Arrêt de la Cour
Joined Cases C-487/01 and C-7/02

Gemeente Leusden and Holin Groep BV cs

v

Staatssecretaris van Financiën

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Turnover taxes – Common system of value added tax – Article 17 of Sixth Directive 77/388/EEC – Deduction of input tax – Amendment of national legislation withdrawing the right to opt for taxation of lettings of immovable property – Adjustment of deductions – Application to current leases)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Deductions made under a right to opt for taxation granted by the Member State concerned in respect of lettings of immovable property acquired as capital goods – Withdrawal of the option and reintroduction of the exemption entailing the adjustment of deductions previously made – Whether permissible – Condition – Account to be taken of the legitimate expectation of taxpayers*

(Council Directive 77/388, Arts 13(B) and (C), 17 and 20)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Taxable transactions – Application of goods for the purposes of a business – Scope – Legislative amendment withdrawing the right to opt for taxation of a financial transaction which is generally exempt – Not included*

(Council Directive 77/388, Art. 5(7)(a))

1. Articles 17 and 20 of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, interpreted in accordance with the principles of the protection of legitimate expectations and legal certainty, do not preclude the withdrawal by a Member State of the right to opt for taxation of lettings of immovable property which it has granted to its taxpayers under Article 13(C) of the Sixth Directive and the consequent reintroduction of the exemption for such lettings under Article 13(B)(b) which results in the adjustment of deductions made in respect of the immovable property acquired as capital goods which is let pursuant to Article 20 of that Directive.

In such circumstances, the Member State concerned must take account of the legitimate expectation of its taxable persons when determining the arrangements for implementing the legislative amendment. The repeal of legislation from which a person liable to pay value added tax has derived an advantage in paying less tax, without there being any abuse, cannot however, as such, breach a legitimate expectation based on Community law.

(see paras 48, 82, operative part 1)

2. A legislative amendment by which a Member State withdraws the right to opt for taxation of

lettings of immovable property entailing payment of amounts equivalent to deductions made previously does not constitute a situation which falls within the terms of Article 5(7)(a) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes. That provision is intended to cover the application of goods, by a taxable person, for the purposes of his business, and not a legislative amendment withdrawing the right to opt for taxation of a financial transaction which is generally exempt.

(see paras 92, 95, operative part 2)

JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004(1)

(Turnover taxes – Common system of value added tax – Article 17 of the Sixth Directive 77/388/EEC – Deduction of input tax – Amendment of national legislation withdrawing the right to opt for taxation of lettings of immovable property – Adjustment of deductions – Application to current leases)

In Joined Cases C-487/01 and C-7/02,
REFERENCES to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between **Gemeente Leusden** (C-487/01),**Holin Groep BV cs** (C-7/02)
and

Staatssecretaris van Financiën,
on the interpretation of Articles 5(7)(a), 17 and 20(2) 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) and the principles of the protection of legitimate expectations and legal certainty,

THE COURT (Fifth Chamber),,

composed of: P. Jann, acting for the President of the Fifth Chamber, A. Rosas (Rapporteur) and S. von Bahr, Judges,
Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,
after considering the written observations submitted on behalf of:

– Gemeente Leusden, by R. Brouwer and H.P. Bodt, Belastingadviseurs,
– the Netherlands Government, by H.G. Sevenster, acting as Agent,
– the French Government, by G. de Bergues and P. Boussaroque, acting as Agents,
– the United Kingdom Government, by P. Ormond, acting as Agent, and P. Whipple, Barrister (C-7/02),
– the Commission of the European Communities, by H.M.H. Speyart, acting as Agent,
after hearing the oral observations of Gemeente Leusden, represented by R. Brouwer and H.P. Bodt, of Holin Groep BV cs, represented by R. Vermeulen, advocaat, of the Netherlands Government, represented by S. Terstal, acting as Agent, and the Commission, represented by H.M.H. Speyart and R. Lyal, acting as Agents, at the hearing on 9 January 2003,

after hearing the Opinion of the Advocate General at the sitting of 3 June 2003,

gives the following

Judgment

1 By judgments of 14 December 2001 (Case C-487/01) and 21 December 2001 (Case C?7/02), received at the Court on 17 December 2001 and 11 January 2002, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 234 EC, two questions in each case on the interpretation of Articles 17 and 20(2) 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') and the principles of the protection of legitimate expectations and legal certainty (Case C-487/01) and of Articles 5(7)(a) and 17 of the Sixth Directive and the principles of the protection of legitimate expectations and legal certainty (Case C?7/02).
2 Those questions were raised in proceedings between, in Case C-487/01, the Gemeente Leusden (municipality of Leusden) and the Staatssecretaris van Financiën (Secretary of State for Finance) and, in Case C?7/02, Holin Groep BV cs ('Holin Groep') and the Staatssecretaris van Financiën, regarding payments corresponding to the amounts deducted in respect of value added tax ('VAT') paid on goods or services supplied for the purposes of refurbishing property to be let, required following a legislative amendment abolishing the right to opt for taxation of lettings of immovable property.

Legal framework
Community legislation
3 Under Article 2 of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is to be subject to VAT.
4 Under Article 5(1) of that directive 'supply of goods' is to mean the transfer of the right to dispose of tangible property as owner.
5 Article 5(7)(a) of the Sixth Directive provides:
'Member States may treat as supplies made for consideration:
(a)the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the value added tax on such goods, had they been acquired from another taxable person, would not be wholly deductible;'
6 Article 11(A)(1)(b) of the Sixth Directive provides:
'The taxable amount shall be:
…
(b) in respect of supplies referred to in Article 5(6) and (7), the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined as the time of supply.'
7 Article 13(B) and (C) of the Sixth Directive provides:
'B. Other exemptions
…
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 …

Member States may apply further exclusions to the scope of this exemption;

…

C. Options

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

(a)letting and leasing of immovable property;

…

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

8 Article 17 of the Sixth Directive provides:

'Origin and scope of the right to deduct

1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a)value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

…'

9 Article 20 of the Sixth Directive provides:

'Adjustments of deductions

1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a)where that deduction was higher or lower than that to which the taxable person was entitled;

(b)where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are cancelled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed, nor in the case of applications for the purpose of making gifts of small value and giving samples specified in Article 5(6). However, Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft.

2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured.

By way of derogation from the preceding subparagraph, Member States may base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods the adjustment period may be extended up to 10 years.

3. In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. Such business activities are presumed to be fully taxed in cases where the delivery of the said goods is; they are presumed to be fully exempt where the delivery is exempt. The adjustment shall be made only once for the whole period of adjustment still to be covered.

…

4. For the purposes of applying the provisions of paragraphs 2 and 3, Member States may:

–define the concept of capital goods,
–indicate the amount of the tax which is to be taken into consideration for adjustment,
–adopt any suitable measures with a view to ensuring that adjustment does not involve any unjustified advantage,
–permit administrative simplifications.
…
6. Where the taxable person transfers from being taxed in the normal way to a special scheme or vice versa, Member States may take all necessary measures to ensure that the taxable person neither benefits nor is prejudiced unjustifiably.'
10 Under Article 1(4) of Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax – scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18), the last paragraph of Article 20(2) of the Sixth Directive was replaced by the following wording:
'In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years.'
11 Under Article 2(1) of Directive 95/7, that provision was to be transposed by 1 January 1996 at the latest.
Dutch legislation
12 Article 11(1)(b)(5) of the Wet op de Omzetbelasting 1968 (the Law of 1968 on turnover tax) laid down the principle of exemption for lettings of immovable property and the possibility, for the parties to a tenancy, to opt for taxation of lettings.
13 That provision was amended by the Wet houdende wijziging van de Wet op de Omzetbelasting 1968, de Wet op belastingen van rechtsverkeer en enkele andere belastingswetten in verband met de bestrijding van constructies met betrekking tot onroerende zaken (Law amending the Law on turnover tax 1968, the Law on the taxation of legal transactions and a number of other tax laws in connection with the combating of [tax avoidance] arrangements with regard to immovable property (of 18 December 1995 (Stadsblad 1995, p. 659), 'the amending law'). That law reserved the right of option for 'persons using the immovable property for purposes in respect of which a full or virtually full right to deduct tax charged exists.'
14 The amending law came into force on 29 December 1995. However, it provided that the right of option was to be withdrawn as of 18.00 hours on 31 March 1995, the date and time of a press release announcing the content of the future law.
15 For contracts concluded before 31 March 1995, the amending law retained the exception to exemption until 29 December 1995 (in practice until 1 January 1996).
16 For subsequent years, Article V(9) of the amending law, which made provision for transitional rules, provided:
'By way of derogation on this point from paragraphs 1 and 5, Article 11(1)(b)(5) of the [amending law] in the version applicable immediately before the entry into force of this law, remains applicable until the 10th financial year following the financial year in which the lessor began to use the immovable property, subject to the condition that:
a.the lease is by contract concluded in writing before 18.00 hours on 31 March [1995];
b.the tenant occupied the property before April 1996;
c.the annual consideration amounts to at least a percentage to be established by ministerial order of the all-in construction costs of the immovable property; and
d.the written contract is notified to the inspector in the four weeks following the entry into force of this law.'
17 By ministerial order of 22 December 1995 (WV 95/891, Staatscourant 1995, p. 250), the percentage of the all-in construction costs of the immovable property, referred to in Article V(9)(c) of the amending law, is set at 7% plus 0.15% for each year which has elapsed since the date of first occupation or use of that property.

Facts, the main proceedings and questions referred

Case C-487/01

18 The Gemeente Leudsen lets playing fields to various sports clubs.

19 During 1990 and 1991, it had a field converted from a natural grass pitch into an artificial grass pitch at a cost of NLG 433 000, plus NLG 79 800 VAT. That pitch was then, as from 1 January 1992, let to the Mixed Hockey Club Leusden.

20 The hockey club does not have a right to deduct VAT. However, the parties opted for taxation of the letting, which, because of the correlation between taxation and the right to deduct, enabled the Gemeente Leusden to deduct the input VAT paid on the cost of converting the pitch.

21 It is not disputed that the Gemeente Leusden could not rely on the transitional provisions of the amending law, inter alia because the rent paid by the hockey club was less than the minimum percentage laid down by those provisions.

22 Following the entry into force of the amending law, an additional assessment to VAT amounting to NLG 15 960 was served on the Gemeente Leusden for the period from 1 January 1997 to 31 December 1998. Following an objection, the additional assessment was upheld by decision of the tax inspector.

23 The Gemeente Leusden brought an action before the Gerechtshof te Amsterdam (Amsterdam Court of Appeal) (Netherlands), but that action was dismissed by judgment of 5 June 2000. The Gemeente Leusden appealed to the Hoge Raad der Nederlanden.

24 Considering a plea of breach of European law, the Hoge Raad observed that, in its judgment in Case C-381/97 *Belgocodex* [1998] ECR I-8153, the Court held that a Member State which has availed itself of the possibility provided for by Article 13(C) of the Sixth Directive and which has thus granted its taxpayers the right to opt for taxation of certain lettings of immovable property, may abolish, by means of a subsequent law, that right of option and thus reintroduce the exemption. The Court left it to the national court referring the question to determine whether the general Community law principles of protection of legitimate expectations and of legal certainty had been respected by the national legislature.

25 The Hoge Raad also observed that, in its judgment in Case C-396/98 *Schlossstraße* [2000] ECR I?4279, the Court interpreted Article 17 of the Sixth Directive as meaning that 'a taxable person's right to deduct VAT paid in respect of goods or services supplied to him with a view to his carrying out certain letting operations is retained where a legislative amendment post-dating the supply of those goods or services but pre-dating the commencement of such operations deprives the taxable person concerned of the right to waive exemption thereof, …'. However, according to paragraph 51 of the judgment, that rule is not applicable where adjustment is made under the conditions laid down in Article 20 of the Sixth Directive.

26 The Hoge Raad held that this case-law does not enable it to assess the merits of the argument relied on by the Gemeente Leusden, namely that adjustment as referred to in Article 20 of the Sixth Directive is out of the question where a use which is subject to VAT is changed, merely by a legislative amendment, into a use which is exempt without any right to deduct.

27 Accordingly, by judgment of 14 December 2001, the Hoge Raad found it necessary to refer the following questions to the Court for a preliminary ruling:

'1.Do Articles 20(2) and 17 of the Sixth Directive or the principles, in European law, of the protection of legitimate expectations and legal certainty preclude adjustment – in a case involving no fraud or abuse or change of planned use as referred to in paragraphs 50 and 51 of the judgment of the Court of Justice in the *Schlossstrasse* case – of the VAT deducted by a taxable person, which he has paid on an item of (immovable) property supplied to him with a view to the letting (subject to VAT) of that property, for the years of the period of adjustment under Article 20(2) which have not yet elapsed at the time of the cessation of that right of option (in this case, in fact, 1 January 1996) for the sole reason

that, as a result of a legislative amendment, the taxable person is no longer entitled to waive exemption for that letting?
2.If the answer to the first question is in the affirmative, is the legislative amendment inapplicable only in respect of the deducted tax mentioned in Question 1, or is it also inapplicable – until the period of adjustment has expired – in respect of the taxed status (subject to the provisions of Article 13(C) of the Sixth Directive) of the letting referred to in Question 1?'
Case C?7/02
28 In the course of 1994 and 1995, G&S Properties BV ('G&S'), one of the companies in Holin Groep, had a new office complex constructed on a plot of land it owned in Amsterdam. Holin Groep deducted the VAT charged in that connection.
29 In the middle of 1994, G&S entered into negotiations with ING Bank NV ('the Bank') with regard to the leasing of part of the office complex or sale of those offices to the Bank. In these negotiations both G&S and the Bank assumed that in the event of leasing they would opt for taxation of the lettings.
30 In December 1995, a lease was signed with effect from 1 January 1996. After this date the Bank finished the conversion work and fitted out the leased property. On 1 October 1996, the Bank commenced using the leased property for its banking activities which were exempt from VAT. Holin Groep, as lessor, and the Bank, as lessee, requested the tax inspector to make an exception and not apply the exemption from VAT with regard to the lease.
31 In the light of the entry into force of the new law, that request was rejected and a VAT assessment amounting to NLG 33 051 was served on Holin Groep, on the basis of the provision of the Dutch law corresponding to Article 5(7)(a) of the Sixth Directive. In response to an objection, the tax inspector upheld the original assessment as regards the principal amount due.
32 Holin Groep brought an action before the Gerechtshof te Amsterdam but that action was dismissed by judgment of 20 January 2000. The Gerechtshof held that at 18.00 hours on 31 March 1995 there was still no lease between Holin Groep and the Bank and that the transitional provisions of the amending law were not applicable, regardless of the fact that on that date there were already pre-contractual obligations between Holin Groep and the Bank with regard to the lease of the premises. Holin Groep appealed to the Hoge Raad der Nederlanden against that decision.
33 On grounds similar to those in Case C-487/01, Gemeente Leusden, the Hoge Raad, by decision of 21 December 2001, referred the following questions to the Court for a preliminary ruling:
'1.Do Articles 5(7)(a) and 17 of the Sixth Directive or the European law principles of the protection of legitimate expectations and of legal certainty preclude ? in a case not involving fraud or abuse or any question of a change in planned use, as mentioned in paragraphs 50 and 51 of the judgment of the Court of Justice in *Schlossstraße*
? the charging of tax on the basis of the abovementioned Article 5(7)(a) when a taxable person has deducted VAT which he has paid for goods delivered, or services provided, to him with a view to the planned leasing, subject to VAT, of a particular immovable property, on the simple ground that, as a result of a legislative amendment, the taxable person no longer has the right to waive the exemption for that lease?
2.Would an affirmative response to the first question also apply to a right to deduct arising in the period between notification of the legislative amendment mentioned in Question 1 and its entry into force? In other words, in the event of an affirmative response to Question 1, can tax still be charged, on the basis of Article 5(7)(a), on the elements of the cost price referred to in Article 11(A)(1)(b) of the Sixth Directive which were incurred after that notification date?'
34 By order of the President of the Fifth Chamber of the Court of 6 November 2002, Cases C-487/01 and C-7/02 were joined for the purposes of the oral procedure and judgment.

The questions referred

Case C-487/01

The first question

35 By its first question, the referring court is essentially asking whether Articles 20(2) and 17 of the Sixth Directive, or the principles of legitimate expectations and legal certainty preclude adjustment under Article 20(2) of the VAT deducted by a taxable person, which he has paid on an item of immovable property supplied to him with a view to the letting subject to VAT of that property, where such adjustment is required on the ground that, as a result of a legislative amendment, the taxable person is no longer entitled to waive exemption for that letting for the years of the period of adjustment which have not yet elapsed at the time of the cessation of that right of option.

– Observations submitted to the Court

36 The Gemeente Leusden takes the view that it is not liable to any VAT by way of adjustment because the legislative amendment constitutes a factor outside its control, within the meaning of paragraph 43 of the judgment in *Schlossstrasse*. It submits that it always assumed it would be able to deduct the VAT on the investment and operating costs. It took that factor into account when it set the rent and when drawing up a budget to balance the costs.

37 It argues that it does not meet the conditions laid down by the transitional provisions, inter alia the condition relating to the minimum amount of the rent. It observes that that amount, that is to say 7% of cost, was determined on the basis of the rates of long-term mortgage loans, in other words, taking account of letting income. According to the Gemeente Leusden, such a scheme is contrary to the spirit of the Sixth Directive since there is no requirement that any profit should be sought from the letting of immovable property. In the present case, the amount of the rent was fixed on the basis of objective criteria but in such a way that the transaction was neutral in terms of the municipality's budget, which explains why the rent was below the minimum amount required by the transitional provisions.

38 The Gemeente Leusden states that, according to the case-law of the Hoge Raad, the decision to impose VAT on a letting cannot be revoked in mid-contract. As it involves a change in the amount of the rent, there is no provision for it in the contract to let. A civil procedure would have been required to change it, of uncertain outcome. In any event, if such a procedure were successful, it would have meant that the lessee would have had to pay a much higher rent, which would have left it in financial difficulty.

39 The French Government, the Netherlands Government and the Commission take the view, on the other hand, that the Gemeente Leusden is liable to VAT under the Netherlands legislation, as it makes provision for adjustment as authorised by Article 20(2) of the Sixth Directive.

40 The Netherlands Government explains that, before its amendment, the Netherlands law gave rise to practices intended to circumvent the fact that an exempt trader could not deduct the VAT invoiced on his goods and services. It gives the example of a sports club which, as it is exempt, cannot deduct VAT invoiced on a sports ground it buys. To get round that, the ground is purchased by a third party – usually linked to the club – which lets it to the sports club, it being understood that the third party and the club will opt for taxation of the letting. The VAT on the sports ground can thus be deducted in full by the third party whereas the sports club is only liable to VAT on the rent which is often set artificially low, given the links with the purchaser. Ownership of the ground may be transferred on expiry of the adjustment period of 10 years. It was precisely in order to make such schemes less attractive that the Member States decided to extend the adjustment period to 20 years by Directive 95/7.

41 The French and Netherlands Governments and the Commission submit that Article 20 of the Sixth Directive also concerns legislative amendments. The wording of that article in general and the use of the expression 'in particular' in the first paragraph in particular show

that cases of adjustment are not listed exhaustively. Moreover, provision for adjustment in such a case would be in keeping with the objective of that article. In that connection the Netherlands Government points out that the Member States must be able to react rapidly to facts of economic life such as abuses. If adjustment were not possible a legislative amendment would not take effect until after the end of the adjustment period. The Netherlands Government also observes that Article 20(6) of the Sixth Directive which provides for transitional measures where the entry into force of a new law is likely to create difficulties would make no sense if the Member States were not entitled to make legislative amendments. Finally, that government submits that if the Community legislature had wanted to preclude from adjustment anything which was outside the control of the taxable person, it would have done so expressly.

42 According to the French Government, the adjustment of deductions referred to in Article 20(2) of the Sixth Directive and the treatment, pursuant to Article 5(6) and (7) of that directive, of certain transactions as supplies for consideration are two provisions with the same objective, namely to prevent a taxable person who has enjoyed a right to deduct from gaining economically unjustified advantages.

43 According to that government, if there were no adjustment, different treatment would result for taxable persons carrying out the same economic activities which would be contrary to the principle of tax neutrality. A taxable person who ceased to carry out transactions subject to VAT and continued to use for such transactions capital goods in respect of which he had had a full right to deduct and the value of which was not fully exhausted would be in a better position than a person who carries out the same type of transactions after the entry into force of the new rules applicable to them and cannot exercise any right to deduct.

44 That government explains that adjustment is the counterpart of the arrangement implemented when an event entails the imposition of VAT on transactions which were previously exempt. In such a case the taxable persons concerned are authorised to adjust the right to deduct which arose under Article 17(1) of the Sixth Directive in respect of capital goods acquired while their activity was exempt but which could not be exercised under Article 17(2) because of the absence of a direct and immediate link with the taxed transactions. That adjustment was effected by means of a supplementary deduction equivalent to a proportion of the VAT imposed on those capital goods and which could not be deducted when those goods were acquired.

45 The French and Netherlands Governments and the Commission point out the difference between the Netherlands law and the situation at issue in *Schlossstraße*. In that case, a deduction which had already been allowed was disallowed, with reotroactive effect. In the case in the main proceedings, a deduction is to be adjusted pursuant to Article 20 of the Sixth Directive. They all stress that, in the present case, it is not a matter of the retroactive effect of the Netherlands law but of a situation in which a legislative amendment has effects on the future consequences of situations arising while the previous rules were in force.

46 The French and Netherlands Governments and the Commission take the view that the Netherlands legislation complies with Article 20 of the Sixth Directive and does not prejudice the general principles of Community law of legal certainty and legitimate expectations.

47 The Netherlands Government recalls that although as a general rule the principle of legal certainty precludes a Community measure from having retroactive effect, it may exceptionally be otherwise when the purpose to be achieved so demands and when the legitimate expectations of those concerned are duly respected (Case 98/78 *Racke* [1979] ECR 69, paragraph 20; Case 99/78 *Decker* [1979] ECR 101, paragraph 8; and Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I?415, paragraph 49). It points out in that connection that the measure was justified by the abuses recorded and that the legitimate expectations of the traders were protected. First, the legislative amendment was announced beforehand and was therefore not a surprise. Second, the Netherlands legislature made provision for transitional

arrangements applicable to many situations. The only situations not covered were those in which the rent for property was low compared with the investment cost, that is to say, those situations which had features characteristic of abuses such as those the law sought to prevent. Finally, the Netherlands Government pointed out that, as is clear from the debates prior to adoption of the legislation, parties to leases for immovable property were given a period of time to allow them to make arrangements to deal with the consequences entailed by the future law.

– Reply of the Court

48 As the referring court observed, a Member State which has availed itself of the possibility provided for by Article 13(C) of the Sixth Directive and which has thus granted its taxpayers the right to opt for taxation of certain lettings of immovable property may abolish, by means of a subsequent law, that right of option and thus reintroduce the exemption (see *Belgocodex*, cited above, paragraph 27).

49 The question at issue in this case is whether the curtailment or withdrawal of the right to opt for taxation of certain lettings of immovable property may have a related effect on the amount of the deductions made in respect of the immovable property which is let and give rise, in that regard, to adjustments of those deductions made pursuant to Article 20 of the Sixth Directive.

50 The third subparagraph of Article 20(2) of the Sixth Directive provides that deductions in respect of immovable property acquired as capital goods may be adjusted for 10 years. Under Directive 95/7, that period was extended to 20 years.

51 It must be observed that Article 20 of the Sixth Directive, which describes a number of situations in which adjustments may be made, does not specifically cover the case of a legislative amendment. On the other hand, it does not exclude it either.

52 Article 20(1) of the Sixth Directive which prefaces the list of situations covered by the paragraph uses the term 'in particular' which indicates that the situations described under (a) and (b) of that provision do not constitute an exhaustive list.

53 Moreover, Article 20(1)(b) of the Sixth Directive deals with changes 'in the factors used to determine the amount to be deducted', whereas Article 20(2) of the Sixth Directive, which specifically concerns capital goods for which the period of adjustment is longer, specifies that the adjustment is made 'on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured', thus providing for a situation in which there is a change in the right to deduct correlating to a change in the right to opt for taxation of an output transaction which is generally exempt.

54 In its observations, the Gemeente Leusden submits, first, that the legislative amendment is a circumstance outside its control and, second, that it took account of the possibility of making a deduction when it set the amount of the rent charged to the sports club.

55 The first argument is refuted by Article 20 of the Sixth Directive. According to Article 20(1)(b), Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft. It therefore follows from that provision that a taxable person may be obliged to adjust deductions in circumstances outside his control.

56 The second argument put forward by the Gemeente Leusden relates to the principles of protection of legitimate expectations and legal certainty. It points out that it took account of the possibility of deducting VAT on immovable property acquired as capital goods when it set the amount of the rent charged to the sports club.

57 The principles of the protection of legitimate expectations and legal certainty form part of the Community legal order. They must accordingly be observed by the Community institutions (Case 74/74 *CNTA* v *Commission* [1975] ECR 533), but also by the Member States when they exercise the powers conferred on them by Community directives (*Belgocodex*, paragraph 26; *Schlossstrasse*, paragraph 44; and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 44).

58 In the present case, it must therefore be ascertained whether the Sixth Directive, interpreted in the light of those principles, precludes the withdrawal by a Member State of the right to opt for taxation of lettings of immovable property which results in adjustment of deductions made on the immovable property acquired as capital goods which is let.

59 The Court has consistently held that, although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. That case-law also applies where the retroactivity is not expressly laid down by the measure itself but is the result of its content (Case C-368/89 *Crispoltoni* [1991] ECR I?3695, paragraph 17).

60 As regards the national rules adopted by the Member States in the area of VAT, the Court has held inter alia that the status of taxable person, once recognised, cannot, save in situations of fraud or abuse, be withdrawn from the taxpayer with retrospective effect, without infringing the principles of the protection of legitimate expectations and legal certainty, as that would retrospectively deprive the taxable person of the right to deduct VAT on the investment expenditure he had incurred (see, to that effect, Case C-400/98 *Breitsohl* [2000] ECR I?4321, paragraphs 34 to 38).

61 The Court has also held that a Member State may not, by means of a legislative amendment made between the date of supply of the goods or services with a view to the performance of certain economic activities and the date of commencement of such activities, with retroactive effect, deprive a taxable person of the right to waive the VAT exemption for such activities (see, to that effect, *Schlossstraße*, paragraph 43).

62 Unlike the legislation at issue in the above two cases decided by the Court, the amending law in the main proceedings does not have retroactive effect and takes effect only for the future, since it retains the exception to exemption until 29 December 1995 and even, in practice, until 1 January 1996, according to the referring court. It is as a result of adjustments made pursuant to Article 20 of the Sixth Directive that the entry into force of the law might prejudice the economic interests of certain taxable persons bound by leases current at the time of entry into force of the law.

63 In that regard, although, in its judgments in *Breitsohl* and *Schlossstraße*, the Court stressed the principle that entitlement to deduct, once it has arisen, is retained, that principle only applies in the absence of fraud or abuse and subject to any adjustments to be made under the conditions laid down in Article 20 of the Sixth Directive (*Schlossstraße* , paragraph 42, and *Breitsohl*, paragraph 41). In *Schlossstraße* and *Breitsohl* the questions referred to the Court did not concern the possibility of adjustment under Article 20 of the Sixth Directive.

64 It is clear from this initial examination that neither the wording of the Sixth Directive nor the case-law of the Court precludes an interpretation of Article 20 of the Sixth Directive as meaning that a legislative amendment withdrawing the right to opt for taxation of lettings of property entails, as a corollary, the obligation to adjust deductions made on immovable property acquired as capital goods.

65 It must therefore be determined whether the principles of protection of legitimate expectation and legal certainty preclude such an interpretation.

66 As regards the expectation which a taxable person might have as regards the opportunities for deduction which might act as an incentive for him to accept a rent of an amount which reflects those opportunities, it must be observed that it is not based on any provision of the Sixth Directive. Rather, Article 13(C) of the Sixth Directive allows the Member States to grant their taxable persons the right to opt for taxation of lettings of immovable property but also allows them to restrict the scope of that right or withdraw it. As we are dealing with a directive on fiscal matters, of which certain provisions, such as Article 13(C), give wide powers to the Member States, a legislative amendment adopted under the directive cannot be considered to be unforeseeable.

67 Moreover, the adverse effect of withdrawing the right to opt for taxation is not confined to cases of adjustment of deductions. An owner of an immovable property which is let, who is bound, as lessor, to carry out essential work on the let property, would suffer a comparable disadvantage if the legislature were to amend, before the work was carried out, the right to opt for taxation of the letting of the property, thereby preventing that owner from deducting the VAT paid on that work, whereas he would be bound by a lease under which the amount of the rent might take account only of the work to be done but not of the VAT relating to it.

68 Thus, any legislative amendment withdrawing the right to opt for taxation of certain lettings of immovable property is liable to disadvantage a taxable person where that person has not made provision for adjustment of the amount of rent charged, whether the expenses relating to the capital goods were incurred in the past or have yet to be incurred. The disadvantage is therefore not specifically caused by the requirement for adjustment within the meaning of Article 20 of the Sixth Directive.

69 It follows that the Sixth Directive, interpreted in accordance with the principles of protection of legitimate expectations and legal certainty, does not preclude the withdrawal by a Member State of the right to opt for taxation of lettings of immovable property which results in adjustment of deductions made in respect of immovable property acquired as capital goods which is let pursuant to Article 20 of the Sixth Directive.

70 Although Article 20 of the Sixth Directive does not, as such, breach the above principles, it cannot none the less be ruled out that the national legislature has breached them in that, without taking account of a legitimate expectation of taxable persons which had to be protected, it suddenly and unexpectedly withdrew the right to opt for taxation of lettings of immovable property, when the objective to be attained did not require it, without allowing taxable persons bound by leases current at the time of entry into force of the law the time to adjust to the new legislative situation.

71 The Netherlands Government submits that the amending law was adopted to prevent schemes to avoid tax, that the transitional provisions were adopted so that the amendment would not affect contracts which could not be considered to be schemes to avoid tax, that the amending law was announced many months before its entry into force, inter alia in a press release in March 1995, thus allowing the parties to a lease time to renegotiate its terms, and that it was still possible for the parties to a contract to let immovable property, where amendment of the amount of rent was not authorised by the contract or could not be negotiated, to seek authorisation for such amendment in the national courts.

72 The Gemeente Leusden argues that it is impossible for it to alter the rent, first because of the uncertain outcome of the court procedure required and, second, because of the financial difficulty in which the sports club would be placed if it had to pay a higher rent.

73 To begin with, it must be observed that the argument that the sports club would find it difficult to finance a higher rent is not based on a legitimate expectation of the taxable person itself, that is to say the Gemeente Leusden, but on an expectation of its lessee, the sports club. That argument is thus not relevant and cannot be taken into consideration.

74 According to the transitional provisions of the law, the debates in preparation for the amending law and the explanations of the Netherlands Government, the legislature was at pains to affect leases current on entry into force of that law as little as possible.

75 As to whether a taxable person such as the Gemeente Leusden had a legitimate expectation, it must be observed that the lease at issue in the main proceedings was not covered by the transitional provisions of the law because the amount of the rent was not high enough compared with the cost of the investment. Such a contract to let is thus covered by the amending law as the Netherlands Government presumes it to be a legal arrangement intended to avoid taxation which the parties consider to be too high.

76 In that connection, it must be borne in mind that, under Article 13(B) of the Sixth Directive, Member States are to exempt the leasing or letting of immovable property under conditions which they are to lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion,

avoidance or abuse. That wording demonstrates that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive.

77 It would be contrary to that objective to prohibit a Member State to require immediate application of its law withdrawing the right to opt for taxation of certain lettings of immovable property entailing an obligation to adjust deductions made, where that State has become aware that the right of option was being used as part of tax avoidance schemes. A taxable person cannot thus justify a legitimate expectation of maintenance of a legislative framework allowing tax evasion, avoidance and abuse.

78 As regards abuses, the Court has held that a finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it (Case C-110/99 *Emsland-Stärke* [2000] ECR I?11569, paragraphs 52 and 53). The Court has held that the obligation to repay an advantage unduly obtained in the event that an abuse is thus established does not breach the principle of lawfulness, but is simply the consequence of a finding that there was an abuse (*Emsland-Stärke*, cited above, paragraph 56).

79 As regards tax avoidance, although, under the law of a Member State, a taxpayer cannot be censured for taking advantage of a provision or a lacuna in the legislation which, without constituting an abuse, has allowed him to pay less tax, the repeal of legislation from which a person liable to VAT has derived an advantage cannot, as such, breach a legitimate expectation based on Community law.

80 In the light of those considerations, it does not appear that a measure such as the amending law must be considered to have gone further than its objective required or to have breached a legitimate expectation of taxable persons.

81 In any event, a taxable person cannot rely on there being no legislative amendment, but can only call into question the arrangements for the implementation of such an amendment. In the present case, it appears that the Netherlands legislature took steps to prevent taxable persons from being taken unawares by implementation of the law in relation to adjustments of the right to deduct. A press release reported the planned legislative amendment on 31 March 1995 and the legislature made provision for transition from taxed letting to exempt letting only from the entry into force of the law, in order to allow the parties to a lease time to confer before that date on the implications of the legislative amendment.

82 In the light of the foregoing considerations, the following answer must be given to the question referred:

Articles 17 and 20(2) of the Sixth Directive interpreted in accordance with the principles of the protection of legitimate expectations and legal certainty do not preclude the withdrawal by a Member State of the right to opt for taxation of lettings of immovable property which results in the adjustment of deductions made in respect of the immovable property acquired as capital goods which is let pursuant to Article 20 of the Sixth Directive. Where a Member State withdraws the right to opt for taxation of lettings of immovable property, it must take account of the legitimate expectation of its taxable persons when determining the arrangements for implementing the legislative amendment. The repeal of legislation from which a taxable person has derived an advantage in paying less tax, without there being any abuse, cannot however, as such, breach a legitimate expectation based on Community law.

The second question

83 In the light of the answer given to the first question, there is no need to reply to the second question.

Case C?7/02

The first question

84 By its first question the Hoge Raad essentially seeks to know whether Articles 5(7)(a) and 17 of the Sixth Directive or the principles of the protection of legitimate expectations and of legal certainty preclude – in a case not involving fraud or abuse or any question of a change in planned use, as mentioned in paragraphs 50 and 51 of the judgment of the Court of Justice in *Schlossstraße* – the charging of tax on the basis of Article 5(7)(a) when a taxable person has deducted VAT which he has paid for goods delivered, or services provided, to him with a view to the planned leasing, subject to VAT, of a particular immovable property, on the simple ground that, as a result of a legislative amendment, the taxable person no longer has the right to waive the exemption for that lease.

– Observations submitted to the Court

85 Whilst they accept that the adjustment of deductions referred to in Article 20(2) of the Sixth Directive and the treatment, under Article 5(6) and (7) of that directive, of certain transactions as supplies of goods made for consideration are two provisions intended to achieve a similar objective, namely to prevent a taxable person who has had a right to deduct from enjoying economically unjustifiable advantages, the French and United Kingdom Governments and the Commission take the view that the adjustment of the right to deduct must be made on the basis of Article 20 of the Sixth Directive rather than on that of Article 5(7) of that directive.

86 They point out that the provisions of Article 5(7) more specifically concern the case where a taxable person intentionally alters the original use of his capital goods, in particular, by making withdrawals of goods or transferring from a taxable activity to exempt activity, or terminates his professional activity.

87 The Netherlands Government takes the view that Holin Groep may be liable to VAT under the provision of Netherlands law transposing Article 5(7)(a) of the Sixth Directive.

88 According to that government, the adjustment payment must be made after the entry into force of the amending law, without retrospective effect. It arises from the time the office block is disposed of in the course of a business, in the event, on 1 January 1996. If, in a comparable case, the office block had been supplied on that date and the purchaser had then leased the property on an exempt lease, the purchaser/lessor would not be entitled to deduct the input tax paid.

89 For the same reasons as those set out in connection with Case C-487/01, the Netherlands Government takes the view that the principles of the protection of legitimate expectations and of legal certainty have not been breached.

– Reply of the Court

90 As the governments submitting observations and the Commission have observed, treatment as supplies made for consideration under Article 5(7)(a) of the Sixth Directive and the adjustment referred to in Article 20(2) of that directive are two mechanisms with the same economic effect, that is to say, they oblige a taxable person to pay amounts equivalent to the deductions to which he was not entitled.

91 However, the arrangements for payment are different. Whereas Article 5(7)(a) of the Sixth Directive entails a single payment, Article 20(2) of that directive provides for adjustments, in respect of capital goods, spread out over several years.

92 As regards the payment of amounts equivalent to deductions claimed by reason of a legislative amendment by which a Member State withdrew the right to opt for taxation of lettings of immovable property, it must be held that such a situation does not fall within the terms of Article 5(7)(a) of the Sixth Directive. That provision is intended to cover the application of goods, by a taxable person, for the purposes of his business, and not a legislative amendment withdrawing the right to opt for taxation of a financial transaction which is generally exempt.

93 It follows that Article 20(2) of the Sixth Directive, providing for adjustment in the event of changes to the right to deduct, may serve as the basis for requiring a taxable person to pay sums originally deducted in respect of immovable property acquired as capital goods which has been let under an exempt lease.

94 As regards respect for the principles of protection of legitimate expectations and of legal certainty in the application of Article 20(2) of the Sixth Directive, reference should be made to paragraphs 57 to 82 of this judgment.

95 The answer to the question referred must therefore be that Article 5(7)(a) of the Sixth Directive concerns the application of goods by a taxable person for the purposes of his business and not a legislative amendment withdrawing the right to opt for taxation of a financial transaction which is generally exempt.

The second question

96 In the light of the answer given to the first question, there is no need to reply to the second question.

Costs

97 The costs incurred by the French, Netherlands 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 proceedings, a step in the action 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 Hoge Raad der Nederlanden by judgments of 14 and 21 December 2001, hereby rules:

1.Articles 17 and 20(2) 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, interpreted in accordance with the principles of the protection of legitimate expectations and legal certainty do not preclude the withdrawal by a Member State of the right to opt for taxation of lettings of immovable property which results in the adjustment of deductions made in respect of the immovable property acquired as capital goods which is let pursuant to Article 20 of the Sixth Directive 77/388.

Where a Member State withdraws the right to opt for taxation of lettings of immovable property, it must take account of the legitimate expectation of its taxable persons when determining the arrangements for implementing the legislative amendment. The repeal of legislation from which a taxable person has derived an advantage in paying less tax, without there being any abuse, cannot however, as such, breach a legitimate expectation based on Community law.

2.Article 5(7)(a) of the Sixth Directive 77/388 concerns the application of goods by a taxable person for the purposes of his business and not a legislative amendment withdrawing the right to opt for taxation of a financial transaction which is generally exempt.

Jann

Rosas

von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass

V. Skouris

Registrar

President

1 – Language of the case: Dutch.