of the exemption for the letting of immovable property, does not authorize them to tax such consideration when the rent paid under the lease was exempt under the said rule. The relations created by a lease cannot be broken up.

REPORT FOR THE HEARING
In Case C-63/92 *

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I — Facts and procedure

A — *Facts*

Lubbock Fine & Co (hereinafter 'Lubbock Fine'), the appellant in the main proceedings, is a United Kingdom firm of chartered accountants.

By a lease dated 14 April 1971, the firm became the tenant of office premises at 3, 4 & 5 Bedford Row and 3, 4 & 5 Jockey's Fields, London WC1, for a term of 25 years and one quarter from 29 September 1970, that is to say until 24 December 1995, at an initial rent of £35 300 per annum.

The owner of the premises, who was also the landlord, was at that time Esso Pension Trust Ltd.

In 1989 Esso Pension Trust Ltd sold the building to Guildhall Properties Ltd.

On 14 February 1990 Guildhall Properties Ltd and Lubbock Fine entered into an agreement whereby Lubbock Fine agreed to surrender the residue of the lease on 1 June 1990 and to return the premises to Guildhall Properties Ltd, who covenanted in return to pay to Lubbock Fine the sum of £850 000.

The surrender took place on the agreed date and the consideration was paid.

The Commissioners of Customs & Excise (hereinafter 'the tax authority'), the respondent in the main proceedings, made an assessment to VAT upon Lubbock Fine in the aforementioned sum of £110 869.56.

Lubbock Fine, considering the transaction to be exempt from VAT, appealed to the Value Added Tax Tribunal.

B — *The applicable rules*

1. *The Sixth Directive*

As regards the present dispute, VAT is governed by the Sixth Council Directive of 17 May 1977 (77/388/EEC) on the harmonization of the laws of Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

Article 2 of that directive provides as follows:

'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; (...)'

Under Article 4 of the Sixth Directive,

'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.

(...)

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

(b) the supply of building land.

"Building land" shall mean any unimproved or improved land defined as such by the Member States (...).'

Article 5 provides as follows:

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

2. (...)

3. Member States may consider the following to be tangible property:

(a) certain interests in immovable property; (...).

4. The following shall also be considered supplies within the meaning of paragraph 1:

(a) (...)

(b) the actual handing over of goods, pursuant to a contract for the hire of goods for a certain period or for the sale of goods on deferred terms, which provides that in the normal course of events ownership shall pass at the latest upon payment of the final instalment; (...)'.

Article 6 contains in particular the following definition:

'1. "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5. (...)'.

Article 13B provides as follows:

'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:

(a) (...)

(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;

(...)

(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);

(h) the supply of land which has not been built on other than building land as described in Article 4(3)(b)'.

Under Article 13C,

'Member States may allow taxpayers a right of option for taxation in cases of:

(a) letting and leasing of immovable property;

(b) the transactions covered in B (...) (g) and (h) above.

Member States may restrict the scope of this right of option and shall fix the details of its use'.

2. *The United Kingdom legislation*

(a) The situation prior to 1989

Before 1989, the transactions exempted from VAT in the United Kingdom were those set out in item 1 of Group 1 of Schedule 6 to the Value Added Taxes Act 1983. That item exempted in particular 'the grant, assignment or surrender of any interest in a right over land or of any licence to occupy land'.

Until 1989, therefore, a payment made in consideration of the surrender of a lease was not subject to VAT.

(b) The Finance Act 1989

As a result of the judgment of the Court in Case 416/85 *Commission* v *United Kingdom* [1988] ECR 3127, that legislation was altered by the Finance Act 1989, which came into force on 1 April 1989.

In particular, the exemptions were changed. The exempt transactions set out in item 1 of Group 1 of Schedule 6 continue to include 'the grant of any interest in or right over land or of any licence to occupy land (...)'. However, it is stated as follows in a footnote:

'"Grant" includes an assignment, other than an assignment of an interest made to the person to whom a surrender of the interest could be made.'

The result of this alteration was to render subject to VAT a payment made by a landlord in consideration of the surrender of a lease by a tenant and of the handing back of possession of the demised premises by the latter to the former.

C — *Procedure before the national court*

1. *Submissions of Lubbock Fine*

Lubbock Fine accepted before the national court that the effect of the Finance Act 1989 is such that VAT is chargeable on the surrender of a lease. However, it asserted that that legislation was contrary to the provisions of the Sixth Directive, which is itself of direct effect.

Lubbock Fine's main submission was that in surrendering its lease it effected the 'supply of a building' in favour of its owner, within the meaning of Article 13B(g) of the Sixth Directive. It maintained in that regard that under Article 5(1) of the directive 'the transfer of the right to dispose of tangible property as owner' constitutes a 'supply of goods'. The supply made by it concerned the right to occupy the building by virtue of a lease.

Lubbock Fine considered in the alternative that the surrender falls within the scope of the term 'leasing or letting of immovable property' referred to in Article 13B(b). It pointed out in that regard that instead of surrendering its lease it could have sub-let or assigned its lease for the remainder of the term. In either case, the supply would have been exempt. The Community legislature could not have intended transactions having the same economic effect, namely the loss of the right to occupy immovable property, to be treated differently, such that the surrender of a lease should be taxable and the other transactions exempt.

2. *Submissions of the tax authority*

It was argued on behalf of the tax authority that the exemptions referred to in Article 13B(g) and (h) are not concerned with the circumstances of this case, since they apply only to the supply of land; in the first case land with buildings on it, and in the second case land which has not been built on.

Furthermore, the tax authority, whilst accepting that the assignment of a lease is exempt under Article 13B(b) of the Sixth Directive, maintained that such exemption does not include the surrender of a lease. It argued that a surrender is different from an assignment because it brings the interest originally granted to an end. Lastly, the tax authorities asserted that the general wording of Article 13B(b) enables Member States to charge tax on surrenders.

3. *Reasoning set out in the order for reference*

The court making the reference considers that the United Kingdom legislation, whereby supplies in the form of the surrender of a lease in favour of the owner are chargeable to tax, does not fall within the scope of Article 13B(g), which concerns only the exemption of the supply of land.

However, since Article 13B refers to all supplies of immovable property, and in the light of the mutual exclusivity of the two categories contemplated by it, namely 'the leasing or letting of immovable property' (Article 13B(b)) on the one hand and, on the other, the supply of land which has buildings on it and land which has not been built upon (Article 13B(g) and (h)), Article 13B(b) is applicable.

The national court observes in that regard that the surrender of a lease amounts to the supply by a tenant to his landlord of an interest in land. Taking into account the fact that VAT is a tax on supplies, it points out that in the present case the supplier, that is to say the tenant, supplies to the landlord the sum of the rights held under the lease.

As regards the question whether Member States may exclude such a surrender from the scope of the exemption and thus make it chargeable to tax, the national court refers to the opinion of Advocate General Jacobs in Case 173/88 *Skatteministeriet* v *Henriksen* [1989] ECR 2763, in which he stated that the discretion conferred upon Member States is subject to certain limits. It considers that those limits prevent Member States from excluding the surrender of a lease from exemption, since its economic effect is comparable with that of the assignment of a lease, which is itself exempt.

In order to satisfy itself as to the correctness of its views, it has decided, by its orders made on 30 July 1991 and 26 February 1992, to refer three questions to the Court for a preliminary ruling.

4. *The preliminary questions*

Those questions are as follows:

'1. Whether the surrender of a lease of immovable property for consideration paid by the landlord to the tenant is a supply within the words "the leasing or letting of immovable property" contained in Article 13B(b) of the Sixth Directive;

2. If the answer to Question 1 is in the affirmative: whether a Member State is entitled to exclude such a surrender from exemption, and thus tax it, by virtue of the final words of Article 13B(b) of the Sixth Directive, namely "Member States may apply further exclusions to the scope of this exemption";

3. If the answer to Question 1 is in the negative: whether the surrender of a lease of buildings, or parts thereof, for consideration paid by the landlord to the tenant is a supply within the words "the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(b)" [1] contained in Article 13B(g) of the Sixth Directive.'

D — *Procedure before the Court*

The order of the Value Added Tax Tribunal was received at the Court Registry on 3 March 1992.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged:

— on 21 May 1992 by Lubbock Fine, the appellant in the main proceedings, represented by David Goy QC,

1 — All the parties accept that the reference to 'Article 4(3)(b)' is a typographical error and should be read as 'Article 4(3)(a)'

— on 24 June 1992 by the Commission of the European Communities, represented by Thomas F. Cusack, Legal Adviser, acting as Agent,

— on 30 June 1992 by the United Kingdom, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by A. W. H. Charles, Barrister,

— on 13 July 1992 by the Hellenic Republic, represented by Fokonias P. Georgakopoulos, member of the State Legal Service, acting as Agent.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, pursuant to Article 104(4) of the Rules of Procedure, to open the oral procedure, having received applications for leave to present oral submissions from Lubbock Fine and from the Hellenic Republic and the United Kingdom. However, it decided to put certain questions to the United Kingdom.

II — Written observations submitted to the Court

A — *The question whether the term 'letting of immovable property' covers the surrender of a lease for consideration paid by the landlord to the tenant*

1. *Observations of Lubbock Fine*

Relying on the judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, *Lubbock Fine* considers that Article 13B of the Sixth Directive is directly applicable, since it is precise and unconditional. It points out that the Court held in its judgment in Case 51/88 *Hamann* v *Finanzamt Hamburg-Eimsbüttel* [1989] ECR 767 that tax exemptions must be strictly interpreted.

(a) Primary submission

Lubbock Fine's primary submission is that the surrender of a lease cannot be termed a 'letting of immovable property'.

It argues that paragraphs (b), (g) and (h) of Article 13B must be considered together in order to determine the purpose which they seek to achieve. It cannot be that none of those paragraphs applies to the present case. Those three paragraphs express the intention of the Community legislature that all supplies of interests in land and buildings are to be exempt save in two cases: first, where provision is made for an express exception to that exemption and secondly, where a taxpayer has exercised his right to opt for taxation pursuant to Article 13(C). As it is impossible to justify the exemption of supplies of certain interests in land or buildings to the exclusion of others, it is inappropriate to concentrate on the precise nature of the interest or the particular way in which it is applied.

The United Kingdom legislation on VAT treats differently two similar ways in which a tenant may exercise his rights: a tenant who sub-lets or assigns his lease to a third party is exempt from VAT, whereas a tenant who

surrenders his lease to his landlord is liable to VAT. In Lubbock Fine's view, the distinction drawn by that legislation between substantially similar transactions is incompatible with Article 13B of the Sixth Directive.

Nevertheless, faced with having to choose whether the surrender of a lease falls within paragraph (g), which exempts all 'supplies of buildings' without exception, or paragraph (b), which exempts the 'letting of immovable property' subject to certain exceptions, Lubbock Fine considers that paragraph (g) applies. A surrender cannot fall within the ambit of the 'letting of immovable property', since its very effect is to bring a lease to an end.

(b) Alternative submission

Lubbock Fine considers in the alternative that the words 'letting of immovable property' encompass the surrender of a lease.

Lubbock Fine asserts in that regard that the concept of the 'letting of immovable property' covers in particular the initial grant of a lease and any subsequent assignments of it. It states in that connection that the exclusion of lease assignments from the concept of the 'letting of immovable property' would result in the anomalous situation that the grant of a lease of property included in the categories excluded from exemption (for example, a site for the parking of vehicles) would be taxable, but not the assignment of that lease.

Although there are certain differences between them, the surrender of a lease has the same effect as the assignment of a lease. Both involve the loss by the tenant of his rights under the lease and enable the landlord or the assignee, as the case may be, to obtain possession of the property for the remainder of the term. Since the assignment of a lease falls within the ambit of paragraph (b), it is wrong to treat a surrender in a different way.

2. *Observations of the United Kingdom*

The *United Kingdom* considers that the questions posed by the national court concern in essence the issue whether Article 13 of the Sixth Directive obliges Member States to exempt the surrender of a lease.

Relying on the aforementioned judgments in the cases of *Hamann* and *Henriksen*, the United Kingdom considers that an exemption is to be construed narrowly, the general rule being that transactions are taxable. It further maintains that in order to ascertain the true extent of the exemptions contained in Article 13 it is necessary to ignore its literal meaning and construe the article as a whole and to avoid making distinctions which are peculiar to English land law.

The United Kingdom takes the view in that regard that the words 'letting of immovable property' refer, first, to all supplies in the form of the creation and grant of a lease, secondly, to the grant of licences to occupy the property and, thirdly, to the assignment of leases or licences.

The United Kingdom explains that VAT is a tax on supplies. The essential nature of the grant of a lease to a tenant is the transfer to the tenant of certain rights belonging to the landlord, notably the right of occupation.

A tenant who assigns his lease also transfers rights to the assignee and thus proceeds to make a supply. From the standpoint of the party to whom the supply is made, there is no difference between the grant of the original lease and the assignment of that lease. The assignment of a lease may thus be lawfully exempted in the same way as the original grant of the lease.

The result of a surrender, on the other hand, is quite different from that of an assignment. As soon as a surrender occurs, the lease ceases to exist and the supply thus comes to an end. The United Kingdom is unable to accept that a surrender pursuant to which the lease is transferred back to the landlord and thus extinguished can fall within the ambit of the words 'letting of immovable property'. Article 13B(b) can thus have no application to this case.

3. *Observations of the Greek Government*

As a preliminary point, the *Greek Government* observes that, by reason of their fiscal nature, the rules contained in the Sixth Directive are to be strictly interpreted. This is particularly the case as regards exemption provisions since, as the Advocate General observed in *Henriksen*, cited above, they constitute an exception to the basic principles of the directive.

The inclusion of the early termination of a lease within the concept of a 'letting of immovable property' involves a broad interpretation of those words.

The Greek Government draws attention in that regard to several of the characteristics of a lease which do not feature in the transaction effected by Lubbock Fine.

It explains in this connection that a lease is a continuing contract whereby the landlord is bound to allow the tenant possession of the property for a given period of time in return for the payment of an agreed rent.

First, an agreement for the early termination of a lease is not in the nature of a continuing agreement. It operates instantaneously and takes effect when it is concluded or performed.

Secondly, in entering into such an agreement the tenant does not grant the landlord the right to possession of the property, but merely releases the landlord from his obligations.

Thirdly, the landlord recovers his property not for a given period of time but in perpetuity.

Lastly, the conclusion of a lease does not in itself impose upon the landlord an obligation to pay any compensation in consideration of the handing back of the demised premises. The fact that the parties to such a lease may agree that upon its termination other rights and obligations are to come into existence is

thus extraneous to the lease itself. A possible agreement between the landlord and the tenant for the payment of compensation in the event of the early termination of the lease cannot lend that compensation the character of rent.

The Greek Government concludes from this that in the present case the tax was charged not on the 'letting of property' but on the return of property, which it asserts to be a 'supply of services' within the meaning of Article 6 of the Sixth Directive.

The Greek Government therefore considers that the Court should give the following answer:

'The surrender of a lease of immovable property by common agreement between the landlord and tenant for consideration paid by the former to the latter is not covered by the exemption from value added tax in respect of "the leasing or letting of immovable property" contained in Article 13B(b) of Directive 77/388/EEC.'

4. *Observations of the Commission*

The *Commission* points out that the Sixth Directive lays down the principle that all buildings of the same kind are to be treated in the same way. Its general scope is such as to render liable to tax supplies of new buildings or building land and to exempt all other transactions. In particular, the directive lays down the principle that all lettings of real property are generally exempt. That conclusion is reinforced by the limited scope of the exceptions to that principle.

According to the Commission, it follows that Article 13B(b) of the Sixth Directive covers all transactions connected with the 'letting of immovable property' apart from those in relation to which there exist special provisions, such as those of Articles 4(3), 5(3)(a) and (b) and 13B(g) and (h). In other words, the concept of the 'letting of immovable property' is to be regarded as encompassing subsequent transactions in respect of such property, which are effected solely by reason of the existence of the original lease.

The Commission observes that, as regards the original lease, Lubbock Fine would have enjoyed the benefit of the exemption if the directive had been in force at the time when it was granted. It goes on to state that the effect of the transaction in question in the present case is to bring about, by common agreement, the early termination of a lease. In the Commission's view, that is all that is required in order for the said transaction to be covered by the exemption laid down in Article 13B(b).

In putting forward that argument, the Commission considers that it is adopting the view taken by the Court in its judgment in *Henriksen*, cited above. The Court should thus accept that the expression 'letting of immovable property' must necessarily cover both the original letting and all subsequent transactions relating to it, for example the transfer of the lease or the grant of a sub-lease or, as in the present case, the surrender by the tenant of his rights.

The Commission therefore proposes that the Court should answer the question as follows:

'The surrender of a lease of real property is a supply within the meaning of the term "leasing or letting of immovable property" contained in Article 13B(b) of the Sixth VAT Directive, whether or not any consideration is paid by either party to the other.'

B — *The question whether Member States are entitled to tax compensation paid on the surrender of a lease*

1. *Observations of Lubbock Fine*

Lubbock Fine deals with this question only on the assumption that the Court considers the surrender of a lease to be covered by the concept of the 'letting of immovable property'.

It draws attention, first of all, to the fact that when drawing up the Finance Act 1989 the United Kingdom, in seeking to justify the taxation of surrenders, never invoked the power given to it by Article 13B(b) of the Sixth Directive to derogate from the principle of exemption. The only justification put forward by it was that in the absence of such taxation there would be 'an added complication in relation to the landlord's option for taxation'.

The answer to the question whether Member States are entitled to tax surrenders depends on whether the directive places any limitation on the ability of Member States to apply further exclusions and, if so, on what the scope of such limitation may be.

Relying once again on the opinion of the Advocate General in the *Henriksen* case, cited above, Lubbock Fine considers that the discretion conferred upon Member States is subject to certain limits. Were that discretion to be unlimited, it would give Member States an unfettered power to tax all lettings of immovable property; this would be contrary to the principle of exemption laid down by the directive.

As regards the scope of that limitation, Lubbock Fine maintains that the additional exclusions which the Member States are empowered to apply must be of the same kind or nature as the exceptions to exemption already set out in Article 13B(b). Those exclusions must therefore relate either to the letting of immovable property for use in a particular way (as in the case of the hotels or parking facilities referred to in subparagraphs (1) and (2) of paragraph (b)) or the letting of a particular sort of immovable property (as in the case of the permanently fixed machinery or safes referred to in subparagraphs (3) and (4)). The Court rightly accepted, therefore, in the *Henriksen* judgment that since Article 13B(b)(2) renders open air parking areas subject to VAT Member States could likewise provide that covered closed garages were to be taxable.

Lubbock Fine goes on to state that, even if the discretion conferred upon Member States were unlimited, it would not be open to those States to exercise it in such a way as to exclude the surrender of a lease, since the economic effect of a surrender is the same as that of the assignment of a lease, which is exempt in any event.

2. *Observations of the United Kingdom*

(a) Primary submission

The *United Kingdom* maintains that the power conferred on Member States by Article 13B(b) of the Sixth Directive to apply further exclusions to the principle of exemption is worded in general terms and is thus unlimited.

It considers in that regard that the Court, in its judgment in the case of *Henriksen*, cited above, did not adopt the Advocate General's view that the discretion conferred on Member States in that connection is subject to certain limits. On the contrary, the judgment in Case 50/87 *Commission* v *France* [1988] ECR 4797 supports the contention that their discretion is unlimited.

Furthermore, that power to apply additional exclusions has the result of limiting the extent of an exemption (which should be strictly construed) and is within the general rule that all supplies are taxable.

(b) Alternative submission

If, contrary to the above submission, it is found that the power of Member States to apply further exclusions is subject to any limitation, that limitation can only be that a Member State should not exclude the exemption in relation to all lettings of immovable property but should approach exclusions on a 'case by case' basis.

In any event, the United Kingdom points out that that limitation cannot prevent a Member State from excluding surrenders from the scope of the exemption because, as it observed in its response to the first question, a surrender is a different transaction from the grant of a lease.

3. *Observations of the Greek Government*

The *Greek Government* considers that since the early termination of a lease does not fall within the concept of the 'letting of immovable property', the exclusions from exemption provided for in the final sentence of Article 13B(b) of the Sixth Directive do not apply to it.

4. *Observations of the Commission*

The *Commission* considers that Article 13B of the Sixth Directive does not entitle a Member State to exclude the surrender of a lease from the exemption laid down, thus making it liable to VAT. It supports in that regard the view expressed by the Advocate General in the case of *Henriksen*, cited above, that the discretion of Member States is limited.

In specifying those limits, the Commission sets forth two criteria.

First, it points out that the intention of the Community legislature was to exempt generally the 'letting of immovable property'. The exceptions to that principle are laid down in subparagraphs (1) to (4) of Article 13B(b), which include supplies which are not really of the same type or nature as a letting (for example, hotels and the hire of machinery) or which tend to occupy the middle ground between a lease and a licence (parking areas and safes). Consequently, the additional exclusions which Member States may apply should be of the same type or nature as those already set out in those subparagraphs (for example, the letting of aircraft hangars or moorings for boats). This view is confirmed by the preparatory documentation drawn up prior to the coming into force of the directive.

It goes on to point out that the extent of the exclusions is to be determined by applying the criteria set out in the introductory wording of Article 13: that is to say, a Member State must be able to show that the taxation applied by it is intended 'for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse'. The Commission is not in a position to assess whether those two criteria are satisfied in this case. It states that it is unable to see what complications could arise were the surrender by a tenant of his lease to be exempt from VAT. It is up to the United Kingdom authority, therefore, to show that the imposition of the tax is justified on the basis of those criteria. If it can do so, this will be conclusive. If not, the criterion should be applied whereby exclusions are permissible only if they can be assimilated to those already laid down in Article 13.

The Commission therefore proposes the following answer:

'Pursuant to the final sentence of Article 13B(b) of the Sixth VAT Directive, which provides that "Member States may apply further exclusions to the scope of this exemption", a Member State is not in principle entitled to exclude such a surrender from the exemption, so as to render it liable to tax, unless it is able to show that the exclusion is justified by the application of the criteria laid down in the first sentence of Article 13B (...), namely that such exclusion has been applied for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse.'

C — *The question whether the concept of 'the supply of buildings or parts thereof, and of the land on which they stand' covers the return of property to a landlord following the surrender by a tenant of his right to occupy the property*

1. *Observations of Lubbock Fine*

Lubbock Fine maintains that the words 'the supply of buildings or parts thereof, and of the land on which they stand' in Article 13B(g) cover the surrender of a lease in consideration of the payment of compensation by the landlord to the tenant.

It is apparent from Article 13B as a whole that the intention of the Community legislature was to exempt all supplies of interests in

land and buildings save those cases where specific exceptions are made or where a taxpayer has exercised an option for taxation pursuant to Article 13C. Since, therefore, the surrender of a lease is not in principle covered by the concept of a 'letting of immovable property', as provided for in paragraph (b), it must necessarily fall within the concept of 'the supply of buildings' referred to in paragraph (g). Otherwise, no exemption would be available, notwithstanding that a surrender has the same economic effect as exempt transactions such as an assignment of the lease or the grant of a sub-lease.

Furthermore, that interpretation avoids the necessity of extending the concept of the 'letting of immovable property'.

Moreover, whereas Article 5(3) of the Sixth Directive recognizes the existence of different sorts of interests in land, paragraph (g) makes no distinction between the various interests in buildings the supply of which falls within its scope.

Lastly, in response to the United Kingdom's assertion that the 'supplies' envisaged by paragraph (g) must relate both to the 'buildings' and to the 'land on which they stand', and that that paragraph thus concerns only a transfer of ownership, Lubbock Fine contends that such an interpretation is irrational from an economic standpoint: it would mean that where a property is subject to a long lease, the sale of the freehold interest in that property, the economic value of which is negligible, would be exempt but that the surrender of the lease, in which the full commercial value of the property rests, would not. This approach shows that paragraph (g) covers all cases not falling within the 'leasing or letting of immovable property' referred to in paragraph (b).

2. *Observations of the United Kingdom*

The *United Kingdom* does not consider that the 'supply of buildings or parts thereof, and of the land on which they stand' referred to in Article 13B(g) of the Sixth Directive covers the surrender of a lease.

It asserts in that regard that the exemption applies only in so far as it relates to the supply both of buildings and of land. The exemption cannot therefore relate solely to the supply of buildings or parts thereof.

It goes on to explain that in paragraphs (g) and (h) the expressions 'land' and 'land which has not been built on', appearing in close proximity to each other, refer to land in the physical sense of the word, since those expressions are used in relation to buildings and construction can only take place on the physical land itself. That view is confirmed by an examination of the wider context of Article 13B and C. As Article 13 deals with 'the supply (...) of land' and 'the leasing or letting of immovable property' separately, it follows that 'the supply (...) of land' must mean the transfer of the ownership or highest interest in the land and not of derivative interests therein, since interests less than ownership are dealt with by the words 'leasing or letting of immovable property'.

Consequently, the supplies referred to in Article 13B(g) cover only transfers of the ownership or highest interest that a person can have. That interpretation must necessarily result from the general approach of the directive whereby an exemption is to be construed strictly and narrowly.

A surrender can never involve the supply of the ground or soil. Furthermore, it does not necessarily confer upon the person to whom it is made any right of ownership or the highest interest in the land, because the landlord to whom the property is surrendered may himself be the holder of a mere right of tenure in respect of that property or a superior lessee.

3. *Observations of the Greek Government*

The *Greek Government* asserts that since (as it stated in the context of its examination of Question 1) the early termination of a lease in return for compensation does not constitute a 'supply of goods' it cannot be regarded as a 'supply of buildings or parts thereof, and of the land on which they stand' which is exempted by Article 13B(g) of the Sixth Directive. That view is supported by the definition of 'supply of goods' given in Article 5(1) of the directive.

4. *Observations of the Commission*

The view of the *Commission* is that, if the Court finds that the surrender of a lease does not fall within the concept of the 'letting of immovable property', it must be covered by the words 'supply of buildings or parts thereof and of the land on which they stand' appearing in Article 13B(g) of the Sixth Directive.

That contention is based on the general principle of the exemption of immovable property which the Sixth Directive seeks to achieve. The only exclusion from that exemption is the supply of immovable property described in Article 4(3)(a) of the directive, that is to say the supply of buildings before first occupation. It is for the national court to determine whether this applies in the present case.

It therefore proposes that the Court should give the following answer:

'If the answer to Question 1 is in the negative, the surrender of a lease in respect of buildings or parts thereof is a supply within the meaning of the words "supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a)" appearing in Article 13B(g) of the Sixth VAT Directive.

However, the question whether, in a given case, the supply falls within the description contained in Article 4(3)(a) of the Sixth VAT Directive and thus constitutes a supply before first occupation, as provided for in that article, is a question of fact and must thus be settled by the national court.'

III — Replies to Questions put by the Court

A — *Questions to the United Kingdom*

Question 1: The national court refers in its order to a consultation paper issued by the United Kingdom Government prior to the introduction of the Finance Act 1989 which stated that if the relief for surrenders were not removed 'there would be an added complication in relation to the landlord's option for taxation'. The United Kingdom is asked to specify what that added complication would have been in practice.

Reply: The *United Kingdom* explains that the exercise of the right, provide for by Article 13C of the Sixth Directive, to opt to tax the letting of immovable property would have been made more difficult for landlords if there had been uncertainty as to whether a payment made in respect of a surrender of a lease would be taxable. There would have been uncertainty if surrenders had been exempted since tenants would have none the less been able to opt for taxation.

Question 2: The United Kingdom is asked to explain to the Court the apparent contradiction between its statement that the surrender of a lease does not fall within the expression 'the leasing or letting of immovable property' which is exempted under Article 13B(b) of the Sixth Directive and the statement that under Article 13B(b) *in fine* Member States have the power to exclude such surrenders from the scope of that exemption. In other words, how can it tackle the second question referred for a preliminary ruling when it has answered the first question in the negative?

Reply: The *United Kingdom* states that its reply to the second question was given, in particular, in the event of the Court giving an affirmative reply to the first question and considering that the surrender of a lease constitutes 'a leasing or letting of immovable property'. In that case, the United Kingdom considers that it was entitled to exclude surrenders from the scope of the exemption provided for by Article 13B(b).

B — *Question to Lubbock Fine, the United Kingdom and the Commission*

Question: The national court links the surrender of a lease to Article 13B of the Sixth Directive. The Greek Government, however, takes the view that the tax was charged on a supply of services within the meaning of Article 6 of the Sixth Directive. Lubbock Fine, the United Kingdom and the Commission are asked to give their views on this interpretation and to inform the Court in addition whether other provisions of the Sixth Directive may be invoked in this case.

Reply: *Lubbock Fine* does not share the Greek Government's view. It considers that a lease may, at the option of the Member States, be treated either as a 'supply of goods' for the purposes of Article 5 of the Sixth Directive or as a 'supply of services'

for the purposes of Article 6. However, that choice has little practical importance, since Article 13B(b) covers both cases.

In addition, Lubbock Fine considers that Article 5(4)(b), to which the Greek Government refers, does not concern circumstances such as those of this case. That article is merely concerned with contracts of hire under which ownership of the goods is intended itself to pass on final payment. That has nothing to do with a leasing of immovable property under which absolute ownership of the immovable property concerned is never intended to pass.

The *United Kingdom* certainly shares the Greek Government's view that a surrender of a lease is not 'a leasing or letting of immovable property'.

However, contrary to the Greek Government's view, it considers that, since Article 5(1) and (3)(a) and (b) of the Sixth Directive allow the Member States to choose whether to treat certain interests in immovable property as a 'supply of goods', neither that provision nor Article 6 may be used to determine the scope of the exemption provided for by Article 13B(b).

Apart from Article 5(1) and (3) and the provisions of the Sixth Directive mentioned by it in its written observations, the United Kingdom does not consider that there are any other provisions of the Sixth Directive that are relevant to this case.

The *Commission* observes that the Greek Government referred to the surrender of a lease as being a 'supply of services' for the purposes of Article 6 of the Sixth Directive only because it considers that a surrender does not constitute a 'supply of goods' for the purposes of Article 5(4)(b). However, the latter provision is of no relevance to this case. That article is merely intended to cover hire-purchase transactions so much so that it has no relevance to transactions bearing upon the 'leasing or letting of immovable property'.

In the Commission's view, the Greek Government's analysis with respect to surrenders is wrong inasmuch as it is based exclusively on the situation in which a landlord gives consideration. Other situations are possible: no consideration may be given in respect of the surrender; consideration may be given by the tenant; or the surrender may be made in connection with the conclusion by the parties of a new lease on different terms. Consequently, the existence of consideration does not go to the core of the analysis of the legal nature of the surrender of a lease.

The Commission is not aware of any other provisions of the Sixth Directive which may be invoked in this case.

R. Joliet

Judge-Rapporteur