OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 2 May 1990 *

Mr President,
Members of the Court,

A — Facts

1. In the case on which I give my opinion today the Court has been asked by the Hoge Raad der Nederlanden to interpret Article 15(4)(a) of Directive 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,[1] that is to say the provision under which Member States exempt from the tax 'the supply of goods for the fuelling and provisioning of vessels' of a certain kind.

2. An interpretation was considered necessary in connection with the supply by the respondent in the main proceedings of two consignments of bunker oil to Forsythe International BV, of The Hague, on which the respondent did not invoice VAT. It is important to be aware of the particular circumstances surrounding the deliveries, which were that:

(i) one consignment originated from Olie Verwerking Amsterdam, was sold by the latter to Verhoeven Rotterdam, resold by Verhoeven to the respondent and delivered direct by Olie Verwerking to Forsythe;

(ii) the other consignment was bought by the respondent from Verhoeven and also delivered direct to Forsythe; and

(iii) both consignments were placed in storage tanks rented by Forsythe from a storage company and from there, on instructions from Forsythe, which did not operate any vessels itself, delivered to departing sea-going vessels.

3. The VAT inspector responsible regarded the application of zero-rating by the respondent, that is to say the non-invoicing of VAT, as unjustified. In his view 'fuelling and provisioning of vessels' within the meaning of the Netherlands Law of 28 December 1978 can only mean a delivery which coincides with the fuelling and provisioning of a vessel, that is to say a delivery *on board* the vessel followed directly by export. That is also the view taken by the Staatssecretaris van Financiën, the appellant in the main proceedings. He considers also that Article 15(4)(a) of the VAT directive, transposed by the said Law of 28 December 1978 into Netherlands law, does not cover supplies to anyone who merely states that the goods are for the fuelling and provisioning of vessels; that is too far removed from actual fuelling and provisioning and does not prevent a change in intended use before the goods are loaded on board. The appellant in the main proceedings points out in addition that extension of the exemption to supplies preceding actual fuelling and provisioning requires prior consultation with the Advisory Committee pursuant to Article

* Original language: German.
1 — OJ 1977, L 145, p. 1.

16(2) of the directive, and the Netherlands had not so consulted.

4. Because the rule in Article 15(4) of the VAT Directive had apparently been transposed unaltered into Netherlands law, when faced with the dispute described above the national court came to the conclusion that it was appropriate to suspend proceedings and ask the Court of Justice to clarify Article 15(4)(a) of the VAT Directive; to be more precise, it sought clarification whether that provision covers only supplies which coincide with fuelling and provisioning (thus shipped on board sea-going vessels) or whether it should be construed more broadly, and if so whether it applies only to the supply of goods to an undertaking which subsequently uses them for the fuelling and provisioning of vessels, or also to supplies effected at a preceding stage.

5. As I see it, the following observations may be made.

B — Observations

6. *1.* Before I address the specific issue, I think I should make two preliminary remarks, prompted by arguments put forward in the course of the proceedings.

7. (a) The Commission submitted written observations concerning *inter alia* the term 'supply of goods' within the meaning of Article 5 of the VAT Directive. The point arose in connection with the fact that the bunker oil in question was delivered by Olieverwerking and Verhoeven direct to Forsythe and was apparently mixed with other oil in the storage tanks Forsythe rented. Because the goods were not brought immediately into the respondent's possession, there might be some doubt whether it was in a position to dispose of the goods as owner and therefore whether this did actually constitute a supply within the meaning of the VAT Directive.

8. I consider that for the purposes of answering the questions referred to the Court we can dispense with an examination of the arguments put forward in that connection. The national court did not raise questions on the point and that must be taken to mean that the court did not regard it as causing any difficulties (probably because it reached the same conclusion as that submitted to us by the Commission).

9. (b) I also think that in dealing with these questions we can ignore the fact that in the storage tanks rented by Forsythe the oil in question was apparently not stored separately so as to enable its intended use to be established at any time.

10. On that point the judgment referring questions to the Court specifically stated that that issue — which had apparently not been put forward previously — could not be raised in the proceedings before the Hoge Raad. The Hoge Raad is obliged to ignore the point and there is therefore no call for us to examine it further in connection with our task of construing the VAT Directive.

11. *2.* As far as the problem actually referred to the Court is concerned, it is apparent that not only the parties to the main proceedings but also those who took part in the procedure before the Court have

different views. On one side there is the view represented by the Netherlands, Portuguese and United Kingdom Governments, that is to say those who suggest that the Court reply to the first question in the affirmative and that there is only a supply for fuelling and provisioning if delivery is effected on to the vessel. The Commission's position comes close to that view, advocating in any event a narrow construction of Article 15(4)(a) whereby only supplies to a vessel operator are covered (which would not rule out interim storage before loading on board).

12. On the other side there is the view taken by the Government of the Federal Republic of Germany, according to which Article 15 should be given a broad interpretation, as suggested in the second question referred to the Court. According to that interpretation Article 15(4)(a) would also cover supplies at previous stages in the commercial chain as long as the intended use (fuelling and provisioning of sea-going vessels) is clearly established. Although of course it could not be inferred from the observations made during the proceedings, that latter solution would appear to correspond to the practice in certain other Member States (Denmark, Greece, Italy and France). (There is, however, a restriction in France, if I understand correctly, in that only the final supply prior to supply to the vessel operator qualifies.)

13. (a) If, with regard to this set of facts, we turn to existing case-law to see whether there are any indications of a solution to the problem raised, it soon becomes apparent that the few judgments that are relevant have nothing decisive to say on the issue.

14. (aa) It is certainly worth noting that in the judgment in Case 348/87 *Stichting Uitvoering Financiële Acties*[2] it was stressed that the formulas used in defining tax exemptions are to be construed strictly. It should not, however, be overlooked that in that case Article 13(A)(1)(f) (services supplied by groups of persons to their members) clearly did apply on the facts. The beneficiaries of the service were thus designated precisely and transactions effected at an earlier economic stage (namely the supply of services by one foundation to another, neither of the foundations being a member of the other) could not therefore be included.

15. (bb) Case 107/84 *Commission* v *Federal Republic of Germany*,[3] which turned on Article 13(A)(1)(a) of the directive (concerning the supply of services by the public postal services), was similar. Although the Court, which found in favour of a strict interpretation, stressed that that provision did not include services supplied by other undertakings on behalf of the postal services (and that it was not therefore possible to extend it to operations carried out to the same end but by other services), it should not be forgotten that that was simply as a result of the fact that in the said provision the body entitled to exemption was referred to explicitly.

16. (cc) On the other hand it is rather interesting that in the judgment in Case 415/85[4] (and similarly in Case 416/85[5]) in connection with tax exemption for social

2 — Judgment of 15 June 1989 in Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737.

3 — Judgment of 11 July 1985 in Case 107/84 *Commission* v *Germany* [1985] ECR 2663.

4 — Judgment of 21 June 1988 in Case 415/85 *Commission* v *Ireland* [1988] ECR 3115.

5 — Judgment of 21 June 1988 in Case 416/85 *Commission* v *United Kingdom* [1988] ECR 3127.

reasons for the benefit of the final consumer pursuant to Article 17 of Directive 67/228 [6] no restrictive interpretation was considered warranted but rather the provision of goods or services at a preceding stage was also to be considered for exemption if it was sufficiently close to the consumer to be of advantage to him.

17. (b) It must also be admitted (not least in consequence of the last-cited judgment), that the wording of the provision before us — as the German Government has rightly pointed out — by no means suggests that a narrow construction is mandatory.

18. That is apparent from the English version ('supply of goods for the fuelling and provisioning of vessels') and the German version ('Lieferung von Gegenständen zur Versorgung von Schiffen'), neither of which implies that the fuelling and provisioning must be immediate. The Dutch, Italian, French and Portuguese versions are even clearer, focusing on the intended purpose ('levering van goederen, bestemd voor de bevoorrading van de navolgende schepen'; 'cessioni di beni destinati al refornimento e al vettovagliamento di navi'; 'livraisons de biens destinés à l'avitaillement des bateaux'; 'entragas de bens destinados ao abastecimento de bacos').

19. If one compares the provisions of the directive which refer specifically to the *recipient* of services and goods (such as, for instance, Article 13(A)(1)(f) and (l): services supplied by groups of persons and bodies to their members; Article 15(11): supplies of gold to Central Banks; Article 15(12): goods supplied to approved bodies), then it can hardly be unreasonable to assume that supplies effected prior to the actual fuelling and provisioning of vessels should also be covered by Article 15(4) as long as they are shown to be for that purpose.

20. It should in addition be acknowledged that (as the German Government also pointed out) from the point of view of the apparent *purpose* of the exemption provision (which is not the bestowing of financial advantages, but manifestly administrative simplification) there is an argument for subsuming transactions preceding direct fuelling and provisioning under Article 15(4), because undertakings which are engaged therein are in any case relieved of any tax burden by way of deduction. It does not seem unreasonable to spare them from tax procedures from the outset if the final recipient does not have to pay tax.

21. (c) In my opinion it is moreover clear *that two arguments which have been put forward by the advocates of a narrow interpretation* are not very effective in corroborating that point of view.

22. (aa) One of these is the reference to the fact that in a final subparagraph in the provision in question it is stated that the Member States may 'restrict the scope of this exemption until the implementation of Community tax rules in this field'. In my view that does not necessarily suggest that a narrow construction is required at all; rather, it supports the opposite point of view, that is to say that if the introduction of a possibility of restricting its scope was

6 — OJ, English Special Edition, 1967, p. 16.

thought to be warranted it must be assumed that the provision itself should be understood in a broad sense.

23. Of course — and this is anticipating another argument put forward in the proceedings — that does not necessarily mean that the said final subparagraph lends clear support for a *very* broad interpretation of Article 15(4) in the sense of the second question referred to the Court, thus bearing out the German Government's particular viewpoint (as we know, it considered that the final subparagraph would be devoid of meaning if the provision were construed narrowly). For even if it must be assumed that Article 15(4) only covers supplies to vessel operators, one can easily imagine possible restrictions, for instance with regard to the goods which might be considered for exemption or to the effect that only supplies effected directly on board (excluding previous storage) would be considered. The final subparagraph of Article 15(4) makes as much sense if it is given a narrow construction as when it is interpreted as the German Government suggests.

24. (bb) Secondly, there is the reference to Article 16(2) (by virtue of which, subject to the consultation with the Advisory Committee provided for in Article 29, Member States may opt to exempt *inter alia* supplies of goods to a taxable person intending to export them).

25. It surely cannot be said of that provision that it is superfluous if Article 15(4) is given a broad interpretation.

26. As it is worded, it certainly does not appear to lend itself easily to operations such as those described in Article 15(4), but rather — as the German Government has rightly pointed out — to be principally designed to cover export operations as such.[7] For those, however, it applies in every case, that is to say it is also relevant if the operation of fuelling and provisioning vessels which is treated as an export were to be understood in a broad sense and in consequence application of Article 16(2) was excluded.

27. (d) Finally, although — as I believe — when all is said and done there is no alternative but to uphold the view of those who argue for a narrow interpretation of Article 15(4) of the VAT directive, the following considerations are of relevance.

28. (aa) It is certainly significant that the directive is made subject to the principle that every business transaction within the territory of a country is liable to tax. It follows that — where provision is made for exemptions — an application of an exemption that extends to several economic stages appears justifiable only on very imperative grounds. It is, however, doubtful whether the idea adduced by the German Government of administrative simplification suffices (that is to say, the avoidance of tax computations, tax payment and deduction of inputs by traders who, inasmuch as they are not the final consumer, are not ultimately subject to a tax burden). It is also quite clear that the interpretation advocated by the German Government — and I shall return to this point — could also involve

7 — See the headings to Articles 15 and 16.

burdening the administration, albeit in a different way.

29. (bb) Furthermore, it is significant — and this remark relates to the structure of Article 15 as a whole — that (as must be inferred from the heading to Article 15) supplies for the fuelling and provisioning of vessels are treated as like transactions because it is to be expected that consumption will take place abroad. If, however, with regard to the export transactions as such covered in the first numbered paragraphs of Article 15, adherence to a strict criterion is required (dispatch to a destination outside the Community), it must be regarded as only proper and in accordance with the system to apply to like transactions a similarly strict standard and to stress the importance of a close connection between supply and fuelling and provisioning.

30. (cc) One further consideration relating to Article 16(2) of the VAT directive cannot be completely disregarded. If — as can be said to be the case — as regards export transactions an extension of the exemption to persons who only *intend* to export is only possible after consultation with the Advisory Committee, it would not appear logical in the case of like transactions within the meaning of Article 15(4) to reach the same result (extension to previous input stages in the commercial chain) by means of a broad interpretation of the term 'the supply of goods for the fuelling and provisioning of vessels'. Even though it must be admitted that Article 16(2) is not directly designed to cover like transactions, it is much more appropriate to use the provision by analogy in order to obtain exemption for transactions preceding actual supply for the fuelling and provisioning of vessels.

31. (dd) In my opinion in interpreting Article 15(4) weight should also be attached to the reference in the first paragraph to the need to ensure the correct and straightforward application of the exemptions and to prevent any evasion or abuse.

32. What strikes one immediately is that it is hard to reconcile that reference with a systematically generous application of Article 15(4) which includes supplies prior to the actual supply for fuelling and provisioning. It appears possible, if the provision is applied in that way, that is to say if the intention of the previous suppliers is focused upon, that that intention might later be changed and the goods supplied reach the domestic market. In that way distortions of competition could arise and if such facts subsequently came to light *ex post facto* correction of the tax treatment would be necessary (which can hardly be regarded as administrative simplification). If such irregularities are to be excluded from the outset, however, specific monitoring measures are necessary, which (quite apart from the fact that they could amount to obstacles to trade) do not exactly represent administrative simplification either.

33. The arguments put forward on that point by the German Government's representative at the hearing do not really provide grounds for reaching any other conclusion. No regard can be had to the fact that the practice of the German Government (the use of computers for checking purposes *inter alia* apparently plays a role) might easily become generalized. It must be said, however, that it appears inconceivable that the relevant part of the first paragraph of Article 15 should be seen as granting a degree of flexibility to the Member States according to the administrative means at their disposal. It must be more correct to assume that the case for

exemption before us is governed by the formula used in Article 15(4) and that must in principle be understood in a uniform Community way. Derogations are only possible pursuant to the final subparagraph of Article 15(4) mentioned previously. To permit derogations on the basis of the introductory paragraph of Article 15 would, on the other hand, be contrary to the structure of the system and constitute a misinterpretation of the meaning of its wording, which is also to be found in other provisions in the directive.

34. (e) Accordingly, although a broad interpretation of Article 15(4), as advocated by the German Government, cannot be accepted as correct (and, if need be, the same result can be obtained by applying Article 16(2) by analogy), it seems to me on the other hand that it is also clear that there are no imperative reasons for sanctioning the very narrow construction advocated by the Governments of the Netherlands, the United Kingdom and Portugal, to the effect that there is supply for the fuelling and provisioning of vessels only when the goods are loaded directly onto the vessel. There is nothing in the wording of the provision to support that (the Commission proposal mentioned by the Netherlands Government which has not yet been adopted by the Council is clearly irrelevant). Against that view, reference may be made to the term 'supply' (according to Article 5 it is the basis of the right to dispose of property as an owner); that definition surely suggests that the giving of the power of disposal to the person who uses the goods for the fuelling and provisioning of ships, that is to say, to the operator of the vessel, is determinant, and that does not rule out interim storage before the goods are loaded onto the vessel.

35. It should perhaps be added that any misgivings with regard to the risk of abuse (which is seen as the critical factor by the proponents of a very narrow interpretation) can be taken into account by way of recourse to the final subparagraph of Article 15(4), that is to say that Member States who regard it imperative to subject the application of Article 15(4) to very strict requirements are quite at liberty to provide for a restriction on the exemption in reliance on that final subparagraph.

C — Conclusion

36. *3.* In view of the foregoing I suggest that the Court reply to the questions put by the Hoge Raad as follows:

'Article 15(4) of the Sixth Value-Added Tax Directive should be interpreted as meaning that the supply of goods to an undertaking which uses the goods subsequently to fuel and provision vessels is to be regarded as the supply of goods for the fuelling and provisioning of the vessels described in the provision. It is not necessary for the supply to coincide with fuelling and provisioning, that is to say, for delivery to be made directly on to the vessel.'