JUDGMENT OF THE COURT (Fourth Chamber)

10 September 2014 (*)

(Reference for a preliminary ruling — Sixth VAT Directive — Article 5(7)(a) — Taxable transactions — ‘Supplies made for consideration’ — First occupation by a municipal authority of premises built for it on land belonging to it — Activities engaged in as a public authority and as a taxable person)

In Case C?92/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 1 February 2013, received at the Court on 25 February 2013, in the proceedings

Gemeente ’s-Hertogenbosch

v

Staatssecretaris van Financiën,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan (Rapporteur), J. Malenovský, A. Prechal and K. Jürimäe, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 22 January 2014,

after considering the observations submitted on behalf of:

– the Gemeente ’s-Hertogenbosch, by S. Beelen, belastingadviseur,

– the Netherlands Government, by M. Bulterman, C. Schillemans and M. Noort, acting as Agents,

– the Greek Government, by K. Paraskevopoulou and K. Karavasili, acting as Agents,

– the European Commission, by A. Cordewener and W. Roels, acting as Agents,

– after hearing the Opinion of the Advocate General at the sitting on 10 April 2014,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 5(7)(a) 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 (OJ 1977 L 145, p. 1) (‘the Sixth Directive’).

2 The request has been made in proceedings between the Gemeente ’s?Hertogenbosch (Municipality of ’s?Hertogenbosch, Netherlands; ‘the Gemeente’) and the Staatssecretaris van Financiën (State Secretary for Finance) concerning the Gemeente’s right to deduct input value added tax (‘VAT’) which it had paid in respect of the construction costs of a new municipal building.

Legal context

EU law

3 The Sixth Directive was repealed and replaced, with effect from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p.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, it is apparent from the order for reference that, in view of the time at which the facts in issue occurred, the dispute in the main proceedings remains governed by the Sixth Directive.

4 Article 2 of the Sixth Directive stated:

‘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 that directive stated:

‘1. “Taxable person” shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

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.

…

5. … [L]ocal government authorities … shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

…

Member States may consider activities of [local government authorities] which are exempt under Article 13 or 28 as activities which they engage in as public authorities.'

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

…'

8 Article 6 of the Sixth Directive provided:

'1. "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

…

2. The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the [VAT] on such goods is wholly or partly deductible;

…

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition.

…'

9 According to Article 17 of the Sixth Directive:

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

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

(a) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

…

(c) [VAT] due under Articles 5(7)(a) and 6(3).

…

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which [VAT] is deductible, and for transactions in respect of which [VAT] is not deductible, only such proportion of the [VAT] shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person.

However, Member States may:

…

(c) authorise or compel the taxable person to make the deduction on the basis of the use of all or part of the goods and services;

…'

Netherlands law

10 Article 3 of the 1968 Law on turnover tax (Wet op de omzetbelasting 1968) of 28 June 1968 (*Staatsblad* 1968, No 329), in the version applicable to the case in the main proceedings ('the Wet OB'), states as follows:

'1. The following shall be considered to be supplies of goods:

…

(c) the supply of items of immovable property by the person who completed 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; land which has not been built on other than building land … is excluded from the application of this subsection …

…'

11 Under Article 11 of the Wet OB:

'1. Subject to conditions to be laid down by public administrative regulation, the following shall be exempt from tax:

(a) the supply of immovable property and the transfer of rights over such property, with the exception of:

(1) the supply before or, at the latest, two years after, the first occupation of buildings or parts of buildings and the land on which they stand, as well as the supply of building land;

…'

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

12 The Gemeente carries out transactions as a public authority and as a taxable person. With regard to the transactions which it carries out as a taxable person, some of these are subject to VAT, while others are exempt under Article 11 of the Wet OB.

13 The Gemeente ordered the construction of a new office building on land belonging to it, work which began in the year 2000. It was envisaged that the Gemeente would use:

– 94% of the area of the building for its requirements as a public authority;

– 5% of that area for activities carried out by the Gemeente in its capacity as a taxable person, for supplies of services entitling it to deduct VAT;

– 1% of that area for activities carried out by the Gemeente in its capacity as a taxable person, for supplies of services not entitling it to deduct VAT.

14 The building in question was first occupied by the Gemeente on 1 April 2003.

15 The invoices relating to the construction of the building which were issued to the Gemeente in July 2002 included the amount of EUR 287 999 in respect of VAT. The tax return submitted by the Gemeente to the tax administration indicated an amount of EUR 32 in respect of VAT to be recovered.

16 The tax administration accepted that tax return, but, subsequently, the Gemeente changed its position and requested a refund of the total amount of the input VAT paid. In support of its request, the Gemeente submitted that the building which had been constructed constituted a good produced in the course of its business, within the meaning of Article 3(1)(h) of the Wet OB, which corresponds to Article 5(7)(a) of the Sixth Directive.

17 Following that challenge, the tax administration decided to increase the VAT refund in favour of the Gemeente to EUR 17 279, which corresponds to 6% of the amount of EUR 287 999 claimed in respect of paid input VAT.

18 The Gemeente challenged that decision before the Gerechtshof te 's?Hertogenbosch

(Regional Court of Appeal, ’s?Hertogenbosch). That court found that the Gemeente had used the building at issue for its business purposes, within the meaning of Article 3(1)(h) of the Wet OB, but only in so far as those business purposes served the Gemeente’s activities in its capacity as a taxable person, that is to say, in the amount of 6% of the total use of the building, the remaining 94% corresponding to a use for the Gemeente’s activities as a public authority and, as such, covered by neither the Wet OB nor the Sixth Directive.

19 The Gemeente brought an appeal in cassation against the judgment of the Gerechtshof te ’s?Hertogenbosch before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). In its appeal, the Gemeente submits that the goods and services concerned were acquired with a view to subsequently engaging in an activity that was subject to VAT, namely having at its disposal, after the supply of the building and for the purposes of its business, goods produced ‘in-house’. Pursuant to Article 3(1)(h) of the Wet OB, read in conjunction with Article 11(1)(a)(1) of that law, that activity should be regarded as a supply which is subject to VAT.

20 The referring court refers to the judgment in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698), according to which Article 5(7)(a) of the Sixth Directive, which allows for certain transactions to be treated as supplies made for consideration, also applies to goods produced, constructed, extracted or processed by a third party with materials provided by the undertaking which has paid input VAT.

21 However, the particular nature of the case in the main proceedings lies in the fact that, here, a third-party taxable person produced, on the instructions of the Gemeente, an item of immovable property of which the Gemeente uses 94% for its activities as a public authority. The referring court seeks to establish whether, despite the fact that local government authorities are not, in principle, liable to pay VAT, Article 5(7)(a) of the Sixth Directive, which confers the right to deduct input VAT, may none the less be applicable inasmuch as the Gemeente uses the building in part, albeit only to a limited extent, for supplies made in its capacity as a taxable person.

22 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Should Article 5(7)(a) of the Sixth Directive be interpreted as meaning that supplies are made for consideration in a situation in which a municipality takes first occupation of a building which it has had built on its own land and which it is to use at the rate of 94% for its activities as a public authority and at the rate of 6% for its activities as a taxable person, including 1% for exempt activities to which no right of deduction applies?’

The question referred for a preliminary ruling

23 First of all, it should be noted that, under Article 4(5) of the Sixth Directive, local government authorities were not, in principle, to be considered liable to pay VAT in respect of the activities or transactions in which they engaged as public authorities.

24 It must be observed that Articles 5(7)(a) and 6(2)(a) of that directive refer to transactions which are, or may be, assimilated, respectively, to a supply of goods or to a supply of services for consideration.

25 With regard, first, to Article 6(2)(a) of that directive, as noted by the Advocate General in points 17 and 51 of her Opinion, the option, stemming from that provision, of allocating goods to the assets used as a taxable person or to those used as a non-taxable person cannot be transposed to a situation in which a taxable person carries out, as in the case in the main proceedings, both economic activities which are subject to VAT and non-economic activities which

fall outside the scope of that scheme (see, to that effect, judgment in *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, C?515/07, EU:C:2009:88, paragraphs 37 and 38).

26 Consequently, it must be stated that Article 6(2)(a) of the Sixth Directive cannot be applicable in a situation such as that in the main proceedings.

27 Next, in accordance with Article 5(7)(a) of the Sixth Directive, Member States may treat as supplies made for consideration, which are subject to VAT, 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, is not wholly deductible.

28 In this regard, it should be observed that the wording of that provision, namely 'goods produced, constructed, extracted, processed, … in the course of [the] business [of a taxable person]', covers not only goods entirely produced, constructed, extracted or processed by the business concerned itself, but also goods produced, constructed, extracted or processed by a third party with materials provided by that business (see, to that effect, judgment in *Gemeente Vlaardingen*, EU:C:2012:698, paragraph 27).

29 Thus, the building constructed by a third party on land belonging to a municipality, such as that in issue in the case in the main proceedings, is covered by the wording set out in the previous paragraph.

30 The option, for a Member State, to treat as a supply made for consideration the application of such goods by a taxable person for the purposes of his business is possible only where the purchase of those goods from another taxable person would not confer upon the first taxable person the right to make a complete deduction of VAT.

31 It is apparent from Article 3(1) of the Wet OB that the Kingdom of the Netherlands made use of that option.

32 As the Advocate General in essence noted in point 62 of her Opinion, the condition for the application of Article 5(7)(a) of the Sixth Directive, referred to in paragraph 30 of the present judgment, is fulfilled in a situation such as that at issue in the main proceedings where, by reason of the fact that the building concerned was used also for purposes other than taxable transactions, the input VAT would not have been wholly deductible if it had been acquired entirely from another taxable person.

33 Consequently, where a municipality takes first occupation of a building which it has had built on its own land and of which it intends to use 94% for its business activities as a public authority and 6% for its activities as a taxable person, including 1% for exempt activities in respect of which no right of deduction exists, that situation must be regarded as coming within the scope of Article 5(7)(a) of the Sixth Directive, in so far as the Member State concerned has exercised the option provided for in that provision.

34 As noted by the Advocate General in points 72 and 73 of her Opinion, the entire amount of the input VAT paid by the Gemeente in respect of the acquisition of the goods for the purposes of the subsequent application must give rise to a right to deduct that VAT, in accordance with Article 17(2) of the Sixth Directive.

35 That subsequent application is itself subject to VAT and the amount of the VAT for which the Gemeente is liable as a result of that application must be calculated, in accordance with Article 11A(1)(b) of the Sixth Directive, on the basis of the overall value of each of those elements, the

land and the building, it being understood that VAT must not have been previously charged on those elements (see, to that effect, judgment in *Gemeente Vlaardingen*, EU:C:2012:698, paragraphs 28 to 33).

36 Finally, under Article 17(2) and (5) of the Sixth Directive, in so far as the goods concerned are used for the purposes of its taxable transactions, corresponding to 5% of the area of the building in the situation at issue in the main proceedings, the taxable person is, in principle, authorised to deduct from the tax for which it is liable the VAT paid in respect of the application referred to in the previous paragraph. In the proportion in which those goods are used for the transactions which are exempt or which do not fall within the scope of VAT, the deduction of VAT will not be permitted.

37 In the light of the foregoing, the answer to the question referred is that Article 5(7)(a) of the Sixth Directive must be interpreted as applying to a situation, such as that at issue in the main proceedings, in which a municipality takes first occupation of a building which it has had built on its own land and of which it intends to use 94% of the area for its activities as a public authority and 6% of that area for its activities as a taxable person, including 1% for exempt activities in respect of which no right to deduct VAT exists. However, the subsequent use of the building for the activities of the municipality may give rise to a right to deduct the tax paid in respect of the application provided for by that provision only in the proportion corresponding to its use for the purposes of the taxable transactions, pursuant to Article 17(5) of the Sixth Directive.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Fourth Chamber) hereby rules:

Article 5(7)(a) 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 must be interpreted as applying to a situation, such as that at issue in the main proceedings, in which a municipality takes first occupation of a building which it has had built on its own land and of which it intends to use 94% of the area for its activities as a public authority and 6% of that area for its activities as a taxable person, including 1% for exempt activities in respect of which no right to deduct VAT exists. However, the subsequent use of the building for the activities of the municipality may give rise to a right to deduct the tax paid in respect of the application provided for by that provision only in the proportion corresponding to its use for the purposes of the taxable transactions, pursuant to Article 17(5) of that directive.

[Signatures]

* Language of the case: Dutch.