# JUDGMENT OF THE COURT (Sixth Chamber)

9 October 2001 *

In Case C-108/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), for a preliminary ruling in the proceedings pending before that court between

Commissioners of Customs & Excise

and

Cantor Fitzgerald International,

on the interpretation of Article 13B(b) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) 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: English.

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric (Rapporteur), C. Gulmann, J.-P. Puissochet and R. Schintgen, Judges,

Advocate General: A. Tizzano,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— Cantor Fitzgerald International, by D. Goy QC, instructed by Deloitte & Touche, accountants,

— the United Kingdom Government, by M. Ewing, acting as Agent, N. Pleming QC and P. Whipple, Barrister,

— the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

— the Commission of the European Communities, by E. Traversa and F. Riddy, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Cantor Fitzgerald International, represented by D. Goy, the United Kingdom Government, represented by G. Amodeo, acting as Agent, N. Pleming and P. Whipple, the German Government, represented by W.-D. Plessing, and the Commission, represented by R. Lyal, acting as Agent, at the hearing on 16 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2001,

gives the following

## Judgment

1 By order of 2 September 1998, received at the Court on 30 March 1999, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), 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 13B(b) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) 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; 'the Sixth Directive').

2 That question was raised in proceedings between Cantor Fitzgerald International ('CFI') and the Commissioners of Customs & Excise ('the Commissioners'), who are responsible for the collection of value added tax ('VAT') in the United Kingdom, concerning the liability to VAT of a supply of services consisting in CFI taking over, in return for payment, the rights and obligations under a lease assigned by the tenant with the landlord's consent.

## Community legislation

3 Article 2, which constitutes Title II ('Scope') of the Sixth Directive, provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

...'.

4 Articles 5 and 6 of the Sixth Directive, which fall within Title V, headed 'Taxable Transactions', provide:

'*Article 5*

Supply of goods

1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

...

*Article 6*

Supply of services

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

Such transactions may include *inter alia*:

...

— obligations to refrain from an act or to tolerate an act or situation,

...'.

5 Article 13 of the Sixth Directive governs exemptions from VAT so far as transactions within the territory of the country are concerned. Article 13B provides, *inter alia*:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of

ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(b) the leasing or letting of immovable property...'.

## Background and the question referred for a preliminary ruling

6 In March 1986 Prudential Assurance Co. Ltd ('the landlord') granted Wako International (Europe) Limited ('Wako') a 15-year lease of the fourth floor of a building in London. Under the lease Wako undertook not to sub-let the property or assign the lease without the landlord's consent.

7 In 1993 Wako and CFI, with the landlord's consent, entered into an agreement for assignment of the lease to CFI. Under the agreement, CFI, which became the new tenant, undertook to perform Wako's obligations under the lease and to indemnify Wako for any losses or liabilities incurred by reason of the lease. In consideration of CFI taking over the lease, Wako undertook to pay CFI a sum of GBP 1.5 million.

8 CFI accounted for VAT on the sum of GBP 1.5 million, which the Commissioners approved by a ruling given on 30 July 1996. CFI appealed against that ruling to the Value Added Tax and Duties Tribunal, London. By decision of 6 August 1997, the Tribunal allowed CFI's appeal, holding that the transaction in question was exempt from VAT.

9 The Commissioners appealed against that decision to the High Court.

10 That court questions whether Article 13B(b) of the Sixth Directive must be interpreted, in the light of Case C-63/92 (*Lubbock Fine* v *Commissioners of Customs and Excise* [1993] ECR I-6665), as meaning that the supply made by CFI is exempt. The court suggests that there might be a simple rule whereby a payment is exempt only if it is made in return for the creation or grant of an interest in land. That solution would cover the facts of *Lubbock Fine* but that was not the way the Court of Justice expressed itself.

11 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Following the decision of the Court in Case C-63/92 (*Lubbock Fine*), does Article 13B(b) of the Sixth VAT Directive exempt from VAT a supply made by a person ("the person") who does not have any interest in immovable property, where the person agrees to accept an assignment of a lease of that immovable property from a lessee, and the lessee pays that person a sum of money in return for that person taking the assignment of the lease in that immovable property?'

## The question referred for a preliminary ruling

*Arguments advanced in the observations submitted to the Court*

12 CFI takes the view that Article 13B(b) of the Sixth Directive exempts from VAT not only the initial letting of immovable property but also all subsequent

transactions based on that letting or ancillary to it. That is the principle laid down by the Court in *Lubbock Fine*. Thus, as a result of that judgment, Article 13B(b) of the Sixth Directive applies to changes in the lease. There was a change in the contractual relationship in the case before the national court.

13 Further, according to CFI, the exemption from VAT would undoubtedly apply if it were CFI which had made a payment to Wako in consideration for the assignment of the lease. However, whether the payment is made by the assignor or the assignee is simply a reflection of market conditions and does not justify treating a transaction assigning a lease differently for the purposes of VAT.

14 The United Kingdom and German Governments submit that, for Article 13B(b) of the Sixth Directive to apply, the supplier of services must be the owner of rights of occupation in the property being leased, which are transferred for consideration to another party. That is not the situation in the case before the national court. Furthermore, in contrast to the case giving rise to the judgment in *Lubbock Fine*, the supplier of services in the main proceedings, CFI, was not party to a lease amended by the contracting parties. The exemption provided for by Article 13B(b) of the Sixth Directive does not therefore apply in the case before the national court.

15 In its written observations the Commission submitted that the Community legislature, by so clearly differentiating between the general language used in Article 13B(a) and (d) of the Sixth Directive and the specific language used in subparagraph (b), intended Article 13B(b) to be limited in its application solely to supplies between landlord and tenant whereby one cedes to the other, by whatever means, the right to occupy property. The judgment in *Lubbock Fine* confirms that this is the correct approach. The statement of the Court, in paragraph 9 of that judgment, that, where the letting of immovable property falls

within the scope of Article 13B(b) of the Sixth Directive, a change in the contractual relationship must also be regarded as falling within that provision must be read in the light of the particular facts of *Lubbock Fine*. The Commission points out that, in that case, the transaction concerned a supply of services by the tenant to the landlord, consisting in the tenant agreeing to surrender its right of occupation of the leased property in return for consideration paid by the landlord.

16 At the hearing, the Commission expressed a different opinion and argued that, unless there were a separate identifiable supply of services, it would be preferable to treat the payment at issue as an estimate of the value of the lease as between assignor and assignee. Further, the principle of the neutrality of VAT would require the transaction at issue before the national court to be exempt. According to the Commission, Wako could have avoided paying too high a rent by making a payment to the landlord so that the latter would reduce the rent that the new tenant, CFI, was to pay. Wako could also have sub-let the building to CFI and paid the landlord the difference between the market rent and the rent stipulated in the original lease. Those two options, which, in economic terms, would have been equivalent to assigning the lease — which was what Wako actually chose to do — would clearly have been exempt. That is why the assignment of the lease ought also to have been exempt, in accordance with the principle of the neutrality of VAT.

*Findings of the Court*

17 It must be borne in mind that, under Article 2(1) of the Sixth Directive, a 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. That is why it is necessary in every case to consider which party supplied the goods or services and which party

provided the consideration. It is supplies of goods or services which are subject to VAT, rather than payments made by way of consideration for such supplies.

18 Consequently, contrary to CFI's claim, it is important in a case of the kind before the national court to ascertain which of the assignor and the assignee makes the payment to the other and which of them makes the supply of services.

19 It is therefore necessary to consider whether a supply of services such as the supply made by CFI to Wako, in return for payment of a sum of money, is a taxable supply or whether, exceptionally, it is exempted under Article 13B(b) of the Sixth Directive.

20 As the referring court explained, the supply at issue in the main proceedings consists of a prospective tenant, as the supplier of services, agreeing to accept an assignment of a lease of property from a lessee, as the recipient. Thus, in the case before the national court, there is, contrary to the Commission's appraisal, an identifiable supply of services, which falls within the scope of the Sixth Directive by reason of Article 2(1) thereof and which is therefore taxable, unless one of the exemptions prescribed by a particular provision of that directive applies. Therefore, it is appropriate to consider whether that supply of services falls within Article 13B(b) of the Sixth Directive.

21 The letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive essentially involves the landlord of property assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it (see, to that effect, Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraphs 52 to 57, Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraphs 64 to 69; and Case C-326/99 *Goed Wonen* [2001] ECR I-6831, paragraph 55).

22 The supply at issue in the main proceedings does not meet those conditions.

23 On the contrary, it was the new tenant, CFI, which, by agreeing to take on the rights and obligations arising under the existing lease, supplied a service to the former tenant, Wako. Wako did not make a supply of services to CFI but paid consideration in cash for the service supplied by CFI, consideration which, as such, is not liable to VAT. The landlord was the only person to effect a supply of services to CFI within the meaning of Article 2(1) of the Sixth Directive, which was exempt under Article 13B(b) thereof, namely the right to occupy its property in consideration for the payment of rent.

24 Contrary to CFI's assertion, Article 13B(b) of the Sixth Directive applies to the grant of leases of property but not to transactions which are merely based on the leases or are ancillary thereto and which have not been effected by the landlord itself.

25 The broad interpretation advocated by CFI is at variance with the settled case-law of the Court, according to which the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive, and in particular 'the leasing or letting of immovable property', are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, *inter alia*, Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13; Case C-453/93 *Bulthuis-Griffioen* [1995] ECR I-2341, paragraph 19; Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 20; and Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 12).

26 That does not conflict with the Court's interpretation of Article 13B(b) of the Sixth Directive in its judgment in *Lubbock Fine*.

27 It is true that in that case the Court ruled that 'the leasing or letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive covers the case where a tenant surrenders his lease and returns the immovable property to his immediate landlord.

28 However, the Court must make clear that that judgment was given in respect of a tenant who returned the immovable property leased to the landlord and who, consequently, for the purposes of taxation, assigned his right to occupy the property back to the landlord by surrendering it. That is why the Court ruled, in paragraphs 9 and 12 of the judgment, that the tenant's surrender of the supply of services made by the landlord, which involved a change in the contractual relationship, has to be exempt where the supply itself is exempt.

29 The factual and legal context of the judgment in *Lubbock Fine* was thus quite different from that of the case before the national court and therefore CFI cannot usefully rely on it in support of its arguments.

30 Further, contrary to the assertions made by the Commission at the hearing, the principle of the neutrality of VAT which must be applied in interpreting the Sixth Directive does not require Article 13B(b) of that directive to be broadly interpreted so that 'the leasing or letting of immovable property' covers a transaction like the one carried out by CFI.

31 It is true that Wako could have remained a tenant and sub-let the property to CFI for a lower rent than that which it had to pay the landlord or that it could have paid compensation to the landlord so that the latter would accept early termination of the lease. In both cases, the economic impact would have been comparable to that of the transaction at issue in the main proceedings, without the parties concerned having to pay VAT.

32 However, that does not justify interpreting Article 13B(b) of the Sixth Directive so as to mean that it also applies to a supply of services that does not include the assignment of a right to occupy property.

33 An approach of that kind would be contrary to the VAT system's objectives of ensuring legal certainty and a correct and coherent application of the exemptions provided for in Article 13 of the Sixth Directive. The Court observes in that connection that, to facilitate the application of VAT, it is necessary to have regard, save in exceptional cases, to the objective character of the transaction in question (see Case C-4/94 *BLP Group* [1995] ECR I-983, paragraph 24). A taxable person who, for the purposes of achieving a particular economic goal, has a choice between exempt transactions and taxable transactions must therefore, in his own interest, duly take his decision while bearing in mind the neutral system of VAT (see, to that effect, *BLP Group*, cited above, paragraphs 25 and 26). The principle of the neutrality of VAT does not mean that a taxable person with a choice between two transactions may choose one of them and avail himself of the effects of the other.

34 Therefore, the answer to be given to the question referred must be that Article 13B(b) of the Sixth Directive does not exempt a supply of services which is made by a person who does not have any interest in the immovable property and which consists in the acceptance, for consideration, of an assignment of a lease of that property from the lessee.

## Costs

35 The costs incurred by the United Kingdom 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 proceedings, 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 (Sixth Chamber),

in answer to the question referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), by order of 2 September 1998, hereby rules:

**Article 13B(b) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment does not exempt a supply of services which is made by a person who does not have any interest in the immovable property and which consists in the acceptance, for consideration, of an assignment of a lease of that property from the lessee.**

Macken Colneric Gulmann

Puissochet Schintgen

Delivered in open court in Luxembourg on 9 October 2001.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber