JUDGMENT OF THE COURT (Fifth Chamber)
8 July 1986 *

In Case 73/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Düsseldorf for a preliminary ruling in the proceedings pending before that court between

Hans-Dieter and Ute Kerrutt, Markgröningen,

and

Finanzamt [Tax Office] **Mönchengladbach-Mitte**

on the interpretation of various provisions of the Sixth Council Directive, No 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 (Official Journal 1977, L 145, p. 1),

THE COURT (Fifth Chamber)

composed of: U. Everling, President, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

after considering the observations presented on behalf of

(a) Hans-Dieter and Ute Kerrutt, by their agent, F. J. Müsers,

(b) the Finanzamt Mönchengladbach-Mitte, by its agent, Rembert Schwarze,

* Language of the Case: German.

(c) the Federal Republic of Germany, by Martin Seidel, Ernst Röder and Jochim Sedemund, acting as Agents,

(d) the Commission of the European Communities, by Jürgen Grunwald, a member of its Legal Department,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 April 1986,

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Article 2 of the Sixth Council Directive, No 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 (Official Journal 1977, L 145, p. 1) provides that value-added tax is to be levied *inter alia* on:

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

Article 4 (3) provides that the Member States may treat as a taxable person anyone who carries out, on an occasional basis, 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;

...

(b) the supply of building land'.

In accordance with Article 13 B (g) Member States are to exempt *inter alia*:

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

...'

Under Article 28 (3) (b) the Member States may, *inter alia*, continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned. Point 16 of Annex F refers to 'supplies of those buildings and land described in Article 4 (3)'.

2. By a contract dated 28 December 1982 and 3 February 1983 the plaintiffs in the main proceedings commissioned a firm of trustees to purchase a plot of land at Mönchengladbach/Hardt for DM 43 792 and to construct a building on it (dwelling No 2 on the plan) at a total cost of DM 445 063. By a contract of 7 February 1983

the plaintiffs acquired, as joint owners in equal shares, a co-proprietor's share amounting to 230/1 000 of a plot of land which had not been built on, located as mentioned above, at the agreed price. The conveyance was effected on 23 August 1983. The division of the property pursuant to paragraph 3 of the Wohnungseigentumsgesetz [Law on the ownership of apartments] was agreed on 14 September 1983 and was registered in the Land Register on 29 November 1983.

The 'Bauherrengemeinschaft' [Co-proprietors' Association] formed by the co-proprietors as an association governed by the Civil Code (paragraphs 705 *et seq.* of the Bürgerliches Gesetzbuch [Civil Code] concluded with a building company a contract dated 26 May 1983 for the construction of a dwelling ready for occupation by 31 December 1983 at a fixed price of DM 679 906.54 plus value-added tax at the rate of 13%. In addition the plaintiffs concluded on their own account the following contracts:

(a) A contract for the supervision of building works (Baubetreuungsvertrag) covering the commercial, financial, organizational and technical groundwork;

(b) A contract for the management of let accommodation;

(c) A contract for the assembly of documentation for tax purposes;

(d) A contract of guarantee;

(e) A contract for the procurement of finance.

The Finanzamt [Tax Office] Mönchengladbach-Mitte issued tax demands dated 12 August 1983 to both the plaintiffs in the main proceedings for real property transfer tax (Grunderwerbsteuer) of DM 2 888 assessed on the basis of a total amount of DM 288 855, all the sums paid by the plaintiffs being included in the taxable consideration in accordance with the definition laid down in the law on real property transfer tax. The Tax Office justified its approach by reference to recent decisions of the Bundesfinanzhof according to which the contract of sale for a plot of land and the contract for the construction of a building must be regarded as a single transaction within the meaning of the law on property transfer tax in so far as each of the two partial contracts is devoid of purpose without the other.

Before the Finanzgericht [Finance Court] Düsseldorf the dispute between the parties turns on whether transfer tax may also be levied on the consideration for the construction of a building.

3. The Finanzgericht takes the view that the dispute raises problems concerning the interpretation of the abovementioned provisions of the Sixth Council Directive (No 77/388/EEC of 17 May 1977). It considers that it is necessary to determine in the first place whether the goods and services supplied by building contractors, skilled workers of the building trade (hereinafter referred to as 'building workers'), trustees and so on under the building contract are subject to value-added tax by virtue of the directive. It is then necessary to consider whether the double taxation of such deliveries and services as a result of the charging of transfer tax in addition to value-added tax is in conformity with Community law.

Accordingly the Finanzgericht Düsseldorf stayed the proceedings and, pursuant to Article 177 of the EEC Treaty, requested the Court to give a ruling on the following questions:

'(1) Does the supply of goods and services under a parcel of contracts offered by a promoter for work and services in connection with the construction of a building, including a contract to purchase land (the "Bauherrenmodell', or co-proprietors' building scheme), together with a transfer of land effected by another undertaking, constitute a single "supply of buildings or parts thereof, and of the land on which they stand" for the purposes of Article 13 B (g) and Article 28 (3) (b) in conjunction with point 16 of Annex F to the Sixth Council Directive on the

harmonization of turnover taxes (Directive No 77/388/EEC of 17 May 1977), or is value-added tax applicable under Article 2 (1) of that directive to the supply of such goods and services but not to the transfer of the land?

(2) If value-added tax is chargeable under Article 2 (1) of the Sixth Directive, does Community law prohibit double taxation so that no additional transfer tax (in this case the German tax on the transfer of real property) may be levied in respect of the aforementioned supply of goods and services?'

4. The order requesting a preliminary ruling was registered at the Court on 19 March 1985.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the government of the Federal Republic of Germany, represented by Martin Seidel and Ernst Röder, acting as Agents, and by the Commission of the European Communities, represented by Jürgen Grunwald, a member of the Commission's Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By an order of 11 November 1985, pursuant to Article 95 of the Rules of Procedure, the Court decided to assign the case to the Fifth Chamber.

II — Written observations submitted to the Court

1. *The first question*

The Federal Government and the Commission both take the view that supplies of goods and services under a 'Bauherren' scheme are subject to value-added tax by virtue of Article 2 (1) of the Sixth Directive and that they do not qualify for exemption from that tax either under Article 13 B (g) of the directive or — in so far as they do not concern the land transaction — under Article 28 (3) (b) in conjunction with point 16 of Annex F to the directive.

(a) The *Federal Government* states that the supplies of goods and services referred to in the national court's question, which are effected by different taxable persons, do not constitute a single 'supply of buildings or parts thereof, and of the land on which they stand' for the purposes of Article 13 B (g) and Article 28 (3) (b) in conjunction with point 16 of Annex F to the Sixth Directive. In its view such supplies are subject to VAT individually by virtue of Article 2 (1) of the directive.

Article 13 B (g) is not applicable because the exemption it provides for does not extend to the matters covered by Article 4 (3) (a), which refers to 'the supply before first occupation of buildings or parts of buildings and the land on which they stand'. Since the purpose of 'Bauherren' schemes is precisely to construct new buildings, exemption under Article 13 B (g) must be ruled out.

Exemption from VAT during the transitional period on the basis of Article 28 (3) (b) in conjunction with point 16 of Annex F for services supplied for consideration by contractors under the 'Bauherren' scheme is likewise excluded. Point 16 of Annex F does indeed refer to supplies of buildings and land as described in Article 4 (3), in other words the delivery of new buildings and the

land on which they stand. However, work done by building contractors and building workers in connection with the construction of a building cannot be regarded as constituting with the delivery of the land by the vendor only a single supply of a building, since in that respect Article 2 (1) applies to the various supplies of goods and services individually.

The Federal Government adds that the fact that the construction, the work done by the building workers and the land transactions, which are all operations carried out by different taxable persons, are economically linked does not affect the requirement laid down by the directive that they be assessed individually. The directive does not authorize exemption for the supply of buildings before first occupation unless the supply of the building and the land represents in law a single transaction, in other words where land which has been built on is supplied by a single taxable person.

The services relating to the construction of the building and the services provided by building workers, which are legally distinct from the land transaction and which are supplied by a taxable person other than the vendor of the land, cannot be reclassified as land transactions. Such a reclassification would be contrary to the principle of the equality of taxation and the requirement that taxation must be non-discriminatory from the point of view of competition, because it would mean that construction services would be exempted from turnover tax where the co-proprietor, as the recipient of the services, accepted a parcel of services, whereas construction services which were not parcelled together would be liable to tax. An exemption under Article 28 (3) (b) in conjunction with point 16 of Annex F can therefore be accorded only in respect of the supply of building land.

In conclusion the Federal Government proposes that the Court should reply to the first question as follows:

'Supplies of goods and services which are effected by different taxable persons must always be assessed separately for the purposes of turnover tax and cannot therefore be regarded as constituting only a single transaction. The fact that under a scheme such as the 'Bauherrenmodell' the recipient of services enters into a group of transactions (for example works contracts, contracts for the provision of services and a transfer of land) with a view to the construction of a building is immaterial in that respect. The labour and services supplied by the contractors are subject to value-added tax by virtue of Article 2 (1) of the Sixth Directive. They are not covered by the exemption provided for in Article 13 B (g) of the directive, and they cannot be exempted from value-added tax during the transitional period on the basis of Article 28 (3) (b) in conjunction with point 16 of Annex F to the directive.'

(b) The *Commission* expresses the view that all the supplies of goods and services under the scheme known as the 'Bauherrenmodell' are in principle subject to VAT under Article 2 of the Sixth Directive. However, it considers that it is necessary to determine whether one of the exemptions provided for by the directive applies.

In its view, Article 13 B (g) does not apply in this case because it excludes the goods described in Article 4 (3) (a), namely the supply of buildings or parts of buildings and the land on which they stand 'before first occupation' (new buildings). The same applies, *mutatis mutandis*, for the exemption laid down in Article 13 B (h) (the supply of land which has not been built on), which expressly excludes the building land described in Article 4 (3) (b).

The Commission adds that exemption is, on the other hand, accorded for 'the granting

and the negotiation of credit and the management of credit by the person granting it' and 'the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit' (Article 13 B (d) (1) and (2)). It follows that in so far as such transactions are part of a scheme such as the 'Bauherrenmodell', they are exempt from VAT.

The Commission points out that under Article 28 (3) (b) in conjunction with point 16 of Annex F Member States are authorized to 'continue to exempt' supplies of the buildings and land described in Article 4 (3) 'under conditions existing in the Member State concerned' during the transitional period referred to in Article 28 (4). In fact the period of five years (from 1 January 1978 to 31 December 1982) initially fixed in the first sentence of Article 28 (4) expired before the construction work at issue in these proceedings was effected. Nevertheless, by virtue of the second sentence of Article 28 (4) the transitional period must be deemed to have been extended for an indefinite period because the Council has yet to determine whether 'any or all of these derogations shall be abolished'.

The Commission adds, however, that Article 28 (3) (b) indicates that the exemption cannot be accorded at will but only under the conditions existing in the Member State concerned when the directive was adopted. Community law prohibits the unilateral extension by the Member States of their national practice regarding exemption after the adoption of the directive.

In the Federal Republic of Germany and in the sector with which this case is concerned, 'transactions subject to the Grunderwerbsteuergesetz [Law on real property transfer tax]' (paragraph 4 (9) (a) of the Umsatzsteuergesetz [Law on turnover tax] of 1973) were not liable to turnover tax when the directive was adopted. The decisions of the Bundesfinanzhof concerning real property transfer tax with regard to 'Bauherren' schemes have in the meantime effectively extended that exemption unlawfully, since services which were not previously exempt, such as those of building contractors, building workers, builders and trustees, are now exempted from turnover tax in addition to the land transaction.

In conclusion, the Commission proposes that the Court should reply to the first question as follows:

'The supply of goods and services under a parcel of contracts offered by a promoter for the construction of a building, including building contracts and contracts for the provision of services and a contract for the sale of a plot of land, (the scheme known as the "Bauherrenmodell") are subject to value-added tax by virtue of Article 2 (1) of Directive No 77/388/EEC.

In so far as transactions of the kind described in Article 13 B (d) (1) and (2) of the directive are effected in connection with a scheme such as the "Bauherrenmodell", such transactions are exempt from that tax. In addition, in accordance with Article 28 (3) (b) in conjunction with point 16 of Annex F to the directive, Member States may grant exemptions under the conditions laid down by national law in force when the directive was adopted.'

2. *The second question*

The *Federal Government* and the *Commission* both point out that according to Article 33 of the Sixth Directive the provisions of the directive do not prohibit the maintenance or introduction of 'stamp duty' [1] by the Member States.

The German Government adds that although in adopting the exemptions laid down in Article 13 B of the directive the Community legislature excluded in some

1 — Translator's note: 'Grunderwerbsteuer' [real property transfer tax] in the German version of Art. 33.

cases the double taxation of certain transactions which would result from the charging of turnover tax with other taxes, at the same time it deliberately tolerated such double taxation in others. In that respect the Sixth Directive has harmonized exemptions from turnover tax; it has not, however, harmonized the rules governing the collection of other taxes.

Nor does Article 33 of the directive limit the right of the Member States to levy transfer tax in connection with transactions involving new buildings and the land on which they stand, which are in principle subject to VAT and which, in accordance with Article 28 (3) (b) in conjunction with point 16 of Annex F and Article 4 (3) (a), may not be exempted after the expiry of a transitional period. The expiry of the transitional period removes the possibility of exemption; it does not, however, render unlawful the levying of transfer tax.

III — Reply to the questions put by the Court

In reply to the questions put by the Court in order to obtain additional information on the German legislation, the government of the Federal Republic of Germany stated as follows:

1. The German tax authorities continue to levy turnover tax on services supplied in connection with a 'Bauherren' scheme on the basis of a contract for the construction of a building (in other words the services of the building contractors and the building workers), even after the recent decisions of the Bundesfinanzhof concerning transfer tax. They take the view that the services of building contractors and building workers do not come within the scope of the exemption from turnover tax provided for in paragraph 4 (9) (a) of the Umsatzsteuergesetz.

2. Depending on the structure of the 'Bauherren' scheme, the administrative practice is based either on the assumption that the building contractors and the building workers supply their services directly to the individual co-propreitors, or that they supply them to the co-proprietors' association. In this case it is necessary to proceed on the assumption that since the work was entrusted to the building contractor by the co-proprietors as a group, they must be regarded as a single entity *vis-à-vis* third parties ('Außengesellschaft'), and, accordingly, as the recipient of the service provided by the building contractor.

(a) The service provided by the building contractor consists in the supply of a dwelling ready for occupation constructed on a plot of land belonging to the co-proprietors. That service is subject to VAT.

(b) Where the association of co-proprietors is — as in this case — the recipient of the building works, it must be assumed that it in its turn transfers the completed individual dwellings to the various co-proprietors. The latter transfer is subject to turnover tax only where the co-proprietors' association is to be regarded as a contractor within the meaning of paragraph 2 (1) of the Umsatzsteuergesetz (which corresponds to a taxable person within the meaning of Article 4 of the Sixth Directive). The general administrative practice is to recognize that the association may be regarded as a contractor.

(c) Where the association is deemed to be a contractor another question arises, namely whether the supply of the completed dwellings by the association to the various co-proprietors is liable to the tax or, on the contrary, exempted by virtue of paragraph 4 (9) (a) of the Umsatzsteuergesetz. The reply to that question is determined by reference to the nature and the extent of the service provided by the association (thus the supply of the dwelling without the land on which it stands is liable to the tax whereas the supply of a plot of land which has been built on is exempted).

(d) In accordance with paragraph 15 of the Umsatzsteuergesetz the association is entitled to the deduction of the prepaid tax

only where it is deemed to be a contractor and where the services which it provides are liable to the tax — and to that end, if necessary, it must waive the exemption provided for in paragraph 4 (9) (a) of the Umsatzsteuergesetz.

(e) Where the service provided by the association to its members is liable to VAT, a member may, by virtue of paragraph 15 of the Umsatzsteuergesetz, deduct as prepaid tax the tax thus invoiced to him separately if he is a contractor and uses the dwelling to carry out transactions subject to VAT.

The Federal Government then states that where, under a 'Bauherren' scheme, the building contractors and the building workers provide their construction services not to the association but directly to the members, those services are also subject to VAT. The members are entitled to deduct the prepaid tax under the same conditions as those set out under point (e).

3. By virtue of paragraph 2 (1) of the Umsatzsteuergesetz, the co-proprietors' association or its members are deemed to be contractors (in other words taxable persons within the meaning of the Sixth Directive) where they carry out independently and on a continuing basis an economic activity for the purpose of obtaining income therefrom.

(a) An association of co-proprietors satisfies that requirement where it intervenes as a single entity *vis-à-vis* third parties in the chain of services between the building contractor (and the building workers) and the co-proprietors and where it provides a continuing service.

(b) A co-proprietor is deemed to be a contractor when he lets out a dwelling which has been constructed; he is not when he uses it for his own accommodation.

IV — Oral procedure

At the sitting on 25 February 1986 oral argument was presented by the following: the plaintiffs in the main proceedings, represented by their Agent, F. J. Müsers; the defendant in the main proceedings, represented by its Agent, Rembert Schwarze; the Federal Republic of Germany, represented by Jochim Sedemund, Rechtsanwalt; and the Commission of the European Communities, represented by Jürgen Grunwald, a member of its Legal Department.

The Federal Government and the Commission essentially expanded upon the observations which they had submitted in the written procedure.

The plaintiffs in the main proceedings argued that supplies of goods and services under a 'Bauherren' scheme, with the exception of the land transaction, are subject to VAT by virtue of the Sixth Directive. In their view, the land transaction is, as such, exempt from VAT both on the basis of the Sixth Directive, which harmonizes exemptions, and on the basis of national law, which precludes the double taxation of a single transaction as the result of the charging of transfer tax and value-added tax. They consider, therefore, that in order to resolve this dispute it is necessary to separate the land transaction, referred to in Article 13 B (g) of the directive, from the supplies of goods and services subject to VAT.

The defendant in the main proceedings submitted observations *inter alia* concerning the recent decisions of the Bundesfinanzhof.

The Advocate General delivered his Opinion at the sitting on 22 April 1986.

Decision

1 By an order of 17 December 1984, which was received at the Court on 19 March 1985, the Finanzgericht [Finance Court] Düsseldorf referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of various provisions of the Sixth Council Directive (No 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 (Official Journal 1977, L 145, p. 1).

2 The questions were raised in proceedings between Hans-Dieter and Ute Kerrutt, a married couple, and the Finanzamt [Tax Office] Mönchengladbach-Mitte. The dispute concerns tax demands issued to the plaintiffs in the main proceedings for real property transfer tax on a building transaction known as the 'Bauherren-modell' [a co-proprietors' building scheme].

3 It appears from the order requesting a preliminary ruling and the explanations provided in the course of the proceedings that the transaction in question operated as follows: the Kerrutts and other persons desirous of building a home commissioned a firm of trustees to purchase on their behalf building land and to construct on it a residential building. By virtue of that contract, they acquired a co-proprietor's share of a plot of land which had not been built on. The division of property provided for in the Wohnungseigentumsgesetz [Law on the ownership of apartments] was lawfully completed and registered in the Land Register. In addition, all the co-proprietors, grouped together in a Bauherrengemeinschaft [an association governed by the Civil Code] concluded a contract with a construction company for the construction of the building. The Kerrutts also concluded on their own account a certain number of contracts, namely a contract for the supervision of building works, a contract for the management of let accommodation, a contract for the assembly of documentation for tax purposes, a contract of guarantee and a contract for the procurement of finance.

4 The plaintiffs in the main proceedings contest the tax demands in so far as the transfer tax was calculated on the basis of the consideration for all the various transactions, in accordance with certain recent decisions of the Bundesfinanzhof. According to those decisions, the contract for the sale of the land and the contract for the construction of the building must be regarded as a single transaction within the meaning of the law on transfer tax if each of the two partial contracts is devoid of purpose without the other. That view is disputed by the plaintiffs in the main proceedings who claim, on the contrary, that only the purchase of the land, and therefore not the construction of the building, is liable to transfer tax.

5 The national court takes the view that the dispute turns upon the interpretation of various provisions of the Sixth Directive (No 77/388/EEC), cited above. By virtue of a provision of national law, paragraph 4 (9) (a) of the Umsatzsteuergesetz [Law on turnover tax], transactions subject to the Grunderwerbsteuergesetz [Law on real property transfer tax] are exempt from turnover tax. It follows that if transfer tax is charged on all the transactions, in other words on the purchase of the land and the construction of the building, turnover tax cannot be levied on the supplies of goods and services of building contractors, building workers and the trustees, which could be contrary to the obligations arising under the Sixth Directive.

6 It is in those circumstances that the Finanzgericht Düsseldorf stayed the proceedings and referred to the Court for a preliminary ruling on the following questions:

'(1) Does the supply of goods and services under a parcel of contracts offered by a promoter for work and services in connection with the construction of a building, including a contract to purchase land (the "Bauherrenmodell", or co-proprietors' scheme) together with a transfer of land effected by another undertaking, constitute a single "supply of buildings or parts thereof, and of the land on which they stand" for the purposes of Article 13 B (g) and Article 28 (3) (b) in conjunction with point 16 of Annex F to the Sixth Council Directive on the harmonization of turnover taxes (Directive No 77/388/EEC of 17 May 1977), or is value-added tax applicable under Article 2 (1) of that directive to the supply of such goods and services but not to the transfer of the land?

(2) If value-added tax is chargeable under Article 2 (1) of the Sixth Directive,

does Community law prohibit double taxation so that no additional transfer tax (in this case the German tax on the transfer of real property) may be levied in respect of the aforementioned supply of goods and services?'

The first question

7 By the first question the national court seeks essentially to establish whether supplies of goods and services, other than the supply of the building land, under a parcel of contracts for work and services in connection with the construction of a building (the 'Bauherrenmodell') are subject to VAT by virtue of Article 2 (1) of the Sixth Directive, or whether they qualify for the exemptions in respect of the 'supply of buildings or parts thereof and the land on which they stand' provided

for in Article 13 B (g) and Article 28 (3) (b) in conjunction with point 16 of Annex F to the Sixth Directive.

8 The plaintiffs in the main proceedings submit, with regard to the first question, that the supplies of goods and services described in the question submitted by the national court are subject to VAT by virtue of the Sixth Directive. On the other hand they consider that the land transaction is exempt from that tax both under the Sixth Directive, which is intended to harmonize exemptions, and under a provision of national law prohibiting the double taxation of the same transaction by the imposition of transfer tax and value-added tax.

9 The Federal Government and the Commission both take the view that supplies of goods and services of the kind in question are subject as such to VAT in accordance with Article 2 (1) of the Sixth Directive and cannot be regarded as forming part of a 'supply of buildings or parts thereof, and the land on which they stand' for the purposes of Article 13 B (g) and Article 28 (3) (b) in conjunction with point 16 of Annex F to the Sixth Directive. Moreover, Article 13 B (g) does not apply to supplies of buildings and the land on which they stand before first occupation, in other words new constructions such as those built under the 'Bauherrenmodell'. The Commission notes in addition that the transitional provision in Article 28 (3) precludes any extension of the national practice regarding exemption decided unilaterally by the Member States after the date of the adoption of the directive.

10 It is common ground that supplies of goods and services under a scheme such as the Bauherrenmodell fall within the scope of Article 2 (1) of the directive as determined by the definitions of the expressions 'taxable persons' and 'taxable transactions' contained in Articles 4, 5 and 6 of the directive. Consequently, they are subject to VAT by virtue of Article 2 (1) unless they qualify for one of the exemptions provided for in the directive. In this case it is necessary to consider whether the exemptions laid down in Article 13 B (g) or Article 28 (3) (b) in conjunction with point 16 of Annex F to the directive apply.

11 According to Article 13 B (g) of the directive Member States must exempt under certain conditions which they are to lay down 'the supply of buildings or parts

thereof, and of the land on which they stand, other than as described in Article 4 (3) (a)'; Article 4 (3) (a) refers to supplies effected before first occupation. Under Article 28 (3) (b) Member States may 'continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned'. Point 16 of Annex F refers to 'supplies of those buildings and land described in Article 4 (3)'.

12 It must be noted in the first place that both the provisions providing for exemptions use the same expression, namely 'the supply of buildings or parts thereof and the land on which they stand'. Their applicability in a case such as that which is the subject of the main proceedings therefore depends on whether the supplies of goods and services in question for the construction of a building, together with the land transaction, constitute a single property transaction which may be regarded as falling within the scope of the expression 'supply of buildings . . . and the land on which they stand' because of the economic connection between the partial transactions concerned and their common aim, which is the construction of the building on the land purchased.

13 It is clear from the words 'supply of buildings . . . and the land on which they stand' that such a single transaction can be said to have taken place only where the two categories of goods supplied, namely the building and the land, are, for the purposes of the law governing the sale of property, the subject of a single delivery inasmuch as the delivery is of land which has been built on.

14 That view corresponds to the aim of the Sixth Directive. As the Federal Government stressed, in order to render tax non-discriminatory from the point of view of competition, the directive is intended to make separate taxable transactions which cannot be grouped together in a single transaction individually liable to VAT.

15 Those considerations lead to the conclusion that in this case supplies of goods and the services of contractors and building workers under a scheme such as the 'Bauherrenmodell', which are transactions legally separate from the land transaction which was completed with another contractor, cannot be regarded as forming, together with that transaction, a unity capable of being classified as a single 'supply of buildings or parts of buildings and the land on which they stand'.

16 It must be added that as regards in the first place the exemption provided for in Article 13 B (g), that article, in conjunction with Article 4 (3) (a), to which it refers, makes the exemption of the supply of buildings and the land on which they stand subject to the condition that the supply is not effected before first occupation; in other words it does not apply to new buildings. It follows that an exemption under that provision is precluded in this case since a scheme such as the 'Bauherrenmodell' caters by definition for the construction of new buildings.

17 Secondly, with regard to the possibility of exemption under Article 28 (3) (b) in conjunction with point 16 of Annex F it must be conceded that under that transitional provision Member States may 'continue to exempt' new constructions 'under conditions existing in the Member State concerned'. However, its wording precludes the introduction of new exemptions or the extension of the scope of existing exemptions after the date of the entry into force of the directive. A possible extension of transfer tax after the implementation of the directive, even if derived from the decisions of the courts, cannot therefore affect the scope of the exemption from turnover tax.

18 For all those reasons the reply to the first question must be that under a scheme such as the 'Bauherrenmodell' referred to in the order requesting a preliminary ruling the supply of goods and services under a parcel of contracts for work and services in connection with the construction of a building, except the supply of the building land, are subject to value-added tax by virtue of Article 2 (1) of the Sixth Council Directive (No 77/388/EEC of 17 May 1977).

The second question

19 By the second question the national court seeks essentially to establish whether Community law precludes a Member State from levying on a transaction already subject to VAT other taxes on transfers and transactions, such as, for example, the German 'Grunderwerbsteuer'.

20 The plaintiffs in the main proceedings submit in that respect that the Sixth Directive, which is intended to harmonize, *inter alia*, exemptions from VAT, would be deprived of its useful effect if a single property transaction could be taxed twice as a result of the application of both VAT and transfer tax.

21 On the other hand, the Federal Government and the Commission consider that the reply is to be found in Article 33 of the Sixth Directive which expressly authorizes the maintenance or introduction by the Member States of any taxes which cannot be characterized as turnover taxes, and in particular 'stamp duty'. The Federal Government states in addition that although by means of the exemptions which it lays down the directive in part excludes the double taxation of certain transactions, it allows such double taxation for other transactions.

22 The argument put forward by the Federal Government and the Commission must be accepted. Article 33 of the Sixth Directive states clearly that 'without prejudice to other Community provisions, the provisions of this directive shall not prevent a Member State from maintaining or introducing . . . stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes'. Since Community law as it now stands does not contain any specific provision excluding or limiting the power of Member States to introduce taxes on transfers and transactions other than turnover taxes, and thus permits concurrent systems of taxation, it must be concluded that such taxes may be levied even where, as in this case, charging them on a transaction which is already subject to VAT may result in the double taxation of that transaction.

23 In reply to the second question it must therefore be stated that no provision of Community law prohibits a Member State from levying on a transaction which is subject to value-added tax under the Sixth Directive other taxes on transfers and transactions, such as the German 'Grunderwerbsteuer', provided that such taxes cannot be characterized as turnover taxes.

Costs

24 The costs incurred by the German Government and the Commission, which have submitted observations to the Court, are not recoverable. Since the proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 reply to the questions referred to it by the Finanzgericht Düsseldorf by an order of 17 December 1984, hereby rules:

(1) **Under a scheme such as the 'Bauherrenmodell' referred to in the order requesting a preliminary ruling the supply of goods and services under a parcel of contracts for work and services in connection with the construction of a building, except the supply of the building land, are subject to value-added tax by virtue of Article 2 (1) of the Sixth Council Directive (No 77/388/EEC of 17 May 1977).**

(2) **No provision of Community law prohibits a Member State from levying on a transaction which is subject to value-added tax under the Sixth Directive other taxes on transfers and transactions, such as the German 'Grunderwerbsteuer', provided that such taxes cannot be characterized as turnover taxes.**

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 8 July 1986.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber