JUDGMENT OF THE COURT (Sixth Chamber)
27 January 2000 *

In Case C-23/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hoge Raad der Nederlanden, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Staatssecretaris van Financiën

and

J. Heerma

on the interpretation of Article 4(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 (OJ 1977 L 145, p. 1),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, acting for the President of the Sixth Chamber, G. Hirsch (Rapporteur) and H. Ragnemalm, Judges,

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

after considering the written observations submitted on behalf of:

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy, acting as Agent,

— the Commission of the European Communities, by H. van Vliet, of its Legal Service, acting as Agent, assisted by L. Vandenberghe, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of J. Heerma, represented by J. Boele, Tax Adviser at Accountants en bedrijfsadviseurs ALFA BEAG, of the Netherlands

Government, represented by J.S. van den Oosterkamp, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by H. van Vliet, at the hearing on 18 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 20 May 1999,

gives the following

Judgment

1 By judgment of 12 November 1997, received at the Court on 28 January 1998, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 4(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 (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

2 That question was raised in proceedings between Mr Heerma and the Netherlands finance authority concerning the imposition of value added tax (hereinafter 'VAT') upon the letting of immovable property belonging to Mr Heerma to a partnership governed by Netherlands law of which he is a member.

The relevant legislation

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 Article 4 of the Sixth Directive provides as follows:

'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.

3. ...

4. The use of the word "independently" in paragraph 1 shall exclude employed and other persons from the tax in so far as they are 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.

Subject to the consultations provided for in Article 29, 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.

5. ...'

5 Article 13B(b) of the Sixth Directive provides that the Member States may in principle exempt the letting of immovable property. However, Article 13C(a) permits the Member States to allow taxpayers a right of option for taxation of such transactions.

6 In accordance with those provisions, Netherlands law provides for the possibility of opting for the taxation of lettings.

The main proceedings

7 On 1 January 1994, Mr Heerma, who was the owner of a farming business, formed a partnership with his wife (hereinafter 'the Heerma Partnership') into which he introduced movable assets consisting of the means of production in that business.

8 Partnerships governed by Netherlands law are not legal persons in their own right. However, they do have the *de facto* independence of companies, which are legal persons and may carry on economic activities independently, with the result that it is the partnership, and not the partner or partners running the business, that, in accordance with Article 4 of the Sixth Directive, is to be considered as the taxable person.

9 In 1994 Mr Heerma began construction of a cattle shed which he subsequently let to the Heerma Partnership for a term of six years commencing on 1 November 1994 at an annual rent of NLG 12 000.

10 Mr Heerma and the Heerma Partnership requested that they be excluded from the exemption from VAT in respect of that letting. The Netherlands finance authority refused that request and dismissed the appeal brought against its refusal. Mr Heerma then brought an action before the Gerechtshof te Leeuwarden (Regional Court of Appeal, Leeuwarden) which annulled the authority's decisions refusing the request and dismissing the appeal and ruled that Mr Heerma's letting of the cattle shed was not exempt from VAT.

11 The finance authority appealed against that decision to the Hoge Raad der Nederlanden. That court observed that it was not in dispute that the lease at issue was granted by Mr Heerma for the purpose of obtaining income therefrom on a continuing basis, and that, accordingly, the letting must be regarded as an economic activity within the meaning of Article 4(2) of the Sixth Directive. On the other hand, having regard to the connection between the lessor and lessee in the present case, there was a question as to whether Article 4(1) of the Sixth Directive was to be construed in such a way that that particular letting of immovable property must be regarded as an independent economic activity or whether the requirement for independence laid down in that provision was to be regarded as not having been satisfied. If the latter were true, that might, according to the referring court, mean that the partner granting the lease must be identified with the lessee partnership with the result that there was only one taxable person within the meaning of the said provision.

12 In those circumstances the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 4(1) of the Sixth Directive to be interpreted as meaning that, where a person's sole economic activity consists in the letting of tangible property to the partnership of which he is a member, that letting, whilst being an economic activity, cannot be regarded as an independent activity, for the reason that the partner and the partnership must together be deemed to constitute a single taxable person within the meaning of Article 4(1)?'

The question referred

13 It should be observed at the outset, first, that when Mr Heerma put the cattle shed at the disposal of the Heerma Partnership he did so not in the form of a contribution to the partnership against a share in its profits and losses, but by way of a lease requiring the payment of rent, and that, in so doing, he effected a supply for consideration within the meaning of Article 2 of the Sixth Directive.

14 Secondly, on the basis of the judgment in Case C-230/94 *Enkler* [1996] ECR I-4517, the national court held that Mr Heerma was carrying on an economic activity within the meaning of Article 4(2) of the Sixth Directive, in so far as he had granted a lease of the cattle shed for the purpose of obtaining income therefrom on a continuing basis.

15 The Netherlands Government argues that, where the letting of tangible property takes place purely within a closed circuit, as happens where a member of a partnership governed by Netherlands law lets property to that partnership, there is no economic independence within the meaning of Article 4(1) of the Sixth Directive. The lessor, who is also a member of the partnership, is jointly liable for the fulfilment of the lessee partnership's obligations under the lease.

16 The German Government and the Commission adopt the contrary position that where, in circumstances such as those in point in the present case, a partner lets property to the partnership of which he is a member, he does so independently. In this connection, the Commission argues that the fact that the contracting parties,

namely the partner and the partnership, do not have opposing interests but, on the contrary, have converging interests, does not mean that they are to be regarded as a single taxable person.

17 It must be held that a partner who, like Mr Heerma in the case in the main proceedings, lets immovable property to the partnership of which he is a member and which is itself a taxable person acts independently within the meaning of Article 4(1) of the Sixth Directive.

18 In so far as the activity at issue is concerned, there is between the partnership and the partner no relationship of employer and employee similar to that mentioned in the first subparagraph of Article 4(4) of the Sixth Directive which would preclude the independence of the partner. On the contrary, the partner, in letting tangible property to the partnership, acts in his own name, on his own behalf and under his own responsibility, even if he is at the same time manager of the lessee partnership. The lease in question was granted neither by the management nor by the representatives of the partnership.

19 In those circumstances, contrary to what the Netherlands Government claims, it is irrelevant that the partner confines his activity to letting an item of tangible property to the partnership of which he is a member. That circumstance is of no consequence for the purpose of determining whether the partner is acting independently, within the meaning of Article 4(1) of the Sixth Directive, in carrying on the economic activity concerned but may, at most, have a bearing on the question whether there can be said to be an economic activity at all, within the meaning of that article. In that respect, however, as the national court observed, it is clear from paragraph 22 of the judgment in *Enkler*, cited above, that the letting 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.

20 Admittedly, according to the second subparagraph of Article 4(4) of the Sixth Directive, the Member States may, subject to the consultations provided for in Article 29, 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.

21 Nevertheless, as Advocate General Cosmas observed at point 22 of his Opinion, there is no need to consider that provision in the present case, given that the Netherlands authority has not argued in the main proceedings that there is a single taxable person within the meaning of that provision.

22 The answer to the question must therefore be that Article 4(1) of the Sixth Directive is to be interpreted as meaning that, where a person's sole economic activity, within the meaning of that provision, consists in the letting of an item of tangible property to a company or a partnership, such as a partnership governed by Netherlands law, of which he is a member, that letting must be regarded as an independent activity within the meaning of that provision.

Costs

23 The costs incurred by the Netherlands and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 (Sixth Chamber),

in answer to the question referred to it by the Hoge Raad der Nederlanden by judgment of 12 November 1997, hereby rules:

Article 4(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 is to be interpreted as meaning that, where a person's sole economic activity, within the meaning of that provision, consists in the letting of an item of tangible property to a company or a partnership, such as a partnership governed by Netherlands law, of which he is a member, that letting must be regarded as an independent activity within the meaning of that provision.

Kapteyn Hirsch Ragnemalm

Delivered in open court in Luxembourg on 27 January 2000.

R. Grass
Registrar

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