JUDGMENT OF THE COURT (Fifth Chamber)
16 January 2003 *

In Case C-315/00,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Rudolf Maierhofer

and

Finanzamt Augsburg-Land,

on the interpretation of Article 13B(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),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, D.A.O. Edward, P. Jann and S. von Bahr (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Maierhofer, by C. Theil, Rechtsanwalt,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents, assisted by A. Böhlke, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Maierhofer, represented by C. Theil, of the German Government, represented by B. Muttelsee-Schön and F. Huschens,

acting as Agent, of the United Kingdom Government, represented by P. Whipple, Barrister, and of the Commission, represented by K. Gross, assisted by A. Böhlke, at the hearing on 7 February 2002,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2002,

gives the following

Judgment

1 By order of 25 May 2000, received at the Court on 21 August 2000, the Bundesfinanzhof referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 13B(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; 'the Sixth Directive').

2 Those questions were raised in proceedings between Mr Maierhofer and the Finanzamt Augsburg-Land, a tax office ('the Finanzamt'), concerning Mr Maierhofer's liability to value added tax ('VAT') in respect of the letting of buildings constructed from prefabricated components.

Community legislation

3 Article 2(1) of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.

4 Article 4 of the Sixth Directive provides:

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

2. 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.

3. Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2 and in particular one of the following:

(a) the supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply or the period elapsing between the date of first occupation and the date of subsequent supply, provided that these periods do not exceed five years and two years respectively.

"A building" shall be taken to mean any structure fixed to or in the ground;

...'

5 Article 13B(b) of the Sixth Directive provides:

'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.'

National legislation

6 The Umsatzsteuergesetz 1993 (Law on Turnover Tax, *BGBl.* 1993, I, p. 565; 'the UStG'), in the version applying to the case before the national court, provides that turnover tax is payable on supplies of goods and services effected for consideration by a trader in the course of his business.

7 Paragraph 4 of the UStG provides for certain exemptions. The leasing and letting of immovable property are among the exemptions laid down by subparagraph (a) of the first sentence of Paragraph 4(12).

8 The second sentence of Paragraph 4(12) of the UStG excludes certain transactions from that exemption:

'The following shall not be exempt: the letting of living rooms or bedrooms which a landlord sets aside for short-term accommodation for foreigners; short-term letting of premises for parking vehicles; short-term letting of places in camping sites; and the leasing and letting of machines and other equipment of any kind

which are part of an operating plant, even if they are essential components of a building.'

9 The first sentence of Paragraph 94(1) of the Bürgerliches Gesetzbuch (German civil code, 'BGB') provides:

'The essential components of immovable property include tangible property firmly attached to the ground, in particular buildings...'.

10 Paragraph 95(1) of the BGB provides:

'The components of immovable property do not include tangible property which is attached to the ground only for a temporary purpose...'.

The main proceedings and the questions referred for a preliminary ruling

11 Mr Maierhofer let to the Free State of Bavaria communal accommodation, 'with the necessary land', for the temporary housing of asylum-seekers. The lease was entered into for a five-year period with the possibility of extension.

12 Some of the buildings were on land which a local authority had let to Mr Maierhofer and others were on land which the lessee of the buildings, the Free State of Bavaria, had rented itself. In both cases the sites were to be fully restored to their original condition once the lease came to an end.

13 Mr Maierhofer had constructed on those sites single-storey and two-storey buildings similar to prefabricated houses using prefabricated components. The buildings stood on a concrete base erected on concrete foundations sunk into the ground. The walls, which were made of panels, were secured to the foundations by bolts. The roof framework was covered with tiles. The floors and walls of the bathrooms and kitchens were tiled. The construction system was such that the buildings could be dismantled at any time by eight persons in ten days and subsequently re-used.

14 Mr Maierhofer did not deduct input tax in respect of the construction of the buildings in 1992. For the period 1993 to 1995, he declared exempt transactions for the letting of immovable property under the first sentence of Paragraph 4(12)(a) of the UStG.

15 The Finanzamt none the less assessed Mr Maierhofer's letting transactions at the normal rate of tax on the ground that the transactions related not to immovable property but merely to buildings which were not in reality the components of immovable property within the meaning of Paragraph 95 of the BGB. The Finanzamt took any deductible tax into account when assessing the tax due.

16 The Finanzgericht (Finance Court, Germany) dismissed the action which Mr Maierhofer had brought against the decisions by which the Finanzamt had demanded that tax.

17 Mr Maierhofer then appealed to the Bundesfinanzhof on a point of law. He claims that the first sentence of Paragraph 4(12)(a) of the UStG, read with the Sixth Directive, has been incorrectly applied

18 The Bundesfinanzhof points out that Paragraph 4 of the UStG, which implements Article 13B(b) of the Sixth Directive, does not expressly exempt from turnover tax transactions such as Mr Maierhofer's, which consist of letting buildings constructed on a temporary basis. However, if national case-law is applied, the first sentence of Paragraph 4(12)(a) of the UStG is to be interpreted in accordance with German civil law, and in particular with the first two sentences of Paragraph 95(1) of the BGB, which provides that tangible property, including buildings, which is attached to the ground only for a limited period is not a constituent part of immovable property. Looked at in that way, the letting of such buildings is a taxable transaction.

19 The Bundesfinanzhof entertains some doubts, however, as to the compatibility with Community law of the approach of German case-law and therefore deems it necessary to refer the following two questions to the Court for a preliminary ruling:

'1. Does the term "letting of immovable property" in Article 13B(b) of Directive 77/388/EEC cover the provision for consideration of a building constructed from prefabricated components which is to be removed following the termination of the contract and may be re-used on another site?

2. Is it of any significance in that connection whether the lessor makes available to the lessee both the building and the land on which it is erected, or merely the building, which he has erected on the lessee's land?'

The first question

20 By its first question, the national court is asking the Court about the meaning of the expression 'letting of immovable property' in Article 13B(b) of the Sixth Directive.

21 According to the German Government, there is no need to give a precise definition of 'letting of immovable property', since Article 13B(b) of the Sixth Directive enables Member States to add further exclusions to those referred to therein, a power which the German legislature has used. It is clear from administrative guidelines approved by the Bundesrat that the letting of buildings constructed from prefabricated components and attached to the ground for a limited period does not amount to a letting of immovable property for the purposes of the BGB and does not therefore fall within the exemption from turnover tax laid down for the letting of immovable property.

22 The Court notes, however, first, that Paragraph 4 of the UStG, which implements Article 13B(b) of the Sixth Directive, provides that the letting of immovable property is, as a general rule, to be exempt and excludes from exemption only certain specific letting transactions broadly corresponding to those referred to in points 1 to 4 of the first subparagraph of Article 13B(b) of the directive. The provisions of Paragraph 4 of the UStG do not contain any additional exclusions and, in particular, do not specifically exclude buildings constructed from prefabricated components.

23 Second, the Bundesfinanzhof does not even mention in its order for reference the administrative guidelines to which the German Government refers. Furthermore, as became clear from the oral argument presented at the hearing, those guidelines, even if they were approved by the Bundesrat, are merely directions and are not a legal provision in the same way as Paragraph 4 of the UStG. They cannot therefore establish a further exclusion for the purposes of the second subparagraph of Article 13B(b) of the Sixth Directive.

24 In those circumstances, the Federal Republic of Germany cannot be regarded as having availed itself, when implementing the Sixth Directive, of the power conferred by Article 13B(b) of the directive to provide exclusions other than those expressly laid down by that provision.

25 Further, it should also be borne in mind that according to settled case-law the exemptions provided for by Article 13 of the Sixth Directive have their own independent meaning in Community law and that they must therefore be given a Community definition (see Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 51).

26 Thus, the interpretation of the expression 'letting of immovable property' in Article 13B(b) of the Sixth Directive cannot be determined by the interpretation given by the civil law of a Member State. It is therefore necessary, contrary to the German Government's submission, to consider the meaning of the expression 'letting of immovable property'.

27 In interpreting a provision of Community law, it is appropriate to consider its wording as well as the context in which it occurs and the objectives of the rules of which it forms part (see Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23, and Case C-191/99 *Kvaerner* [2001] ECR I-4447, paragraph 30).

28 The wording of Article 13B(b) of the Sixth Directive does not define the term 'letting of immovable property'. It is thus appropriate to consider the context in which the provision occurs and the objectives of the rules of which it forms part.

29 It is apparent from the wording of Article 13B(b) of the Sixth Directive that the Community legislature intended the letting of movable property to be subject to tax — in contrast to the letting of immovable property which, as a general rule, is to be exempt.

30 The Court has thus held that a national provision which extended to certain movable property the exemption from VAT which, pursuant to Article 13B(b) of the Sixth Directive, is restricted exclusively to the letting of immovable property was contrary to the provisions of that directive (see Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 16).

31 The property at issue in *Commission* v *France* was caravans, tents, mobile homes and light-framed leisure dwellings. A characteristic of that property, classified as

movable, was that it was either mobile, in the case of caravans and mobile homes, or could be easily moved, in the case of tents and light-framed leisure dwellings.

32 By contrast, the buildings at issue in the case before the national court, described at paragraph 13 of this judgment, are not mobile; nor can they be easily moved. They are buildings with a concrete base erected on concrete foundations sunk into the ground. They can be dismantled on expiry of the lease for subsequent re-use but by having recourse to eight persons over ten days.

33 Such buildings made of structures fixed to or in the ground must be regarded as immovable property. In that connection, it is significant that the structures cannot be easily dismantled or easily moved but, contrary to the German Government's submission, there is no need for them to be inseverably fixed to or in the ground. Nor is the term of the lease decisive for the purpose of determining whether the buildings at issue are movable or immovable property.

34 If 'building' is defined in that way, that is consonant with the definition of the term in Article 4(3)(a) of the Sixth Directive concerning the supply of buildings or parts of buildings. There is no reason to treat that term differently depending on whether what is concerned is a letting transaction under Article 13B(b) of that directive or a supply under Article 4(3)(a).

35 The answer to the first question must therefore be that the letting of a building constructed from prefabricated components fixed to or in the ground in such a way that they cannot be either easily dismantled or easily moved constitutes a

letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive, even if the building is to be removed at the end of the lease and re-used on another site.

The second question

36 By its second question, the national court is asking whether the fact that the lessor makes available to the lessee the building and the land on which it is erected, or merely the building which he has erected on the lessee's land, is relevant in determining whether a letting constitutes a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive.

37 Mr Maierhofer and the Commission submit that that circumstance is wholly irrelevant as regards classification of a transaction as a letting of immovable property.

38 The United Kingdom Government, however, submits that it is significant whether the lessor makes available to the tenant not only the building itself but also the land on which the building is erected. Otherwise, there is a risk that a taxable supply of services, such as construction or repair works to a building, might be made to look like an exempt transaction for the letting of immovable property.

39 In that regard, it is appropriate to point out that Article 13B(b) of the Sixth Directive defines exempt transactions by reference to the nature of the transactions effected. In order to determine whether a transaction comprises a letting or construction or repair work, account must be taken of its essential features (see, as regards Article 2(1) of the Sixth Directive, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 29), irrespective of the way in which it might be artificially presented.

40 Furthermore, as is apparent from the answer to the first question, the letting of immovable property may concern solely a building. It is not necessary for it to concern both the building and the land on which the building is erected in order for it to be classified as a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive.

41 The answer to the second question must therefore be that whether the lessor makes available to the lessee both the building and the land on which it is erected or merely the building which he has erected on the lessee's land is irrelevant in determining whether a letting constitutes a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive.

Costs

42 The costs incurred by the German and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 25 May 2000, hereby rules:

1. The letting of a building constructed from prefabricated components fixed to or in the ground in such a way that they cannot be easily dismantled or easily moved constitutes a letting of immovable property for the purposes of 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, even if the building is to be removed at the end of the lease and re-used on another site;

2. Whether the lessor makes available to the lessee both the building and the land on which it is erected or merely the building which he has erected on the lessee's land is irrelevant in determining whether a letting constitutes a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive 77/388.

Wathelet Timmermans Edward

Jann von Bahr

Delivered in open court in Luxembourg on 16 January 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber