Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

29 March 2012*

(Sixth VAT Directive — Article 6(2), first paragraph, point (a), and Article 13(B)(b) — Right of deduction — Business assets which belong to a taxable person which is a legal person and which are placed at the disposal of its staff for their private use)

In Case C-436/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour d'appel, Mons (Belgium), made by decision of 8 September 2010, received at the Court on 13 September 2010, in the proceedings

Belgian State

v

BLM SA,

THE COURT (Fifth Chamber),

composed of M. Safjan, President of the Chamber, J.-J. Kasel (Rapporteur) and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2011,

after considering the observations submitted on behalf of:

— BLM SA, by O. D'Aout, avocat,

— the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents,

— the German Government, by T. Henze and C. Blaschke, acting as Agents,

— the European Commission, by B. Stromsky, D. Recchia and C. Soulay, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: French.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of point (a) of the first paragraph of Article 6(2) and of Article 13(B)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (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 Belgian State and BLM SA ('BLM'), a company incorporated under Belgian law, concerning the deduction of value added tax ('VAT') paid as input tax on immovable property used partly for the private use of the staff of that company.

Legal context

European Union legislation

3 According to the fifth and sixth recitals in the preamble to the Sixth Directive:

'… to enhance the non-discriminatory nature of the tax, the term "taxable person" must be clarified to enable the Member States to extend it to cover persons who occasionally carry out certain transactions;

… the term "taxable transaction" has led to difficulties, in particular as regards transactions treated as taxable transactions; … these concepts must be clarified'.

4 Point (1) of Article 2 of the Sixth Directive provides:

'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;'

5 Article 4(1) of the Sixth Directive states:

'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.'

6 Article 6(2) of the Sixth Directive is worded as follows:

'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 the 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;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

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

7 Under Article 13B(b) of the Sixth Directive, the Member States are to exempt from VAT 'the leasing or letting of immovable property ...'

8 Article 17(2) of the Sixth Directive, in the version resulting from application of Article 28f of that directive, provides:

'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 within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;'

National legislation

9 Article 19(1) of the Belgian VAT Code provides:

'The use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or, more generally, for purposes other than those of his business shall be treated as a supply of services for consideration where the VAT on that asset is wholly or partly deductible.'

10 Under point (2) of Article 44(3) of the Belgian VAT Code, 'the leasing and letting of immovable property and the assignment of leases of immovable property and the use thereof in accordance with Article 19(1) …' are to be exempt from VAT.

11 In its order for reference, the Cour d'appel, Mons refers to Administrative Circular No E.T.108691 of 31 January 2005, which was drawn up following the judgment in Case C-269/00 *Seeling* [2003] ECR I-4101 and sets out the practical implications of that judgment for national law. According to the referring court, that circular limits the application of *Seeling* to taxable persons who are natural persons. As regards taxable persons which are legal persons and which make available to a manager or a partner immovable property which has been wholly allocated to the assets of the business, that circular states that such use constitutes the letting of immovable property, which, as such, is exempt from VAT.

The dispute in the main proceedings and the question referred

12 BLM is a company established in April 2003 by Messrs Bertrand and Bernard Losfeld, the objects of which include financial, technical, commercial or general administrative consultancy and the assistance and provision of services, directly or indirectly, in the administrative and financial fields, in sales, production and general management. In respect of those activities, BLM is liable for VAT.

13 In December 2003, BLM received a contribution from Mr Bertrand Losfeld and his wife in the form of a usufructury right *in rem* of 20 years over a building which they had previously had constructed and for the construction of which they had opted to be liable for VAT. Mr and Mrs Losfeld have lived in that building with their children since July 2002. BLM has an office and an archive room there.

14 That contribution gave rise to the payment of VAT, which was deducted by BLM in its return for the fourth quarter of 2003 in the amount of EUR 42 420.61.

15 BLM, of which Mr Bertrand Losfeld is the managing director, does not require Mr Losfeld to pay rent for the private use of part of the building at issue. However, he is liable for personal income tax on the benefit in kind, calculated on a flat-rate basis of 75% private occupation of the building.

16 After carrying out an on-the-spot inspection, the Tournai Tax authorities ('the tax authorities') challenged the deductibility of part of the VAT — in the amount of EUR 31 683.96 — paid by BLM at the time of the contribution. The tax authorities held that the use made of the building was not work-related. As it is, the private use of a building is a transaction exempt from VAT. Consequently, the taxable person cannot deduct the input tax charged on the construction of the part of the building placed at the disposal of BLM's managing director.

17 The tax authorities found that the VAT relating to the construction costs of the business premises — the office and the archive room — was 100% deductible; that the VAT relating to the work carried out in the 'dual-use' premises was 25.31% deductible; and that the remainder of the building was to be regarded as solely for private use. Accordingly, by decision of 1 March 2005, the tax authorities declared BLM liable to pay EUR 31 683.96 for the wrongful deduction of the VAT, together with a fine and default interest.

18 BLM contested that decision before the Tribunal de première instance de Mons (Court of First Instance, Mons). In their pleadings before that court, the tax authorities submitted, by way of an alternative form of order sought, a counterclaim seeking to set the tax base for private use of the building, for each year which had elapsed, at 1/15th of the price of that property. By judgment of 8 August 2006, the Tribunal de première instance de Mons held, inter alia, that the annual tax base for BLM's making the immovable property available free of charge should be fixed at 1/20th of the price paid by BLM for purchase of the usufruct over the building, in respect of the part occupied privately.

19 Dissatisfied with that judgment, the tax authorities brought an appeal before the Cour d'appel, Mons. In support of the appeal, they argue that the making available of a building such as that at issue must be regarded as a letting for consideration, exempt from VAT. As that is a transaction which is not taxable, the taxable person cannot deduct the VAT charged on the construction of the part of the building placed at his disposal. In that regard, the tax authorities submit that *Seeling* applies only to a taxable person who is a natural person since a natural person cannot, at one and the same time, be the owner and the tenant of the same building.

20 Before the referring court, BLM contends that the approach adopted by the Court of Justice in *Seeling* can be transposed to a situation such as that at issue.

21 In those circumstances, the Cour d'appel, Mons decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive … be interpreted as precluding national legislation which treats as an exempt supply of services, on the basis that it constitutes a leasing or letting of immovable property for the purposes of Article 13B(b), the private use by a director and his family of part of a building constructed or owned under a right *in rem* in that property by a taxable legal person, where the input tax on that business asset is deductible?'

Consideration of the question referred

22 By its question, the referring court asks essentially whether point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive must be interpreted as precluding national legislation which — despite the fact that the characteristics of the leasing or the letting of immovable property for the purposes of Article 13(B)(b) are not present — treats as a supply of services exempt from VAT under that provision the private use by the staff of a taxable person which is a legal person, of part of a building constructed or owned by virtue of a right *in rem* in immovable property, held by that taxable person, where the input tax on that business asset is deductible.

23 In that connection, it should be recalled that the Court ruled in *Seeling* that point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive must be interpreted as precluding national legislation which treats as an exempt supply of services, on the basis that it constitutes a leasing or letting of immovable property for the purposes of Article 13B(b), the private use by a taxable person of part of a building forming, in its entirety, part of the assets of his business.

24 Admittedly, in the case which gave rise to the judgment in *Seeling*, the taxable person was a natural person, and the taxable person and the person using property forming part of the assets of the business for his private use were the same person. However, contrary to assertions made by the Belgian Government in its submissions before the Court, it cannot be inferred from this that the way in which the Court construed point (a) of the first paragraph of Article 6(2) of the Sixth Directive in that judgment cannot apply where the taxable person is a legal person.

25 First, as is clear from the wording of that provision, point (a) of the first paragraph of Article 6(2) of the Sixth Directive refers not only to the case of a taxable person who uses property forming part of the assets of the business for his private use, but also to the situation where the staff of a taxable person make such use of that property. In the latter case, the persons concerned are not one and the same, and the fact that the taxable person is a legal person does not mean that the staff of that taxable person cannot use the property for private use.

26 Furthermore, it should be noted that point (a) of the first paragraph of Article 6(2) of the Sixth Directive, which uses the term 'taxable person', makes no distinction between natural persons and legal persons, and merely specifies the manner in which certain financial transactions which are not covered by other provisions of the Sixth Directive are to be treated for VAT purposes.

27 Moreover, it follows from the fifth and sixth recitals to the Sixth Directive that the status of 'taxable person' is linked to the transactions carried out by an economic operator and not to the legal form of that operator. Also, in accordance with Article 4(1) of that directive, 'taxable person' means any person who independently carries out in any place any economic activity specified in Article 4(2), whatever the purpose or the results of that activity.

28 Secondly, it should be made clear that, contrary to the assertions made by the Belgian Government, it does not follow from *Seeling* that the Court based its reasoning on the assumption that it is impossible to conceive of a letting of immovable property where the transaction concerns one and the same natural person, who would accordingly be both lessor and lessee.

29 Although the Court could simply have held that, in circumstances such as those of the case which gave rise to the judgment in *Seeling*, there could not, by definition, be any agreement as to the conditions of the letting, it examined whether that situation could be treated as the letting of immovable property for the purposes of Article 13(B)(b) of the Sixth Directive and concluded in that regard, in paragraph 51 of its judgment, that it is a feature of such a situation not only that no rent is paid but also that there is no agreement on the duration of the right of enjoyment, the right of occupation of the dwelling, or the exclusion of third parties.

30 It follows that, in the absence of such features, the private use, by the staff of a taxable person which is a legal person, of part of a building constructed or owned by virtue of a right *in rem* in immovable property, held by that taxable person, cannot be treated as the letting of immovable property for the purposes of Article 13(B)(b) of the Sixth Directive.

31 Accordingly, the answer to the question referred is that point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive must be interpreted as precluding national legislation which — despite the fact that the characteristics of the leasing or the letting of immovable property for the purposes of Article 13(B)(b) are not present — treats as a supply of services exempt from

VAT under that provision the private use, by the staff of a taxable person which is a legal person, of part of a building constructed or owned by virtue of a right *in rem* in immovable property, held by that taxable person, where the input tax on that business asset is deductible.

32 In that connection, it is for the referring court to determine whether, in a situation such as that at issue in the case before it, a finding can be made that there is a letting of immovable property for the purposes of Article 13(B)(b) of the Sixth Directive.

Costs

33 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 (Fifth Chamber) hereby rules:

1. **Point (a) of the first paragraph of Articles 6(2) and Article 13(B)(b) 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, must be interpreted as precluding national legislation which — despite the fact that the characteristics of the leasing or the letting of immovable property for the purposes of Article 13(B)(b) are not present — treats as a supply of services exempt from VAT under that provision the private use, by the staff of a taxable person which is a legal person, of part of a building constructed or owned by virtue of a right *in rem* in immovable property, held by that taxable person, where the input tax on that business asset is deductible**;

2. **It is for the referring court to determine whether, in a situation such as that at issue in the case before it, a finding can be made that there is a letting of immoveable property for the purposes of Article 13(B)(b) of the Sixth Directive**.

[Signatures]