

Arrêt de la Cour
Case C-468/93

Gemeente Emmen
v
Belastingdienst Grote Ondernemingen

(Reference for a preliminary ruling from the Gerechtshof te Leeuwarden)

«(Sixth VAT Directive – Article 13B(h) and Article 4(3)(b) – Supply of building land)»

Opinion of Advocate General Fennelly delivered on 14 December 1995 Judgment of the Court
(Fifth Chamber), 28 March 1996

Summary of the Judgment

Tax provisions – Harmonization of laws – Turnover tax – Common system of value added tax – Exemptions provided for by the Sixth Directive – Exemption for the supply of land which has not been built on other than building land – Meaning of building land – To be defined by the Member States

(Council Directive 77/388, Arts 4(3)(b) and 13B(h)) Article 13B(h) of the Sixth Directive (77/388) on the harmonization of the laws of the Member States relating to turnover taxes, which provides for tax exemption for the supply of land which has not been built on, excludes from tax exemption building land as described in Article 4(3)(b). Since Article 4(3)(b) refers expressly to the Member States' definitions of building land, it is for the Member States to define what land is to be regarded as being building land, for the purposes of the application both of Article 4(3)(b) and of Article 13B(h), in view of the reference made by the latter provision. It therefore does not fall to the Court to specify what degree of improvement land which has not been built on must exhibit in order to be categorized as building land within the meaning of the directive.

JUDGMENT OF THE COURT (Fifth Chamber)
28 March 1996 (1)

((Sixth VAT Directive – Article 13B(h) and Article 4(3)(b) – Supply of building land))

In Case C-468/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Gerechtshof te Leeuwarden (Netherlands) for a preliminary ruling in the proceedings pending before that court between
Gemeente Emmen

and

Belastingdienst Grote Ondernemingen

on the interpretation of the combined provisions of Article 13B(h) and Article 4(3)(b) 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 (OJ 1977 L 145, p. 1),

THE COURT (Fifth Chamber),,

composed of: D.A.O. Edward, President of the Chamber, J.-P. Puissechet (Rapporteur), J.C. Moitinho de Almeida, C. Gulmann and M. Wathelet, Judges,
Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,
after considering the written observations submitted on behalf of:

?the municipality of Emmen, by R. Brouwer and W.A. Rouwenhorst, Tax Advisers,
?the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
?the Commission of the European Communities, by B.J. Drijber, of the Legal Service, acting as Agent,
having regard to the Report for the Hearing,

after hearing the oral observations of the municipality of Emmen, represented by R. Brouwer and W.A. Rouwenhorst, the Netherlands Government, represented by J.S. van den Oosterkamp, Assistant Legal Adviser in the Ministry of Foreign Affairs, and G.D. van Norden, Director in the Ministry of Finance, and the Commission of the European Communities, represented by B.J. Drijber, at the hearing on 9 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 14 December 1995,

gives the following

Judgment

1 By order of 14 December 1993, received at the Court on 16 December 1993, the Gerechtshof te Leeuwarden (Regional Court of Appeal, Leeuwarden) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of the combined provisions of Article 13B(h) and Article 4(3)(b) 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 (OJ 1977 L 145, p. 1, the Sixth Directive).

2 Those questions were raised in proceedings between the municipality of Emmen and Belastingdienst Grote Ondernemingen, Groningen (Tax Office for Large Businesses, Groningen, the Belastingdienst), in which the former contests the liability to turnover tax pursuant to the Netherlands legislation implementing Article 13B(h) of the Sixth Directive of the supply of land which has not been built on.

3 Article 13B(h) 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:...(h) the supply of land which has not been built on other than building land as described in Article 4(3)(b).

4 Article 4(3)(b) of the Sixth Directive provides as follows: 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:...(b) the supply of building land. Building land shall mean any unimproved or improved land defined as such by the Member States.

5 It appears from the case-file that in the Netherlands the expression building land within the meaning of the Sixth Directive has not been expressly defined by the legislature.

6 Article 13B(h) of the Sixth Directive was transposed into Netherlands law by Article 11(1)(a)(1) of the Wet op de Omzetbelasting 1968 (Law on Turnover Tax 1968, hereinafter the WOB), which provides as follows:

1. The following shall be exempt from tax on conditions to be determined by administrative regulation:

(a) the supply of immovable property, with the exception of:

(1) the supply of a transformed immovable which takes place before or no later than two years after the immovable is put into use for the first time.

7 In the absence of a legislative definition of the expression building land, the Hoge Raad (Supreme Court of the Netherlands) has held that turnover tax was not due in respect of the supply of land which had not been built on but was intended to be used for building except where the land was improved land. However, according to the Hoge Raad's case-law, land which has not been built on has to be regarded as being improved land if the site has been prepared with a view to building or if equipment has been installed on it which is exclusively intended for the site.

8 It appears that that interpretation is narrower than the interpretation formerly employed by the Netherlands tax authorities to the effect that land which had not been built on had to be regarded as improved land where work had been carried out in its surroundings with a view to its development.

9 In June 1992 the municipality of Emmen supplied eight sites which had not been built on and were earmarked for housing. Before it was supplied, the development land was equipped with roads and sewers. The plots were connected up to the water, gas, electricity, telecommunications and cable television networks.

10 The municipality of Emmen paid a total of HFL 67 542 by way of turnover tax, but immediately appealed against the assessment on the ground that the work carried out had not caused the land supplied to become transformed immovables within the meaning of Article 11(1)(a)(1) of the WOB.

11 The Belastingdienst contests the municipality of Emmen's interpretation, arguing that the plots at issue constitute transformed immovables within the meaning of the WOB. In the view of the Netherlands tax authorities, each plot was provided with equipment exclusively earmarked for it or had had work carried out on it.

12 The case came before the Gerechtshof te Leeuwarden. It asks whether it is possible to give a narrow interpretation of the expression transformed property in the case of building land. It observes that, according to the Court's case-law, exceptions to exempting provisions of the Sixth Directive must not be narrowly construed.

13 Taking the view that the dispute did not relate solely to the application of the Netherlands legislation but also turned on the interpretation of the combined provisions of Article 13B(h) and Article 4(3)(b) of the Sixth Directive as regards the expression improved land, the national court stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

I.

(a) Are the words improved land as used in Article 4(3)(b) of the directive to be understood as meaning only land where the soil itself has been prepared and/or for which measures have been taken which are of use exclusively for the land itself, or

(b) In view of the fact that exceptions to exemptions must be interpreted broadly, is there improved land where the land comes under a zoning plan as referred to in section 2.3 and, prior to the supply and first use of that land, infrastructure measures have been taken, such as ?excavation of drains and the laying of a sewerage system and roads (used for construction work);

?installation of services as described in section 2.3?

II. If the answer to Question I(a) is in the affirmative, must both the conditions set out therein be satisfied? Does that mean that land coming under a zoning plan for which the measures referred to at I(b) above have been taken by means of one or more of the operations described at (a) to (f) below becomes improved land?

(a) The installation of the abovementioned facilities within the boundaries of the land.

(b) The installation of a standpipe and a distributor on the main sewer connected to or situated on the land, or the connection of the land to the distributor.

(c) The installation for the land of a surface inlet to the main sewer.

(d) The raising of the land by adding soil brought in for the purpose.

(e) The laying of drainage pipes within the area of the zoning plan but outside the boundaries of the land.

(f) The filling-in of a ditch within the boundaries of the land by soil brought in.

14 By its two questions, the national court is essentially seeking to establish whether land which has not been built on must have been subjected to specific improvements in order to be categorized as building land within the meaning of the Sixth Directive.

15 The municipality of Emmen considers that the expression transformed immovable in the Netherlands legislation has to be interpreted in conformity with the expression improved land used in Article 4(3)(b) of the Sixth Directive. In its view, that expression covers only land intended for use as the site for the construction of a building which has itself undergone substantial transformation to that end.

16 The Netherlands Government points out that it is for the Member States to define the expression building land. Consequently, the concept of a transformed immovable in the Netherlands legislation has an independent meaning and cannot be interpreted on the basis of the expression improved land used in the Sixth Directive.

17 The Commission argues that the liability to tax of supplies of building land constitutes an exception to the exemption for supplies of immovables which have not been built on. Such supplies therefore come under the general regime of the Sixth Directive, which aims to subject to tax all taxable transactions, except where derogations are expressly provided for. Accordingly, whilst the Sixth Directive leaves it to the Member States to define the concept of building land, they are not entitled to adopt a narrow interpretation. In the Commission's view, the structure of that expression therefore means that the Member States should regard as building land not only land which has already been improved but, in addition, all land for building, it being granted that it is for the Member States to determine the criteria by virtue of which land becomes land for building.

18 The reply suggested by the Commission and, to a degree, that suggested by the municipality of Emmen amounts essentially to proposing a Community definition of building land, with the Member States being left solely to lay down the conditions for its application.

19 It should first be observed that whilst, according to the opening words of Article 13B of the Sixth Directive, the Member States are to lay down the conditions for exemptions for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse, those conditions cannot define the content of the exemptions provided for (Case 8/81 *Becker* [1982] ECR 53, paragraph 32, and Case 173/88 *Skatteministeriet v Henriksen* [1989] ECR 2763, paragraph 20).

20 In this case, as the Netherlands Government has rightly argued, Article 4(3)(b) of the Sixth Directive refers expressly to the Member States' definitions of building land. It follows that it is for the Member States to define what land is to be regarded as being building land, for the purposes of the application both of that provision and of Article 13B(h), in view of the reference made by that provision.

21 That interpretation is also borne out by the fact that the Commission's initial proposal and amended proposal for the Sixth Directive embodied a common definition of building land. The Council, however, did not accept either of those proposals and finally deferred to the Member States' definitions.

22 The Court has, moreover, held that, where the Community legislature makes an implied reference in a regulation to national usages, it is not for the Court to give a uniform Community definition to the terms employed (See Case 327/82 *Ekro v Produktschap voor Vee en Vlees* [1984] ECR 107, paragraph 14).

23 The Commission suggests, however, that the fact that unimproved land is mentioned in Article 4(3)(b) alongside improved land means that the Community legislature intended to impose on the Member States' definitions of building land certain limits, as a result of which those definitions should necessarily include land which has not been improved at all.

24 Under Article 4(3)(b) of the Sixth Directive, Building land shall mean any unimproved or improved land defined as such by the Member States. It appears from the use of the conjunction or that that provision takes no account of any transformations which the land in question might have undergone. Accordingly, the expression refers to land, irrespective as to whether or not it has been improved, which has been defined by the Member States as land intended for building. That interpretation results, in particular, from the Dutch version of the Sixth Directive, which uses the expression *als zodanig omschreven al dan niet bouwrijp gemaakte terreinen*, and from the Danish, Italian and Portuguese versions, in which the words unimproved or improved appear between commas, whilst the other versions do not contain anything to the contrary.

25 Lastly, whilst it is settled case-law that the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law (see Case C-453/93 *Bulthuis-Griffioen* [1995] ECR I-2341, paragraph 18) and, consequently, the Member States may not alter their content, in particular in laying down conditions of application, that cannot be so where the Council has specifically conferred the task of defining certain terms of an exemption on the Member States, provided always that they comply with the objective pursued by Article 13B(h) of the Sixth Directive, which seeks to exempt from tax only supplies of land which has not been built on and is not intended to support a building.

26 It follows from the whole of the foregoing that it is for the Member States to define the concept of building land within the meaning of the combined provisions of Article 13B(h) and Article 4(3)(b) of the Sixth Directive. It therefore does not fall to the Court to specify what degree of improvement land which has not been built on must exhibit in order to be categorized as building land within the meaning of that directive.

Costs

27 The costs incurred by the Netherlands Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 *Gerechtshof te Leeuwarden*, by order of 14 December 1993, hereby rules:

It is for the Member States to define the concept of building land within the meaning of the combined provisions of Article 13B(h) and Article 4(3)(b) 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. It therefore does not fall to the Court to specify what degree of improvement land which has not been built on must exhibit in order to be categorized as building land within the meaning of that directive.

Edward

Puissochet

Moitinho de Almeida

Gulmann

Wathelet

Delivered in open court in Luxembourg on 28 March 1996.
R. Grass

D.A.O. Edward

Registrar

President of the Fifth Chamber

1 – Language of the case: Dutch.