JUDGMENT OF THE COURT (First Chamber)

8 November 2012 (*)

(Taxation – VAT – Taxable transactions – Application for the purposes of a business of goods obtained ‘in the course of such business’ – Treatment as a supply for consideration – Sports pitches belonging to the taxable person and transformed by a third person)

In Case C?299/11,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Hoge Raad der Nederlanden (Netherlands), made by decision of 13 May 2011, received at the Court on 15 June 2011, in the proceedings

Staatssecretaris van Financiën

v

Gemeente Vlaardingen,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ileši? (Rapporteur), E. Levits and M. Berger, Judges,

Advocate General: J. Mazák,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 May 2012,

after considering the observations submitted on behalf of:

– Gemeente Vlaardingen, by G.J.A. van Kalmthout, advocaat,

– the Netherlands Government, by C. Wissels, J. Langer and M.K. Bulterman, acting as Agents,

– the European Commission, by L. Lozano Palacios and P. van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(7)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) (‘the Sixth Directive’).

2 The reference has been made in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and the Gemeente Vlaardingen (the Municipality of Vlaardingen; 'Vlaardingen') concerning the value added tax ('VAT') arising as a result of Vlaardingen's application, in a business activity, of immovable property which it owns and which had undergone improvement by a third party.

Legal context

European Union ('EU') law

3 The Sixth Directive was repealed, with effect from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, given the material time in relation to the facts, the main proceedings remain governed by the Sixth Directive.

4 Under Article 2 of the Sixth Directive:

'The following shall be subject to [VAT]:

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

2. the importation of goods.'

5 Article 4 of the Sixth Directive provided:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2 …

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services … . The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

3. Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2 and in particular one of the following:

(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.

Member States may apply criteria other than that of first occupation … .

"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.

…'

6 Title V of the Sixth Directive was entitled 'Taxable transactions' and comprised Articles 5 to

7 of that directive, respectively entitled ‘Supply of goods’, ‘Supply of services’ and ‘Imports’.

7 Article 5 of the Sixth Directive was worded as follows:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

…

5. Member States may consider the handing over of certain works of construction to be supplies within the meaning of paragraph 1.

…

7. Member States may treat as supplies made for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the [VAT] on such goods, had they been acquired from another taxable person, would not be wholly deductible;

(b) the application of goods by a taxable person for the purposes of a non-taxable transaction, where the [VAT] on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with subparagraph (a);

(c) except in those cases mentioned in paragraph 8, the retention of goods by a taxable person or his successors when he ceases to carry out a taxable economic activity where the [VAT] on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with subparagraph (a).

…’

8 Article 11 of the Sixth Directive provided:

‘A. Within the territory of the country

1. The taxable amount shall be:

…

(b) in respect of supplies referred to in Article 5(6) and (7), the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined as the time of supply;

…’

9 Under Article 13(B) of the Sixth Directive:

‘… Member States shall exempt …

…

(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).'

10 Article 18 and Article 74 of Directive 2006/112 correspond, in essence, to Article 5(7) and Article 11(A)(1)(b) of the Sixth Directive.

Dutch law

11 Article 3 of the 1968 Law on Turnover Tax (Wet op de Omzetbelasting 1968), in the version applicable in the case before the referring court ('the Wet OB') is set out as follows:

'1. "Supply of goods" shall mean:

…

(c) the supply of immovable properties by those who produced them with the exception of land which has not been built on other than building land …

…

(h) the use for business purposes of goods produced in-house in cases where, had the goods been acquired from a trader, the tax on the goods would not have been deductible or would not have been wholly deductible; goods which are produced to order, with the materials, including land, being provided, shall be treated as goods produced in-house; excluded from the application of this subsection is land which has not been built on other than building land …

…'

12 Article 8(3) of the Wet OB states:

'With regard to the supply of goods as described in Article 3(1)(g) and (h), … the consideration shall be the amount, exclusive of turnover tax, which would have to be paid for the goods if, at the time of supply, they were to be acquired or produced in the condition in which they are at that time.'

The dispute in the main proceedings and the question referred for a preliminary ruling

13 Vlaardingen owns a sports complex which includes a number of open air pitches. It rents out those pitches to sports associations, applying the VAT exemption laid down for such associations.

14 During 2003, Vlaardingen instructed contractors to cover the sports pitches, the surface of which was natural grass, with an artificial surface. After the completion of that work in 2004, Vlaardingen continued to rent out the same pitches, exempt from VAT, to the sports associations which had rented them previously.

15 After paying the invoices for that work, which amounted in total to EUR 1 547 440, including VAT in the amount of EUR 293 993, Vlaardingen was ineligible for a deduction of that VAT, as its activity in relation to the pitches at issue – namely, their renting out to sports associations – was exempt from VAT.

16 Following an audit of Vlaardingen's tax situation, the competent authority issued it with a notice of assessment, in respect of VAT for the year 2004, in the amount of EUR 116 099. According to that authority, Vlaardingen's application of the pitches at issue for its rental activity should be regarded as 'the use for business purposes of … goods which are produced to order,

with the materials, including land, being provided' within the meaning of Article 3(1)(h) of the Wet OB.

17 For the purposes of calculating VAT, the competent authority took into account both the costs of the transformation of the sports pitches concerned and the value of the ground on which those pitches lay:

Costs of transformation of the pitches: EUR 1 547 440

Value of the ground: + EUR 610 940

Taxable amount: EUR 2 158 380

VAT at 19% on EUR 2 158 380: EUR 410 092

Deduction of VAT paid for the transformation: – EUR 293 993

VAT payable: EUR 116 099.

18 Vlaardingen contested that levy before the Rechtbank te 's?Gravenhage (District Court, The Hague). Vlaardingen argues that the application for the purposes of its rental activity business of its pitches, which from now on will have an artificial surface, should not be subject to VAT.

19 The Rechtbank te 's-Gravenhage dismissed Vlaardingen's action. On appeal, the Gerechtshof 's-Gravenhage (Regional Court of Appeal, The Hague) set aside the decision at first instance, as well as the contested assessment, by decision of 26 January 2009. It held, inter alia, that Article 3(1)(h) of the Wet OB is incompatible with Article 5(7)(a) of the Sixth Directive, in so far as, under that provision of the Wet OB, the simple fact of a person having at his disposal goods produced by third persons is regarded as a supply of goods. The Staatssecretaris van Financiën lodged an appeal in cassation against the decision of the Gerechtshof 's-Gravenhage.

20 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 5(7)(a) of the Sixth Directive, read in conjunction with Article 5(5) and Article 11(A)(1)(b) of the Sixth Directive, be interpreted as meaning that, upon the occupation of immovable property by a taxable person for exempt purposes, a Member State may charge VAT in a case where:

– that immovable property consists of a (building) work completed on the taxable person's own land and to his own order by a third person for consideration, and

– that land was previously used by the taxable person for (the same) exempt business purposes, and the taxable person did not previously enjoy a VAT deduction in respect of that same land,

with the result that (the value of that) same land becomes included in the VAT charge?'

Consideration of the question referred for a preliminary ruling

21 As is apparent from the order for reference, the sports pitches at issue in the case before the referring court are owned by Vlaardingen and rented out by it to sports associations. That rental activity is an economic activity which is exempt from VAT.

22 It is also established that the supply of transformation works in respect of those pitches led

to VAT being levied on that supply, payable by Vlaardingen. Without it being necessary to know whether that tax was levied pursuant to the rule laid down in Article 5(5) of the Sixth Directive or rather pursuant to one of the other rules laid down in that directive, it emerges in any event from the documents before the Court that the levying of that VAT – the legality of which, moreover, Vlaardingen does not dispute – did not primarily come about as a result of applying the option, available under Article 5(7)(a) of the Sixth Directive, of treating certain applications of goods as supplies made for consideration.

23 The option provided for under Article 5(7)(a) of the Sixth Directive did, on the other hand, lead to an assessment – disputed by Vlaardingen – according to which Vlaardingen had to pay, in addition to the VAT relating to the supply of transformation works in respect of its sports pitches, VAT relating to the value of the ground on which those pitches lie.

24 Consequently, the question referred must be construed as seeking to ascertain whether Article 5(7)(a) of the Sixth Directive, read in conjunction with Article 11(A)(1)(b) of that directive, must be interpreted as meaning that the application by a taxable person, for the purposes of an economic activity exempt from VAT, of sports pitches which he owns and which he has had transformed by a third person, can be subject to VAT calculated on the basis of the aggregate arrived at by adding to the transformation costs the value of the ground on which the pitches lie.

25 Article 5(7)(a) of the Sixth Directive concerned situations in which the mechanism for deduction provided for, by way of a general rule, under the Sixth Directive could not apply. In so far as goods are used for the purposes of an economic activity which is subject to output tax, it is necessary to deduct the input tax on those goods in order to avoid double taxation. On the other hand, where goods acquired by a taxable person are used for the purposes of transactions which are exempt, no input tax can be deducted (see, inter alia, Case C?184/04 *Uudenkaupungin kaupunki* [2006] ECR I?3039, paragraph 24; Case C?515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie* [2009] ECR I?839, paragraph 28; and Case C?118/11 *Eon Aset Menidjmunt* [2012] ECR, paragraph 44). As the Netherlands Government and the Commission pointed out, one of the situations concerned by Article 5(7)(a) of the Sixth Directive was that in which no deduction can be made, from the output VAT charged, of an amount paid by way of input VAT, since the output economic activity was exempt from VAT.

26 In particular, as the Advocate General pointed out in point 45 of his Opinion, Article 5(7)(a) of the Sixth Directive allowed Member States to develop their tax law in such a way that businesses which, owing to the fact that they are engaged in an activity which is exempt from VAT, cannot deduct the VAT that they have paid on acquiring their business goods are not placed at a disadvantage as compared with competitors engaged in the same activity who use goods which they have obtained without paying VAT, by producing the goods themselves or, more generally, by obtaining them ‘in the course of [their] business’. In order to make those competitors subject to the same tax burden as businesses which have acquired their goods from a third party, Article 5(7)(a) of the Sixth Directive gave Member States the option of treating the application, for the purposes of the exempt activities of the business, of goods obtained in the course of business as a supply of goods made for consideration within the meaning of Article 2(1) and Article 5(1) of the Sixth Directive, and of making that application subject to VAT.

27 In order for it to be possible for that option, which was reproduced in Article 18 of Directive 2006/112, to be used in a way which truly eliminates all inequalities, in relation to VAT, between taxable persons who have acquired their goods from another taxable person and those who have acquired them in the course of their business, the terms ‘goods produced, constructed, extracted, processed, … in the course of such business’ must be construed – as the Netherlands Government and the Commission argue – as covering not only goods entirely produced,

constructed, extracted or processed by the business concerned itself, but also goods constructed, extracted or processed by a third party with materials provided by that business.

28 A taxable person who, for the purposes of an activity exempt from VAT, applies goods which he owns and which he has had completed or improved by a third party could – but for the treatment option provided for under Article 5(7)(a) of the Sixth Directive – find himself in a situation in which only the work carried out by that third party would be subject to VAT. In order for such a taxable person to be subject, consistently with the aim of Article 5(7)(a), to the same tax burden as competitors who carry out the same exempt activity using goods which they have acquired in their entirety from a third party, it must be possible for the treatment option available under that provision to be extended to all goods completed or improved by the third party and, accordingly, to cause VAT to be levied on the basis of the overall value of those goods.

29 Consequently, it is open to the authorities of a Member State which makes use of the option available under Article 5(7)(a) of treating certain applications of goods as supplies made for consideration to hold that the tax burden, in terms of VAT, on a taxable person who rents out to sports associations pitches which it has had covered with an artificial surface must be at the same level as it would be for a competitor who rents out to sports associations pitches covered with artificial surfaces which have been purchased in their entirety from a third party.

30 In that case, those authorities must, in accordance with the rule laid down in Article 11(A)(1)(b) of the Sixth Directive, which has been reproduced in Article 74 of Directive 2006/112, calculate the VAT payable by that taxable person on the basis of a value which is determined at the time when the transformed sports pitches are applied – that is to say, at the time when they are put to use for the purposes of the exempt activity – and which corresponds to the market price for sports pitches of similar location, size and surface to the pitches at issue. In the light of those criteria, the aggregate of the value of the ground on which the pitches concerned lie and the cost of transforming those pitches may constitute an appropriate basis of assessment.

31 That being so, a taxation mechanism of that design cannot give rise to breach of the principles laid down in relation to VAT, which must at all times – including, therefore, when use is made of the treatment option referred to above – be respected by the Member State concerned.

32 In that regard, it should be noted that it is one of the essential characteristics of VAT that it is imposed on the added value of the goods or services concerned, since the tax payable on a transaction is calculated after the tax paid on the preceding transaction has been deducted (see, inter alia, Case C?208/91 *Beaulande* [1992] ECR I?6709, paragraph 14; Case C?347/95 *UCAL* [1997] ECR I?4911, paragraph 34; and Case C?308/01 *GIL Insurance and Others* [2004] ECR I?4777, paragraph 33). Consequently, the option of treating certain applications as supplies made for consideration, as interpreted above, cannot be used in order to charge VAT on the value of goods which the taxable person concerned has made available to the third party who completed or improved them, to the extent that the taxable person has already, in the context of an earlier tax period, paid VAT on that value. As the Commission stated, such repeated taxation would be incompatible both with the essential characteristic of VAT, referred to above, and with the aim of the above option, which is intended to enable Member States to make subject to VAT the application of goods for the purposes of activities exempt from VAT, but in no way authorises Member States to levy VAT several times on the same element of the value of those goods.

33 In the present case, it is for the referring court to ascertain whether, prior to the assessment at issue in the main proceedings, Vlaardingen had paid VAT on the value of the ground on which the sports pitches lie. If it transpires that this is indeed the position, it would have to be found that an assessment such as that made in Vlaardingen’s case, in so far as it is based on the overall value of that land, goes beyond the option provided for in Article 5(7)(a) of the Sixth Directive and

conflicts with the broad logic of that directive.

34 If it transpires that Vlaardingen had not, prior to the assessment at issue in the main proceedings, paid VAT on the value of the ground on which its sports pitches lie, it would also be necessary, before the VAT payable in accordance with that assessment could be declared compatible with Article 5(7)(a) of the Sixth Directive, to check that those pitches are not covered by the exemption provided for in Article 13(B)(h) of the Sixth Directive.

35 Under Article 13B(h) of the Sixth Directive, the supply of land which has not been built on, other than building land as described in Article 4(3)(b) of that directive, is exempt from VAT.

36 Accordingly, it is only if the sports pitches at issue in the main proceedings can be categorised as land which has been built on, or as building land within the meaning of Article 4(3)(b), that VAT would be payable on their application for the purposes of the business. It is sufficient to note in that regard that, where, pursuant to the option available under Article 5(7)(a) of the Sixth Directive, the application for the purposes of the business of land which is neither ‘built?on?land’ nor ‘building land’ is treated as a supply of that land made for consideration, that treatment causes Article 13(B)(h) of the Sixth Directive to apply, with the result that no VAT may be levied.

37 In the present case, it is for the referring court to check whether the application for the purposes of the business of sports pitches covered with an artificial surface may legitimately be treated as a supply of ‘built-on-land’ or ‘building land’.

38 In the light of the foregoing, the answer to the question referred is that Article 5(7)(a) of the Sixth Directive, read in conjunction with Article 11(A)(1)(b) of that directive, must be interpreted as meaning that the application by a taxable person, for the purposes of an economic activity exempt from VAT, of sports pitches which he owns and which he has had transformed by a third person, can be subject to VAT calculated on the basis of the aggregate arrived at by adding to the transformation costs the value of the ground on which the pitches lie, to the extent that the taxable person has not yet paid the VAT relating to that value or to those costs, and provided that the pitches at issue are not covered by the exemption provided for in Article 13(B)(h) of the Sixth Directive.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 5(7)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, read in conjunction with Article 11(A)(1)(b) of that directive, must be interpreted as meaning that the application by a taxable person, for the purposes of an economic activity exempt from VAT, of sports pitches which he owns and which he has had transformed by a third person can be subject to VAT calculated on the basis of the aggregate arrived at by adding to the transformation costs the value of the ground on which the pitches lie, to the extent that the taxable person has not yet paid the VAT relating to that value or to those costs, and provided that the pitches at issue are not covered by the exemption provided for in Article 13(B)(h) of the Sixth Directive.

[Signatures]

* Language of the case: Dutch.