

Conclusions  
OPINION OF ADVOCATE GENERAL  
JACOBS  
delivered on 6 June 2002 (1)

**Case C-315/00**

Rudolf Maierhofer  
v  
**Finanzamt Augsburg-Land**

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1. In this reference from the Bundesfinanzhof (Federal Finance Court), Germany, the Court is asked for guidance on the interpretation of the term immovable property within the meaning of Article 13B(b) of the Sixth VAT Directive. (2)

The relevant Community legislation

2. Under Article 2 of the Sixth Directive, a supply of goods or services effected for consideration by a taxable person acting as such is to be subject to VAT.

3. According to Article 4(1), a taxable person is a person who carries out an economic activity. According to Article 4(2) economic activities include the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis. Article 4(3) allows the Member States to also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in Article 4(2) and in particular one of the following:

(a) the supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand ... A building shall be taken to mean any structure fixed to or in the ground;

(b) the supply of building land. Building land shall mean any unimproved or improved land defined as such by the Member States.

4. Article 5(1) defines a supply of goods as the transfer of the right to dispose of tangible property as owner. Article 6(1) defines a supply of services as any transaction which does not constitute a supply of goods.

5. Article 13B lists a number of exemptions from VAT, including:

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;
2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;
4. hire of safes.

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

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

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

6. Under Article 13C Member States may allow taxpayers a right of option for taxation in cases of:

(a) letting and leasing of immovable property;

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

The relevant national legislation

7. Paragraph 4(12)(a) of the Umsatzsteuergesetz (Law on turnover tax, the Law) (3) provides for the exemption from turnover tax of the letting or leasing of immovable property [Grundstücke].

Several exclusions from that exemption are then laid down, which more or less reflect those exclusions set out in Article 13B(b)(1) to (3).

8. The first sentence of Paragraph 94(1) of the Bürgerliches Gesetzbuch (German civil code, BGB) provides: The essential components of immovable property [Grundstück (literally, a plot of land)] include tangible property [Sachen] firmly attached to the ground [Grund und Boden], in particular buildings ...

9. Paragraph 95(1) of the BGB provides: The components of immovable property do not include tangible property which is attached to the ground only for a temporary purpose ....

The facts and the main proceedings

10. The case concerns the status for the purpose of the exemption in Article 13B(b) of two transactions entered into between Mr Maierhofer and the Free State of Bavaria. The referring court describes the facts in the order for reference as follows.

11. Mr Maierhofer let to the Free State of Bavaria various buildings to provide communal accommodation for the temporary housing of asylum-seekers. It was agreed that the length of the two leases concerned was to be a minimum period of five years, subject to possible extension, and that the land was to be completely cleared and returned once the letting by Mr Maierhofer came to an end.

12. Some of the buildings were on land which Mr Maierhofer had rented from the city of Bamberg; others were on land which the Free State of Bavaria had rented from the city of Bayreuth. The precise nature of the arrangements in the latter case are not clear. It appears from the order for reference and from what was stated at the hearing by Mr Maierhofer's counsel that the land was made available to Mr Maierhofer without a formal lease or the requirement to pay any consideration. However, the order for reference states that Mr Maierhofer let the accommodation together with the necessary land.

13. Mr Maierhofer had constructed the single-storey and two-storey buildings from prefabricated components. The buildings stood on a concrete base erected on concrete foundations sunk into the ground. The walls were made of panels and secured by bolts embedded in the foundations. The roofs were tile on timber. The floors and walls of the bathroom and kitchen areas were tiled. The construction system was such that the structure placed on the foundations could be dismantled at any time by a team of eight persons within a period of 10 days and be re-used elsewhere.

14. Mr Maierhofer did not deduct input tax when the buildings were erected in 1992. In respect of the years in contention, covering the period from 1993 to 1995, he declared tax-exempt turnover (namely the rent he received from the Free State of Bavaria) arising from the letting of immovable property. The Tax Office assessed Mr Maierhofer's turnover to tax on the ground that what he had let was not immovable property but merely buildings constituting pseudo-components (Scheinbestandteile). In making that assessment, the Tax Office also took amounts of input tax into account.

15. The finding of the Tax Office reflects the case-law of the Bundesfinanzhof, which until now has

held that the notion of immovable property in Paragraph 4 of the Law must be interpreted in accordance with civil law, and hence by reference to the rules of the BGB. The notion has accordingly been regarded as encompassing buildings and parts of buildings since pursuant to the first sentence of Paragraph 94(1) of the BGB they are essential components of immovable property if they are firmly attached to the ground. However, pursuant to the first sentence of Paragraph 95(1) of the BGB even buildings and parts of buildings are not components of immovable property where they are attached to the ground only for a temporary purpose. The letting of such pseudo-components has thus not been regarded as a letting of immovable property within the meaning of the exemption in Paragraph 4 of the Law.

16. On appeal the Finanzgericht (Finance Court) confirmed the Tax Office's assessment and found that the buildings leased were not component parts of immovable property since they were attached to the land only for a temporary purpose. Under the agreements governing the provision of the land, Mr Maierhofer was obliged to return the plots of land in question duly cleared. Nor did the owners of those plots of land have any option to take over the buildings. Since the buildings fell to be classified as pseudo-components, Mr Maierhofer had let movable property and was not entitled to claim the benefit of the exemption.

17. Mr Maierhofer has appealed to the Bundesfinanzhof. In its order for reference that court, apparently reconsidering the previous case-law, states that the notion of the letting of immovable property contained in Article 13B(b) of the Sixth Directive is an autonomous concept of Community law. Even though Article 13B(b) allows the Member States a wide measure of discretion as to whether a transaction is to be exempt or taxed, (4) the interpretation of the concept of immovable property cannot depend on the civil law of a Member State since it would then be impossible to ensure the uniform application of the provision in all the Member States.

18. The Bundesfinanzhof observes also that, according to the case-law of the Court of Justice, the term letting of immovable property covers the letting of buildings (5) but not the letting of tents, caravans or mobile homes. (6) The criteria for a letting of immovable property have thus not yet been clarified. It cannot therefore be excluded that the term immovable property used in Articles 9(2)(a) and 13B(b) of the Directive indicates, in accordance with its literal meaning, an immovable object which is firmly (fest) attached to the land, as distinct from objects which can be moved. If that is correct, a letting of buildings constructed for temporary purposes will constitute a letting of immovable property since the relevant provision does not prescribe a specific period of attachment to the land.

19. If that is the case, the Bundesfinanzhof raises the further question whether it is also the position where the lessor lets only the building and not the land on which it has been erected. In the context of the letting by Mr Maierhofer of the building on land belonging to the City of Bayreuth, the Free State of Bavaria, as tenant, had taken a lease of that land and merely permitted Mr Maierhofer to erect the building on it. It cannot be ruled out that the letting in that case did not therefore relate to immovable property.

20. The Bundesfinanzhof has accordingly referred the following questions for a preliminary ruling:

1. Does the term letting of immovable property in Article 13B(b) of Directive 77/388/EEC cover the provision for consideration of a building constructed from prefabricated components which is to be removed following the termination of the contract and may be re-used on another site?
2. Is it of any significance in that connection whether the lessor makes available to the lessee both the building and the land on which it is erected, or merely the building, which he has erected on the lessee's land?

21. Mr Maierhofer, the German Government and the Commission have submitted written observations to the Court and, together with the United Kingdom Government, were represented at the hearing.

The first question referred

22. The Bundesfinanzhof asks whether the term letting of immovable property in Article 13B(b) covers the provision for consideration of a building constructed from prefabricated components which is to be removed following the termination of the contract and may be reused on another

site.

23. It follows from the order for reference taken as a whole and the factual context that the referring court's doubts concern mainly the interpretation of the term immovable property rather than the classification of the transactions between Mr Maierhofer and the Free State of Bavaria as lettings. The main issue is therefore whether the term immovable property in Article 13B(b) includes buildings such as those in issue in the main proceedings.

24. Mr Maierhofer, the United Kingdom and the Commission consider that such buildings constitute immovable property for the purposes of Article 13B(b). The German Government submits in the first place that the question is irrelevant and, in the alternative, that such buildings do not constitute immovable property for the purposes of Article 13B(b).

Relevance of the question

25. The German Government's main submission is that the first question is irrelevant because the German legislature has, in accordance with the second indent of Article 13B(b) of the Directive, provided for a further derogation from the scope of the exemption from VAT. It has so legislated by way of administrative instructions prepared by the Bundesfinanzministerium (the federal ministry of finance) which require the agreement of the Bundesrat, the second parliamentary chamber. Those instructions apparently reflect the case-law of the Bundesfinanzhof referred to in paragraph 15 above to the effect that the notion of immovable property in Paragraph 4(12)(a) of the Law must be interpreted in accordance with civil law, and hence by reference to the BGB including the provisions on pseudo-components. The instructions accordingly state that there is no letting of immovable property where the buildings let are attached to the ground for a temporary purpose only and that the letting of prefabricated dwelling units may thus be subject to VAT.

26. I cannot accept that argument.

27. I considered the scope of the option in Article 13B(b) in my Opinion in *Henriksen*, (7) where I expressed the view that, although the discretion conferred by that provision is broad and the question whether the exclusion has been extended in a particular way is a question of interpretation of the national legislation and is a matter for the national courts, it is plain from the scheme and structure of the Directive that, on the proper interpretation of its provisions, the national legislation cannot have that effect unless it contains its own specific provisions to that effect. Where the national legislation does no more than reproduce the provisions of the Directive, with its specific exemptions and specific exclusions, then the legislation must be interpreted in accordance with those provisions, and it is not open to the national tax authorities to apply any further exclusions unless the Member State has adopted additional legislative measures to extend liability to VAT to such lettings.

28. As Mr Maierhofer and the Commission submit, the alleged exception for pseudo-components cannot be considered to have been enacted by the German legislature and cannot therefore be regarded as an exercise by Germany of its option to limit the exemption under Article 13B(b). That exception is based on principles developed by the courts and reflected in certain administrative instructions. It appears from what was stated at the hearing that those instructions are binding neither on the courts nor on the Government: they are simply criteria to be applied by the administration. They are not adopted by the Bundesrat although they require its approval. Administrative guidelines cannot modify primary legislation such as the Law. (8) This approach seems to be confirmed by the fact that the Bundesfinanzhof made no mention of the guidelines in its order for reference. *The term immovable property in Article 13B(b)*

29. It will be recalled that the buildings in issue

?were constructed as single-storey and two-storey buildings from prefabricated components,  
?stood on a concrete base erected on concrete foundations sunk into the ground and were secured by bolts embedded in those foundations,

?had tiled bathroom and kitchen walls and roofs which were tile on timber,

?could be dismantled by a team of eight persons within a period of ten days and be re-used elsewhere,

?were let for a minimum period of five years subject to possible extension and were to be removed

following the termination of the contract.

30. The German Government submits that the provision of pre-fabricated buildings does not constitute the letting of immovable property within the meaning of Article 13B(b). It notes, first, that most of the language versions of Article 13B(b), although not the German version, refer to the immovable nature of the property: the pre-fabricated buildings supplied by Mr Maierhofer may however be dismantled and rebuilt elsewhere. Moreover the buildings at issue in the present case are comparable to the tents, caravans, mobile homes and light-framed leisure dwellings in *Commission v France* : (9) even though fixed to the ground, they can be dismantled without damage at any point and put up again on another plot. Finally, the common feature of the transactions expressly excluded from the exemption in Article 13B(b) is that they entail more active exploitation of the immovable property justifying further taxation in addition to that levied upon its initial sale. (10) On that basis the letting of pre-fabricated houses cannot be exempt within the meaning of Article 13B(b): buildings which are put up on a temporary basis only and which may be dismantled without damage may be used on several plots; the operation therefore generates added value going well beyond the mere letting of immovable property and is hence comparable to the exceptions to the exemption from tax laid down in Article 13B(b).

31. I am not convinced by those arguments and agree with Mr Maierhofer, the United Kingdom Government and the Commission that buildings such as those in issue in the main proceedings must be regarded as immovable property for the purposes of Article 13B(b).

32. The only property that is inherently immovable is land itself: even conventional buildings intended to be permanent fixtures may in many cases be removed and re-erected if sufficient care is taken. On the other hand there are clearly different degrees of movability of property other than land: a true building with walls and foundations will, in view of the costs, only very exceptionally be moved whereas a circus tent's core function is precisely to be movable.

33. The question whether buildings or other literally movable objects are in legal terms immovable property may in principle be answered either by objective criteria relating to the quality of the attachment of the object under consideration to the land on which it stands, such as for example the strength of the attachment ( firmly attached) or its inseverability ( inseverably attached), or by subjective criteria such as the intended duration of the attachment.

34. The Sixth Directive does not expressly define the concept of immovable property. (11) Nor does it leave that definition to the legal orders of the Member States. (12) Since according to settled case-law it follows from the 11th recital of the preamble to the Sixth Directive that the exemptions provided for in Article 13 of the Directive have their own meaning which must in principle be independent from the civil law concepts of individual Member States, the terms used to specify the exemption in Article 13B(b) must be given a Community definition. (13)

35. I consider that the word immovable must be the starting point and basis of the analysis of the term immovable property. Whilst the German version uses the word *Grundstück* which means literally plot of land, all the other language versions of the directive use a term equivalent to immovable.

36. It can be deduced from the existing case-law that the term letting of immovable property in Article 13B(b) covers not only the letting of land but also the letting of conventional buildings and parts of such buildings. This is implicit in the many judgments (14) concerning other aspects of the interpretation of Article 13B(b) in which neither the Court nor the parties raised doubts about the classification of conventional buildings as immovable property. There is as yet however no relevant guidance from the Court on the criteria to be applied in borderline cases: although the ruling in *Commission v France* (15) indirectly concerned the issue whether tents, caravans, mobile homes and light-framed leisure dwellings were immovable property for the purpose of Article 13B(b), its value as a precedent is limited since France did not contest the Commission's action and there is therefore no analysis of the infringement.

37. In order to determine the meaning of immovable in Article 13B(b), subjective criteria such as the intended duration of the attachment should in my view not be taken into account. It will be recalled that the emphasis in the German legislation is on the intended temporary nature of the

attachment of the buildings to the ground and it is clear from the order for reference that that issue is the central concern of the referring court. Intention is however a notoriously fickle criterion since subjective criteria raise problems of verification. It cannot necessarily be assumed that, simply because it is intended when a building is erected that it should not remain permanently on its site the building will in fact subsequently be removed: many pre-fabricated buildings put up in the immediate aftermath of the Second World War expressly as a temporary measure to alleviate the then housing crisis remain standing today. Moreover nothing in the Sixth Directive supports the use of subjective criteria for determining the borderline between immovable and movable tangible property. On the contrary, Article 4(3)(a) defines building objectively as any structure fixed to or in the ground. Finally, in particular in the area of taxation legal certainty is of paramount importance and subjective criteria tend to undermine legal certainty.

38. It is desirable therefore that the criterion for determining whether a building or similar structure constitutes immovable property within the meaning of Article 13B(b) should be objective. In my view the correct criterion is ? as submitted in particular by the United Kingdom Government and the Commission ? whether the structure is firmly fixed to or in the ground. I reach that conclusion on the basis that the term immovable property in Article 13B(b) must be construed in the light of the concepts used in Article 4(3).

39. Article 13B(b) exempts the leasing or letting of immovable property from VAT; Article 13B(g) exempts the supply, other than as described in Article 4(3)(a) (and hence other than before first occupation), of buildings or parts thereof and of the land on which they stand. Article 13B(g) accordingly exempts second-hand sales of buildings, parts of buildings and the land on which they stand; in parallel, Article 13B(b) exempts the letting of immovable property. It is clear from the wording of Article 13B(g) that the terms used in that provision must be construed in accordance with Article 4(3), which refers to the concepts of land and building and defines building as any structure fixed to or in the ground. The concepts of land and buildings as described in Article 4(3) therefore constitute in my view the two basic elements of the concept of immovable property in Article 13B(b). If the Community legislature had wished to keep certain buildings as defined in Article 4(3) outside the concept of immovable property in Article 13B(b) ? and hence at the same time to exempt pursuant to Article 13B(g) the supply of certain structures firmly fixed to or in the ground while keeping the same structures outside the scope of the parallel exemption in Article 13B(b) ? it is unlikely in my view that the directive would not have spelt that out explicitly. (16)

40. I do not therefore accept the German Government's proposal to adopt the stricter criterion of an inseverable attachment to the ground. I have already explained above that even conventional buildings may be removed and re-erected elsewhere. It is thus not in my view appropriate to construe the term immovable as meaning inseverable from the ground: that test might not only entail the exclusion of practically all buildings but also require a complex assessment of whether a given building could in fact be removed and re-erected.

41. Nor do I consider that it is correct to assume that the letting of structures which are firmly fixed to or in the ground but which may be removed and re-erected elsewhere necessarily entails a more active exploitation of property comparable to the transactions listed in Article 13B(b)(1) to (4). In the present case for example Mr Maierhofer merely lets the buildings in issue to the Free State of Bavaria; in so doing he does not exploit the property more actively than he would if the letting were of a conventional building which he had constructed. Admittedly it is possible that the buildings in issue could be dismantled at the end of each lease and be re-erected and relet on other plots of land; the German Government appears concerned that the value added to the land in question by each such transaction would ? but should not ? escape VAT. However the likelihood of such a sequence of events is to my mind merely hypothetical, and as such cannot without undermining legal certainty influence the correct classification of a building at a given time as immovable property for the purpose of Article 13B(b).

42. In my view, buildings such as those in issue must be regarded as firmly fixed to or in the ground within the meaning of the suggested criterion. The buildings stand on a concrete base erected on concrete foundations sunk into the ground and are secured by bolts embedded in those

foundations. It appears that they were solidly built in order to last at least five years. It would take a team of eight persons a period of ten days to dismantle them. They may thus be distinguished from tents, caravans and mobile homes which are both inherently mobile and less firmly attached to the ground.

43. I accordingly conclude that the term immovable property in Article 13B(b) of the Sixth Directive covers buildings constructed from prefabricated materials such as those in issue in the main proceedings if they are firmly fixed to or in the ground.

The second question referred

44. In its second question the Bundesfinanzhof asks essentially whether it is of any significance to that analysis whether the lessor makes available to the lessee both the building and the land on which it is erected or merely the building which he has erected on the lessee's land.

45. Mr Maierhofer and the Commission are of the view that that circumstance is irrelevant: the criteria for determining whether a given building is immovable property, and hence whether a letting of the building is exempt by virtue of Article 13B(b), do not include the ownership of the land on which it stands.

46. The German Government makes no observations on the second question. The United Kingdom however submits that the ownership of the land on which the buildings are constructed is very significant for classification of the transaction for the purposes of Article 13B(b). In essence, unless Mr Maierhofer was in a position to convey the land as well as the buildings to the Free State of Bavaria the transactions cannot be regarded as the leasing or letting of immovable property and he should simply be regarded as having erected buildings and hence made a taxable supply of construction services.

47. To my mind, however, there is nothing in Article 13B(b) to suggest that the criteria for determining what constitutes the leasing or letting of immovable property for the purposes of that provision include the pattern of ownership of the land and any building thereon.

48. Nor am I persuaded by the argument of the United Kingdom to the effect that extreme consequences will follow if a letting of a building on land not owned by the lessor may be exempt under Article 13B(b). The United Kingdom suggests that in that case a contractor engaged by a householder to replace the roof of his house ? or even just one tile of the roof ? could argue that his services should come within the exemption because the house itself was immovable property. The United Kingdom accepts that the parties in that example would have to structure their payment arrangements to look like a lease, but submits that that would not present a difficulty in commercial terms so long as the price reflected payment over time. It accordingly concludes that vast amounts of construction work could be brought within the exemption in Article 13B(b).

49. However, as the United Kingdom itself submitted at the hearing in a slightly different context, it is settled case-law that it is the inherent nature of the activity in question which governs its tax status and not the form of the arrangements between the parties. The Court has recently given guidance on the scope of the concept letting and leasing. First, it has stated that that term cannot be considered to cover contracts in which the parties have not agreed on any duration for the right of enjoyment of the immovable property, which is an essential element of a contract to let. (17) Second, it has ruled that the letting of immovable property for the purposes of Article 13B(b) essentially involves the landlord of property assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it. (18) I cannot therefore see how maintenance or construction work involving a building risks being construed as a leasing or letting of immovable property within the meaning of Article 13B(b).

50. I accordingly conclude on the second question referred that it is not relevant to the question whether the letting of a building falls within the exemption in Article 13B(b) whether the lessor makes available to the lessee both the building and the land on which it is erected or merely the building which he has erected on the lessee's land.

Conclusion

51. In the light of the above I am of the opinion that the Court should reply to the questions referred by the Bundesfinanzhof as follows:

- (1) The letting of immovable property within the meaning of Article 13B(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes ? Common system of value added tax: uniform basis of assessment covers the letting of buildings constructed from prefabricated materials such as those in issue in the main proceedings if they are firmly fixed to or in the ground.
- (2) It is not relevant to the question whether the letting of a building falls within the exemption in Article 13B(b) whether the lessor makes available to the lessee both the building and the land on which it is erected or merely the building which he has erected on the lessee's land.
- 1 – Original language: English.
- 2 – 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.
- 3 – BGBl. 1993 I, p. 565.
- 4 – Case C-12/98 *Amengual Far* [2000] ECR I-527.
- 5 – Case C-346/95 *Blasi* [1998] ECR I-481.
- 6 – Case C-60/96 *Commission v France* [1997] ECR I-3827.
- 7 – Case 173/88 *Henriksen* [1989] 2763, paragraph 22.
- 8 – See by analogy Case 167/73 *Commission v France* [1974] ECR 359, paragraphs 41 and 42 of the judgment, and Case 116/86 *Commission v Italy* [1988] ECR 1323, paragraph 14.
- 9 – Cited in note 6.
- 10 – . *Blasi* , cited in note 5, paragraph 16 of my Opinion.
- 11 – See for such an express definition the definition of a building in Article 4(3)(a).
- 12 – See by contrast the concept of building land in Article 4(3)(b) which shall mean any unimproved or improved land defined as such by the Member States and the concept of land on which [building or parts of buildings] stand in Article 4(3)(a) of which the Member States may determine the conditions of application.
- 13 – See for example Case C-358/97 *Commission v Ireland* [2000] ECR I-6301, paragraph 51 of the judgment, and Case C-359/97 *Commission v United Kingdom* [2000] ECR I-6355, paragraph 63, and the cases there cited.
- 14 – See for example *Blasi* , cited in note 5, Case C-326/99 *Goed Woenen* [2001] ECR I-6831, Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, Case C-409/98 *Mirror Group* [2001] ECR I-7175, Case C-63/92 *Lubbock Fine* [1993] ECR I-6665 and *Amengual Far* , cited in note 4.
- 15 – Cited in note 6.
- 16 – In further support of that construction it is interesting to note that the French, Portuguese and Spanish versions of Article 4(3)(a) use two terms without distinction in the same paragraph, one corresponding to building and the other being closer to immovables.
- 17 – . *Commission v Ireland* , cited in note 13, paragraph 56 of the judgment, and *Commission v United Kingdom* , also cited in note 13, paragraph 68.
- 18 – . *Mirror Group* , cited in note 14, paragraph 31 of the judgment, and *Cantor Fitzgerald International* , also cited in note 14, paragraph 21, and the cases there cited.