# JUDGMENT OF THE COURT (Second Chamber)

29 April 1999 *

In Case C-136/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the VAT and Duties Tribunal, Manchester Tribunal Centre (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

**Norbury Developments Ltd**

and

**Commissioners of Customs & Excise**

on the interpretation of Article 28(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 taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), read in conjunction with point 16 of Annex F thereto,

* Language of the case: English.

THE COURT (Second Chamber),

composed of: G. Hirsch (Rapporteur), President of the Chamber, G. F. Mancini and R. Schintgen, Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by Kenneth Parker QC,

— the Commission of the European Communities, by Peter Oliver, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Norbury Developments Ltd, represented by Julian Ghosh, Barrister, the United Kingdom Government, represented by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, assisted by Kenneth Parker QC, and the Commission, represented by Peter Oliver, at the hearing on 11 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

## Judgment

1 By order of 2 April 1997, received at the Court on 14 April 1997, the VAT and Duties Tribunal, Manchester Tribunal Centre, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 28(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 taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive'), read in conjunction with point 16 of Annex F thereto.

2 That question was raised in proceedings between Norbury Developments Ltd ('Norbury') and the Commissioners of Customs & Excise ('the Commissioners'), the authority responsible for the collection of value added tax ('VAT') in the United Kingdom, concerning a decision of the Commissioners refusing to accept the deductibility of VAT paid by Norbury by way of input tax on the purchase of a plot of land.

## The Community legislation

3 Article 28(3) of the Sixth Directive provides:

'3. During the transitional period referred to in paragraph 4, Member States may:

...

(b) continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned;

(c) grant to taxable persons the option for taxation of exempt transactions under the conditions set out in Annex G;

...'

4 Annex F to the Sixth Directive, headed 'Transactions referred to in Article 28(3)(b)', refers in point 16 to 'Supplies of those buildings and land described in Article 4(3)'.

5 Annex G to the Sixth Directive, headed 'Right of option', provides:

'1. The right of option referred to in Article 28(3)(c) may be granted in the following circumstances:

...

(b) in the case of transactions specified in Annex F ...'

6 Article 4(3)(b) of the Sixth Directive provides that 'building land' is to mean any unimproved or improved land defined as such by the Member States.

7 Under Article 13B of the Sixth Directive, headed 'Other exemptions', Member States are required to exempt '(h) the supply of land which has not been built on other than building land as described in Article 4(3)(b)'.

## The national legislation

8 When the Sixth Directive was adopted, sales of land were exempted from VAT by Group 1 of Schedule 5 to the Finance Act 1972. That exemption was, however, subject to various exceptions. At the material time in the main proceedings, the exemption in question and the corresponding exceptions were provided for by the Value Added Tax Act 1983 ('the 1983 Act'), as amended by the Finance Act 1989,

which reduced the scope of the exemption by introducing more numerous exceptions to it and the right to elect for taxation in certain cases.

## The facts in the main proceedings

9 Norbury purchased from Rivermead Homes Ltd a plot of land in Chesterton with the benefit of planning permission. It then resold that land to John Kottler Ltd. Both transactions were completed on 29 April 1994.

10 Under the 1983 Act, the sale of the land was an exempt supply. However, in accordance with the provisions of that Act, Rivermead Homes Ltd elected to waive the exemption and to charge VAT on the sale of the land, whereas no VAT was charged on the sale by Norbury to John Kottler Ltd. On 12 September 1994 the Commissioners assessed Norbury to VAT in the sum of UKL 12 443, representing the input tax charged on the purchase of the land. It is not disputed that, under paragraphs 2 and 3 of Schedule 6A to the 1983 Act, Norbury could not retroactively elect to waive the exemption in respect of the sale to John Kottler Ltd.

11 Norbury claimed, however, that, since the provisions of the Sixth Directive have direct effect, that sale was a taxable transaction by virtue of Article 2(1) thereof, so that it was entitled to deduct the input tax paid.

12 The Commissioners maintained, by contrast, that the relevant provisions of the national legislation were in conformity with Article 28(3)(b) of the Sixth Directive, read in conjunction with point 16 of Annex F thereto, so that they continued to apply at the date of the transaction.

13 The VAT and Duties Tribunal, Manchester Tribunal Centre, before which the case had been brought, found that, since 1977, the scope of the exemption from VAT in the United Kingdom had not been extended; on the contrary, it had been reduced by the introduction of further exceptions. The issue, therefore, was whether that restriction of its scope precluded the application of Article 28(3)(b) of the Sixth Directive. Consequently, the Tribunal decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'In relation to a supply of land which has not been built on, but on which at the time of supply the erection of buildings has been legally authorised by a permission granted in accordance with the law of the Member State and which the Tribunal has held to be building land, is the United Kingdom entitled to exempt the supply under Article 28(3)(b) of the Sixth Directive? Notwithstanding that:

(a) the taxation of supplies of land, including supplies of land which is indisputably building land, has altered since the United Kingdom adopted the Sixth Directive on 17 May 1977, in particular since the enactment of the Finance Act 1989, which introduced the election to waive VAT exemption in respect of certain such supplies; and

(b) the taxation of supplies of land which is indisputably building land has altered since the United Kingdom adopted the Sixth Directive on 17 May 1977, in particular since the enactment of the Finance Act 1989, which required certain such supplies which were previously exempt to be standard-rated as civil engineering works

and noting that

the supply would have been exempt had the supply taken place before 17 May 1977 under item 1 of Group 1 of Schedule 5 to the Finance Act 1972.'

## The question referred

14 It should be noted, as a preliminary point, that the national court has held that the plot of land sold by Norbury constitutes building land within the meaning of Article 4(3) of the Sixth Directive. Since, by virtue of that provision, the definition of 'building land' is a matter for the Member States, the Court is bound by the national court's determination in that regard, and there is no need to take into account the fact that no such definition features in the United Kingdom legislation.

15 Norbury maintains, first, that the purpose of the transitional provisions in Article 28(3) of the Sixth Directive was to 'freeze' the exemptions in Annex F as at the date on which the Sixth Directive was adopted, namely 17 May 1977. According to the very wording of Article 28(3)(b), the United Kingdom was entitled to continue to exempt supplies of building land only if the conditions existing on 17 May 1977 had been maintained.

16 Norbury submits, however, that, by introducing the right to elect to waive the exemption in respect of building land, the United Kingdom has changed the conditions allowing it to maintain the initial exemptions.

17 The short answer to that point is that Article 28(3)(c) of the Sixth Directive, read in conjunction with Annex G thereto, expressly permits Member States to grant taxable persons the right — as the United Kingdom has done — to elect for taxation in respect of transactions exempted in accordance with Annex F.

18 Next, Norbury maintains that the transitional exemption provided for by Article 28(3)(b) of the Sixth Directive can no longer be applied, since the scheme of taxation of supplies of building land has been fundamentally altered by the enactment of the Finance Act 1989, under which certain such supplies are no longer exempt. In that regard, it relies in particular on Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437.

19 It is true that in paragraph 17 of its judgment in *Commission* v *Germany*, cited above, the Court held that the maintenance by a Member State of partial exemptions not expressly provided for by the transitional provisions contained in Article 28(3) of the Sixth Directive was not permissible, and that it ran counter to the principle of legal certainty. However, it should be borne in mind that that judgment related to the incorrect transposition by a Member State of Article 26 of the Sixth Directive, concerning the complex scheme specifically governing the activities of travel agents and, in particular, the applicability of the transitional provisions laid down in points 17 and 27 of Annex F. Consequently, the factual and legal circumstances in *Commission* v *Germany* were entirely different from those in point in the main proceedings in the present case, and Norbury cannot therefore rely on the judgment in that case to support its arguments.

20 In the main proceedings, the United Kingdom is entitled, pursuant to Article 28(3)(b) of the Sixth Directive, read in conjunction with point 16 of Annex F thereto, to continue to exempt supplies of land, save as regards the various exceptions to the maintenance of the exemption listed in Group 1 of Schedule 5 to the Finance Act 1972, as supplemented by Group 1 of Schedule 6 to the 1983 Act, in the version thereof resulting from the Finance Act 1989. As the national court has found, those amendments have not widened the scope of the exemption; on the contrary, they have reduced it. Consequently, they were not adopted in disregard of the wording of Article 28(3)(b). Whilst that provision precludes the introduction of new exemptions or the extension of the scope of existing exemptions

following the entry into force of the Sixth Directive, it does not prevent a reduction of those exemptions, since their abolition constitutes the objective pursued by Article 28(4) of the Sixth Directive.

21 It would be contrary to that objective to construe Article 28(3)(b) of the Sixth Directive narrowly, to the effect that a Member State may maintain an existing exemption but may not abolish it, even only partially, without thereby abolishing all the other exemptions. Moreover, as the Advocate General observes in point 31 of his Opinion, such an interpretation would have adverse effects for the uniform application of the Sixth Directive. A Member State might find itself compelled to maintain all the exemptions existing at the date of adoption of the Sixth Directive, even if it regarded it as possible, appropriate and desirable progressively to implement the system laid down in the directive in the sphere under consideration.

22 The answer to the question referred to the Court must therefore be that, in relation to the supply of building land, a Member State is entitled to exempt that supply under Article 28(3)(b) of the Sixth Directive, read in conjunction with point 16 of Annex F thereto, notwithstanding the fact that, on the one hand, it has since the adoption of that directive introduced an election to waive the VAT exemption in respect of such supplies and, on the other hand, it has reduced the material scope of the exemption applicable to such supplies so that some previously exempt supplies are now subject to VAT.

## Costs

23 The costs incurred by the United Kingdom Government 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 (Second Chamber),

in answer to the question referred to it by the VAT and Duties Tribunal, Manchester Tribunal Centre, by order of 2 April 1997, hereby rules:

**In relation to the supply of building land, a Member State is entitled to exempt that supply under Article 28(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 taxes — Common system of value added tax: uniform basis of assessment, read in conjunction with point 16 of Annex F thereto, notwithstanding the fact that, on the one hand, it has since the adoption of that directive introduced an election to waive the exemption from value added tax in respect of such supplies and, on the other hand, it has reduced the material scope of the exemption applicable to such supplies so that some previously exempt supplies are now subject to value added tax.**

Hirsch Mancini Schintgen

Delivered in open court in Luxembourg on 29 April 1999.

R. Grass G. Hirsch

Registrar President of the Second Chamber