JUDGMENT OF THE COURT (Second Chamber)
14 February 1985 [1]

In Case 268/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] for a preliminary ruling in the proceedings pending before that court between

D. A. Rompelman and E. A. Rompelman-Van Deelen, Amsterdam,

and

Minister van Financiën [Minister for Finance],

on the interpretation of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal L 145 of 13 June 1977, p. 1),

THE COURT (Second Chamber),

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

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1 — Language of the Case: Dutch.

* after considering the observations submitted on behalf of
the plaintiffs Rompelman by Mr L. Wolfsbergen,
the Netherlands Government by Mr I. Verkade, acting as Agent,
the Commission of the European Communities by Mr J. F. Buhl, acting as Agent, assisted by Mr F. W. G. M. van Brunschot,
after hearing the Opinion of the Advocate General delivered at the sitting on 15 November 1984,

gives the following

JUDGMENT

(The account of the facts which is contained in the complete text of the judgment is not reproduced)

Decision

1 By judgment dated 30 November 1983, which was received at the Court on 7 December 1983, the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the second sentence of Article 4 (2) of the Sixth Council Directive (No 77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax — uniform basis of assessment (Official Journal 1977 L 145, p. 1).

2 The question was raised in proceedings pending before the Hoge Raad between Mr and Mrs Rompelman, who reside in Amsterdam, and the Minister van Financiën [Minister for Finance] and concerning the right to the refund of value-added tax (VAT) paid in respect of the first three quarters of 1979.

3 By two written agreements dated 25 November 1978 Mr and Mrs Rompelman, the appellants in the main proceedings, acquired the future title to two units in premises under construction since 1 September 1978 together with a usufructuary interest in the land pertaining thereto. On the building plan the two units purchased were marked as 'showrooms'.

4 By letter dated 26 June 1979 sent to the Inspector of Taxes, the Rompelmans declared that the showrooms would be let to traders and that the lessor and the lessee would in due course submit an application under Article 11 (1) (b) No 5 of the Wet op de Omzetbelasting [Turnover Tax Law] of 28 December 1978 (Staatsblad 677) for a derogation from the exemption from turnover tax provided for in the case of lettings. They also applied under Article 15 (3) of the Turnover Tax Law to deduct the input tax on the instalments of the sale price payable as building progressed.

5 On 18 October 1979 the appellants in the main proceedings made a turnover tax return claiming a refund of input tax amounting to HFL 14 186.46. Since the

notarial deed transferring title was not executed until 31 October 1979, the premises in question had still not been let when that return was made.

6 Their claim was rejected by the Inspector of Taxes on the ground that actual exploitation of the units purchased had not yet commenced. The Rompelmans appealed against that decision to the Gerechtshof [Regional Court of Appeal], Amsterdam.

7 After the Gerechtshof had upheld the Inspector's decision, the Rompelmans appealed against its judgment to the Hoge Raad on a point of law.

8 According to the judgment making reference to the Court, it is argued on behalf of the appellants in the main proceedings that under Article 15 (1) of the Turnover Tax Law, a trader may deduct the turnover tax which other traders have charged him during the period covered by the tax return and that a person who does not become a trader until a later date cannot, under the Turnover Tax Law, deduct the turnover tax charged to him when he was not a trader. Therefore, in the present case, the Turnover Tax Law does not preclude the deduction of input tax if trading is held to commence with the first transaction effected with a view to exploiting the property.

9 In its aforesaid judgment, the Hoge Raad states that the Gerechtshof decided that the appellants were not traders because, whilst the exploitation of property did constitute trading, for the purposes of Article 7 (2) (b) of the Turnover Tax Law it had to be understood as meaning the actual use of property in society, which presupposed that it existed; in the present case, the appellants had merely acquired an enforceable claim and not a right *in rem.*

10 Considering that the question of the meaning of the expression 'exploitation of property' appearing in Article 7 (2) (b) of the Turnover Tax Law depended on the interpretation of the second sentence of Article 4 (2) of the Sixth Directive, the Hoge Raad decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling;

'Does "exploitation" within the meaning of the second sentence of Article 4 (2) of the Sixth Directive commence as soon as a person purchases future property with a view to letting that property in due course?'

11 The appellants in the main proceedings take the view that property is exploited as from the time of the acquisition of title to it. Such a preparatory act must be treated as part of the commercial activity since it is necessary in order to make that activity possible.

12 The Netherlands Government maintains that the moment at which an economic activity must be considered as having commenced precedes the date on which the property begins to yield regular income. In the present case, that means that a person who lets immovable property began to exploit it at the time when he bought it as future property. However, since an investment may, but does not necessarily, lead to the exploitation of property, exploitation must not be considered to exist until there is more objective evidence of the investor's intention. A declaration of intention must be confirmed by other facts and circumstances.

13 According to the Commission, it follows from Article 17 (1) of the Sixth Directive that the exploitation of immovable property will generally begin with the first preparatory act, that is to say with the first transaction on which input tax may be charged. The first transaction completed in the course of an economic activity consists in the acquisition of assets and therefore in the purchase of property. Any other view would be contrary to the purpose of the VAT system since in the period between the payment of the VAT which is payable on the first transaction and the refund of that VAT a financial charge on the property will arise; however, under the VAT system, the intention is precisely to relieve the trader entirely of that burden.

14 The question submitted by the national court is in substance designed to ascertain whether the acquisition of a right to the future transfer of ownership of part of a building yet to be constructed with a view to letting such premises in due course may be regarded as an economic activity within the meaning of Article 4 (1) of the Sixth Directive.

15 Before that question is answered, the elements and characteristics of the VAT system which are relevant to this case should be briefly recalled, in particular the principles of the system, the deduction rules and the concept of a taxable person.

16 As the Court pointed out in its judgment of 5 May 1982 in Case 15/81 *(Schul* v *Inspecteur der Invoerrechten en Accijnzen,* [1982] ECR 1409), a basic element of the VAT system is that VAT is chargeable on each transaction only after deduction of the amount of the VAT borne directly by the cost of the various components of

the price of the goods and services and that the deduction procedure is so designed that only taxable persons may deduct the VAT already charged on the goods and services from the VAT for which they are liable.

17 Article 4 (1) of the Directive must be considered against that general background. That provision defines a taxable person as 'any person who independently carries out in any place any economic activity specified in paragraph (2), whatever the purpose or results of that activity'. Article 4 (2) provides that 'the economic activities referred to in paragraph (1) shall comprise all activities of producers, traders and persons supplying services ...'. In particular, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis' is considered to be an economic activity.

18 Article 17 (1) of the Sixth Directive provides that 'the right to deduct shall arise at the time when the deductible tax becomes chargeable'. Article 17 (2) provides that, in so far as the goods and services are used for the purposes of his taxable transactions, the taxable person is to be entitled 'to deduct from the tax which he is liable to pay the value-added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person'.

19 From the provisions set forth above it may be concluded that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of value-added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way.

20 Having regard to those elements of the common VAT system it is necessary to consider the question whether the acquisition of a right to the transfer of the future ownership of a building which is still to be constructed in return for the payment of the purchase price in instalments as building progresses must in itself be regarded as the commencement of exploitation of tangible property and therefore as goods or as a service used for the purposes of taxable transactions, in this case for letting.

21 As regards the letting of immovable property, Article 13 B. (b) of the Sixth Directive provides that it is in principle exempt from VAT. However, since the appellants in the main proceedings apparently exercised the option provided for in Article 13 (c) to be taxed on lettings of immovable property, the letting in this case must be treated as a taxable transaction.

22 As regards the question of the time when the exploitation of immovable property commences, it must first be pointed out that the economic activities referred to in Article 4 (1) may consist in several consecutive transactions, as is indeed suggested by the wording of Article 4 (2) which refers to 'all activities of producers, traders and persons supplying services'. The preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, which form part of those transactions must themselves be treated as constituting economic activity.

23 In this regard, it is not necessary to distinguish the various legal forms which such preparatory acts may take, in particular between the acquisition of a right to the transfer of the future ownership of property and the acquisition of the property itself. Furthermore, the principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of and with the view to commencing a business must be regarded as an economic activity. It would be contrary to that principle if such an activity did not commence until the property was actually exploited, that is to say until it began to yield taxable income. Any other interpretation of Article 4 of the Sixth Directive would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it in accordance with Article 17 and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of immovable property and expenditure incurred during exploitation. Even in cases in which the input tax paid on preparatory transactions is refunded after the commencement of actual exploitation of immovable property, a financial charge will encumber the property during the period, which may sometimes be considerable, between the first investment expenditure and the commencement of exploitation. Anyone who carries out such investment transactions which are closely connected with and necessary for the future exportation of immovable property must therefore be regarded as a taxable person within the meaning of Article 4.

24 As regards the question whether Article 4 must be interpreted as meaning that a declared intention to let future property is a sufficient ground for assuming that the acquired property is to be used for a taxable activity and that therefore, on that basis, the investor must be treated as a taxable person, it must first be pointed out that it is for the person applying to deduct VAT to show that the conditions for deduction are met and in particular that he is a taxable person. Therefore Article 4 does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation.

25 The answer to the question submitted to the Court must therefore be that the acquisition of a right to the future transfer of property rights in part of a building yet to be constructed, with a view to letting such premises in due course, may be regarded as an economic activity within the meaning of Article 4 (1) of the Sixth Directive. However, that provision does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation.

Costs

26 The costs incurred by the Netherlands Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the appeal pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question submitted to it by the Hoge Raad der Nederlanden by judgment of 30 November 1983, hereby rules:

The acquisition of a right to the future transfer of property rights in part of a building yet to be constructed with a view to letting such premises in due course may be regarded as an economic activity within the meaning of Article 4 (1) of the Sixth Directive. However, that provision does not preclude the tax administration from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 14 February 1985.

P. Heim
Registrar

O. Due
President of the Second Chamber