JUDGMENT OF THE COURT (Sixth Chamber)
8 February 1990 *

In Case C-320/88

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

Staatssecretaris van Financiën (Finance Secretary)

and

Shipping and Forwarding Enterprise Safe BV (Safe Rekencentrum BV), whose registered office is at Hillegom (the Netherlands),

on the interpretation of Article 5(1) of the Sixth Council Directive 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),

THE COURT (Sixth Chamber)

composed of: C. N. Kakouris, President of Chamber, T. Koopmans, G. F. Mancini, T. F. O'Higgins and M. Díez de Velasco, Judges,

Advocate General: W. Van Gerven
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

the Government of the Kingdom of the Netherlands, by Dr B. R. Bot, Secretary-General in the Ministry of Foreign Affairs, acting as Agent,

* Language of the case: Dutch.

the Commission of the European Communities, by its Legal Adviser Johannes Føns Buhl and by Berend Jan Drijber, a member of its Legal Department, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 12 October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 9 November 1989,

gives the following

Judgment

1 By judgment of 19 October 1988, which was received at the Court on 3 November 1988, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions on the interpretation of Article 5(1) of the Sixth Council Directive 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, hereinafter referred to as 'the Sixth Directive').

2 The questions were raised in proceedings between the Netherlands Staatssecretaris von Financiën and the tax entity Shipping and Forwarding Enterprise Safe BV (Safe Rekencentrum BV, hereinafter referred to as 'Safe'). The proceedings concern a notice of retroactive assessment by which the tax inspector assessed Safe to turnover tax on the supply by Safe to Kats Bouwgroep NV (hereinafter referred to as 'Kats') of immovable property comprising a detached house and outbuildings, hereinafter referred to as 'the immovable property').

3 It is apparent from the documents before the Court that, under a notarial act between Safe and Kats dated 19 June 1979, Safe agreed to transfer to Kats for payment of HFL 2 250 000 an unconditional right to the immovable property, free of mortgages and other rights *in rem*. According to the act, any changes in the

value of the property and all profits and outgoings were for the benefit or at the expense of Kats, which acquired the power to dispose of the property. In addition Safe undertook to transfer title to the immovable property when required by Kats, and in any event no later than 31 December 1982. For that purpose Safe granted Kats an irrevocable power of attorney to execute the transfer of legal ownership of the immovable property. On 11 August 1983 the trustees in bankruptcy of Kats concluded a notarial act with a third party by which they sold to the third party, for HFL 450 000, Kats's rights in the immovable property under the notarial act of 19 June 1979. On the same date, Safe transferred legal ownership of the immovable property to the third party.

4 Safe appealed against the notice of assessment to the tax inspector and subsequently to the Gerechtshof (Court of Appeal), The Hague. The Staatssecretaris van Financiën then brought proceedings before the Hoge Raad der Nederlanden, which decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 5(1) of the Sixth Directive be interpreted as meaning that a supply of goods takes place only where legal ownership of the property is transferred?

(2) If not, does a supply of goods also take place where their legal owner:

(i) has entered into an agreement with another party under which any changes in the value of the property and all profits or outgoings are for the benefit or at the expense of that other party;

(ii) has agreed to transfer legal ownership of the property to the other party at any future time;

(iii) has agreed to grant the other party an irrevocable power of attorney to carry out any transactions necessary to execute that transfer of legal ownership;

(iv) has, pursuant to that agreement, actually placed the property at the disposal of the other party?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

6 It should be noted that Article 5(1) of the Sixth Directive provides as follows '"supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

7 It is clear from the wording of this provision that 'supply of goods' does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property.

8 This view is in accordance with the purpose of the directive, which is designed *inter alia* to base the common system of VAT on a uniform definition of taxable transactions. This objective might be jeopardized if the preconditions for a supply of goods — which is one of the three taxable transactions — varied from one Member State to another, as do the conditions governing the transfer of ownership under civil law.

9 Consequently, the answer to the first question must be that 'supply of goods' in Article 5(1) of the Sixth Directive must be interpreted as meaning the transfer of the right to dispose of tangible property as owner, even if there is no transfer of legal ownership of the property.

The second question

10 It is clear from the documents before the Court that the national court sought to establish in particular whether the transfer of 'economic ownership', a concept

which has been developed in Netherlands tax law, could be deemed to be a supply of goods within the meaning of Article 5 of the Sixth Directive and it defined the four elements which constituted a transfer of economic ownership in the case before it.

11 By referring in the second question to the four elements thus defined, the national court is in reality asking the Court to apply Article 5(1) of the Sixth Directive to the contract at issue in the main proceedings. Under the division of functions provided for by Article 177 of the Treaty, however, it is for the national court to apply the rules of Community law, as interpreted by the Court, to an individual case. No such application is possible without a comprehensive appraisal of the facts of the case.

12 This is illustrated, moreover, by the specific conditions mentioned in the second question, since they refer, on the one hand, to an agreement to transfer ownership under civil law, which does not necessarily seem to entail the transfer of actual power as indicated by Article 5(1) of the Sixth Directive, and, on the other, the actual placing of the property at the disposal of the other party, which would normally point towards a finding that actual power has been transferred.

13 The answer to the second question must therefore be that it is for the national court to determine in each individual case, on the basis of the facts of the case, whether there is a transfer of the right to dispose of the property as owner within the meaning of Article 5(1) of the Sixth Directive.

Costs

14 The costs incurred by the Government of the Netherlands 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions submitted to it by the Hoge Raad der Nederlanden, by judgment of 19 October 1988, hereby rules:

(1) 'Supply of goods' in Article 5(1) of the Sixth Directive must be interpreted as meaning the transfer of the right to dispose of tangible property as owner, even if there is no transfer of legal ownership of the property.

(2) It is for the national court to determine in each individual case, on the basis of the facts of the case, whether there is a transfer of the right to dispose of the property as owner within the meaning of Article 5(1) of the Sixth Directive.

Kakouris Koopmans

Mancini O'Higgins Díez de Velasco

Delivered in open court in Luxembourg on 8 February 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Sixth Chamber