JUDGMENT OF THE COURT (Fifth Chamber)

4 October 2001 *

In Case C-326/99,

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

Stichting 'Goed Wonen'

and

Staatssecretaris van Financiën,

on the interpretation of Article 5(3) and Article 13B(b) and C(a) of the Sixth Council Directive (77/338/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 (Fifth Chamber),

composed of: A. La Pergola (Rapporteur), President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Commission of the European Communities, by E. Traversa and H.M.H. Speyart, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Stichting 'Goed Wonen', represented by G. Vos, gemachtigde; of the Netherlands Government, represented by J.S. van den Oosterkamp, acting as Agent; of the German Government, represented by

W.-D. Plessing, acting as Agent; and of the Commission, represented by H.M.H. Speyart, at the hearing on 7 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 22 February 2001,

gives the following

Judgment

1 By judgment of 24 August 1999, received at the Court on 31 August 1999, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 5(3) and Article 13B(b) and C(a) 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 The two questions have been raised in proceedings between Stichting 'Goed Wonen', a Netherlands foundation, and the Staatssecretaris van Financiën concerning a supplementary assessment issued by the tax inspector in the matter of the value added tax (hereinafter 'VAT') declared by the foundation for the period from 1 April to 30 June 1995.

Law

Community rules

3 The scope of the Sixth Directive is defined in Article 2 as follows:

'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;

2. the importation of goods.'

4 In Title V, headed 'Taxable transactions', Article 5 of the Sixth Directive, which is itself headed 'Supply of goods', provides:

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

...

3. Member States may consider the following to be tangible property:

...

(b) rights *in rem* giving the holder thereof a right of user over immovable property;

...'

5 According to Article 6 of the Sixth Directive, which is also contained in Title V and headed '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.

...'

6 In Title X, headed 'Exemptions', Article 13 of the Sixth Directive, itself headed 'Exemptions within the territory of the country', contains the following provisions, also relevant to the present case:

'...

B. *Other exemptions*

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 excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption;

...

C. *Options*

Member States may allow taxpayers a right of option for taxation in case of:

(a) letting and leasing of immovable property;

...

Member States may restrict the scope of this right of option and shall fix the details of its use.'

7 Article 17 of the Sixth Directive, headed 'Origin and scope of the right to deduct', provides in paragraph 2:

'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person'.

8 In Title XV, headed 'Simplification procedures', Article 27 of the Sixth Directive provides:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

3. The Commission shall inform the other Member States of the proposed measures within one month.

4. The Council's decision shall be deemed to have been adopted if, within two months of the other Member States being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.

...'

The Dutch legislation

9 Article 3 of the Wet houdende vervanging van de bestaande omzetbelasting door een omzetbelasting volgens het stelsel van heffing over de toegevoegde waarde (Law replacing turnover tax by the system of taxing added value, Stbl. 1968, p. 329, of 28 June 1968, as amended by the Wet ter bestrijding van constructies met betrekking tot onroerende zaken (Law to prevent devices relating to immovable property, Stbl. 1995, p. 659, hereinafter 'the VAT Law'), of 18 December 1995, which entered into force with retroactive effect from 31 March 1995, is designed to transpose Article 5(3)(b) of the Sixth Directive. The first subparagraph of Article 3(2) of the VAT Law provides:

'The grant, transfer, modification, waiver or termination of limited rights over immovable property, with the exception of mortgages and ground rents, must also be viewed as a supply of goods, save where the total consideration plus turnover tax amounts to less than the economic value of those rights. The economic value shall not be less than the cost price of the immovable property to which the right relates, including turnover tax, which would be produced were that right to be created by an independent third party at the time of the transaction.'

10 Point 5 of Article 11(1)(b) of the VAT Law is intended to transpose the provisions of Article 13B(b) and C(a) of the Sixth Directive. It provides:

'The following are exempted from tax, subject to the conditions to be laid down by general administrative regulation:

...

(b) the letting (including the leasing) of immovable property, excluding:

...

(5) the letting of immovable property, apart from buildings and parts thereof which are used as accommodation, to persons using such property for the purposes in respect of which there exists a complete or virtually complete right to deduct tax pursuant to Article 15, provided that the lessor and lessee have jointly submitted a request to that effect to the Inspector and provided that they otherwise fulfil the conditions to be laid down by Ministerial regulation; "letting of immovable property" shall be taken to mean, *inter alia*, any other form in which immovable property is made available for use otherwise than by way of the supply thereof.'

11 The Explanatory Statement relating to the draft law on the basis of which the Law of 18 December 1995 was enacted explains in this regard:

'The legislation on turnover tax applicable to immovable property is being increasingly used in a manner not anticipated by the legislature. Undertakings exempt from turnover tax, such as hospitals, banks and insurance companies, and bodies which are not undertakings, such as municipalities, are making use — quite often through a foundation or a company specially created for the purpose — of the "optional" regime for taxed lettings or taxed supplies of immovable property (the reference here is to the options available under Article 13C of the Sixth Directive implemented at national level). As a result, immovable property is attracting a lower burden of tax — in some cases, much lower than was envisaged [by the law]...

The Directive allows certain rights in immovable property to be considered to be goods (Article 5(3)). But there is no mandatory obligation. In principle, the Directive therefore regards the creation of the right, its transfer and so forth as provisions of services. In order to combat [abusive arrangements in relation to immovable property] it is therefore necessary to exempt those supplies of services so that there is no right to deduct input tax and thereby remove the VAT advantage. As regards the matter of current concern, Article 13B(b) of the Directive exempts "leasing or letting", without linking that expression to corresponding civil law concepts in the Member States. Since, in particular, detached rights [such as usufruct, emphyteusis and so forth] at issue here essentially exhibit a strong similarity with leasing and letting, the proposed treatment of them as analogous to letting [last subparagraph of Article 11(1)(b) of the VAT Law] reflects the scheme of the Directive. Member States are at liberty to define the concept of letting used in the Directive and may depart from the meaning of that concept in their own civil law, since the Directive makes no reference to it.'

The main proceedings and the questions referred for a preliminary ruling

12 The Stichting 'Goed Wonen', the applicant in the main proceedings, is the legal successor of the housing association Woningbouwvereniging 'Goed Wonen' (hereinafter referred to as 'the GW Association').

13 In the course of the second quarter of 1995, three newly-built housing complexes with dwellings designed for letting were supplied to the GW Association.

14 By notarial act dated 28 April 1995, the GW Association set up the Stichting 'De Goede Wonen' (hereinafter 'the GW Foundation') and granted to it a usufructuary right for a term of 10 years in respect of the new dwellings in return for a sum lower than the cost price of those dwellings. As usufructuary, the GW Foundation commissioned the GW Association to manage the dwellings, to carry out or have carried out large and small-scale maintenance work, to collect and administer rents, to issue receipts for rent received, to conclude, amend and terminate leases of the dwellings, issue invoices in respect of rent increases and to carry out all such legal acts on behalf of the usufructuary as the GW Association might deem appropriate in connection with such management.

15 In its tax return for the period 1 April to 30 June 1995, the GW Association entered, first, the VAT which it had charged the GW Foundation for the grant of the usufruct, amounting to NLG 645 067, and, second, the amount of VAT which it itself had been charged for construction of the dwellings, amounting to NLG 1 285 059, which was deducted as input tax. On the basis of that declaration, the GW Association recouped NLG 639 992.

16 The Tax Inspector later issued a supplementary assessment for the amount deducted by the GW Association. That assessment was confirmed by a decision of 12 December 1996 which the GW Association challenged before the Gerechtshof te Arnhem. However, by decision of 14 February 1997, the Inspector reduced his assessment to the sum of NLG 639 992, which corresponded to the amount which the tax authorities had reimbursed to the GW Association on the basis of its tax declaration.

17 On 21 August 1997, the GW Association adopted the legal form of a foundation and became the Stichting 'Goed Wonen'

18 By judgment of 20 May 1998, the Gerechtshof upheld the supplementary assessment, as reduced in the meantime by the Tax Inspector. It is against that judgment that the Stichting 'Goed Wonen' has appealed in cassation to the referring court, the Hoge Raad der Nederlanden.

19 As the Hoge Raad der Nederlanden points out in its judgment, the Gerechtsof te Arnhem ruled that the situation created by the GW Association, in setting up the GW Foundation and granting it the usufructuary right over the dwellings, was no different from that which would have prevailed if it had itself let the newly-built dwellings. Given its very limited freedom of action, the GW Foundation was to be assimilated to the GW Association owing to the quite preponderant role of the latter, as shown by the powers conferred in granting the usufructuary right, and to the close administrative association of the two bodies. Consequently, the creation of the usufruct could not be a taxable transaction for VAT purposes.

20 The Gerechtsof also held, that even if the GW Foundation could not be assimilated to the GW Association, the supplementary assessment had to be upheld for the following reasons:

— the grant of a limited right such as usufruct did not constitute a supply of goods within the meaning of Article 3(1)(e) of the VAT Law or Article 5(1) of the Sixth Directive since that concept does not cover the transfer of the right to dispose of an asset as owner;

— the Sixth Directive does not preclude the grant of a limited right *in rem* from being treated as a supply of goods under the sole condition referred to in the first subparagraph of Article 3(2) of the VAT Law;

— the grant of a usufruct in the circumstances of the instant case had to be treated as a 'letting' within the meaning of Article 13B(b) of the Sixth Directive so that the exemption provided for by that provision was applicable.

21 The Hoge Raad der Nederlanden held that the first plea of the Stichting 'Goed Wonen', so far as it contested the interpretation of the Gerechtshof assimilating it to the GW Foundation, was well founded. According to the Hoge Raad, the legal transactions which had taken place in the case had incontestably led to the creation of a new and distinct legal person by the GW Association.

22 With regard to the question whether the Dutch legislature could so implement Article 5(3)(b) of the Sixth Directive as to treat or not treat rights *in rem* entitling the holder to use immovable property as tangible goods depending on the price of transfer of those rights, the national court refers to the principles laid down in Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraphs 8 and 9. According to the Hoge Raad the Court, in that judgment, held that the transfer of the power to dispose of tangible property as owner, even if there were no transfer of the legal property in the goods, was to be regarded as a 'supply of goods' on the ground that it was necessary to base the common VAT system on a uniform definition of taxable transactions.

23 The Hoge Raad also points out that, since the Sixth Directive does not define 'letting' or 'leasing', the case raises the question whether, in Article 13B(b) of the Directive, the Council intended to limit the scope of those concepts to that which they have in the civil law of the Member State concerned.

24 Taking the view that, in those circumstances, the case required an interpretation of the Sixth Directive, the Hoge Raad der Nederlanden stayed proceedings and referred the following two questions to the Court for a preliminary ruling:

'1. Is Article 5(3) of the Sixth Directive to be interpreted as meaning that rights *in rem* entitling the holder thereof to use immovable property may be treated by the national legislature as tangible property only if the remuneration agreed in respect of the grant, transfer, modification, waiver or termination of those rights is at least equivalent to the financial value of the immovable property concerned?

2. Are Article 13B(b) and Article 13C(a) of the Sixth Directive to be interpreted as meaning that the national legislature may treat the terms "leasing or letting" as covering not only leasing and/or letting in the sense applied to those terms by civil law but also any other form in which immovable property is made available for use otherwise than by way of the supply thereof?'

Preliminary observation

25 Those two questions have been raised in proceedings which concern a transaction by which the owner of tangible immovable property, consisting of a building divided into several dwellings, confers on a legal person, for an agreed period and for consideration, the right to occupy the building as if it were the owner thereof and to exclude any other person from enjoyment of that right. It is common ground that the consideration agreed for the transfer of the right in question was lower than the cost price of the building concerned.

The first question

26 By its first question, the Hoge Raad asks essentially whether, on a proper construction of Article 5(3)(b) of the Sixth Directive, it precludes a national provision, such as Article 3(2) of the VAT Law, whereby classification as a 'supply of goods' of the grant, transfer, modification, waiver or termination of rights *in rem* is made subject to the condition that the total consideration, plus turnover tax, amounts at least to the economic value of the immovable property to which the rights *in rem* relate.

27 The Stichting 'Goed Wonen' contends that the grant of the usufruct to the GW Foundation was a supply of goods subject to VAT since that foundation acquired the power to dispose of the dwellings in question as owner.

28 It also contends that Article 3(2) of the VAT Law is incompatible with Article 5(3) of the Sixth Directive. In its view, Article 5(3) allows the Member States only to select, within the catalogue of rights *in rem* existing in their national legal order, the rights which should be assimilated to tangible property. That provision does not, however, authorise them to differentiate between such rights on the basis of the consideration for a transaction concerning them.

29 According to Stichting 'Goed Wonen', the effect of the criterion chosen by the Kingdom of the Netherlands is that, depending on the sum paid, a given right *in rem* could be regarded as tangible property in some cases and not in others. Furthermore, the price paid, which represents the consideration for creating a usufructuary right for a limited period, is inevitably lower than the economic value of the immovable property in question.

30 The Stichting 'Goed Wonen' also contends that, before amending Article 3(2) of the VAT Law, the Kingdom of the Netherlands ought to have sought the authorisation provided for in Article 27 of the Sixth Directive. It did not have such authorisation at the time when its legislature made the amendments to that national legislation. Council Decision 96/432/EC of 8 July 1996 authorising the Netherlands to apply a measure derogating from Article 11 of Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (Sixth VAT Directive) (OJ 1996 L 179, p. 51), was late, concerned a derogation from a different provision of the Sixth Directive and in any event was never used by that Member State.

31 The Netherlands Government and the Commission submit that, owing to the artificial nature of the arrangement in the present case, the total amount of VAT paid by the GW Association and the GW Foundation was much lower than that which that association would have had to pay if it had acted itself as lessor of the dwellings. Since the majority of tenants were undoubtedly private individuals not subject to VAT, the GW Association would not have been able to submit, together with the tenants, an application for joint taxation on the basis of the option provided for in Article 11(1)(b), point 5, of the VAT Law. The exemption for lettings of immovable property would therefore have been applicable and the GW Association would not have been able to deduct input VAT upon acquisition of the dwellings.

32 Consequently, according to the Netherlands Government and the Commission, the situation which gave rise to the main proceedings falls into the category of devices aiming artificially to reduce VAT on the transfer of immovable property, which is just what the Netherlands legislature sought to prevent by the amendment to the VAT Law introduced in 1995.

33 As to those arguments, it is to be noted at the outset that, according to Article 5(1) and (3) of the Sixth Directive, the Member States may treat as tangible property forming the object of a 'supply' only the transfer of rights *in rem* entitling the holder to use immovable property. However, the Court has held, in Case C-186/89 *Van Tiem* [1990] ECR I-4363 that, in so far as a Member State has made use of such a possibility, the term 'transfer' used in Article 5(1) is to be interpreted as also covering the creation of one of the rights *in rem* mentioned in paragraph (3)(b) of that provision.

34 Furthermore, as the Netherlands Government and the Commission rightly point out, the Member States are at liberty to exercise the choice afforded them by Article 5(3) of the Sixth Directive, by, *inter alia*, laying down certain conditions, in so far as these do not fundamentally alter the nature of the choice afforded, since no provision of the Sixth Directive in any way restricts the Member States'

discretion in this regard. Consequently, whilst Article 5(3) of the Sixth Directive allows all the rights in question to be treated as tangible property, or only one or more of those rights to be so treated, that provision also allows such treatment to be restricted to only those rights which meet the precise criteria adopted by the Member State concerned.

35 So, the condition laid down in Article 3(2) of the VAT Law, according to which the agreed consideration for the grant of the rights covered by that provision, plus turnover tax, must be not less than the cost price of the immovable property in question, is consonant with the aim of the Sixth Directive to ensure that VAT is actually collected and in the proper way, notwithstanding the fact that this condition will rarely be fulfilled in practice.

36 Consequently, such a condition is not contrary to the provisions of Article 5(3) of the Sixth Directive.

37 In those circumstances, it is not necessary to consider the argument of the Stichting 'Goed Wonen' that the amendment made to the VAT Law in 1995 constituted a special derogation, within the meaning of Article 27 of the Sixth Directive, for which Council authorisation was necessary.

38 Consequently, the reply to be given to the first question must be that, on a proper construction of Article 5(3)(b) of the Sixth Directive, it does not preclude adoption of a national provision, such as Article 3(2) of the VAT Law, whereby classification as a 'supply of goods' of the grant, transfer, modification, waiver or termination of rights *in rem* in immovable property is made subject to the condition that the total consideration, plus turnover tax, must amount to at least the economic value of the immovable property to which those rights *in rem* relate.

The second question

39 By its second question, the national court asks essentially whether, on a proper construction of Article 13B(b) and C(a) of the Sixth Directive, it precludes adoption of a national provision, such as Article 11(1)(b), point 5, of the VAT Law, which, for the purposes of applying the VAT exemption, allows the grant of a usufructuary right over immovable property for a limited period of time to be regarded as leasing or letting of immovable property.

40 The Stichting 'Goed Wonen' and the Commission submit that the grant of rights *in rem*, whereby immovable property is made available for use otherwise than by supply, does not constitute 'leasing' or 'letting'. Consequently, according to them, the exemption created by the VAT Law in the case of the grant of a usufructuary right is contrary to the Sixth Directive.

41 They submit that a strict construction must be given to the exempting provisions of the Sixth Directive, which may break the chain of deductions between taxable persons arising under Article 17 of the Sixth Directive and, consequently, lead to a charge to tax because input tax cannot be deducted.

42 The Commission submits in particular that leasing and letting, on the one hand, and usufruct, on the other, are significantly different in the civil law systems originating in Roman law, such as those existing in the majority of the Member States. First of all, the usufructuary acquires, besides the right to use the property in question, the right to enjoy the fruits of it. Next, usufruct in immovable property is a right *in rem*, whereas leasing and letting are rights *in personam*. Furthermore, usufruct is extinguished automatically when the usufructuary dies whereas a lease in principle continues in favour of the tenants' successors. Finally,

unlike usufruct, a rental agreement generally makes the property in question available to the tenant to live in. Consequently, subletting of the property by the tenant is in principle excluded, unless exceptionally authorised by the owner, whereas the usufructuary has the right to use the property in question to the full and thus also to sublet it. Moreover, only a usufructuary right can be granted without consideration.

43 According to the Commission, if the Community legislature had wanted to exempt from VAT the grant of rights *in rem* entitling the holder to use immovable property, it would have explicitly mentioned those rights, as it did in Article 4(2) or Article 5(3)(b) of the Sixth Directive, rather than only mentioning leasing and letting in Article 13.

44 In considering the merits of that argument, it is to be noted that the Sixth Directive does not define 'leasing' or 'letting', nor does it refer to relevant definitions adopted in the legal orders of the Member States, as it does, for example, as regards 'building land' (see Article 4(3)(b)) of the Sixth Directive, which provides that '"building land" shall mean any unimproved or improved land defined as such by the Member States'.

45 As is clear from the actual wording of Article 13B(b) and C of the Sixth Directive, the latter has left the Member States wide discretion as to whether the transactions concerned are to be exempt or taxed (see Case C-12/98 *Amengual Far* [2000] ECR I-527, paragraph 13).

46 Next, it is settled in case-law that, since the exemptions provided for in the Sixth Directive, in particular in Article 13, are derogations from the general principle stated in Article 2 of the Directive, according to which VAT is to be levied on all

supplies of goods or services made for consideration by a taxable person, those exemptions must be interpreted strictly (see, as regards in particular the exemption for leasing and letting of immovable property, Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 55, and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25).

47 Finally, it should be observed that, according to the 11th recital of the preamble to the Sixth Directive, the Council's aim in establishing the common list of exemptions was to ensure that the Community's own resources are collected in a uniform manner in all the Member States. It follows that, even though Article 13B of the Sixth Directive refers to the exemption conditions laid down by the Member States, the exemptions provided for by that provision must constitute independent concepts of Community law so that the basis for assessing VAT is determined uniformly and according to Community rules (see *Commission* v *Ireland*, paragraph 51, and Case C-240/99 *Försäkringsaktiebolaget Skandia* [2001] ECR I-1951, paragraph 23).

48 In this regard, the argument put forward by the Stichting 'Goed Wonen' and the Commission to the effect that the Community definition of leasing and letting must be based on the similarities existing between the relevant legal concepts prevailing in the civil law of the Member States most heavily influenced by Roman law cannot be accepted.

49 As the Advocate General points out in paragraph 71 to 75 of his Opinion, such an approach would ignore the significant differences existing between the legal systems of the Member States in the matter of rights *in rem* conferring on their holder a right of user over immovable property. Moreover, the Court has held that the concept of leasing or letting in Article 13B(b) of the Sixth Directive is broader than that existing in the various national laws (see *Commission* v *Ireland*, paragraph 54).

50 Consequently, in order to provide a helpful answer to the second question, as reformulated in paragraph 39 above, it is first necessary to analyse the *ratio legis* of the exemption established by Article 13B(b) of the Sixth Directive for the leasing or letting of immovable property. Second, it will be necessary to examine whether that *ratio legis* would allow that exemption to be extended to the grant of a right *in rem* such as usufruct, which entitles the holder to use immovable property so that the latter transaction can be regarded as also being covered by the Community concept of leasing or letting, as interpreted in the light of its context and the aims and scheme of the Sixth Directive.

51 In this regard, the Explanatory Memorandum to the Commission's proposal for the Sixth Directive, presented to the Council on 29 June 1973 (Bull. EC 11-73, Supplement, p. 7, particularly p. 16), states, with regard to Title x of the Sixth Directive, concerning exemptions, that '[t]he list of exemptions has been drawn up having regard to (i) the exemptions already existing in the various Member States, and (ii) the need to keep the number of exemptions as small as possible... [I]n the Member States the letting of immovable property is generally exempted on technical, economic and social grounds. But the arguments which justify the exemption of lettings of premises as dwellings... no longer apply in the case of hotel premises or of lettings for industrial or commercial purposes'.

52 Although the leasing of immovable property is in principle covered by the concept of economic activity within the meaning of Article 4 of the Sixth Directive, it is normally a relatively passive activity, not generating any significant added value. Like sales of new buildings following their first supply to a final consumer, which marks the end of the production process, the leasing of immovable property must therefore in principle be exempt from taxation, without prejudice to the right to opt for taxation which the Member States may grant to taxable persons, pursuant to Article 13C of the Sixth Directive.

53 However, it is also consistent with the general aim of the Sixth Directive that if immovable property is made available to a taxable person through leasing or

letting, as a means of contributing to the production of goods or services whose cost is passed on in their price, the property stays within, or returns to, the economic circuit and must be capable of giving rise to taxable transactions. The common characteristic of the transactions which Article 13B(b) of the Sixth Directive excludes from the scope of the exemption is indeed that they involve more active exploitation of immovable property, thus justifying supplementary taxation, in addition to that charged on the initial sale of the property.

54 The foregoing considerations are valid, *mutatis mutandis*, for the grant of a right *in rem* conferring on its holder a right of user over immovable property such as the usufructuary right in question in the present case.

55 The fundamental characteristic of such a transaction, which it has in common with leasing, lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right.

56 Consequently, observance of the principle of the neutrality of VAT and the requirement for a consistent application of the provisions of the Sixth Directive, in particular the proper, simple and uniform application of the exemptions provided for (see Case C-283/95 *Fischer* [1998] ECR I-3369, paragraph 28), entail treating the grant of a right such as the usufructuary right in question in the present case like leasing and letting, for the purposes of the application of Article 13B(b) and C(a) of the Sixth Directive.

57 As the Netherlands Government has rightly pointed out, treating such a form of use of immovable property as letting prevents any abusive creation of a right to deduct input tax on immovable property, which is an aim expressly provided for by Article 13 of the Directive.

58 That interpretation is not affected by the fact, pointed out by the Stichting 'Goed Wonen' and the Commission, that in the civil law of many Member States usufruct has characteristics which distinguish it from leasing or letting. As the Advocate General points out in paragraphs 87 to 91 of his Opinion, those points are not relevant to the determination of the present case. The particularities in question, arising from the fact that these legal institutions belong to distinct legal categories, are secondary in relation to the fact that, economically, a right such as the usufructuary right in question in the present case and leasing and letting present the essential common characteristic mentioned in paragraph 55 above.

59 It follows from the foregoing considerations that the reply to be given to the second question must be that, on a proper construction of Article 13B(b) and C(a) of the Sixth Directive, it does not preclude adoption of a national provision such as Article 11(1)(b), point 5, of the VAT Law, which, for the purposes of the application of the VAT exemption, allows the grant, for an agreed period and for payment, of a right *in rem* entitling the holder to use immovable property, such as the usufructuary right in question in the present case, to be treated as the leasing or letting of immovable property.

Costs

60 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 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 (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 24 August 1999, hereby rules:

1. On a proper construction of Article 5(3)(b) 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 tax — Common system of value added tax: uniform basis of assessment, it does not preclude adoption of a national provision, such as Article 3(2) of the Wet houdende vervanging van de bestaande omzetbelasting door een omzetbelasting volgens het stelsel van heffing over de toegevoegde waarde (Law replacing turnover tax by the system of taxing added value) of 28 June 1968, as amended by the Wet ter bestrijding van constructies met betrekking tot onroerende zaken (Law to prevent artificial arrangements relating to immovable property) of 18 December 1995, whereby classification as a 'supply of goods' of the grant, transfer, modification, waiver or termination of rights *in rem* in immovable property is made subject to the condition that the total consideration, plus turnover tax, must amount to at least the economic value of the immovable property to which those rights *in rem* relate.

2. On a proper construction of Article 13B(b) and C(a) of Directive 77/388, it does not preclude adoption of a national provision such as Article 11(1)(b), point 5, of the VAT Law of 28 June 1968, as amended by the Law of 18 December 1995, which, for the purposes of the application of the exemption from value added tax, allows the grant, for an agreed period and for payment, of a right *in rem* entitling the holder to use immovable property, such as the usufructuary right in question in the present case, to be treated as the leasing or letting of immovable property.

La Pergola Wathelet Edward

Jann Timmermans

Delivered in open court in Luxembourg on 4 October 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber