is to be regarded as a supply of goods within the meaning of Article 5 of the directive.

Background

2. I shall begin with a brief summary of the facts underlying the reference by the national court. On 29 September 1980 Mr W. van Tiem bought a building plot. On the supply he was charged turnover tax amounting to HFL 10 677.97. Immediately after the purchase Mr van Tiem granted to Tiem's Electro Technisch Installatiebureau BV building rights in respect of the plot for a period of 18 years subject to the annual payment of HFL 3 000 (inclusive of turnover tax). On 20 October 1980 Mr van Tiem requested the Netherlands tax authorities to exclude him with effect from 29 September 1980 from the exemption applicable under Netherlands legislation to the grant of building rights.[2] Mr van Tiem's request was granted on the basis that his request concerned the letting of the immovable property. Some time later Mr van Tiem submitted a turnover tax declaration in which he deducted the amount paid on the purchase. The dispute in the main proceedings concerns the refusal by the Netherlands tax authorities to allow that deduction.

Under the 1968 Netherlands law on turnover tax, amended in 1978 in order to transpose the Sixth Directive, Mr van Tiem can claim a deduction whenever he acts as a trader, in regard both to the purchase of the land and the creation of building rights. The tax authority contends that he did not so act in the present case. For the sake of clarity I should add that Mr van Tiem can only point to the abovementioned legal operations, and not to any other activity, in order to prove his status as a trader.

* Original language: Dutch.

1 — Sixth Council Directive of 17 May 1977 (77/388/EEC) 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 referred to as the 'Sixth Directive').

2 — Evidently that request was made for the purpose of acquiring in respect of that transaction the status of a 'taxable person' (more on this later) and thus the right to deduct the turnover tax paid on the purchase.

3. The point at issue between the parties in the main proceedings is not (so much) the question whether Mr van Tiem can be regarded as a trader in respect of the purchase of the building plot, but whether he may be deemed to be a trader as regards the grant of building rights. Mr van Tiem's ground of appeal is based on Article 7(2)(b) of the Wet op de Omzetbelasting (Law on turnover tax), which is worded as follows:

'Where reference is made in this legislation to traders, that should also be understood to mean:

(a) ...

(b) the exploitation of tangible or intangible property for the purpose of obtaining income therefrom.'

Specifically Mr van Tiem maintains that the grant of the building rights described above must be deemed to be an exploitation of tangible property for the purpose of obtaining income therefrom on a continuing basis, so that he must be deemed to be a trader and is entitled to make the deduction.

The questions

4. Article 7(2) of the Turnover Tax Law mentioned above was enacted in order to transpose Article 4(2) of the Sixth Directive. That is why the Hoge Raad referred to the Court three questions on the interpretation of the Sixth Directive. They are in the following terms:

'(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 to 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 a 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 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 Question 1 different if and in so far as Question 2 is answered in the affirmative?'

5. Those questions relate to the scope of VAT, as defined in the Sixth Directive.

Under the terms of Article 2(1) of the directive the following are subject to value-added tax: 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'. It is clear from that provision that liability to tax presupposes a taxable person and a transaction chargeable to tax. The former concept is defined in Article 4 of the Sixth Directive, and the second in Articles 5 to 7. The first question submitted for a preliminary ruling concerns the interpretation of the concept of 'taxable person', which corresponds to the concept of 'trader' in the Netherlands legislation. The second and third questions ask whether the definition of the concept of 'supply of goods' (one of the chargeable transactions mentioned in the directive) can affect the assessment of status as a taxable person.

The first question

6. In accordance with Article 4(1) of the Sixth Directive any person who *independently* carries on an *economic* activity, whatever the purpose or results of such activity, is to be regarded as a taxable person. The expression 'economic activity' is defined in the second paragraph of Article 4, to which, as has been stated, Article 7(2) of the Turnover Tax Law corresponds. That expression includes

'all activities of producers, traders and persons supplying services ... 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'.

It is not disputed by the parties to the main proceedings that, in regard to the transactions described above, Mr van Tiem was carrying on an independent activity and on the basis of those transactions is to be regarded as a trader or a supplier of services. The question to be answered is accordingly whether the purchase of the plot and the creation of building rights over it should be deemed, either together or separately, to be an 'economic activity'.

7. What guidance may be derived from the case-law? In the first place the Court has stressed on several occasions that Article 4 of the Sixth Directive attributes to VAT a very wide scope.[3] In fact the purpose of the VAT system is to ensure absolute neutrality by subjecting all phases of production, distribution and the provision of services to as general a system of taxation as possible. The notion of 'economic activity' must therefore be broadly interpreted in the light of the principle of neutrality.[4]

It is in that light that it is necessary to read the final sentence of the second subparagraph of Article 4, which gives as an example of economic activity 'the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis'. The judgment in the *Rompelman* case[5] in which the facts were to some extent similar to those of the present case, contains certain indications of relevance for the interpretation of that phrase.

3 — See for example the judgment in Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraphs 6 to 8.

4 — See the judgment mentioned in the previous footnote and the Opinion of Mr Advocate General Lenz in that case, in particular at paragraphs 19 to 21. See also the judgment in Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraphs 10 to 13.

5 — Judgment in Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655.

8. What was at issue in *Rompelman* was the acquisition of a right to the title in a building under construction with a view to a subsequent letting. Just as in the present case, turnover tax was paid on the transfer of the immovable property and the fiscal authority refused to allow the tax to be deducted. The Court was requested to determine whether the acquisition of such a right could be regarded as an economic activity (more specifically the exploitation of immovable property) within the meaning of Article 4(1) of the Sixth Directive, in such a way as to confer entitlement to deduction (and to set off). The Court answered that question in the affirmative on the basis of an analysis of the fundamental characteristics of the VAT system.

In the judgment it was pointed out that the deduction system was intended fully to relieve the trader from VAT paid or payable by him in the context of all his economic activities, thereby ensuring the absolutely neutral fiscal treatment of all economic activities, irrespective of the objectives or the results of those activities.[6] As regards specifically the question of the time when the exploitation of immovable property commences, it was pointed out that the economic activities referred to in Article 4(1) of the Sixth Directive may consist in several consecutive transactions, such as the purchase of immovable property; those preparatory acts must themselves be treated as constituting economic activity.[7] That viewpoint was explained as follows:

'... the principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of and with the view to commencing a business must be regarded as an economic activity. It would be contrary to that principle if such an activity did not commence until the property was actually exploited, that is to say until it began to yield taxable income. Any other interpretation of Article 4 of the Sixth Directive would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it ... and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of immovable property and expenditure incurred during exploitation. Even in cases in which the input tax paid on preparatory transactions is refunded after the commencement of actual exploitation of immovable property, a financial charge will encumber the property during the period, which may sometimes be considerable, between the first investment expenditure and the commencement of exploitation. Anyone who carries out such investment transactions which are closely connected with and necessary for the future exploitation of immovable property must therefore be regarded as a taxable person within the meaning of Article 4'.[8]

9. In the present case the following elements of the *Rompelman* judgment are of relevance. First the purchase of immovable property with a view to its subsequent exploitation (for example by means of letting) is itself to be deemed to be an economic activity, so that the purchaser thereupon acquires the status of a taxable person and with it the right to deduct the tax paid at the time of the supply of the goods. Secondly, the principle of VAT neutrality means that the economic activities

6 — Paragraph 19.

7 — Paragraph 22.

8 — Paragraph 23.

referred to in Article 4(1) of the Sixth Directive may consist in several consecutive transactions. It follows that the act of investment (the purchase of the goods) and subsequent exploitation may not be considered separately, with the consequence that in the course of exploitation a claim may be made to deduct the tax paid in the context of the investment transaction.

10. The *Rompelman* judgment did not expressly define the term 'exploitation' of immovable property. But it leaves no doubt that the *letting* of immovable property must be deemed to be the exploitation of that property. In fact in the operative part of that judgment it is stated that the acquisition of a right to the future transfer of property rights in part of a building yet to be constructed *with a view to letting such premises in due course* may be regarded as an economic activity within the meaning of Article 4(1) from the very moment of the asset's acquisition. The fact that letting is by implication but without doubt to be regarded as an exploitation is borne out by the passage of the judgment dealing with the exemption from VAT on lettings provided for in Article 13 B(b) of the Sixth Directive. The judgment states that the lessor in *Rompelman* had exercised the option provided for in Article 13 C to be taxed on lettings of immovable property and held that the purchaser of immovable property is to be regarded as a taxable person from the moment of purchase. [9]

The present proceedings do not concern the letting of property but the grant of building rights. However, there is no reason not to regard the grant of such a right of user as an exploitation of property. Just as in the case of the letting of property the owner is seeking to derive income from the property by granting building rights over it. Accordingly, it would be contrary to the principle of tax neutrality to restrict the concept of 'exploitation' of an asset to the letting of that asset, thus favouring one legal arrangement over other legal transactions. [10] As the Netherlands Government and the United Kingdom rightly pointed out, the concept of 'exploitation' must therefore be regarded as referring to all transactions, irrespective of their legal form, whereby it is sought to derive income from the asset in question. By the grant of building rights over a building plot for a period of 18 years it is doubtless sought to derive income 'on a continuing basis' from that property within the meaning of Article 4(2) of the Sixth Directive.

11. Yet in the judgment of the Arnhem district court, against which Mr van Tiem appealed to the Hoge Raad, it was stated that the grant of building rights cannot be regarded as an 'exploitation' of the property by the owner since the grantee of the building rights under Netherlands law acquires the *right of disposition* over the asset so that it is the holder of the building rights and not the owner who is exploiting the asset. This view does not seem to me to be correct under Community law. The fact that the holder of the building rights (under national law) may 'dispose' of the immovable property, for example by erecting constructions on it, does not prevent the owner of the immovable property from exploiting that property within the meaning of Article 4 of the Sixth Directive by the grant of building rights.

9 — Paragraph 21.

10 — It should however be noted that the Netherlands fiscal authorities granted Mr van Tiem's request to exclude him from exoneration from turnover tax in respect of the grant of building rights on the ground that the request related to the *letting* of immovable property (see above, paragraph 2).

The owner transfers his power of disposition over the property for a certain time subject to a periodic remuneration. In that sense he is 'exploiting' the property. In other words, the term 'exploitation' is a Community concept which implies that in the application of VAT the national (civil) law may not lead to a situation where one form of exploitation but not another is regarded as an economic activity depending on the nature of the power of disposition enjoyed by the holder of the user rights under national law. The view of the Arnhem Gerechtshof would lead precisely to a situation in which the Community concept of 'exploitation' is tied to a national law concept having a different objective and content, thus infringing the principle of VAT neutrality. [11]

12. On the first question it remains to examine a point raised by the Commission: is it a prerequisite for the status of taxable person for the economic activity to be carried on on a *regular* basis? That requirement was contained in the Second Directive [12] but is missing from Article 4(1) of the Sixth Directive. Nevertheless, as the Commission rightly points out, that requirement must be accepted as continuing to be of general application. Indeed Article 4(3) gives Member States the possibility of treating as a taxable person anyone who on an occasional basis carries out a transaction relating to the activities referred to in the second paragraph of that article. That provision would be superfluous, if the first paragraph already applied to economic activities carried on on an occasional basis.

The Commission further rightly pointed out that the Community legislature was seeking in Article 4(3) to achieve a better tax neutrality by extending the concept of taxable person to those persons carrying on economic activities on an occasional basis. The same objective also underlies the final sentence of Article 4(2): the exploitation of an asset for the purpose of obtaining income therefrom on a continuing basis is also to be considered an 'economic activity' conferring the status of taxable person. I am in agreement with the Commission that in such a case the element of regularity may be inferred from the intention of deriving income *on a continuing basis* from an asset, in other words that the element of regularity is subsumed within the 'continuing basis'.

The second and third questions

13. As has already been mentioned, the concept of 'taxable transactions' is more particularly described in Articles 5 to 7 of the Sixth Directive. The first kind of taxable transaction is the supply of goods, which is defined in Article 5(1) as:

'the transfer of the right to dispose of tangible property as owner'.

The third paragraph (under (b)) of that article permits the Member States to regard as tangible property:

11 — The same reasoning was followed by the Court of Justice in connection with the expression 'goods from customers' materials' in Article 5 of the Second and the Sixth Directives (judgment in Case 139/84 *Van Dijk's Boekhuis* [1985] ECR 1405, in particular paragraphs 15 to 17), and with regard to the concept of 'supply' in Article 5(1) of the Sixth Directive (judgment in Case C-320/88 (Shipping and Forwarding Enterprise Safe BV [1990] ECR I-285, in particular paragraphs 6 to 9), more on this in paragraph 14.

12 — See Article 4 of Directive 67/228/EEC of 11 April 1967 (OJ, English Special Edition 1967, p. 16).

'rights *in rem* giving the holder thereof a right of user over immovable property'.

The Netherlands availed themselves of this possibility in Article 3(2) of the Turnover Tax Law. In that connection the Hoge Raad wishes to ascertain in its second question whether Article 5(1) is to be interpreted as meaning that the expression 'supply of goods' includes the creation of a right of user over the property.

14. The concept of supply of goods arose in the recent *Safe* judgment [13] in which the Court made clear that it does not refer to transfer of ownership under procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it *as if he were* the owner of the property. [14] Whether there is a transfer of the owner's power to dispose of tangible property (that is to say the actual power, which can be wider than the legal concept of ownership) must be determined by the national court in each individual case on the basis of its facts. [15]

In the case of the creation of a right of user over immovable property, the situation is somewhat different when a Member State has availed itself of the option afforded by Article 5(3)(b). The (optional) assimilation of rights of user over immovable property to tangible property is intended, at the Member States' option, to place transactions (for example the creation of a right of user over immovable property) which are economically equivalent to the supply of immovable property on the same footing as regards the imposition of turnover tax. In that respect Article 5 makes no distinction according to the nature of the right of user (provided it is a right of user *in rem*) or according to the extent of the powers conferred by the right over the immovable property. In other words the creation of a right of user *in rem* is classified as a supply as a result of the (optional) assimilation without its being necessary, pursuant to the guidelines given in the *Safe* judgment, to take into consideration the powers conferred by the right of user *over the asset in question.*

For the sake of completeness I would add that the guidelines contained in the *Safe* judgment must be applied when the right *in rem* created is a right *in rem* over another right *in rem*, for example, a right of usufruct or a mortgage on building rights whereby the holder of the right cannot dispose of the latter right as an owner. Should such a case arise — which does not seem to be the situation in the present proceedings — then under the terms of Article 5 of the directive the person entitled would not be able to dispose as owner of a right of user *in rem* assimilated to tangible property.

15. The third question seeks to ascertain whether, assuming that under the answer to be given to the second question the creation of building rights is to be regarded as a supply, the owner of the asset may continue to be presumed to be exploiting the

13 — Cited above in footnote 11.

14 — Paragraph 7.

15 — Paragraphs 10 to 12.

immovable property in question and thus to be deemed to be a taxable person within the meaning of Article 4 of the Sixth Directive. The Commission and the Netherlands Government maintain that the question whether the creation of building rights is to be deemed to be a 'supply' within the meaning of Article 5 is distinct from the question whether a person is to be regarded as a taxable person in accordance with the criteria set out in Article 4. I am also of the view that both questions must be answered separately, for the following reasons.

The status of taxable person must be assessed solely on the basis of the criteria stated in Article 4. The examination of the first question showed clearly that the grant of building rights can very well amount to an economic activity as mentioned in Article 4 (thus giving rise to the status of taxable person). This determination is not affected by the fact that a Member State may have availed itself of the possibility afforded by Article 5(3) to deem the creation of certain rights *in rem* to be tangible property (with the consequence that the creation of building rights is deemed to be a supply within the meaning of Article 5(1)). That option is certainly of importance in defining the term 'taxable transaction' and may also be of relevance in the taxation of the transaction because the rules applicable to the supply of goods differ from those applicable to the provision of services,[16] but it is not intended to affect the determination of the concept of 'taxable person'. Indeed the harmonization sought by the Sixth Directive would be jeopardized, if the scope of Article 4 could differ from Member State to Member State according to whether use is made of the option offered by Article 5(3).

Conclusion

16. On the basis of the foregoing considerations I suggest that the questions referred to the Court by the Hoge Raad should be answered as follows:

'(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 payment, must be regarded as 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.

16 — See for example Articles 8 and 9 (place of taxable transactions) and Article 11 (taxable amount).

(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, the creation of such a right must be taxed as the supply of immovable property.

(3) The answer to Question 2 has no effect on the answer to Question 1.'