# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 4 May 2004 [1]

## I — Introduction

1. Article 13B(b) of the Sixth Value Added Tax Directive [2] grants exemption for 'the leasing or letting of immovable property', an expression whose meaning has been determined in Community case-law in an independent and uniform manner in accordance with the law of the Union, [3] so that it has a broader definition than in certain national systems of law. [4] The Court of Justice regards it as an agreement whereby the landlord of property assigns to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it. [5]

2. The purpose of the present preliminary question is to examine the possibility of bringing within the scope of that expression three contracts by which a company lets, without security of tenure and for an indeterminate period, to three companies within its business group the use and enjoyment of a building which it owns, in return for a stipulated price, determined primarily by reference to the area occupied, even though none of the companies is granted exclusive rights in respect of any specific part of the building.

3. More particularly, the Brussels Cour d'appel (Sixième chambre fiscale) (Court of Appeal, Sixth Tax Division) raises two issues, which are two sides of the same coin. First, it wishes to know whether it is appropriate for those contracts to be regarded as leases of immovable property for the purposes of the

1 — Original language: Spanish.

2 — 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).

3 — See Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 51, Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 63; Case C-326/99 *'Goed Wonen'* [2001] ECR I-6831, paragraph 47; Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 25, Case C-269/00 *Seeling* [2003] ECR I-4101, paragraph 46; and Case C-275/01 *Sinclair Collis* [2003] ECR I-5965, paragraph 22. This approach is the consequence of the 11th recital in the preamble to the Sixth Directive, under which the common list of exemptions is designed to ensure that the tax is levied in a uniform manner in all the Member States. In his Opinion in *'Goed Wonen'*, Advocate General Jacobs stated that it was impossible to give a unitary definition of that legal concept and that it was appropriate to take a functional approach, taking account of the context and structure of the Sixth Directive.

4 — *Commission* v *Ireland*, paragraph 54, *Commission* v *United Kingdom*, paragraph 66, and *'Goed Wonen'*, paragraph 49.

5 — Case C-409/98 *Mirror Group* [2001] ECR I-7175, paragraph 31. Also relevant are *Seeling*, paragraph 49, and *Sinclair Collis*, paragraph 25.

exemption in question. Second, it wonders whether the abovementioned Community law concept extends to the use, as described in the foregoing point, of the property owned by Temco for purposes unconnected with its business.

4. In its written observations, the Belgian State opposes the latter approach because, in its view, account must be taken of a provision of its domestic law (Article 44(3)(2), first indent, of the Code de la taxe sur la valeur ajoutée [6] [Value Added Tax Code]), which is not applicable to the present case, since it was not invoked by the parties or taken into consideration by the Brussels Tribunal de première instance (Court of First Instance). That view, which it reiterated at the hearing in response to questions put by me and which was supported by the other parties present, can be easily rebutted: it is for the Court of Justice, in preliminary-ruling proceedings, to interpret or give a ruling as to the validity of Community law but not to examine the choice of the provision or the interpretation of national law adopted by the referring court, which is responsible, as 'owner' of the case, for determining the extent to which any provision is relevant for determination of the dispute. In short, the assessment of the relevance of the question is a matter for the judge who raises it, [7] and the Community Court cannot review it, except where the question bears no relation to reality or to the subject-matter of the main proceedings, [8] is not a matter of Union law, [9] or reflects a manifestly misconceived assessment of the content thereof, [10] — and none of those circumstances arises in this case.

## II — Legal background

### A — *Community law: the Sixth Directive*

5. Article 2 defines a taxable event as 'the supply of goods or services effected for

6 — The Code was approved by the Law of 3 July 1969 (*Moniteur belge*, 19 July 1969).

7 — In Case 53/79 *Damiani* [1980] ECR 273, the Court of Justice stated that it was not its role to pronounce on the expediency of the request for a preliminary ruling. By virtue of the division of jurisdiction under Article 177 of the EC Treaty (now Article 234 EC) it is for the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, to appreciate, with full knowledge of the matter before it, the relevance of the question of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment (paragraph 5).

8 — Case 126/80 *Salonia* [1981] ECR 1563, paragraph 6, and Case C-186/90 *Durighello* [1991] ECR I-5773, paragraph 9.

9 — In Case 93/78 *Mattheus* [1978] ECR 2203, the Court of Justice declared that it had no jurisdiction to interpret measures that had not been adopted by the Community.

10 — Case 13/68 *Salgoil* [1968] ECR 453, paragraph 1, and Case 166/84 *Thomasdünger* [1985] ECR 3001, paragraph 11.

consideration within the territory of the country by a taxable person acting as such'.

6. Article 4(1) explains that a taxable person is:

'... any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'.

Under Article 4(2), in particular, '[t]he exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis' is to be considered an economic activity.

7. Article 6(1) refers to the taxable event of the 'supply of services' on a residual basis ('any transaction which does not constitute a supply of goods') and that is assimilated, in Article 6(2)(a), to the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible.

8. Article 13 provides:

'Exemptions within the territory of the country

...

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. [11]

...

C. Options

Member States may allow taxable persons a right of option for taxation in cases 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.'

B — *Belgian law: the Code de la taxe sur la valeur ajoutée (the Belgian Value Added Tax Code)*

9. Article 44(3)(2) of the Code exempts the letting of immovable property and the use of thereof in accordance with Article 19(1), that is to say for consideration and for purposes unconnected with the taxable person's economic activity. It excludes from the exemp-

11 — The Spanish version of that sentence is as follows: *Los Estados miembros podrán ampliar el ámbito de esta exención a otros supuestos* [*sic*]. The Spanish version thus differs totally from the other language versions of the Sixth Directive: *Les États membres ont la faculté de prévoir des exclusions supplémentaires au champ d'application de cette exonération* (French); *Die Mitgliedstaaten können weitere Ausnahmen vom Geltungsbereich dieser Befreiung vorsehen* (German); *Member States may apply further exclusions to the scope of this exemption* (English) and *Gli Stati membri possono stabilire ulteriori esclusioni al campo di applicazione di tale esenzione* (Italian).

tion financial leases, and the provision of vehicle parking spaces, areas for storage and for camping, accommodation in hotels and similar establishments, and the hire of safes.

## III — The facts and the main proceedings

10. The Belgian public limited company Temco Europe ('Temco'), whose business is the cleaning and maintenance of buildings, is subject, as such, to value added tax ('VAT'); it is the owner of a building in Brussels, which it reinstated between 1993 and 1994, but which is not its head office.

11. On 1 February 1994 it concluded three contracts with three companies belonging to its business group, under the same central management, which the parties described as 'assignments', granting them the use and enjoyment of the premises on the following conditions:

— the companies are to carry on business in the property, for the purpose agreed upon by the management of Temco, but without any specific right to any particular area;

— the term of the contracts depends on the course of events, but the management of the property may, at any time and without notice, require the premises to be vacated;

— the charges are to be borne by the three undertakings; the costs of water and electricity are calculated according to consumption, whereas the common charges are determined by reference to the area occupied, as is the cost of repairs;

— the rent, which is paid annually, amounts to BEF 3 500 (now the equivalent sum in euro) per square metre of office area and BEF 1 000 per square metre for storage areas. To this is added 0.4% of the tenants' turnover and BEF 5 000 a year per employee;

— internal rules, which govern access to and cleaning of the building, grant an unlimited right of access to the management of the transferor company;

— the parties excluded the application of Article 1709 of the Belgian Civil Code, which defines a lease.

12. The owner deducted the VAT invoiced to it for the reinstatement works; however, the Belgian tax administration took the view that the contracts described above constitute genuine leases which are exempt from tax, and therefore deduction is inappropriate. As a result, on 16 April 1997 it issued a payment order which, after being confirmed and declared enforceable, was served on Temco. Temco challenged it.

13. The Brussels Tribunal de Première Instance, by judgment of 29 September 2000, annulled the order and prohibited further enforcement; the Belgian State appealed against that decision.

## IV — The question referred to the Court

14. The Cour d'appel stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'May Article 13B(b) of the Sixth Directive be interpreted to mean that transactions, corresponding in Belgian law to a contract of indefinite duration by which one company, by a number of contracts with associated companies, simultaneously grants a licence to occupy a single property in return for a payment set partially but essentially on the basis of the area occupied, where the inherent insecurity of a licence is absent owing to the fact that the transferees and the transferor are under common management, constitute a letting of immovable property within the meaning of Community law, or, in other words, does the independent Community law concept of the "letting of immovable property" in Article 13B(b) of the Sixth Directive cover use, for consideration, of an immovable asset for purposes other than those of the taxpayer's business — which definition is adopted in Article 44(3)(2) *in fine* of the Belgian Code de la TVA — that is to say, the grant under a licence of indefinite duration of a non-exclusive right of occupation in return for a monthly payment, albeit fluctuating and partly dependent on the profits of one of the contracting parties, where the inherent insecurity of a licence is absent owing to the fact that the transferees and the transferor are under common management?'

## V — The procedure before the Court of Justice

15. Written observations were submitted within the period laid down in Article 20 of the EC Statute by the Belgian Government, Temco and the Commission.

16. At the hearing on 1 April 2004, the parties participating in the written phase presented oral argument.

## VI — Analysis of the questions referred to the Court

### A — *The first question*

17. The long and rambling question from the Belgian Court contains two complementary but different questions. The first seeks to clarify whether agreements like those in the main proceedings can be regarded as constituting 'leasing of immovable property' within the meaning attributed to that term by Article 13B(b) of the Sixth Directive, as interpreted by the Court of Justice.

18. The second question is expressed in particularly confused terms. A superficial glance at the last part of the long question discloses a redundancy of expression whereby the same dilemma is re-stated in different terms. However, that allusion to Article 44(3)(2) and the onward reference to Article 19(1) of the Value Added Tax Code give the impression that the true unknown which it is sought to clarify lies in the question whether, if it is decided that the contracts at issue are not lettings, it is possible to conclude that they are for exploitation of the building, for consideration, for purposes other than the business of Temco. If it proves appropriate to examine this alternative, it would seem necessary to decide whether the Member States are entitled to extend the scope of the exemption provided for in the abovementioned provision of the Sixth Directive so as to include matters unconnected with the leasing of immovable property.

19. At the beginning of this Opinion I set out the meaning which the Court of Justice has given to the opening words of Article 13B(b) of the Sixth Directive. In fact, little more should be added, for fear of overstepping the limits of the Court's jurisdiction in preliminary-ruling proceedings and going beyond its function as the ultimate interpreter of Community legislation: if it considered the application thereof to this specific case it would thereby encroach upon the jurisdiction of the referring court. [12] However, that 'little more' provides the key to giving the Brussels Cour d'appel the answer it seeks.

20. According to the Community case-law, there is an exemption from VAT for (1) transfer by the owner of an immovable property to another person, (2) to the

12 — See the considerations that I set out on the respective roles of the Court of Justice and the national courts in point 35 of my Opinion of 11 December 2003 in Case C-30/02 *Recheio* judgment of 17 June 2004, ECR I-6051, p. 6053 is yet to be delivered.

exclusion of all others, (3) of the use and enjoyment thereof, (4) for an agreed term, (5) in exchange for the payment of rent. In order to decide whether that definition applies to a specific agreement, account must be taken of all the elements of the transaction and the circumstances in which it takes place, [13] the objective content [14] thereof being decisive, regardless of how the parties have characterised it. [15]

21. Since the first and third elements are present in the contracts signed by Temco, the debate in these proceedings has focused on the requirements of the exclusive basis of the assignment, its duration and the nature of the contractual price.

1. The tenant's possession

22. The leasing of an immovable property is characterised by the transfer of the powers of the owner — with the exception of the power of disposal — and, therefore, the capacity to exclude all others (including the owner) from enjoyment of the property. Nevertheless, an exclusive tenancy is not synonymous with a sole tenancy, since there is the possibility of joint possession, [16] by means of one or more agreements. The decisive feature is the monopoly enjoyed by the tenants, who are seen by everyone to be in possession of the leased property and are entitled to prohibit anybody else from using it.

23. It is, therefore, irrelevant whether the powers transferred are exercised by one person alone or by several and whether, in the second case, the transfer is the result of one agreement or of more than one. Indeed, according to the definition given by the Court of Justice, it is immaterial whether each user has a part of the building assigned to him or whether the allocation is on an undivided basis, in notional shares. [17]

24. The exemption in Article 13B(b) of the Sixth Directive relates to certain transactions which constitute an economic activity within the meaning of Article 4 of the directive and which, by their nature, do not produce relevant added value, a fact which renders

13 — Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 26.

14 — Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 33.

15 — *Maierhofer*, paragraph 39.

16 — In his Opinion in *Commission* v *Ireland*, cited above, Advocate General Alber pointed out that property may be leased to more than one person at the same time (paragraph 65).

17 — In its written observations, the Commission points out that the contracts signed on 1 February 1994 grant each tenant a clearly identified area, which they enjoy to the exclusion of others, and the Belgian State adds that the essential factor in determining the rent is the areas occupied by each of them. Also, in legal relationships like those involved in the main proceedings, it is materially impossible for there to be no specific allocation of areas of the building, without prejudice to the use of the common parts. In any event, the three companies form a single entity vis-à-vis third parties, the latter being excluded from use of the building.

exemption appropriate for financial reasons; [18] the same considerations account for the exceptions to the exemption, to the extent to which they involve more active use of immovable assets. [19]

25. The key is to be found, therefore, in the nature of the transaction and its economic reality, regardless of the legal classification attributed to it by the parties since, otherwise, there would be a danger of disregarding the general nature of the tax and of undermining its neutrality by allowing operations which were substantively the same to be treated differently. It was on that basis that the Court of Justice ruled in *'Goed Wonen'* that Article 13B(b) and Article 13C(a) of the Sixth Directive do not preclude a national provision 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 to be treated as the leasing or letting of immovable property.

26. In those circumstances, it is for the national court to analyse the content of the contracts and the circumstances in which they are put into effect, [20] in order to determine whether they grant the transferees enjoyment vis-à-vis the world at large and, in particular, vis-à-vis the owner.

2. The term of the letting

27. Time is a crucial factor in contracts of this kind, for which reason the Court of Justice, in its judgments in *Commission* v *Ireland* and *Commission* v *United Kingdom* (paragraphs 56 and 68 respectively), cited above, held that there was no lease in cases in which the consent of the parties did not take time into account, such as, for example, the use of a road network in exchange for the payment of a toll. For similar reasons, the *Stockholm Lindöpark* judgment states that the duration of the use by the parties of a golf course, in return for a payment, is one of the factors which the national court must take into account in deciding whether the trans-

18 — Quite apart from the right to opt for taxation, which the Member States can grant to taxable persons under Article 13C. In my Opinion in Case C-396/98 *Schlosstrasse* [2000] ECR I-4279, I stated that, under that provision, the Member States are free to decide, according to the economic context prevailing at the time, whether it is appropriate to grant that right and, if so, under what conditions and subject to what limits (paragraph 20).

19 — See to that effect the *'Goed Wonen'* judgment, paragraphs 52 and 53. In his Opinion in Case C-346/95 *Blasi* [1998] ECR I-481, Advocate General Jacobs set out a number of interesting considerations on the treatment of immovable property in the Sixth Directive (paragraphs 15 and 16). It is now almost three decades since J.C. Scholsem, in *La TVA européenne face au phénomène immobilier*, Faculty of Law, University of Liège, 1975, p. 123 et seq., set out the problems relating to the taxation of rents.

20 — In their written observations, the Belgian State and Temco undertake a detailed study of the factors to be assessed in due course by the Cour d'appel de Bruxelles which has to give judgment on the substance.

action is exempt from the VAT (paragraphs 27 and 28), and the *Blasi* judgment added (paragraphs 23 to 26) that the period of the assignment constitutes a basic element in distinguishing the renting of a dwelling from one of the accommodation transactions for which Article 13B(b) of the Sixth Directive rules out any exemption.

28. However, even where the degree of permanence of possession is of some importance, it is only one of several features of the renting of immovable property, for which reason it is inappropriate to treat it as the sole 'indicator' on the basis of which to characterise an agreement as a lease, without taking any other consideration into account, in particular the real duration of the relationship. In *Blasi,* the Court of Justice made it clear that it is for the referring court to verify whether the period stated in the agreement reflects the true intention of the parties since, if it does not, it would be necessary to determine the actual period of possession of the property.

29. Furthermore, an 'agreed period' is not the equivalent of a 'specified period', so that the assignment of the use of a property for an imprecise period does not, for that reason alone, constitute a tenancy within the meaning of the Sixth Directive.[21] It may be relevant if the period is so short that, under the rule in *Blasi,* it should be described as accommodation, but it is irrelevant if, after the minimum threshold has been passed, it is extended. In this respect, it is of little importance that the period of the relationship might be made dependent on the will of one of the parties or of both, or indeed on an external circumstance outside their control, because, in any event, contractual consent is expressed by the intention to make the property available for a period, even if its duration is uncertain.

30. Licences do not, for such purposes, lose their status as leases by reason of the fact that their expiry is dependent on the will of the owner. It is necessary to take the reality of each case into account and, as in the *Blasi* case, to evaluate the period of the legal relationship, a task which also falls to the national court.[22] As the Belgian State indicates in its written observations, the decision to exclude licences from the scope of the tax exemption infringes the principle of neutrality, since transactions which are intrinsically the same would be treated differently. It is not mistaken when it observes that that Community law concept

21 — In paragraph 84 of his Opinion in *'Goed Wonen'*, Advocate General Jacobs defined the transaction referred to in Article 13B(b) as an agreement 'whereby one party grants the other the right to occupy a defined immovable property as his own and to use or even take profits from that property for an agreed (*definite or indefinite*) duration in exchange for remuneration linked to that duration' (emphasis added).

22 — In the main proceedings, the agreements were signed on 1 February 1994 and, it seems, are still in force.

must be defined by reference to the nature of what is supplied rather than to the way in which it comes to an end, so that, in accordance with the case-law of the Court of Justice, any transfer of the tenancy of an immovable property by the owner, in exchange for rent, must be classified as a tenancy. [23]

3. The rent

32. Temco places particular emphasis on the rent in denying the status of tenancy for the agreements signed in 1994, stating that the rent is not determined solely by reference to the period of occupation but also by reference to turnover and the number of employees of the occupants. That assertion does not, at first sight, appear to be entirely true, since the main component of the price is the area occupied. Also, according to the information before the Court, time is not a factor affecting the determination of the rent.

31. The foregoing considerations highlight the irrelevance of the fact that, in the main proceedings, the company which owns the building and the transferees belong to the same business group and have the same management, because, even though this may compensate for the insecurity of tenure, it does not confer on the agreements any greater 'leasehold' status: if the indeterminate length and insecurity of the tenancy are irrelevant for their classification as such, under the Sixth Directive, any reduction of that uncertainty is, in turn, of scant importance.

33. It is sufficient for the price to be indicated in kind or in legal tender; normally, in both cases, the main parameters are the size of the property, its location, its state of upkeep, its use and the duration of the agreement. There may be others, such as those in the present case, and others which may be conceived of, provided that they are not illegal or inimical to good customs or morals. It is also permissible for some of those criteria to be lacking, for example the temporal factor, but the contract nevertheless retains its status as a lease. Thus, it is not unusual for the rent to be paid monthly, whilst the term of the relationship is stipulated in years. There is, therefore, no correlation between the variables used for fixing the price and the legal nature of the transaction.

23 — In footnote 27 to his Opinion in Case C-63/92 *Lubbock Fine* [1993] ECR I-6665, Advocate General Darmon stated that, under Community VAT law, a letting includes a licence.

34. In short, Article 13B(b) of the Sixth Directive is concerned with agreements by which the owner of immovable property assigns the use and enjoyment thereof to another person, excluding all others — including the owner — for a period of time, in exchange for a price. The decision whether a particular operation fulfils those requirements is a matter for the national court which, for that purpose, must take account of all the features thereof, in addition to the material circumstances in which it takes place, the following being irrelevant:

1. the legal classification which the parties attribute to the agreement;

2. the number of transferees, the existence of only one, or more than one, contract relating to the same property, and, where appropriate, the specific allocation of an area or the attribution of notional shares or proportions;

3. the greater or lesser indeterminacy of the term of the agreement and the expiry thereof, it being permissible for the period not to be expressly agreed upon or for it to be dependent upon consent by one of the parties, or both, or upon an event outside their control;

4. the fact that the undertakings on each side of the legal relationship may belong to a single business group and be under common management;

5. the way the rent is determined and the parameters used for its determination; in particular, any failure to specify the duration of the transfer.

4. Comments on the possibility of an intent to defraud and the principle of strict interpretation of exemptions

35. To prevent, in the words of the opening paragraph of Article 13B, 'any possible evasion, avoidance or abuse', [24] the referring court, in discharging this duty, must inquire whether the taxable person has illegitimate

24 — R. De Mendizábal Allende, in 'La infracción tributaria y el delito fiscal', published in *Actualidad Administrativa* No 1 of 1996, p. 1, states that there is nothing older than fraud and, by way of illustration, he recounts that when travelling in Egypt, on arriving at Sakkara, he saw, on a mastaba, near the terraced pyramid of Djoser, a vivid representation of deception and bribery. On one side a group of four peasants are being flogged by a like number of officials of the Pharaoh. 'Dilatory taxpayers receive punishment from the revenue inspectors'. Above their heads is a warning in hieroglyphs which states, somewhat elliptically, 'They do not pay what they owe to the Pharaoh but rather they bribe their scribes not to punish them'.

motives or whether [25] the public treasury's loss of a particular tax debt has occurred without there being any intention to deceive. It must use the latter criterion of interpretation in the exercise of its judicial authority to assess the facts in order to verify whether the precise requirements are fulfilled for a transaction to be declared exempt.

36. The national courts are obliged to be even more rigorous when confronted with ingenious legal manoeuvres devised with the intent of evading the application of a provision and must enforce the neutrality rule which governs the common system of VAT.

37. That approach allows contracts which, at first sight, should be classified differently to be regarded as 'leases of immovable property' and does not contradict the rule, repeatedly enunciated by the Court of Justice, that exemptions should be interpreted restrictively. [26] This prevents the tax benefit from being granted in various cases other than those contemplated by the provision, but not in the case of operations which, despite their appearance, are very similar to exempt transactions, so that they must be covered by the same exclusion. As Advocate General Jacobs stated in his Opinion in the *Seeling* case, that requirement of strict interpretation does not mean that the terms used to specify exemptions should be construed narrowly or restrictively so as to deprive the exemptions of their intended effect (point 32).

B — *The second question*

38. The Brussels Cour d'appel also asks whether the agreements at issue in the main proceedings may constitute use of the building by Temco for consideration for purposes other than its business, for the purposes of Article 44(3)(2) in conjunction with Article 19(1) of the Belgian Value Added Tax Code. That, in fact, is a question to which the answer must be sought by the Belgian court itself, in the exercise of its judicial authority, having regard to the facts and legal issues in the case before it. It is not for the Court of Justice to classify an act-in-the-law in order to determine whether or not a rule of national law is applicable to it.

25 — The Court of Justice has recognised the objective nature of the concept of tax avoidance used in the Sixth Directive (Joined Cases 138/86 and 139/86 *Direct Cosmetics* [1988] ECR 3937, paragraphs 21 to 23).

26 — See Case C-185/89 *Velker International Oil Company* [1990] ECR I-2561, paragraph 19; Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 20; Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 64; and Case C-240/99 *Skandia* [2001] ECR I-1951, paragraph 32. More recent cases include Case C-8/01 *Assurandor-Societetet* [2003] ECR I-13711, Case C-212/01 *Margarete Unterpertinger* [2003] ECR I-13859, and Case C-307/01 *d'Ambrumenil* [2003] ECR I-19989, paragraphs 36, 34 and 52 respectively.

39. Nevertheless, the doubt entertained by the national court is in one respect of wider significance: does the Sixth Directive preclude national legislation which extends the scope of the exemptions? In other words, does it allow Member States to exonerate, in addition to leases, the use of buildings for profit, for purposes other than the business or economic activities of the taxable person?

40. In my opinion, the answer must be in the negative.

41. The intention of the Community legislature is to levy VAT on all supplies, for profit, of goods and services in every Member State by persons engaged in economic activities of the kind referred to in Article 4(2) of the Sixth Directive, including the exploitation of tangible or intangible property.

42. A taxable person has two choices as regards the part of his assets which he uses for purposes other than those which give rise to tax: to exclude it from the common system of VAT or integrate it in his business assets, deducting the input VAT and paying the charge for private use under Article 6(2)(a) of the Sixth Directive. [27] The purpose of that provision is to avoid non-taxation of an asset allocated to an undertaking but used for personal enjoyment if the tax paid on the acquisition thereof was deductible, [28] in order to guarantee equal treatment as between the taxable person and the final consumer. [29]

43. Thus, Article 4(2), read in conjunction with Article 6(2)(a), enables it to be stated that the use and enjoyment of immovable property for purposes other than the business or economic activity of the taxpayer constitute supplies for profit and, consequently, fall to be taxed, provided that, at an earlier stage, they gave rise to a right of deduction. [30]

44. For its part, Article 13B(b) exempts a class of services, [31] whether they form part of the economic activity of the taxable person or are supplied in other circumstances, provided that, in the latter case, they are

27 — In paragraph 29 of his Opinion in *Seeling*, Advocate General Jacobs draws attention to this alternative.

28 — Case 50/88 *Kühne* [1989] ECR 1925, paragraph 8.

29 — Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 25.

30 — See paragraph 42 of the judgment in *Seeling* and the cases referred to there.

31 — The Court of Justice has classified as such leases of immovable property. See, for example, *Mirror Group*, paragraph 24 et seq., and *Cantor Fitzgerald International*, paragraph 17 et seq.

subject to taxation, because the subject-matter of the lease gave rise, in the past, to the deduction of VAT.

45. The common system established by the Sixth Directive, and the principles of general application and neutrality, which are the basis for the rule that exemptions must be interpreted restrictively, do not allow a general exemption for the exploitation, whatever the legal nature thereof, of assets appropriated to the business activity of the taxable person for non-business purposes if they gave rise to the right to deduct input VAT.[32] There is nothing in the Community provision to indicate that such use should be assimilated to a lease.[33]

46. The foregoing consequence is not contrary to the second paragraph of Article 13B (b), in the Spanish version, under which the Member States may extend that 'exemption' to other cases, because, as the Court of Justice has stated,[34] having regard to the various language versions and to the context of the provision, its meaning is precisely the contrary, namely, to allow the Member States to exclude from the tax benefit cases other than those which it enumerates.[35]

47. The *Amengual Far* judgment, cited above, in which the Court of Justice decided that the Sixth Directive allows Member States, by means of a general rule, to subject to VAT lettings of immovable property and, by way of exception, to exempt only lettings of immovable property to be used for dwelling purposes, likewise does not cast any doubt on the approach which I advocate. That ruling takes account of the considerable degree of latitude which the Community provision granted to national legislatures in relation to exemptions for leases of immovable property, as is apparent from the terms of Article 13B(b) and the option provided for by part C, but it does not extend to any other economic transaction under the conditions laid down by Article 6(2)(a).

32 — In *Seeling* it was stated that Article 6(2)(a) and Article 13B(b) of the Sixth Directive preclude national legislation which treats as exempt services the use, for the private needs of the taxable person, of a part of a building allocated in its entirety to his business, since it cannot be classified as a lease or rental.

33 — In his Opinion in *Seeling*, Advocate General Jacobs stated that 'if ... the [Community] legislature had intended Article 6 (2)(a) to be read in conjunction with Article 13(B)(b), it might have been expected that Article 6(2)(a) would contain an express reference to Article 13(B)(b): the effect of such a reading is, after all, to transform a taxable supply into an exempt supply.'

34 — *Lubbock Fine*, paragraph 13, and Case C-12/98 *Amengual Far* [2000] ECR I-527, paragraph 10.

35 — In Case 173/88 *Henriksen* [1989] ECR 2763, the Court of Justice explained that the final paragraph of Article 13B(b) gives the Member States the power to restrict, by means of additional exceptions, the scope of the exemption, but it does not allow them to free from tax transactions excluded from the exemption (paragraph 21).

## VII — Conclusion

48. In view of all the foregoing considerations, I propose that the Court of Justice reply as follows to the questions submitted to it by the Cour d'appel de Bruxelles:

(1) The letting of immovable property referred to in Article 13B(b) of 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 is a legal transaction whereby the owner of an immovable property assigns the use and enjoyment thereof to another person, to the exclusion of all others — including the owner — for a period of time, in exchange for payment of a price. The decision as to whether a transaction fulfils those requirements is a matter for the national court which, for that purpose, must take account of all the elements of the transaction, in addition to the material circumstances in which it takes place, in particular the possible intent to defraud or the possibility of tax avoidance, the following being irrelevant:

(a) the legal classification which the parties attribute to the agreement;

(b) the number of transferees, the existence of only one, or more than one, contract relating to the same property, and, where appropriate, the specific allocation of an area or the attribution of notional shares or proportions;

(c) the greater or lesser indeterminacy of the term of the agreement and the expiry thereof, it being permissible for the period not to be expressly agreed upon or for it to be dependent upon consent by one of the parties, or both, or upon an event outside their control;

(d) the fact that the undertakings on each side of the legal relationship may belong to a single business group and be under common management;

(e) the way the rent is determined and the parameters used for its determination; in particular, any failure to specify the duration of the transfer.

(2) Articles 6(2)(a) and 13B(b) of the Sixth Directive must be interpreted as precluding national legislation which allows a general exemption from value added tax for the exploitation, whatever the legal nature thereof, of immovable property appropriated to the taxable person's business which, having given rise to a right of deduction, is used for purposes other than the taxable person's business.