Conclusions
OPINION OF ADVOCATE GENERAL
FENNELLY
delivered on 14 December 1995 (1)

Case C-468/93

Gemeente Emmen
v
Belastingdienst Grote Ondernemingen, Groningen

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1. How is building land to be defined for value added tax (hereinafter VAT) purposes? The Sixth VAT Directive exempts sales of land generally, but building land is an exception. A flood of claims for repayment of VAT charged on the sale of land by local authorities in the Netherlands has given rise to the present reference for a preliminary ruling from the Gerechtshof, Leeuwarden. We are informed that it is a test case. (2) Because the Dutch courts have had to apply a pre-existing criterion of preparation of land, in the absence of any national legislative or other formal definition, the Court is being asked to provide answers to a number of questions regarding the interpretation of building land.

I ? The relevant legislation

The Community measures

2. The bedrock of the Community VAT system is the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ? Common system of value added tax: uniform basis of assessment (hereinafter the Sixth Directive). (3) Article 13 is the first article of the Sixth Directive dealing with exemptions. It concerns exemptions that Member States are obliged to apply internally within their territories. At Article 13B it provides as follows: Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:...

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

3. The primary purpose of Article 4(3) is to permit Member States, at their discretion, to treat as taxable persons those who, though on an occasional basis, engage in the supply of buildings (Article 4(3)(a)) (4) and the supply of building land (Article 4(3)(b)). It is only the definition, in the latter provision, of building land, borrowed as it is for the purpose of Article 13B(h), which is relevant to the present case. It says: Building land shall mean any unimproved or improved land defined as such by the Member States.

The national measures

4. Article 11(1)(a)(1) of the Wet op de Omzetbelasting (Turnover Tax Law) 1968 (5) (hereinafter the 1968 Law) provides:
1. The following shall be exempt from tax on conditions to be determined by [us] (6) by general administrative measures:
(a) the supply of immovable property, with the exception of:
(1) the supply of a prepared immovable which takes place before or no later than two years after the immovable is put into use for the first time.
5. Pursuant to Article 3 of the Uitvoeringsbeschikking omzetbelasting (decision applying the 1968 Law) of 30 August 1968 (7) public law bodies, such as the Gemeente Emmen, are considered to be taxable persons in so far as they are involved in the transfer or servicing of plots of land. In cases where VAT is applicable, no liability to pay transfer taxes will arise pursuant to the Wet op Belastingen van Rechtsverkeer (Law on the Taxation of Legal Transactions) 1970. (8)
II ? Factual circumstances and procedure
6. In June 1992 the Gemeente Emmen (the Commune of Emmen), the appellant in the main proceedings (hereinafter the appellant), supplied eight plots of unbuilt land at a price which included a charge for VAT. In its subsequent tax return it included and paid a sum of HFL 67 542 VAT in respect of these supplies. With the written consent of the relevant tax inspector the appellant brought an appeal against its liability to pay that sum to the Belastingdienst Grote Ondernemingen, the respondent in the main proceedings (hereinafter the respondent). The lots at issue were all previously designated for agricultural use, but were redesignated for building use prior to their transfer and, on the appellant's instructions, the implementation of a re-zoning plan had been commenced involving, *inter alia* , the laying of pipes necessary for the provision of services, the excavation of drains, the installation of a sewerage system and other operations. (9)
7. The dispute was brought before the Gerechtshof, Leeuwarden (Regional Court of Appeal, Leeuwarden, hereinafter the national court), where the essential issue between the appellant and the respondent was whether the eight plots should be treated as land prepared for use (vervaardigde onroerende zaken) within the meaning of the 1968 Law. The appellant argued before the national court that the works carried out did not transform the plots into such land and, thus, that VAT was not payable. The respondent argued that, either because the services had been provided for each plot or because preparatory work had been carried out on each plot, they had been properly classified as land prepared for use and accordingly subject to VAT.
8. The national court explains in its order for reference that, for the purposes of implementing the Sixth Directive, the Netherlands has opted to adapt the notion of a prepared immovable (vervaardigd onroerend goed), already employed in the 1968 Law, and apply it to the supply of land, supposedly in implementation of the Sixth Directive. The result was that the VAT exemption on the supply of land under the Sixth Directive was available in the Netherlands unless the property could be regarded as prepared for use within the meaning of the 1968 Law. The national court refers to a judgment of the Hoge Raad (the Supreme Court of the Netherlands) of 21 November 1990 (10) (the 1990 Decision), deciding that, for that purpose building land (bouwterrein) is to be understood as referring exclusively to improved land (bouwrijp gemaakte terreinen). (11) The national court states that the Hoge Raad relied on an earlier judgment of 12 March 1980 (hereinafter the 1980 Decision) where a strict interpretation was given. (12)
9. The national court considers that the 1980 Decision concerned matters (presumably facts occurring) prior to the adaptation by the Netherlands of its system to that prescribed by the Sixth Directive. Furthermore, it states that, as exceptions to tax exemptions permitted by the Sixth Directive are not to be interpreted strictly, assistance can no longer be obtained from the 1980 Decision in order to interpret the term improved land. (13) Its approach is, therefore, that, in the absence of a more precise definition in the Netherlands legislation of the concept of building land, one must look to Articles 13B(h) and 4(3)(b) of the Sixth Directive for the meaning of improved land.
10. As this approach involves the interpretation of Community law, the national court opted to refer the following questions to the Court:

I(a) Are the words improved land as used in Article 4(3)(b) of the directive to be understood as meaning only land where the soil itself has been prepared and/or for which provisions have been made which are of use exclusively for the land itself, or
(b) In view of the fact that exceptions to exemptions must be interpreted widely, is there improved land where land has been designated as described in section 2.3 (14) and prior to the supply and first use of that land basic commodities have already been provided for, such as:
? excavation of drains and the laying of a sewerage system and streets:
? installation of facilities as described in section 2.3.
14The facilities which are referred to comprise the supply by the various utility undertakings, such as telecommunications, gas, water and electricity, of their central antenna which would normally involve digging ditches, laying pipes, wires, or both, and then refilling the said ditches. It is clear from the order for reference that the national court does not wish to emphasize the differing extent of the actual works carried out on each of the eight lots of land at issue in the main proceedings.
II If the answer to Question I(a) is yes, must both the conditions set out therein be satisfied? Does that mean that designated land for which the facilities referred to at I(b), above, have been provided by means of one or more of the operations described at (a) to (f), below, becomes improved land?
(a) The laying of the abovementioned facilities within the boundaries of the land;
(b) The installation of a standpipe and a distributor on the main sewer connected to or situated on the land, or the connection of the land to the distributor;
(c) The installation for the land of a surface inlet to the main sewer;
(d) The raising of the land by adding soil brought in for the purpose;
(e) The laying of drainage pipes in accordance with the designation but outside the boundary of the land;
(f) The filling-in of a ditch within the boundary of the land by soil brought in.
III ? Observations submitted to the Court
11. In accordance with Article 20 of the Statute of the Court, the appellant, the Dutch Government and the Commission submitted written observations and also appeared at the hearing. Their submissions may be summarized as follows.
The appellant
12. According to the appellant the problem raised by the national court's questions concerns the conditions under which VAT may be levied on the transfer of a plot of land which has not been built upon at the moment of its transfer, but which is nevertheless destined for construction. The appellant maintains that the Netherlands has failed correctly to implement the Sixth Directive as a result of its decision not to define, as required by Article 4(3)(b), the notion of building land. To support this argument, it refers to Article 1, which obliges Member States to modify their pre-existing VAT systems so as to ensure their compliance with the system established by the Sixth Directive by 1 January 1979. (16)
13. According to the appellant the reference in the 1968 Law to the supply of a prepared immovable does not properly define the concept of building land. (17) The interpretation of this notion was governed (at least at an administrative level), prior to the entry into force of the Sixth Directive, by a ministerial circular pursuant to which the supply of land was subject to VAT whenever it was cleared out or improved (ontgonnen or bouwrijp gemaakt). (18) Improved land was understood to include not only land which had itself been improved, but also land which was prepared (for example by the provision of means of access) and rendered suitable for subsequent construction. This interpretation of the land which could be subject to VAT was, according to the appellant, expressly retained following the entry into force of the Sixth Directive. (19)
14. The appellant maintains that, in the light of the legal uncertainty arising from the lack of a specific implementation of Article 4(3)(b) of the Sixth Directive, the national court was correct to consider it necessary to turn to Community law for guidance as to what could be considered as building land. According to the appellant, to be regarded as improved land, the site must be designed to serve as a location for one or several buildings. It claims that the provision calls for a

distinctive definition of the concept of improved land so as to differentiate it from the concept of unimproved land, which is also contained in the same indent, for the overall purpose of defining the concept of building land. It, thus, argues that not all unbuilt land which is destined for construction ought to be subject to VAT. In particular, unbuilt land should not be considered to be building land within the meaning of Article 4(3)(b), unless it is designed to serve as a site for the construction of one or several buildings and has been improved by the execution of extensive physical work on the land itself.

15. To support this approach, reliance is placed, by way of analogy, on the definition furnished by the Sixth Directive of the concept of supply (20) (levering) which Member States may consider, pursuant to Article 5(5)(b) of the Sixth Directive, to include ... the handing over of certain works of construction. (21) The appellant maintains that the use, in Article 4(3)(b), of the term improved land alongside the term unimproved land implies that for land to be capable of being classified as building land certain construction works must have been carried out to it by the person supplying the relevant plot(s). Reference is made to the interpretation of Article 5(5)(b) adopted by the Court in its ruling in *Van Dijk's Boekhuis* v *Staatssecretaris van Financiën* . (22) In order, therefore, for a transfer of building land to occur, works must have been carried out by the transferor which, having regard to the original state of the land, would generally be accepted as having altered its nature. Accordingly, the appellant argues that substantial transformation must have taken place; the execution of general works in the immediate environment of the relevant land, such as the installation of a sewerage scheme, would not constitute a substantial alteration for this purpose.

16. The appellant acknowledges that, if the Court were to consider the mere alteration of the designation of land as sufficient to render it building land for the purposes of the Sixth Directive, then even acts physically remote from the land itself, such as the issuance of building permits, might be sufficient to create improved land. Consequently, it invites the Court to indicate explicitly the extent of the works (significant or minimal) necessary for the land to be regarded as building land. In its view, land should not be so regarded unless: (a) it is laid out to serve as the site for the construction of a building; (b) it has already been the subject of *substantial* alterations (appellant's emphasis).

The Dutch Government

17. The principal observation of the Dutch Government is essentially that the determination of the scope of the notion of building land as employed in the Sixth Directive depends exclusively, in conformity with Article 189(3) of the Treaty, obliging the Member State only to achieve the result required by the directive, on how it has been interpreted by the Dutch legislature. Thus, according to the Dutch Government, in making its reference, the national court overlooked the express wording of Article 4(3)(b) of the Sixth Directive which leaves the realization of the definition of that notion to the discretion of the Member States. At the hearing the Government maintained that it was within the discretion afforded by Article 4(3)(b) of the Sixth Directive to Member States to decide that the notion of building land could be confined to improved land. (23)

18. In the Netherlands, the relevant legislative provision is Article 11(1)(a)(1) of the 1968 Law. The point of reference for the interpretation of that provision is stated to be the 1990 Decision of the Hoge Raad where the notion of a prepared good was interpreted, in the light of the Sixth Directive's reference to building land, as encompassing only improved land, in the sense that work has been carried out or infrastructures put in place which exclusively serve that land. The Dutch Government claims that this definition discharges in national law the obligation to define building land imposed on the Netherlands by the Sixth Directive. (24) According to the Government, the Hoge Raad's definition includes only land upon which the infrastructures necessary to prepare that land for construction have been provided. Accordingly, it maintains that the questions posed should be answered as follows: (i) Question I(a), affirmatively and Question I(b), negatively; (ii) Question II, to the effect that the conditions should not be regarded as cumulative, so that once at least one of them is satisfied the relevant land may be classified as improved.

19. The Dutch Government none the less recognizes that the extent of the discretionary power conferred on Member States regarding the definition of building land is not unlimited. (25) Thus, it

accepts that general principles of interpretation, particularly that requiring a broad construction of exceptions to exemptions, are applicable and limit the extent of the Member States' discretion. However, it considers the Hoge Raad's interpretation to be wholly in conformity with such a requirement and observes that the national court should find the answers to its questions by examining the criteria formulated in the 1990 Decision. (26)

The Commission

20. The Commission maintains that in order to address the central question of what constitutes building land for VAT purposes, several factors must be borne in mind: (27)

(i) the preservation of fiscal neutrality pursuant to which the liability to pay VAT ought to be determined by reference to objective criteria capable of affording those affected a sufficient degree of legal certainty regarding their potential liabilities;

(ii) the requirement to interpret exemptions from VAT strictly (28) and the corresponding obligation to ensure a broad interpretation of any exception to such exemptions; (29)

(iii) the recognition that Member States have the duty to define the notion of building land and that this competence must be exercised in the light of the criteria outlined at points (i) and (ii) above. (30)

The principle underlying the Sixth Directive is that every economic transaction conducted by a taxable person within a Member State should be subject to VAT. Thus, while the Member States are at liberty to define the concept of building land, that liberty is not unlimited. The Commission, therefore, argues that it is necessary to develop an objective approach to the definition of building land.

21. From this point of reference, the Commission submits that the decisive criterion is the designation of land for building purposes. It is not possible to regard its physical improvement as the decisive factor because the wording of Article 4(3)(b) refers to both improved and unimproved land. (31) The crucial issue is whether a plot of land is designated as building land. The intention of the parties, being subjective, at the time of the transaction cannot be decisive. The Commission considers the decisive factor to be the acquisition of the right to build on the land, whether by way of zoning or obtaining individual building permits. (32) Conversely, a plot of land which has been furnished with the infrastructures required for building is not necessarily building land, particularly where, for whatever reason, building permission is withheld.

22. The Commission observes penultimately that it is only the adoption of this objective approach which avoids pointless arguments regarding which particular works should be regarded as sufficient to transform land into building land. (33) It cites the list of operations set out in the national court's second question to demonstrate this point. It is for each Member State to determine in detail, in accordance with the discretion conferred by Article 4(3)(b) of the Sixth Directive, the public law acts which determine whether a buyer has a right to build on a particular site and, thus, whether it is building land.

23. Finally, the Commission gives its opinion on the potential effects of this approach. Given the absence of harmonization of the notion of building land, it acknowledges that they would not be uniform throughout the Community. In the Netherlands, for example, the effect would be to broaden the categories of taxed transactions. For the parties involved in particular transactions, the Commission anticipates negative consequences only for individual (non-taxable) purchasers who, not being registered VAT payers, are not, thus, in a position to deduct the amount of VAT included in the price paid for the supply of the land from VAT payable in respect of their own supplies of goods or services. (34)

IV ? Consideration of the questions referred to the Court

Preliminary issues

24. The legal and factual circumstances surrounding this reference raise, in my opinion, a number of important legal issues, some of which have led me to go outside the observations presented to the Court. In particular, I believe that I must consider the consequences of the unusual situation created by the interpretation by the national courts in the Netherlands of a pre-existing legal concept, poorly adapted to give effect to the dividing line envisaged by the Sixth Directive between

exempt land and non-exempt building land.

(i) The transitional derogation

25. The Netherlands has, according to the appellant, not implemented the Sixth Directive correctly as a result of its failure to establish a definition of building land. A similar accusation presumably underlies the formal complaint which has already been lodged by numerous Dutch communes with the Commission. (35) Certainly, the Netherlands has passed no new law defining building land for the purpose of the Sixth Directive. Moreover, the adaptation by the Dutch courts of pre-existing law has had the effect of excluding the imposition of VAT on the sale of unimproved building land. In my opinion, before considering that point, it is necessary to ascertain whether the Netherlands is actually under any obligation to lay down such a definition.

26. I digress briefly to draw attention to one significant qualification on any such obligation, though not involved in the present case. Article 28 is the sole article of Title XVI of the Sixth Directive dealing with [T]ransitional [P]rovisions. It is provided at paragraph (3) that: During the transitional period referred to in paragraph 4, the Member States may:...

(b) continue to exempt the activities set out in Annex F under the conditions existing in the Member State concerned.

Annex F(16) of the Sixth Directive refers to [S]upplies of those buildings and land described in Article 4(3). While Article 28(4) clearly envisaged that the transitional period would initially last from 1 January 1978 until 31 December 1983 for the then nine Member States, it none the less gave the Council the duty both of reviewing its continued operation and terminating any or all of the relevant derogations, acting unanimously on a proposal from the Commission. (36) In so far as the transactions covered by Annex F(16) are concerned, it appears that the Council's current policy is to await the expiry, at the end of 1996, of the current arrangements (37) designed to advance the achievement of a definitive system of VAT for the internal market. (38)

27. In principle Member States are consequently entitled under Article 28(3)(b) to maintain any exemption of Annex F(16) transactions which predated the Sixth Directive. (39) The continued existence of these Article 28(3) derogations reflects the ongoing effects of the Council's inability to agree a common list of exemptions at the time of the adoption of the Sixth Directive. (40) The scope of any exemption thereunder must be construed narrowly, in the light of the overriding objective of the Sixth Directive to create a uniform basis of assessment for a common, integrated system of VAT. The first condition of such an exemption is that it should be a mere continuation of a pre-existing tax exemption granted by national law. As the Court ruled in *Kerrutt* , (41) the wording of Article 28(3)(b) precludes the introduction of new exemptions or the extension of the scope of existing exemptions after the date of entry into force of the directive whether by legislative, administrative or judicial means.

28. The exemption from VAT of the supply of land in effect, pursuant to the 1968 Law, when the Sixth Directive entered into force in the Netherlands, was qualified. Once a plot of land was classified as a prepared immovable for the purposes of the 1968 Law, its supply was subject to turnover tax. The agent for the Commission stated at the hearing that the Netherlands has never applied or sought to apply any Article 28(3)(b) derogation. Nor has any such claim been advanced on behalf of the Netherlands at any stage of these proceedings. In these circumstances, the Netherlands has been under an obligation since 1 January 1979 to ensure the availability of the exemption provided in Article 13B(h) for the supply of land other than building land and under a corresponding duty to subject all supplies of building land to VAT.

(ii) The Sixth Directive in national law

29. The absence of any formal Dutch implementation, whether by way of normative or regulatory measures, of the obligation under Article 13B(h) to define building land, so as to exclude it from the exemption, coupled with the rather unusual nature of the dispute between the parties to the main proceedings in the present case, raises a possible issue concerning direct effect. That issue has normally arisen either in the context of disputes between Member States, or their public authorities, and private natural or legal persons (the so-called vertical direct effect of directives), or in disputes arising between such private persons themselves (horizontal direct effect).

30. In this case, certain provisions of the Sixth Directive, though not the principle of direct effect, have been invoked by a municipal authority against national revenue authorities. It is not at all clear that this principle can be invoked by one State authority against another. In any event this issue would only have to be addressed if the appellant could simply be assimilated to individuals, (42) in other words, treated as acting as, or on behalf of, private individuals. In my opinion, in the present circumstances, it cannot, for reasons explained in paragraph 32 below.

31. It is settled case-law that individuals may rely directly as against a Member State, subject to certain conditions, on the unimplemented or incorrectly implemented provisions of a directive. (43) In *Becker* (44) the Court held that Article 13B(d)(1) of the Sixth Directive concerning the exemption for the granting and negotiation of credit was directly effective notwithstanding the conditions set out in the opening words of Article 13B. (45) According to the Court: The conditions referred to are intended to ensure the correct and straightforward application of the exemptions. A Member State may not rely, as against a taxpayer who is able to show that his tax position actually falls within one of the categories of the exemption laid down in the directive, upon its failure to adopt the very provisions which are intended to facilitate the application of that exemption. Moreover [they] refer to measures intended to prevent any possible evasion, avoidance or abuse. A Member State which has failed to take the precautions necessary for that purpose may not plead its own omission in order to refuse to a taxpayer an exemption which he may legitimately claim under the directive .... (46)

32. The principle of direct effect cannot, however, have any bearing on this case. The appellant asks the Court to interpret the term, building land, in the absence of a clear legislative definition. The position is clearly distinguishable from *Becker* , since the 1968 Law, unlike the German law at issue in that case, gives legal effect to the exemption mandated by Article 13B(h). We are, in this case, concerned rather with an exception to the exemption, a provision which awaits definition by the Member State. A definition, for that purpose, will specify, by reference to national law, the legal or administrative acts which qualify land as building land. Choices will have to be made, for example, between the varying types of zoning criteria and building permissions and provision made for uncertain situations such as the effect of conditions attached to these and of appeal procedures in so far as they may be relevant. None of this has been done in the Netherlands. The Court has consistently held that, even where the implementation period has expired, an unimplemented or incorrectly implemented directive must be both sufficiently precise and unconditional, before its provisions can be directly invoked by an individual before the courts of a Member State. (47) In my opinion, the second of these conditions is not met in the present case. The range of Member State discretion in the choice of criteria of definition is such that the existence of such a definition is a condition of the application of the Sixth Directive in this respect, although I could envisage cases so clearly outside the scope of possible definition as to leave no room for doubt. There is, however, another reason closely connected with this last point which decisively excludes direct effect in this case. An obvious deduction from the direct effect of an exemption, decided in *Becker* , is that an individual could challenge an unduly broad national definition of an exception to that exemption. In that way, a definition of building land, so widely drawn as to include agricultural land, might be challenged by an adversely affected individual, who, in the absence of a national-law exemption, would seek to rely on the direct effect of Article 13B(h) of the Sixth Directive. No individual presents such an argument in this case. More importantly, even if the appellant can be regarded as one, the facts as described in the order for reference would not appear to admit of such a claim. For reasons I suggest later in this Opinion, the plots of land sold by the appellant are clearly building land for the purposes of Article 4(3)(b) and, therefore, of the exception in Article 13B(h). The individuals who should benefit from direct effect of an unimplemented provision cannot include those who would *not* benefit from that provision if properly implemented.

33. That conclusion does not affect the obligation of the national court to endeavour, when applying national law, to construe the 1968 Law in the light of the relevant provisions of the Sixth Directive as interpreted by the Court. In *Von Colson and Kamann* v *Land Nordrhein-Westfalen,*

the Court held that the relevant directive did not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law. (48) However, it also stated that: (49) ... the Member States' obligation ... arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [the directive], national courts are required to interpret their national law in the light of the wording and purpose of the directive ....

34. While the *Von Colson and Kamann* case concerned a directive which had been implemented by the Member State in question, the Court has since ruled in *Marleasing* that the obligation is equally applicable even where the directive has not been implemented. (50) Advocate General Van Gerven in his Opinion in *Marleasing* considered that the reasoning underlying the *Von Colson* principle, whereby the national courts are obliged to seek to achieve the result pursued by the directive by *all* appropriate measures within their power ... is true in particular in the case of national provisions which ... relate to the branch of the law covered by the directive, even though they predate the directive and were not thus enacted for its implementation. (51) In my opinion, however, this interpretative obligation cannot go so far as to require a national court to do violence to or expressly contradict the terms of national law. The interpretation and application of national law remains the function of the national court. Its obligation is, thus, as stated by the Court, limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. (52) As stated in *Von Colson* it is so obliged in so far as it is given discretion to do so under national law. (53)

35. The 1968 Law predated and, thus, was not introduced in implementation of the Sixth Directive. However, the Court is invited to consider that a deliberate decision was made to retain it on the statute book but allow it to be adapted by the courts to the purposes of the Sixth Directive. I regard this situation as falling between *Von Colson and Kamann* and *Marleasing* and, in any event, as calling for an interpretation of the 1968 Law in harmony with the Sixth Directive. The appellant is, in effect, seeking a definition of building land which will allow it to rely on the exemption from VAT on the supply of land. Without the exemption, such supply would be subject to tax. To rephrase the point I have made at paragraph 32 above, if *Becker* had concerned the supply of land rather than the granting and negotiation of credit, as it did, but it had been shown that the land was building land, it would clearly have been impossible for the plaintiff to rely on direct effect. Here we are in the presence of a Dutch law being interpreted by Dutch courts so as to give effect to the discretion conferred on Member States to define building land. It is inescapable, in my view, that such a law must be approached with a view to reconciling it with the letter and spirit of the Sixth Directive. In simple terms, given the absence of any other Dutch law definition, a prepared immovable must be interpreted as if it excluded building land from the exemption from VAT, and as if the excluded building land were then defined within the limits permitted by the Sixth Directive. In fact, of course, the existing Dutch definition, whether we regard it as express or implied, excludes unimproved building land entirely from the scope of VAT.

The substance of the questions

36. Building land, whatever it is, does not enjoy the obligatory exemption conferred by Article 13B(h) of the Sixth Directive. But what is it? To find out we must look at Article 4(3)(b), which acts as a definition section. Its accidental location in Article 4 cannot influence the content of the definition. Article 4(3)(b) is simply expressed: building land *shall mean* any unimproved or improved land defined as such by the Member States (emphasis added). The Court has consistently held that the scope of the uniform Community system of VAT is very wide and comprises all economic activities of producers, traders and persons supplying services. (54) In so far as exemptions provided by the Sixth Directive from that system are concerned, the Court has

taken the view that it is evident from the eleventh recital in its preamble that [they] constitute independent concepts of Community law which ... should be placed in the general context of the Community system of VAT introduced by the Sixth Directive. (55) In other words the mandatory exemptions are a Community-law concept and any exception to them must be construed accordingly.

37. The Court has also consistently held that the terms used to specify the exemptions envisaged by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for consideration by a taxable person. (56) Acceptance of this principle and its natural corollary, namely that any exception to such an exemption must itself be construed *broadly* , (57) represents the only point of general consensus among the observations submitted to the Court in this case. In my opinion, these general principles equally govern the interpretation of the provisions here at issue.

(i) The discretion of the Member States

38. In order to determine the meaning of building land, it is necessary, in the light of the submissions of the appellant and the Netherlands, in particular, to determine the ambit of the Member States' discretion. Article 13 of the Sixth Directive lists two categories of obligatory exemptions from VAT. While both Article 13A and 13B oblige Member States to lay down clear conditions for their correct and straightforward application, it is clear from *Becker* that the exemption must be sufficiently precise and unconditional as to be capable of conferring rights on individuals. However, a significant number of the exceptions listed in both Articles 13A and 13B envisage some form of Member State recognition of a body involved. In some cases, the text uses the expression, as defined by the Member State concerned or as defined by the Member States. In the case of exclusions for the leasing or letting of immovable property (Article 13B(b)), Member States may apply further exclusions to the scope of this exemption. Article 13B(f) provides an exemption for betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State. With such provisions the role of the Member State is unambiguously to limit the scope of the exemption in accordance with the general provisions of the Sixth Directive. (58) The power to define found in Article 4(3)(b) is merely a power to define the subject-matter of the *exception* to the exemption. I see no reason to treat it differently from the other powers to define found in Article 13. Its nature suggests, as does its wording, that it should be construed so as to give a broad effect to the definition of building land and, in particular, that it cannot leave out unimproved land.

39. The specificity of the questions referred by the national court, particularly the detail of Question II, suggests that the use of the notion of a prepared immovable to determine the application of VAT to land transactions in the Netherlands inevitably engenders debate as to the nature and extent of particular improvement works which will bring land within its scope. I find this approach prima facie difficult to reconcile with the simple wording of Article 4(3)(b) which states that building land shall mean *any* unimproved *or* improved land defined *as such* by the Member States (emphasis added). Nevertheless, the emphasis on preparatory works pervades the appellant's contention that only the transfer of improved land can come within Article 4(3)(b) and that unbuilt land is exempt except where it can be shown to be improved; in other words, that it must be designed to serve as a site for the construction of one or several buildings and have been so improved by the execution of extensive physical work on the land itself. In response to a question at the hearing, counsel for the Netherlands maintained that the Member States' discretion to define building land allows the exclusion from the definition of all unimproved building land. This disjunctive interpretation of Article 4(3)(b) means that unimproved building land will always be exempt from VAT.

40. I do not believe that Member States can exclude, by definition, one category of building land which is included in the definition of that term in the Sixth Directive. Member States are obliged to define as building land both unimproved and improved land. (59) Six linguistic versions of the text were authentic at the time of the adoption of the Sixth Directive. Nothing, in my opinion, in those various versions supports the disjunctive interpretation. (60) I am, therefore, satisfied that the only interpretation of Article 4(3)(b) which is consonant with the ordinary sense of the words employed,

the prerequisite of a broad construction and, thus, the achievement of its underlying Community objective is that the Member States are obliged to define both the notions of unimproved and improved building land so as to include them within building land.

(ii) The definition of building land

41. The appellant and the Dutch Government disagree with the Commission's approach to the criteria for defining building land. The Dutch Government claims that the Commission unduly emphasizes the intention of the parties at the time of the sale and that this could result in technically improved land being excluded from the notion of building land; that is to say land upon which various specific improvement works have been carried out but which is not zoned for building purposes. I feel that these concerns are unfounded. As I understand it, the Commission proposed, as a guiding principle, that the land should be destined for building. It would remain necessary to adopt objective criteria for the application of this principle. Hence, the defining role is left to the Member States.

42. I find the Commission's approach more satisfactory in the search for a definition of building land. The Dutch Government claims that it has exercised the discretion to give such a definition, paradoxically, by not giving one, but by allowing the Dutch courts to interpret a pre-existing concept which does not purport to define building land. Any definition of the scope of the exemption which complied with the requirements of Article 13B should, at least, have the merit of clarity. However, this is a quality which quite obviously does not exist at present in Dutch law. One of the effects of a satisfactory and clear definition would be to avoid the necessity for preliminary references such as the present one. I find it particularly revealing that the Hoge Raad, in the most recent of its judgments to which the Court has been referred, seems to have expressed serious doubts as to the compatibility with the Sixth Directive of the 1968 Law. (61) I share these doubts. As already stated, the prevailing definition of building land in Dutch law entirely and, I think, unacceptably excludes all unimproved building land. A further consequence of accepting the argument of the Dutch Government would, in my view, be that, as has happened in this case, Dutch courts in more and more cases would find it necessary to refer to this Court questions of interpretation of the concept of improved building land by reference, in each case, to potentially limitless permutations of the nature and extent of development works.

43. If I am right in suggesting that unimproved building land must be included in any definition, a ready solution emerges for the problem described in the preceding paragraph. If land can be described as building land when unimproved, the extent of any particular development works or provision of services, i.e. of improvements is of no consequence. Once it has become building land even though unimproved, it will so remain through all the stages of improvement. This does not, of course, mean that improvement alone can transform land into building land. It is not unknown for developers innocently or intentionally to carry out development works on land without any lawful planning or development permission, sometimes in anticipation of a change of classification of the land or of a planning permission and sometimes even in the hope of pre-empting the decision of a public authority. In my view, such action, in contravention of national laws or regulatory provisions could not, of itself, transform land into building land.

44. This leaves us the problem of providing material for a satisfactory definition of building land, in the absence of a definition by a Member State. Before doing so, I would like to digress briefly to explore the implications and feasibility of the alternative view proposed by the Dutch Government.

45. Firstly, as I have already said, this opens up the prospect of further, repeated and more refined references for preliminary rulings to the Court. The tacit Dutch definition of building land as improved land does not, nevertheless, make any attempt to address the substantive question of what is improved land.

46. Secondly, it would be very difficult to lay down criteria, such as are sought here, which would permit an objective judgment to be made on the basis of the nature or extent of particular works or on the distinction, if any, to be drawn between works which exclusively prepare specific land for subsequent construction and works which merely endow land with the basic commodities which might facilitate future construction. In so far as it may be relevant, I cannot see that it makes any

difference whether services such as roads, sewers or drains merely reach the neighbourhood of the land or are physically on it, so long as they are apt to advance its usefulness as building land. It would be absurd to treat it as building land if a drain encroached by one metre on to it, but not so if it stopped at the boundary. The Dutch Government, while apparently seeing but, nevertheless, not defining such a distinction, prefers to conclude that the Court may pick and choose from the list annexed to the national court's second question. The appellant submits that the works must be substantial before the land is considered to be improved but does not supply the Court with any criteria for defining this vague notion. It refers to *Dijk's Boekhuis* (62) to support the view that works clearly altering the nature of the land ought to have been effected in order for the land to be classified as building land. The relevance of this case is questionable. It was concerned with whether the execution of substantial repairs to damaged books could be regarded as making or assembling movable property for the purposes of Article 5(5)(a) of the Sixth Directive, or whether it could only be regarded as falling within the concept of the supply of services. The Court dealt with the case as one demanding an interpretation permitting the maintenance of a uniform basis of assessment in applying the Sixth Directive. It, thus, felt that the meaning attributed to make in common usage could be employed. According to the Court, ... the concept of making an article implies the creation of an article that did not previously exist ... [and the] conclusion may therefore be drawn that the production of goods from customers' material only takes place where a contractor produces a new article from the materials entrusted to him by his customer. (63) Unless, as the appellant maintains, the requirement of the creation of something new is to be viewed as a principle of general import, it is difficult to see what direct relevance, other than as a mere illustration, this ruling can have for the interpretation of the concept of improved building land.

47. I believe that only the adoption as a starting point of the approach formulated by the Commission in its observations is capable of permitting a definition of building land which encompasses adequately the notion of unimproved building land. The Commission, in my opinion, has rightly observed that the subjective and private intentions of the parties to a transaction at the moment of the supply of land cannot be decisive, but, rather, that the crucial criterion should be whether, objectively, in accordance with the system of public law in force in the Member State concerned, it can be said that the land supplied can, in principle, be built upon. I accept the Commission's observation that in many cases the zoning of land for building in an official and publicly available development plan would be sufficient to render it building land for the purposes of the Sixth Directive. To require the possession of an individual permit for the erection of specific buildings in all cases, would, in my opinion, represent an unduly strict threshold for the attainment of building land status. However, there may be Member States or areas of Member States where such a system of zoning does not exist, in which case an individual building permit would be the only means of discerning the publicly recognized status of building land.

48. It is for each Member State to set out clearly the nature and extent of the public law acts which will determine the process whereby land, which was previously not designated as building land, attains that status. Such a procedure is also required, to draw attention to but one example, in the definition by Member States of the medical and paramedical professions for the purpose of Article 13A(1)(c). Furthermore, the discretion of the Member States is not confined to such an enumeration but, in accordance with the introductory words to Article 13B, also includes an obligation to lay down rules designed to ensure that the exemption is applied in a straightforward manner and to prevent any possible evasion, avoidance or abuse. All of this remains within the discretion of the national authorities. The exercise of that discretion should, consistent with the objective underlying the exemption, be left entirely to the Member State, subject only to judicial review.

49. It is, of course, the absence of any Member State action of the kind described in the preceding paragraph which requires the Court to provide the national court with an interpretation of Articles 13B(h) and 4(3)(b) which will enable it to decide whether the plots in question in this case are building land for the purposes of the Sixth Directive. The duty of the Court is to assist the national

court to decide the case before it. The national court must take into account the requirements of the Sixth Directive, the facts of the case, including any relevant aspects of national law, such as, for example, the requirement of legal certainty. (64)

50. The following facts, described in the order for reference, are, in my view, sufficient to furnish a clear basis for a decision in the present case:

(i) the appellant supplied parcels of land, not built on but designated as building land (the lots);

(ii) the lots are all part of land which was previously for agriculture but has now been designated in a zoning plan. Prior to the supply of each lot, and on the appellant's instructions, implementation of the zoning plan applicable to the lot was commenced and, on the instructions of the various utility undertakings, mains were laid for the central antenna, telecommunications lines and the gas, water and electricity supply (utilities). In that context implementation of the zoning plan means the excavation of drains and the laying of a sewerage system and (residential) streets, as well as (other) operations. The laying of utility systems entails digging a ditch and placing pipes in it, and refilling the ditch with the original soil;

(iii) all the lots are on streets which only exist on the plan.

51. It is clear that, not only has the land in question been designated as building land in a zoning plan, a fact sufficient on its own to bring it within the definition of building land, but extensive work has been done in the laying on of services either in or adjacent to the land.

52. In my opinion the Court should answer the questions posed by the national judge by providing the following essential elements of guidance:

(a) if land is designated as building land in an official zoning plan, that is sufficient to bring it within the definition in Article 4(3)(b) of the Sixth Directive, whether it is improved or not;

(b) services, suitable to assist the development of the land need not be physically upon the land in order to be relevant to its transformation into improved building land;

(c) whether any one or more of the particular listed improvements have been carried out is not relevant; the judgement as to whether land is to be regarded as improved building land is to be made in the light of its purpose.

V ? Conclusion

53. Accordingly, I am of the opinion that the questions referred by the Gerechtshof, Leeuwarden should be answered as follows:

(1) The term building land, in Article 4(3)(b) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ?