OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 9 November 1989 *

Mr President,
Members of the Court,

1. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has referred to the Court for a preliminary ruling on two questions on the interpretation of Article 5(1) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to *turnover taxes.*[1] Article 5(1) provides as follows:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

Summary of the facts in the main proceedings

2. The questions were raised in an action arising from dealings in real property in which three undertakings were involved: Shipping and Forwarding Enterprise Safe BV (hereinafter referred to as 'Safe'), Kats Bouwgroep NV (hereinafter referred to as 'Kats') and Abreka BV (hereinafter referred to as 'Abreka'). By a notarial act of 19 June 1979 entitled 'Economic conveyance', Safe sold to Kats the rights to a detached house with land attached for a purchase price of HFL 2 250 000, excluding VAT.

The important provisions of that agreement seem to me to be the following:

(i) Safe undertakes to transfer to Kats an unconditional right of ownership;

(ii) as from the date of the agreement Kats is entitled to all profits and liable for all outgoings in respect of the property;

(iii) as from the date of the agreement the property is entirely at the risk of Kats;

(iv) Safe undertakes to transfer legal ownership of the property as soon as Kats so wishes and by 31 December 1982 at the latest;

(v) as from the date of the agreement Kats has the use of the property for its own benefit and at its own risk; from that date Kats is also entitled to engage in all (legal) dealings with regard to the property; for its part Safe undertakes to refrain from any (legal) dealings with regard to the property;

(vi) Safe grants Kats an irrevocable power of attorney to execute the transfer of legal ownership.

3. In 1980 the house was demolished on the orders of Kats and the property was turned into building land. In 1982, before legal ownership was transferred, Kats went bankrupt. By a notarial act dated 11 August 1983, the trustees in bankruptcy of Kats

* Original language: Dutch

1 — 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 (OJ 1977, L 145, p. 1)

sold to Abreka all Kats's rights in respect of the property. The purchase price was HFL 425 000, plus turnover tax of HFL 76 500 on the transaction. At the same time legal ownership of the property was transferred by Safe to Abreka.

4. In 1984 the Inspecteur der Invoerrechten en Accijnzen (Inspector of Customs and Excise), Leiden, imposed on Safe a retroactive assessment to turnover tax of HFL 343 125 on the ground that the payment of HFL 2 250 000 by Kats to Safe in 1979 should be regarded as payment in advance for a supply liable to VAT. Safe appealed against that assessment. The Gerechtshof (Court of Appeal), The Hague, annulled the retroactive assessment. The Staatssecretaris van Financiën (Finance Secretary) appealed against that judgment. In the course of that appeal the Hoge Raad requested the Court to give a ruling on the following questions:

'(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. So that the preliminary questions may be properly understood, it seems to me to be useful to give a brief explanation of the concept of 'economic ownership' under Netherlands law, to outline the framework in which this concept is applied according to Netherlands practice and to summarize the judgments of Netherlands courts on the consequences which the concept may have as regards the application of the Netherlands Wet op de Omzetbelasting (Law on Turnover Tax).

The Netherlands legislation, case-law and practice

6. 'Economic ownership' is a concept which has been developed by Netherlands courts in judgments in tax cases. In a judgment of 19 October 1955, [2] the Hoge Raad expressly mentioned the term for the first time:

'the fact that a person is the owner of and as such objectively entitled to property does not prevent another person from being entitled to the economic benefit thereof,

2 — BNB (Beslissingen Nederlandse Belastingsrechtspraak) 1955, p. 377.

while such benefit — which might be called the economic ownership — may form part of the other person's assets'.

In the many commentaries on this and subsequent judgments, many definitions of the concept of 'economic ownership' may be found. They all stress that the benefit accrues to a person other than the owner as defined in civil law, which essentially presupposes two characteristics:

(i) any changes in the value of the property and all profits and outgoings are for the benefit of or at the expense of the other person;

(ii) the other person also has effective power to dispose of the property.

7. In the case of movable property the transfer of 'economic ownership' normally coincides with the transfer of ownership under civil law, at least under Netherlands law (unlike French law, for example, where for special cases the principle of consensus applies), at the time of the supply. For immovable property the situation is different. Under Article 671 of the Netherlands Burgerlijk Wetboek (Civil Code), the transfer of legal ownership of immovable property does not take place, so far as the parties and third parties are concerned, until the notarial act of transfer has been entered in the appropriate registers. The transfer of 'economic ownership' of immovable property takes place, when it is separate from the transfer of 'legal ownership', at the moment when the property is actually placed at the disposal of the other party.

8. In the Netherlands, in the immovable property sector in particular, the transfer of economic ownership — the legality of which has been recognized by the Hoge Raad, as stated above — has been found to be a device for saving transfer tax. Article 2 of the Wet op Belastingen van Rechtsverkeer (Law of Taxation of Legal Transactions) [3] provides in particular that transfer tax is imposed on the acquisition of immovable property situated within the Netherlands. The courts have consistently held that the term 'acquisition' means the transfer of ownership under civil law. If immovable property which is not exempt from transfer tax is purchased with the intention of selling it on to a third party, it is under those circumstances in the interests of the parties to transfer solely economic ownership to the original purchaser and to ensure that legal ownership may be transferred directly from the original seller to the final purchaser. Transfer tax is then payable only once.

9. In practice the circumstances are usually more complicated. Thus on the transfer of immovable property account must be taken of the interaction between *transfer* tax and *turnover* tax. Although it cannot be 'consumed', immovable property does not by its nature fall outside the scope of turnover tax but does pose particular problems. In this regard the Netherlands legislation is based on the premiss that overlapping of the two taxes should be avoided

3 — Law of 24 December 1970 (*Staatsblad* 1970, p. 611) laying down new rules superseding the legislation on registration and stamp duty (Wet op Belastingen van Rechtsverkeer)

as far as possible. Thus Article 15 of the Wet op Belastingen van Rechtsverkeer which governs transfer tax provides that the supply of immovable property subject to turnover tax is in principle exempt from transfer tax.

Account must also be taken of the fact that the nature of the immovable property frequently changes during the transfer process and this may have important technical consequences for tax purposes, as is apparent in the present case in which a house was converted into a building plot. According to the rule governing exemption contained in Article 11 of the Wet op de Omzetbelasting (Law on Turnover Tax) 1968, the transfer of an 'old' dwelling is in principle exempt from turnover tax (but is therefore not exempt from transfer tax). The transfer of building land, on the other hand, is subject to turnover tax (but not to transfer tax).

10. The concept of supply, as defined in Article 3 of the Law on Turnover Tax 1968 (hereinafter referred to as 'the 1968 Law', is the main issue in this case. Supply covers *inter alia*:

'(1) (a) the transfer of ownership of property pursuant to an agreement;

...

(1) (e) the transfer of property under which that property leaves the business assets of an undertaking'.

In his opinion in the case pending before the Hoge Raad, Advocate General Van Soest stated that Article 3(1)(e) was inserted in the legislation in 1954 in order to fill a 'lacuna' which existed at the time but not in order to cover the transfer of economic ownership. From this history of the legislation and from the general scheme of the article it has up to now been concluded by the courts [4] that (exactly as in the case of transfer tax, see 8 above) the transfer of ownership under civil law referred to in Article 3(1)(a) must be taken as the basis for interpreting the concept of supply, whereas the function of Article 3(1)(e) is merely supplementary. In their judgments the courts have inferred from that that no turnover tax should be charged until the supply of legal ownership, unless it is clear from the circumstances in which the agreement was concluded or from subsequent factors that the supply of legal ownership will not (or will no longer) take place or will take place considerably later, in which case it is necessary to fall back on the supply of economic ownership. The observations which the Netherlands Government has submitted to the Court in this case are essentially in line with these judgments.

11. Safe, however, takes a different view and one which was accepted by the Gerechtshof, The Hague. It argues basically that the term 'supply' defined in the national legislation must be interpreted in accordance with the term 'supply' as defined in Article 5(1) of the Sixth Directive. Article 3(1)(e) of the 1968 Law would best correspond to this Community concept of supply. Therefore the provision must be

4 — See in particular the judgment of the Gerechtshof s'Hertogenbosch of 8 December 1978, BNB 1980, p. 208.

regarded as having an independent and not merely a supplementary function.

If this view is accepted it will lead, in circumstances such as those in the main proceedings, to a tax charge favourable to Safe. The transfer of economic ownership of what was at that time an old dwelling is and would then remain exempt from taxation, regardless of the time at which legal ownership of the property was later transferred and irrespective of the fact that at that later date it was taxable. As regards the general scheme of the legislation, however, that point of view has the consequence that Article 3(1)(e) of the 1968 Law must be regarded as the fundamental provision as regards the concept of supply, whilst other provisions such as Article 3(1)(a) are, in cases where economic and legal ownership are transferred separately, superfluous or at least subsidiary. The adoption of Safe's position might therefore compel the Netherlands legislature to review the general scheme of the 1968 Law and possibly even the relationship between turnover tax and transfer tax. The questions asked by the Hoge Raad must in my opinion be seen in this light.

The first question

12. By the first question the Hoge Raad wishes to ascertain whether the only supply covered by Article 5(1) of the Sixth Directive is one by which legal ownership of property is transferred.

There is no dispute between the parties as to the answer to this question. The Netherlands Government, Safe and the Commission consider that the question must be answered in the negative. I share that view, for the following reasons.

13. The first reason is to be found in the text of Article 5(1) of the Sixth Directive. It states that the supply of goods means 'the transfer of the right to dispose of tangible property as owner'. This provision places the emphasis on the transfer of the *right* of disposal, which must enable the transferee to be able to dispose of the goods 'as owner'. This phrase in my opinion means that the transferee does not have to be the formal legal owner but need only obtain a right of disposal provided that he thereby acquires a position which is *de facto* analogous to that of the formal legal owner.

14. The second reason for which the question should be answered in the negative is that the terms used in the VAT directives must be defined at Community level unless the directives themselves leave it to the Member States to determine the definition of a term.[5] This ensures a uniform application of the common system of turnover tax. For that reason the expression 'supply of goods' cannot be regarded as meaning 'formal supply in the civil law sense of legal ownership of goods'. The latter expression is not defined in the VAT

5 — See judgment of 1 February 1977 in Case 51/76 *Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraphs 10 and 11.

directives so that in order to supplement it reference would have to be made to the — to my knowledge — very different ways in which transfer, supply and enforceability of legal — as opposed to economic — ownership are defined in the Member States.

The second question

15. The second question submitted by the Hoge Raad is more difficult; whereas the first question asks whether transfers other than transfers of formal legal ownership are covered by the Community concept of supply, the question at issue here is *which* other transfers are covered. The Hoge Raad wishes to know in particular whether there is such a transfer if the parties conclude an agreement the content of which may be summarized as follows:

(a) under the agreement any changes in the value of the property and all profits or any outgoings are for the benefit of or at the expense of the party other than the legal owner; he, moreover, acquires the right to dispose of the property;

(b) the legal owner undertakes to transfer legal ownership of the property to the other party at a later date; he grants the other party an irrevocable power of attorney to execute transactions which will transfer legal ownership.

In my opinion the clauses in (a) must be distinguished from those in (b). The former are the same criteria as those on the basis of which the Hoge Raad defines the term 'economic ownership'. The latter are means of transferring legal ownership.

16. Personally I am reluctant to state in general — particularly in terms borrowed from the legal order of one Member State — that once the criteria referred to in (a) are satisfied, a supply within the meaning of Article 5(1) of the Sixth Directive has taken place. As I have already pointed out, the Community legislature, in defining the Community concept of supply, placed emphasis on a right of disposal which is analogous to that of the formal legal owner. I agree with the Commission that the national court must assess on the basis of the particular facts of each case whether the other party acquires the right to dispose of the property 'as owner'. It seems to me at least that he does if the right of ownership retained by the original seller is so diminished that it is reduced to mere legal title.

17. It remains to consider the effect of the clauses in (b). Here it is essentially a question of determining whether, in assessing in each case whether there is a right of disposal within the meaning of Article 5(1) of the Sixth Directive, it makes any difference if the parties to an agreement for the immediate transfer of 'economic ownership' alone have decided on the method by which legal ownership will subsequently be transferred.

The Netherlands Government answers this question in the affirmative. As I have already outlined (in 10 above), it takes the view that Article 5(1) of the Sixth Directive

presupposes the transfer of legal ownership. It therefore considers that if the parties to an agreement on the transfer of economic ownership of property agree that legal ownership shall be transferred at a later stage, this later transfer of ownership must be regarded as a supply for purposes of the directive. It acknowledges, however, that the transfer of economic ownership may be decisive, especially if no date is specified for the transfer of legal ownership or if the latter transfer takes place some considerable time after economic ownership is transferred.

18. I agree with the Commission that no support for this view can be found in the Community legislation. Where, in the light of the particular circumstances, a transfer of economic ownership of property must be regarded as transfer of 'the right to dispose of tangible property as owner', there is in my view a supply within the meaning of Article 5(1) of the Sixth Directive. That is not altered by any agreement between the parties concerning the subsequent transfer of legal ownership. If it were, the precondition for taxation contained in Article 5(1) would be defined in such a way as to depend on specific agreements between the parties, which would be contrary to legal certainty and would jeopardize the uniform application of the conditions governing taxation laid down by the Community.

Conclusion

19. In conclusion I propose that the Court should answer the preliminary questions as follows:

'(1) Supply, within the meaning of Article 5(1) of the Sixth Directive, does not cover solely the transfer of legal ownership of property.

(2) Supply, within the meaning of that provision, covers any transfer of the right to dispose of property by which a party acquires a position which is *de facto* analogous to that of the formal legal owner. It is for the national court to assess on the basis of the particular circumstances of the case whether such a right of disposal is transferred. In that regard it makes no difference that the parties to an agreement by which such a right to dispose of property is transferred have reached an agreement as to the subsequent transfer of legal ownership.'