

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 5 March 1985 *

*Mr President,
Members of the Court,*

an additional amount of value-added tax for the years 1976 to 1979; the plaintiff's objection against that demand was rejected by a decision in May 1982.

A. The plaintiff in the proceedings which have given rise to this reference is a dealer in used and new school books. It also has a department in which repairs, sometimes radical, are carried out on school books for customers. According to the findings of fact made in the Netherlands proceedings (by the Gerechtshof [Regional Court of Appeal], Arnhem), the 'radical' repair of a book which has fallen apart consists of removing the remains of the binding, cutting off the spine, rebinding the loose leaves, glueing them, providing them with a new cover or binding, and then trimming the edges of the book.

In proceedings brought before the Gerechtshof, Arnhem, the applicant had no greater success with its argument that since the operation did indeed constitute the manufacture and supply of books, the decision to reassess the amount of value-added tax payable was incorrect. In a judgment of 14 April 1983 that court held that in the repair of books as described above the old book continues to exist with its text unchanged; no new product is manufactured and there is therefore no supply of goods within the meaning of the legislation on value-added tax.

The plaintiff paid value-added tax at the reduced rate of 4% on the amounts invoiced for such repairs, as laid down for the *supply of books* in Table 1 of the Netherlands law on value-added tax. After an investigation of the undertaking in 1981 the Inspector of Customs and Excise, Zwolle, came to the conclusion that since even in the case of extensive repairs the old book is retained and no new product is manufactured, the work described did not constitute the supply of products by the manufacturer, and thus a supply of goods within the meaning of the Netherlands law on value-added tax of 1968, but rather a supply of services, for which at that time value-added tax was charged at the rate of 18%. He therefore demanded payment of

The plaintiff then appealed to the Hoge Raad [Supreme Court of the Netherlands]. The plaintiff is of the view that the comprehensive repair of books (in which respect it adds that unusable parts of tattered books are removed, so that a number of loose leaves result, and the unusable leaves are replaced with old leaves from other books) constitutes the manufacture of a new book, since even though the text remains the same the old book is destroyed entirely. It is contended that the refusal of the Netherlands tax authority to acknowledge that such operations amount to the supply of goods constitutes an incorrect application of the Netherlands law on value-added tax of 1968 in conjunction with Article 5 (2) (d) of the Second Council Directive on the harmonization of legislation of Member States concerning

* Translated from the German.

turnover taxes (with regard to the tax for the years 1976 and 1977) and Article 5 (5) (a) of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes (with regard to tax for the years 1978 and 1979). Let me recall the content of those provisions before going any further:

Article 5 (2) of the Second Directive:

'The following shall also be considered as supply within the meaning of paragraph 1:

...

- (d) the delivery of movable property produced under a contract for work, that is to say the handing over by a contractor to his customer of movable property which he has made from materials and objects entrusted to him by the customer for this purpose, whether or not the contractor has provided a party of the products used;

Article 5 (5) of the Sixth Directive:

'Member States may consider the following to be supplies within the meaning of paragraph 1:

- (a) supplies under a contract to make up work from customers' materials, that is to say delivery by a contractor to his customer of movable property made or assembled by the contractor from materials or objects entrusted to him by the customer for this purpose, whether or not the contractor has provided any part of the materials used.'

During the proceedings in the national court the *Advocaat-Generaal* expressed the view that in VAT legislation and in general linguistic usage the term 'to make' implies the creation of a new product. That, he said, was not the case in relation to book repairs of the nature described, since a book is defined by its content, and that is not altered by the fact that the book falls apart; the binding of loose leaves does not constitute the making of a book. Since, however, it must be assumed that the Netherlands legislation on value-added tax complies with the Community directives and since it is not entirely clear how the term 'to make' must be interpreted in that connection, the *Advocaat-Generaal* thought it advisable to seek a binding interpretation by means of a preliminary ruling.

The Hoge Raad held first that the plaintiff's contention that unusable leaves were replaced by new ones and that pages from other books were sometimes inserted must be disregarded, since that argument was not raised before the *Gerechtshof*. Since, moreover, it also considered that the term 'make' in the Netherlands law on value-added tax of 1968 did not differ in meaning from the same term as used in Article 5 of the Second Directive, and must — because the wording of the Law was not changed after the adoption of the Sixth Directive — be understood as meaning the same as 'made or assembled' in Article 5 of the Sixth Directive, it acted on the suggestion of the *Advocaat-Generaal* and by a judgment of 16 May 1984 stayed the proceedings and referred the following questions for a preliminary ruling under Article 177 of the EEC Treaty:

- '1. Must the work performed by a taxable person who radically repairs or renovates for a customer movable property made available to him by that customer and then supplies the property

to the customer be regarded as the making of movable property within the meaning of Article 5 (2) (d) of the Second Directive or the making or assembly of movable property within the meaning of Article 5 (5) (a) of the Sixth Directive only if, according to ordinary language usage or commonly accepted views, the result of that work constitutes new property?

2. If the criterion set out in the first question is not decisive,
 - (a) What are the minimum requirements which must be fulfilled in order for such work to be considered to involve the making of movable property or the making or assembly of movable property?
 - (b) Must a distinction be drawn in this regard between goods characterized mainly by physical qualities and goods characterized mainly by non-physical qualities, such as books?
 - (c) Must a distinction be drawn in this regard between the repair or renovation of goods which have fallen to pieces or which are first taken apart by the contractor and the repair or renovation of goods which are still intact and remain so?
 - (d) Must a distinction be drawn in this regard depending on the extent to which the contractor adds new materials?

1. The interpretation sought is relevant in circumstances in which the school books to be repaired remain the *property of the customer*. In the proceedings in the national court the Advocaat-Generaal emphasized that point, referring to the statement of claim. The term 'made available' in the questions submitted to the Court therefore refers not to a transfer of the power of disposal but only to physical delivery. Otherwise the delivery of the repaired books would clearly be a supply of goods within the meaning of Article 5 (1) of both directives, since it would again entail the transfer of the power of disposal as referred to in both those provisions, and the problem of the interpretation of Article 5 (2) (d) of the Second Directive and Article 5 (5) (a) of the Sixth Directive would simply not arise.

An interpretation is moreover only necessary with regard to *very extensive repairs* using material provided by the contractor, whether such repairs are to be understood as described in the findings of fact made by the Gerechtshof, or as including the work referred to in the supplementary statements made by the plaintiff before the Hoge Raad. Only in such circumstances is there a real problem of distinguishing between the supply of goods and the performance of services. Simple current repairs, in contrast, must clearly be regarded as the performance of services. That may be concluded from paragraph 9 of Annex A to the Second Directive, which reads as follows:

As regards Article 6, paragraph 1

"The definition of provision of services given in this paragraph involves classification of,

B. My opinion on the matter is as follows.

inter alia, the following as provision of services:

...

The carrying out of work on goods, if such work is not considered as supply within the meaning of Article 5 (2) (d) and (e) as, for example, *current maintenance work*, the laundering of linen, etc.'.

2. It may be inferred from the remarks of the Advocaat-Generaal in the Hoge Raad, to which the Netherlands Government added its voice in these proceedings, that the interpretation of the directives has been sought because the provisions of the Netherlands law of 1968 do not differ from Article 5 (2) (d) of the Second Directive and are therefore to be understood in the same sense. According to those remarks, it is also clear that since the law of 1968 remained unaltered after the adoption of the Sixth Directive it must be inferred that the Netherlands legislature took advantage of the option offered by Article 5 (5) (a) of the Sixth Directive and that the question therefore also arises of how the term 'contract to make up work' in that provision is to be interpreted.

3. Turning to the specific problem of interpretation, it does not seem to me justifiable to assume that with regard to the term 'contract to make up work' those directives and provisions simply refer to national law (a point of view which seems to be suggested in the observations of the French Government).

Evidence against such an assumption is provided by the fact that both provisions include not only the term 'contract to make up work' but also an explanatory phrase beginning with the words 'that is to say', indicating that a uniform meaning is being

laid down for the Community. Moreover, the distinction between the supply of goods and the provision of services, significant in this connection, is also important in determining the place of such supply or provision; for supply of goods see Article 5 of the Second Directive and Article 8 of the Sixth Directive, and for the provision of services see Article 6 of the Second Directive and Article 9 of the Sixth Directive. If that distinction and the terms governing it were not understood in a uniform manner there would be a risk of double taxation or of tax loop-holes. It is hard to imagine that such confusion could be permitted in circumstances where efforts were being made to achieve harmonization in the area of value-added tax.

The Commission also correctly pointed out that it would be inappropriate to treat Article 5 (5) of the Sixth Directive differently on the ground that it is a permissive provision. It clearly does not leave the Member States entirely free to decide where to draw the distinction between the supply of goods and the provision of services. It merely makes it possible to extend the scope of the supply of goods in a particular way, within the limits laid down by the directive.

4. The most important term for the interpretation of the provisions at issue in these proceedings is the verb 'to make'. The noun 'fabrikant' (manufacturer), to which the Netherlands Government attached particular weight, cannot on the other hand be of decisive significance since it appears only in the Dutch version of the Second Directive.

With regard to the question whether movable property is made, under a contract for work, from materials provided by the customer, within the meaning of those provisions, the Commission and the Netherlands Government take the view that *general linguistic usage* (on which attention is

usually focused; cf. the judgment of the Court of 9 February 1984 in Case 295/82¹) suggests that such can be the case not where work is performed *on* an article which in principle remains intact, but rather where the activity in question gives rise to a *new article*. Whether such a new article — or rather a *different* article in the sense *that a different market need is satisfied* — is produced must be determined according to the general understanding of the trade. A new article may in particular be produced where there is an alteration of the purpose or of the significant characteristics of the article.

I find that argument, together with the inference that it is only in such circumstances that the delivery of movable property made under a contract for work constitutes a supply of goods under the VAT legislation, entirely convincing. It must also be assumed that that conclusion is not affected by the Sixth Directive, in which the word 'made' is joined by the words 'or assembled'. It cannot be inferred that the addition of those words was intended to effect an extension of the scope of supply of goods; it should rather be assumed that the element was already included in the term 'made' and that the Sixth Directive merely added a clarification.

Accordingly I can only propose that the first and main question referred by the Hoge Raad should be answered in the affirmative. (It is interesting to note that, as the case-law and the history of the 1968 law show, the interpretation followed in the Netherlands accords with that answer.)

It may be added (the final decision on this issue is of course a matter for the national court) that in the case of the repair, even the extensive repair, of books, as described in the judgment of the Gerechtshof, Arnhem, it is difficult to speak of the manufacture of a new article in the sense discussed. The matter might be viewed differently, however, if the supplementary statements made by the plaintiff before the Hoge Raad were taken into account and the activity in question were therefore assimilated to that of book binders who manufacture new books from loose pages supplied to them (which in the Netherlands case-law is indeed regarded as the supply of goods).

5. It is therefore no longer necessary to consider in its various aspects the second question, which was posed in case the answer to the first question should be in the negative. Permit me however to add the following brief remarks.

(a) I cannot see (here too, I agree with the Commission) how minimum requirements as referred to in subparagraph (a) could be laid down which would go beyond what has been said here and in a general manner provide an additional, generally applicable refinement of the decisive criterion.

(b) I think it hardly appropriate, moreover, to make a general distinction between articles whose primary characteristics are material in nature and those, such as books, whose primary characteristics are intangible. The difficulties associated with such a distinction cannot be ignored, as the French Government in particular pointed out.

(c) On the other hand, the circumstances referred to in subparagraphs (c) and (d)

¹ — *Groupeement d'intérêt économique 'Rhône-Alpes Huiles' v Syndicat national des fabricants raffineurs d'huile de graissage* [1984] ECR 575.

may be relevant to the application of the test based on commonly accepted views. In so far as the criterion referred to in subparagraph (c) is concerned, I have already mentioned it in connection with the answer to the first question. Moreover, it may certainly be relevant whether the contractor

adds new material to a significant extent (that is, not merely incidental material), since in such a case what he does is at least similar to what would be done under a contract for work and materials, and could, like that work, be described as the supply of goods.

C. In conclusion, I therefore propose that the answer to be given to the questions referred by the Hoge Raad should be that the work performed by a taxable person who radically repairs or renovates for a customer movable property made available to him by that customer and then delivers the property to the customer must be regarded as the making of movable property within the meaning of Article 5 (2) (d) of the Second Directive or of Article 5 (5) (a) of the Sixth Directive if according to ordinary language usage or commonly accepted views the result of that work constitutes a new article in the sense that it satisfies a different market need.