OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 15 November 1984

Mr President,
Members of the Court,

By two written agreements dated 25 November 1978, Mr and Mrs Rompelman acquired the title to two units in premises under construction together wich a usufructuary interest in the land pertaining thereto. The unit bought by Mr Rompelmans was No 100 and that bought by his wife was No 99. The property right acquired in both cases is described as a right of 'future joint ownership'. The ground floor of the building was designed for use as showrooms or shops with dwellings on the other floors. The units purchased were showrooms.

In a letter dated 26 June 1979, sent on behalf of Mr and Mrs Rompelman to the Inspector of Taxes, it is said that the units were intended for letting and that, when the notarial deed passing title was executed, the title to the units would be put in the joint names of Mr and Mrs Rompelman so that, in the opinion of the writer of the letter, they should be treated together as one undertaking for the purpose of turnover tax. The notarial deed transferring title was executed on 31 October 1979. On 18 October a turnover tax return was made on behalf of Mr and Mrs Rompelman for the first three quarters of 1979, claiming the refund of HFL 14 186.46 by way of input tax. It seems to be common ground that the input tax in question was that payable on the sale of the property to the Rompelmans. The price appears to have been paid in instalments as construction progressed.

The Inspector of Taxes refused to grant the refund because the exploitation of the property had not in fact commenced. The Rompelmans then instituted proceedings before the Gerechtshof against the Inspector's decision. The Order for Reference states that, by this time, the building had been completed but the premises in question had still not been let. The Gerechtshof confirmed the Inspector's decision on the basis that, under the Dutch law on turnover tax, the Rompelmans did not constitute an undertaking because only a person who independently carries on a business constitutes an undertaking. The carrying on of a business includes the exploitation of tangible property, which means the actual use in society of property which is in existence; the property in question was not in existence (the Rompelmans only had a claim to the provision of rights in the future), therefore they did not constitute an undertaking. The Rompelmans appealed to the Hoge Raad on the ground that the Gerechtshof erred in deciding that exploitation of property means the actual use of existing property. The Hoge Raad referred the following question for a preliminary ruling:

'Does "exploitation" within the meaning of the second sentence of Article 4 (2) of the Sixth Directive' (i.e. Council Directive No 77/388 of 17 May 1977, OJ 1977, L 145/1) 'start as soon as a person purchases property which is to be built, with a view to letting that property in due course?'

Article 2 of the Directive provides, *inter alia*, that 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subject to value-added tax ('VAT'). The taxable person is entitled to deduct from the tax which he is liable to pay the VAT due or paid in respect of goods or services supplied or to be supplied to him by another taxable person in so far as such goods or services are used for the purposes of his taxable transactions (see Article 17 (2)). Article 4 (1) defines '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'. Paragraph 2 is as follows: 'The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity'.

The object of the question referred is to determine whether the Rompelmans could be considered to be taxable persons at the time they claimed the refund, even though they had not yet carried out a taxable transaction so that they were in substance claiming to deduct from the VAT payable on a future taxable transaction (the letting of the premises) the VAT paid in respect of the supply of goods (the sale to them of the property in question) to be used for the purpose of the future taxable transaction.

It is accepted that the supply of the premises to Mr and Mrs Rompelman was properly chargeable to VAT, that there was a chargeable event within the meaning of Article 10 of the Directive and that VAT was duly paid in respect of the supply.

In the ordinary way the letting of immovable property is exempt from VAT under Article 13 B (b) of the Directive, though under Article 13 C Member States may allow taxpayers a right of option for taxation. It seems that in the Netherlands such a right of option has been given and is exercisable jointly by the lessor and the lessee. The reference in this case appears to proceed on the basis that if the option is exercised the letting is to be treated as a taxable transaction for the purposes of deduction, and that it is possible to deduct in one tax period deductible tax which became chargeable in another tax period. No arguments have been addressed to the contrary. Although it may be uncertain which future transactions concerning the supply of capital goods will be taxable, it seems that (a) the right to deduct arises when the deductible tax becomes chargeable, i.e. when the capital goods are supplied (Article 17(1); (b) the right to deduct is exercisable when the goods are used for the purposes of taxable transactions (Article 17 (2) and 18 (2) subject to adjustments which may be made under Article 18 (4) and Article 22. In the case of immovable property, the adjustment period may be increased from the normal period for capital goods, which is five years, to ten years.

On behalf of Mr and Mrs Rompelman, who are supported by the Commission, it has been submitted that the acquisition of the means of carrying out an economic activity (here the purchase of the property), is the first act performed in the carrying out of the acitivity and that, in consequence, a person is to be considered a taxable person within the meaning of Article 4 (1) as from the time of such preparatory act. The Dutch Government accepts that exploitation in

general commences before income is received and may be considered as beginning when a person buys property which has not yet come into existence. However, the Dutch Government diverges from the other parties in that it contends that, because a preparatory act may not necessarily lead to the exploitation of the property, there must be sufficient evidence of objective probative value to establish that this will in fact be the case. The stated intention of the person concerned is not sufficient.

For the purposes of the Directive a person is a taxable person if he independently carries out 'any economic activity specified in paragraph 2 of Article 4 whatever the purpose or results of that activity', such activities, as I read it, not being limited to those defined in Articles 5 and 6 of the Directive.

The purchase of immovable property is, in my view, 'an economic activity'. The question is, therefore, whether it is specified in Article 4 (2). It seems to me that, since the grant of the right to use the premises does not constitute the transfer of the right to dispose of them as owner for the purposes of Article 5, or at any rate unless it does so, the letting of immovable premises constitutes a supply of services for the purposes of the Directive. The purchase of immovable property for letting in my view is an activity of a person supplying services within the meaning of the first sentence of paragraph 2 of Article 4. I do not read the first sentence as excluding acts preparatory to the actual supply of the services. That sentence includes 'all activities . . . of persons supplying services' and the purchase of immovable property for the purposes of letting is in my view such an activity. Despite the use of the word 'also' in the English language version, and its equivalent in the German language, I read the second sentence as giving a specific example of one of the activities included in the first sentence and not as extending those activities. The Dutch and Danish language versions, as I understand it, refer to operations involving the exploitation of tangible or intangible property as being 'amongst others' included in 'economic activities', and the French and Italian language versions seem to me by the use of the words 'notamment' and 'in particolare' to support this view. In any event it seems to me that it is not a natural use of language to regard the acquisition of property as 'the exploitation' of the property. It is the subsequent use of it, as here by letting it, which constitutes the exploitation, or turning to account, of the property.

On this basis the activity of acquiring property to be used in supplying services is an economic activity specified in Article 4, paragraph 2, though in the first and not in the second sentence as the question referred postulates. A person independently carrying out such an activity is a taxable person within the meaning of Article 4 (1).

The Dutch Government is, in my view, clearly right in saying that there must be evidence that the property acquired is to be used to supply services. In other words it must be shown that what is said to be a preparatory act to a further economic activity is in truth 'preparatory' to that activity. Merely to purchase immovable property is not *per se* such a preparatory act, since it may be acquired e.g. for personal occupation rather than for letting or for other economic activities.

Whether the purchase is such a preparatory act is, however, entirely a question of evidence and in my view the stated intention of the purchaser, if accepted, may constitute sufficient evidence. Whether it should be accepted may depend on the lay-out of the premises and the suitability of the property purchased for the declared intended use. Here it is said that the property purchased was both designed and purchased for use as showrooms.

Accordingly, in my opinion, the question referred should be answered on the following lines:

'The economic activities specified in Article 4 (2) of Directive No 77/388 include the making of a contract to purchase immovable property which is to be built so long as there is sufficient evidence to establish that the property is to be used in the activities of producers, traders and persons supplying services. The letting of immovable property constitutes a supply of services for this purpose'.

The costs of the parties to the proceedings before the referring court fall to be dealt with by that court. No order should be made as to the costs of the Commission and the Government of the Netherlands.