OPINION OF ADVOCATE GENERAL DARMON

delivered on 17 September 1992 *

Mr President,
Members of the Court,

1. In the question referred to you for a preliminary ruling, the Tribunal de Grande Instance (Regional Court), Nantes, invites you to determine whether stamp duties charged on building land not developed within four years of purchase, in contravention of the undertaking made in this regard, can be characterized as turnover taxes within the meaning of Article 33 of the Sixth Council Directive [1] (hereinafter the 'Sixth Directive') and are consequently incompatible with the applicable system of VAT.

2. The facts can be summarized briefly as follows. Mr Beaulande, who was a builder by trade and therefore a trader subject to VAT, purchased a house in Nantes on 16 January 1980, undertaking to demolish it and to erect a residential building in its place within a period of four years.

3. As the land had not been built on within the prescribed period, the tax authorities rejected an application for an extension of the period and on 26 February 1985 sent the party concerned an assessment to tax amounting to FF 221 700 (by way of stamp duty) and FF 73 091 (additional 6% duty).

4. Mr Beaulande contested that tax adjustment and lodged an objection with the tax authorities, which was rejected on 2 June 1989.

5. On 14 September 1989 he accordingly brought an action against the Directeur des Services Fiscaux (Director of the Tax Authorities) of Loire Atlantique before the Tribunal de Grande Instance, Nantes, on three grounds. The national court dismissed the first two grounds relating solely to the application of national law and, with regard to the third, put a question to the Court of Justice in which it sought essentially a definition of the nature of the stamp duties claimed by the tax authorities in the light of the Community concept of turnover tax.

6. The relevant national and Community provisions, to which I shall refer where necessary, are set out in the Report for the Hearing.

7. Under French law, the system of VAT on real estate transactions has gradually moved away from traditional stamp duty, which was originally intended to cover all conveyances

* Original language: French.

1 — Sixth Council Directive No 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).

of real property. [2] Increasing urbanization and the emergence of an important sector of economic activity, namely the construction sector, led the national legislature [3] to make economic operators involved in the purchase of undeveloped land subject to a neutral tax, VAT, upon the first sale of the completed building.

8. However, the old stamp duty has not disappeared altogether, since the present system constitutes an alternative to VAT. Although Article 257(7) of the Code Général des Impôts (General Tax Code, hereinafter 'the CGI') includes within the scope of VAT 'transactions contributing to the production or supply of buildings', the seller of the property or the builder may opt for land registration tax or stamp duty to be levied at 0.60% (Article 692 of the CGI).

9. In the present case, the applicant chose to be subject to the system of VAT on real estate transactions, paid the tax at the prevailing rate and was exempted from payment of stamp duty subject to an undertaking to build within a period of four years, in accordance with Article 691(II)(1) of the CGI. [4]

10. Having failed to fulfil this undertaking, and thus to furnish proof that the intended work had been carried out (Article 691(II)(2) of the CGI), Mr Beaulande received a demand for payment of the amounts mentioned above pursuant to Article 1840 G ter of the CGI. However, in accordance with Article 291 of Annex II to the CGI, the VAT paid at the time of purchase and not yet deducted was offset against the stamp duty claimed.

11. As we can see, VAT and stamp duty are not cumulative under the national tax system. If the builder fulfils his obligation to build within the period set, he is subject only to VAT on real estate transactions and exempted from stamp duty. In the opposite case, stamp duty plus a supplementary duty of 6% will be claimed, on the understanding that the VAT he paid and was unable to deduct will be set against this liability. The transaction is then, as it were, retroactively subjected to transfer duty. The two charges are therefore not cumulative, but alternative.

12. Article 33 of the directive, to which the national court refers, is worded as follows:

'Without prejudice to other Community provisions, the provisions of this directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes'.

2 — The concepts of transfer duty and stamp duty are used interchangeably to describe the tax on the legal transfer of real estate sold for valuable consideration; the concept of transfer duty is nevertheless wider.

3 — Primarily by means of Law No 405 of 10 April 1954 and Law No 254 of 15 March 1963.

4 — Article 691 of the CGI:
'I.Land registration tax and stamp duty shall not apply to purchases of
1.undeveloped land or land covered by buildings that are to be demolished;
...
where such purchases attract VAT.

13. On some ten previous occasions [5] the Court has been called upon to examine the compatibility of national taxation with the Sixth Directive, and more precisely with Article 33 thereof.

14. The decisions given by the Court stake out the ground, so to speak. The applicant in the main proceedings knows this well and asserts that, as is apparent from its case-law, 'the Court's interpretation of that provision (Article 33) is surprising and appears open to criticism in many respects'. [6]

15. Before studying the salient characteristics of the Community concept of turnover tax, in the light of which the validity of the charge will be assessed, it is necessary to remind ourselves of the general scheme of the common system of VAT.

16. Indeed, it is this rationale that forms the basis of my interpretation.

17. It is necessary to go back to the First Council Directive of 11 April 1967 [7] (hereinafter the 'First Directive') in order to grasp the general and practical objective that led to the creation of a harmonized tax system, the aim of which is to achieve neutrality in competition.

18. The concern that emerges from that measure, and which can be seen as a long-term objective, is 'to achieve such harmonization of legislation concerning turnover taxes as will eliminate, as far as possible, factors which may distort conditions of competition'. [8]

19. The practical means chosen to achieve this objective consist in establishing a common system of VAT, which necessarily entails the 'abolition of cumulative multi-stage taxes'. [9]

20. Nevertheless, tax systems in Member States differ widely, hence in order not to undermine national legislation in sensitive economic and budgetary areas, only a gradual abolition of these cumulative multi-stage taxes could be envisaged; the Sixth Directive is therefore but one step in the direction of the harmonization objective.

21. In that regard, Article 33 constitutes a derogation from the system established, the purpose of which is to provide uniform coverage for the various stages in the production and movement of goods and services. This derogation, the limits of which have been set by the Community legislature, permits the double taxation of goods provided that the

5 — Judgments in Cases 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759, 73/85 *Kerrutt* v *Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219, 391/85 *Commission* v *Belgium* [1988] ECR 579, 252/86 *Bergandi* v *Directeur-Général des Impôts* [1988] ECR 1343, 317/86, 48-49/87, 285/87, 363-367/87, 65/88 and 78-80/88 *Lambert and Others* v *Directeur des Services Fiscaux de l'Orne and Others* [1989] ECR 787, 93-94/88 *Wisselink and Others* v *Staatssecretaris van Financiën* [1989] ECR 2671, C-109/90 *Giant* v *Gemeente Overijse* [1991] ECR I-1385, C-200/90 *Dansk Denkavit and Poulsen* v *Skatteministeriet* [1992] ECR I-2217 and C-347/90 *Bozzi* [1992] ECR I-2947.

6 — Observations of Mr Beaulande, p. 11.

7 — Council Directive (EEC) No 67/227 of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

8 — Third recital in the preamble to the First Directive.

9 — Fourth recital.

tax levied in addition to VAT does not have the characteristics of a turnover tax. Put simply, the one must not be the 'double' of the other.

22. Although the prohibition on the cumulation of VAT with a tax having the characteristics of a turnover tax is clearly laid down in this article, the list of charges that can be combined with VAT is not exhaustive. Suffice it to note that stamp duty is included in the list and that it is necessary to assess each tax in the light of its inherent characteristics, regardless of any formal criterion or designation, in order to determine whether or not it can be equated to a turnover tax.

23. Finally, to conclude on the subject of the legislative background to Article 33, it is important to note that in all its judgments, and especially in the earliest ones, the Court felt the need to set that article in the context of the general scheme of the VAT system.

24. In the *Rousseau Wilmot* judgment [10] the Court laid down as a matter of principle that this provision could not lead to double VAT, holding that:

'In leaving the Member States free to maintain or introduce certain indirect taxes ... Article 33 of the Sixth Directive seeks to prevent the functioning of the common system of VAT from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to VAT ...'. [11]

25. Similarly, the *Bergandi* judgment [12] indicates clearly that the objective pursued is to replace turnover taxes and that Article 33, by allowing them to continue in being, cannot therefore jeopardize the system adopted. [13]

26. Finally, the *Wisselink* judgment [14] summarizes perfectly in the following terms a rationale whose purpose is to prevent the harmonized system of VAT from being undermined by means of the derogation in Article 33:

'The Member States were thus prohibited from maintaining, either wholly or in part, or reintroducing, either wholly or in part, any turnover taxes under the cumulative multi-stage tax system. If the Member States had been allowed to introduce other kinds of turnover tax besides VAT, the objectives underlying the common system of turnover tax would have been jeopardized'. [15]

27. In replying to the question from the national court, the Court of Justice will therefore have to provide it with a ruling on interpretation that will enable that court to determine whether or not the disputed tax displays the characteristics of a turnover tax. As the Court indicated in the *Bergandi* judgment,

'Although it is not for the Court, in the present proceedings, [16] to examine the

10 — See the references in footnote 5 above.
11 — Paragraph 16.
12 — See the references in footnote 5 above.
13 — See paragraphs 9 and 10.
14 — See the references in footnote 5 above.
15 — Paragraph 8.
16 — Also a reference for a preliminary ruling.

characteristics of a national law in the light of Community law (judgment of 21 October 1970 in Case 20/70 *Transports Lesage & Cie* v *Hauptzollamt Freiburg* [1970] ECR 861), it is nevertheless competent to interpret the concept of tax which can be characterized as a turnover tax in order to enable the national court to apply it correctly to the tax at issue'. [17]

28. That said, when the time comes for that interpretation, it should be remembered that turnover tax is a Community concept set in the context which I have just described. All the previous judgments make reference to its Community character. For example, the *Wisselink* judgement emphasizes that:

'the term "turnover tax" has a specific meaning in the context of Article 33 of the Sixth Directive. The Court stated that ... the scope of Article 33 had to be determined in the light of the role of that provision in the harmonized system of turnover tax, which takes the form of a common system of VAT.' [18]

29. It matters little, moreover, what name is given to the national charge levied in addition to VAT; it is the analysis of its objective characteristics that will serve as the basis for determining whether or not it can be characterized as a turnover tax. [19]

30. Let us now list those characteristics.

31. It is the definition of VAT that provides the main criteria for defining turnover tax. As defined in Article 2 of the First Directive, VAT is a general tax on consumption exactly proportional to the price of the goods and services. In the case-law on Article 33, the Court refers systematically to the principle of the common system of VAT.

32. Thus, in the *Bergandi* judgment, the Court clearly indicates the objective pursued with regard to turnover tax and gives a concise definition of VAT in ruling that

'In order to decide whether a tax can be characterized as a turnover tax it is necessary, in particular, to determine, as the Court stated in its judgment of 27 November 1985 in Case 295/84 (*Rousseau Wilmot SA* v *Organic* [1985] ECR 3759), whether it has the effect of compromising the functioning of the common system of VAT by levying a charge on the movement of goods and services and on commercial transactions *in a way comparable to VAT*.

... The principle of the common system of VAT consists, according to the first paragraph of Article 2 of the First Directive, in the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the final stage at which tax is charged'. [20]

17 — Paragraph 13.
18 — Paragraph 16.
19 — See the *Wisselink* judgment, paragraph 10.
20 — Paragraphs 14 and 15; emphasis added.

33. Consequently, taxes can be characterized as turnover taxes if they have the same characteristics as VAT and pursue the same objective, even if they are not identical.

34. In its written observations, the Commission rightly points out that the disputed tax does not have to be similar to VAT in all respects; what matters is whether, to adopt the same expression as that used in Article 33, the tax can be 'characterized' as a turnover tax. [21]

35. Against that background, established in its earliest rulings, the Court has defined turnover tax in greater detail, especially in its last three judgments on Article 33, by identifying three essential criteria.

36. In the *Giant* judgment, [22] the Court first recalled the principles already referred to in its earlier decisions, namely the possibility for tax systems to co-exist with VAT provided that they do not compromise its functioning, and then listed the characteristics of a turnover tax as follows:

'A tax of the kind to which the national court refers in the present case does not possess the characteristics of a turnover tax within the meaning of Article 33 of the Sixth Directive.

In the first place, it is not a general tax ... Secondly, it is not charged at each stage of the production and distribution process since it is imposed annually on the aggregate receipts ... Thirdly, it is not levied on the value added at each transaction ...'. [23]

37. In the subsequent *Dansk Denkavit* and *Bozzi* judgments, [24] in which the Court also relies on those three criteria in order to establish whether or not the disputed tax is a turnover tax, it points out that:

'... VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services; it is charged at each stage of the production and distribution process; and finally it is imposed on the added value of goods and services ...'. [25]

38. The national court will therefore have to adopt this reasoning and examine whether the stamp duty in question meets the criteria laid down.

39. It will only meet those criteria if it is established that:

— it is a general tax, in other words it applies to all transactions involving the transfer of goods or the provision of services;

21 — Paragraph 7 of the Commission's observations.

22 — See the references in footnote 5 above.

23 — Paragraphs 13 and 14.

24 — See the references in footnote 5 above.

25 — *Dansk Denkavit* judgment, paragraph 11, and *Bozzi* judgment, paragraph 12.

— it is charged at each stage in the distribution or production process;

— finally, it is imposed only on the added value.

40. On the first point, that is the *general nature of the tax*, it would seem that transfer duties relate only to changes in the legal ownership of real property and not to all economic transactions. Stamp duty is restricted to the legal transfer of real estate sold for valuable consideration, the conveyance of which gives rise to a number of formalities under civil law. To reiterate the definition given by J.-C. Scholsem, [26] transfer duties are 'analytical, real taxes, imposed on isolated transactions without regard to the personality of their originator'. In that regard, the French Government has emphasised that stamp duty is not a general tax.

41. On the second point — *the charging of the tax at all stages of production and distribution* — it should be pointed out that transfer duty is levied only when real property passes into the ownership of the final consumer, while production and distribution fall within the scope of VAT on real estate transactions. It is therefore apparently from the time when the property leaves the commercial circuit and enters private ownership that it is taxed. The French Government points out in this regard that such tax is in the nature of a capital levy applied to the entire value of the property, without the possibility of subsequent deduction.

42. Thirdly, it would seem, the levying of transfer duty takes no account of the *added value*, but is based on the *total capital value* of the property in question.

43. In the light of those observations, I consider that a charge of the kind at issue cannot be characterized as a turnover tax, all the more so as in the *Kerrutt* judgment [27] the Court ruled in this way with regard to a German tax (Grunderwerbsteuer, tax on the transfer of real property), the characteristics of which were very similar to those of the duties involved in the present case. There, the Court stated that:

'... Since Community law as it now stands does not contain any specific provision excluding or limiting the power of Member States to introduce taxes on transfers and transactions other than turnover taxes, and thus permits concurrent systems of taxation, it must be concluded that such taxes may be levied even where, as in this case, charging them on a transaction which is already subject to VAT may result in the double taxation of that transaction'. [28]

44. Here, by contrast, the problem of double taxation does not even arise, since, as stated above, VAT paid and not recovered can be deducted from the stamp duty if no building

26 — J.-C. Scholsem: *La TVA européenne face au phénomène immobilier*, Liège, 1976, p. 371.

27 — See the references in footnote 5 above.

28 — Paragraph 22.

is erected on the building land within four years.

45. The proportional nature of the charge, referred to by the national court, cannot be regarded as a relevant argument in support of the view that transfer duties have the character of turnover taxes. While there is no doubt that stamp duty is proportional to the value of the property, that is to the stated price, the fact remains that the Court has indicated on several occasions that this criterion alone was insufficient. [29]

46. Finally, in reply to the final argument of the applicant in the main proceedings, a point which is moreover of no great relevance to the question raised and which concerns not the compatibility of the entire national system of VAT on real estate transactions with Community law but that of stamp duty with Article 33 of the Sixth Directive, it should be noted that the concept of building land is expressly defined by national law (Article 4(3)(b) of the said directive) and that in that respect the Member State may take the intention to build as the criterion for determining the classification of the property for tax purposes. If at the end of the four-year period the builder has not carried on an activity as a 'producer, trader or person supplying services' (Article 4(2) of the Sixth Directive), it is legitimate to consider that the property acquired under the system of VAT on real estate transactions and as part of his professional or trade activity is not used for that purpose and, since it does not form part of any economic process, no longer falls under that system but under the arrangements reserved for private individuals which, unless the Member States opt for the possibility available to them under Article 4(3) of the Sixth Directive, are based on transfer duty.

47. Finally, it is apparent from the above considerations that, regard being had to the rationale of the Sixth Directive, stamp duty on the purchase of building land cannot, in the event of failure to build on that land within the statutory period of four years from the time of acquisition despite an undertaking to that effect given by the purchaser, be considered as a turnover tax within the meaning of Article 33 of the directive.

48. Consequently, I propose that the Court rule as follows:

Article 33 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 VAT: uniform basis of assessment, must be interpreted as meaning that it does not prevent the charging of stamp duty on purchases of building land which has not been developed within the period of four years laid down by national legislation, even if such duty is proportional to the value of the property.

29 — See the *Wisselink* judgment, paragraph 20.