Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 20 May 2021 [1]

Case C-299/20

Icade Promotion SAS, formerly Icade Promotion Logement SAS
v
Ministère de l'Action et des Comptes publics

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Margin taxation scheme – Scope – Supply of buildings and building land for the purpose of resale – Taxable person does not have the right to deduct tax on the purchase of immovable property – Resale subject to VAT – Concept of 'building land')

I. Introduction

1. This request for a preliminary ruling has arisen in the context of a dispute between Icade Promotion SAS ('the applicant') and the French tax authorities (more specifically the ministère de l'Action et des Comptes publics (Ministry for the Public Sector and Public Accounts)) concerning the repayment of value added tax (VAT) paid by the applicant in relation to sales of building land to individuals in 2007 and 2008.

2. The request concerns the interpretation of Article 392 of Directive 2006/112/EC [2] ('the VAT Directive') which establishes a margin taxation scheme that derogates from the ordinary legal rules, which provide for taxation on the selling price.

3. By its questions, the referring court asks, in essence, whether the derogating margin taxation scheme provided for in Article 392 of the VAT Directive applies to certain transactions concerning land, in respect of which the taxable person does not have the right to deduct the VAT on its purchase, where that land is resold, after being divided into parcels and development works being carried out, as building land.

4. The present case raises a novel issue which will require the Court to clarify the conditions for the application of the margin taxation scheme in a very specific case by interpreting the key terms in Article 392 of the VAT Directive.

[1] Original language: French.

[2] Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

II. Legal framework

A. European Union law

1. The VAT Directive

5. Article 9(1) of the VAT Directive states:

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

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

…’

6. Article 12 of that directive provides:

‘1. Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions:

(a) the supply, before first occupation, of a building or parts of a building and of the land on which the building stands;

(b) the supply of building land.

2. For the purposes of paragraph 1(a), “building” shall mean any structure fixed to or in the ground.

Member States may lay down the detailed rules for applying the criterion referred to in paragraph 1(a) to conversions of buildings and may determine what is meant by “the land on which a building stands”.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply, or the period elapsing between the date of first occupation and the date of subsequent supply, provided that those periods do not exceed five years and two years respectively.

3. For the purposes of paragraph 1(b), “building land” shall mean any unimproved or improved land defined as such by the Member States.’

7. Under Article 73 of that directive:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be

obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

8. Article 135 of the same directive provides:

'1. Member States shall exempt the following transactions:

…

(j) the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1);

(k) the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1);

…'

9. Article 137(1) of the VAT Directive states:

'Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

…

(b) the supply of a building or of parts thereof, and of the land on which the building stands, other than the supply referred to in point (a) of Article 12(1);

(c) the supply of land which has not been built on other than the supply of building land referred to in point (b) of Article 12(1);

…'

10. Under Title XIII of that directive, entitled 'Derogations', Chapter 1, entitled 'Derogations applying until the adoption of definitive arrangements', includes Article 392, which provides:

'Member States may provide that, in respect of the supply of buildings and building land purchased for the purpose of resale by a taxable person for whom the VAT on the purchase was not deductible, the taxable amount shall be the difference between the selling price and the purchase price.'

2. Implementing Regulation (EU) No 1042/2013

11. Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services [3] ('the Implementing Regulation') provided for the insertion of an Article 13b into the text of the latter regulation, which states:

'For the application of [the VAT Directive], the following shall be regarded as "immovable property":

…

(b) any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved;

…'

12. Article 31a of the Implementing Regulation provides:

'1. Services connected with immovable property, as referred to in Article 47 of [the VAT Directive], shall include only those services that have a sufficiently direct connection with that property. Services shall be regarded as having a sufficiently direct connection with immovable property in the following cases:

(a) where they are derived from an immovable property and that property makes up a constituent element of the service and is central to, and essential for, the services supplied;

(b) where they are provided to, or directed towards, an immovable property, having as their object the legal or physical alteration of that property.

2. Paragraph 1 shall cover, in particular, the following:

…

(d) the construction of permanent structures on land, as well as construction and demolition work performed on permanent structures such as pipeline systems for gas, water, sewerage and the like;

…'

B. French law

13. Article 257 of the code général des impôts (General Tax Code), in the version applicable to the dispute in the main proceedings, states:

'The following shall also be subject to value added tax:

…

[3] OJ 2013 L 284, p. 1.

(6) Without prejudice to the provisions of paragraph 7:

(a) Transactions relating to immovable property … the income from which must be included in the taxable amount for the purposes of income tax on industrial or commercial profits;

…

(7) Transactions contributing to the production or supply of buildings.

Such transactions are taxable even when of a private nature.

1. The following, in particular, are included:

(a) The sale … of building land …;

The first subparagraph shall apply, in particular, to land in respect of which, within four years of the date of the relevant deed of purchase, the purchaser … obtains a building permit or commences the necessary works for the construction of a building or group of buildings or for the construction of new premises above existing buildings.

The present provisions shall not apply to land purchased by a natural person for the purpose of the construction of a building which that person is to use for residential purposes.

…

(b) The sale of immovable property …'

14. Article 268 of the General Tax Code provides:

'In relation to the transactions referred to in Article 257(6), the taxable amount for value added tax purposes shall be the difference between:

(a) the price charged together with relevant associated charges, or the market value of the property if greater than the price charged together with relevant associated charges, and

(b) …

– … the amount which the seller has paid for any reason for the purchase of the property;

…'

15. Article 231(1) of Annex II to the General Tax Code, the provisions of which have been reproduced, with effect from 1 January 2008, in point 9 of Article 206(IV)(2) of that annex, provides:

'The persons designated in Article 257(6) of the General Tax Code may not deduct the tax on the purchase price or the cost of constructing the buildings …'

III. Facts and main proceedings

16. In the course of its activity as a developer, the applicant has purchased undeveloped land from persons not subject to VAT (individuals or local authorities). [4] Those purchases were therefore not subject to VAT.

17. First, after having divided that land into parcels and carried out works to install various services (roads, drinking water, electricity, gas, sewerage, telecommunications), the applicant sold the serviced parcels to natural persons in 2007 and 2008 as building land, for the purpose of the construction of buildings for residential use. The applicant made the sales of building land, concluded during the period from 1 January 2007 to 31 December 2008, subject to the VAT margin scheme in accordance with the provisions then laid down in Article 257(6) and Article 268 of the General Tax Code.

18. Secondly, the applicant claimed from the tax authorities the restitution of that VAT on the margin, paid in the amount of EUR 2 826 814 for 2007 and EUR 2 369 881 for 2008. In that regard, it challenged the position of the tax authorities according to which the sale of such land should be subject to the VAT margin scheme. It was in the applicant's interest to be covered by the common system of VAT on the selling price since, in accordance with the national legislation in force at the material time, the sale of building land to individuals for the purpose of constructing buildings for residential use was exempt from VAT. By contrast, that legislation prohibited the deduction of the VAT on the purchase of immovable property the resale of which was subject to VAT based on the margin.

19. As its claim was rejected by the tax authorities, the applicant brought an action before the tribunal administratif de Montreuil (Administrative Court, Montreuil, France), which was dismissed by judgment of 27 April 2012.

20. By judgment of 18 July 2014, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France) dismissed the appeal brought by the applicant for the first time.

21. However, that judgment was partially set aside by the Conseil d'État (Council of State, France) on 28 December 2016 and the case was referred back to the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles) which, by a second judgment of 19 October 2017, dismissed the appeal brought by the applicant on its merits.

22. The applicant then brought an appeal on a point of law before the Conseil d'État (Council of State) against that second judgment.

23. The applicant submits that it had purchased the land, which had not been built on and which fell outside the scope of VAT, for the purpose of reselling it without constructing buildings on it, then it had divided the land it had purchased into parcels and carried out works to install various services for those parcels before selling them to natural persons, as building land, for the purpose of the construction of buildings for residential use.

[4] The date of the initial purchase of that land is not mentioned in the request for a preliminary ruling or in the observations of the parties to the main proceedings.

24. To challenge the application of the VAT margin scheme to such sales made under the combined provisions of Article 257(6) and Article 268 of the General Tax Code, the applicant submits that that application is contrary to Article 392 of the VAT Directive in two respects.

25. In the first place, according to the applicant, Article 392 of that directive permits the Member States to make the supply of building land subject to a margin taxation scheme only where the taxable person carrying out that supply has paid VAT when purchasing the land without having any right to deduct it.

26. However, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles) held that the absence of a 'right of deduction' during the purchase, referred to in Article 392 of the VAT Directive, covers only cases in which the purchase was not subject to VAT.

27. In the second place, according to the applicant, Article 392 of the VAT Directive permits the Member States to make the supply of building land subject to a margin taxation scheme only where the taxable person who carries out the supply does no more than purchase and resell the land as it is. Therefore, Article 392 of that directive is not said to apply to transactions for the sale of building land which, since its purchase, has been developed.

28. In that regard, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles) held that the reference in Article 392 of the VAT Directive to the supply of building land 'purchased for the purpose of resale' was neither intended to exclude, nor had the effect of excluding, purchases of land which has not been built on followed by its resale as building land.

IV. The questions referred for a preliminary ruling

29. In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 392 of [the VAT Directive] to be interpreted as reserving the application of the margin taxation scheme to transactions for the supply of immovable property the purchase of which has been subject to VAT, without the taxable person who subsequently resells the property having the right to deduct that tax, or does it permit that scheme to be applied to transactions for the supply of immovable property the purchase of which has not been subject to VAT, either because that purchase falls outside the scope of VAT or because it falls within the scope of VAT but is exempt from it?

(2) Is Article 392 of [the VAT Directive] to be interpreted as excluding the application of the margin taxation scheme to transactions for the supply of building land in the following two cases:

– where that land, purchased as land that has not been built on, becomes building land in the time between it is purchased and resold by the taxable person;

– where that land, in the time between it is purchased and resold by the taxable person, is developed, in the sense that it is divided into parcels or works are carried out in order to install services (roads, drinking water, electricity, gas, sewage, telecommunications)?'

30. The parties to the main proceedings propose that the first question referred for a preliminary ruling should be answered as follows:

– The applicant proposes that the Court should rule that Article 392 of the VAT Directive is reserved to cases in which the taxable dealer has incurred non-recoverable VAT at the time of purchase. It submits that, in the light of the condition laid down in Article 392 of that directive, in accordance with which the VAT margin scheme presupposes that 'the VAT on the purchase was not deductible' for the taxable person, that scheme for the taxation of immovable property would apply only if the taxable dealer had incurred VAT at the time of purchase and was unable to deduct it. However, the application of that scheme should be excluded where the purchase was subject to VAT which the taxable dealer was able to deduct or where the purchase was not subject to VAT.

– According to the French Government, Article 392 of the VAT Directive must be interpreted as allowing the application of the margin taxation scheme to transactions for the supply of building land both where its purchase was subject to VAT, without the taxable person who subsequently resells it being entitled to deduct that tax, and where its purchase was not subject to VAT, either because that transaction did not fall within the scope of VAT or because it fell within the scope of VAT but was exempt from it.

31. As regards the first sub-question of the second question referred for a preliminary ruling, the parties to the main proceedings propose that it should be answered as follows:

– The applicant submits that, in order for the VAT margin scheme to apply the purchase by the taxable dealer must concern land which has already been classified as building land by the tax legislation at the time of purchase.

– According to the French Government, Article 392 of the VAT Directive must be interpreted as allowing the application of the margin taxation scheme to transactions for the supply of building land where that land was not built on when purchased by the taxable dealer.

32. As regards the second sub-question of the second question referred for a preliminary ruling, the parties to the main proceedings propose that it should be answered as follows:

– The applicant sees no obstacle to the application of the VAT margin scheme in the case where building land for which the vendor has not obtained a building or development permit, or carried out development works on the land, has been divided into parcels. However, it considers that the application of VAT on the margin should be excluded where works are carried out in order to install various services on the land (roads, drinking water, electricity, gas, sewerage, telecommunications) in so far as those works are to be regarded as construction as they are in the ground.

– According to the French Government, Article 392 of the VAT Directive must be interpreted as allowing the application of the margin taxation scheme to transactions for the supply of building land where that land, in the time between its purchase and its resale by the taxable person, is developed, in the sense that it is divided into parcels or development works are carried out in order to install roads and various services.

33. The European Commission, which proposes a joint answer to the two questions referred by the national court, considers that the derogating margin taxation scheme provided for in Article 392 of the VAT Directive does not apply to the resale of land, purchased without VAT, which has been divided into parcels and on which work has been carried out in order to install various services (roads, drinking water, electricity, gas, sewerage, telecommunications).

V. Analysis

A. Preliminary observations

34. As a preliminary point, it should be noted that the Court has not yet had the opportunity to rule on the interpretation of Article 392 of the VAT Directive.

35. It also appears that, according to the information provided by the Commission, only the French Republic has made use of the provisions laid down in Article 392 of the VAT Directive and exercised the option of providing for a derogating margin taxation scheme and the other Member States have not opted for a taxation scheme of that kind.

36. By its questions, the referring court asks whether the derogating margin taxation scheme provided for in Article 392 of the VAT Directive applies to certain transactions concerning land, for which the taxable person does not have the right to deduct the VAT on the purchase, where that land is resold, after being divided into parcels and development works being carried out, as building land.

37. It is therefore for the Court to interpret, first, the concept of the 'right of deduction on the purchase', in accordance with the French- language version and, secondly, that of goods 'purchased for the purpose of resale' within the meaning of Article 392 of the VAT Directive.

38. Before carrying out an in-depth analysis of the key terms in that provision, for me it is important to point out first of all that, in my opinion, the dispute concerning the property transaction which gave rise to the request for a preliminary ruling in the present case does not fall within the scope of Article 392 of the VAT Directive. The purchase of land which has not been built on, which is not subject to VAT, followed by (the carrying out of works and) its resale as building land, falls outside the scope of the derogating margin taxation scheme. Thus, that scheme appears only to cover a few specific cases involving building land and buildings purchased for the purpose of resale for which input VAT has been paid without subsequently being deducted, unlike land which has not been built on and which is expressly exempt from VAT under the VAT Directive.

39. The following analysis is intended to support the foregoing observation by providing a literal, contextual and teleological interpretation of Article 392 of the VAT Directive in order to enable the Court to provide a useful response to the referring court.

B. The first question referred for a preliminary ruling

40. By its first question, the referring court asks, in essence, whether Article 392 of the VAT Directive must be interpreted as allowing the margin taxation scheme to be applied to transactions for the supply of building land both where its purchase was subject to VAT, without

the taxable person who subsequently resells it being entitled to deduct that tax, and where its purchase was not subject to VAT, either because that transaction did not fall within the scope of VAT or because it fell within the scope of VAT but was exempt from it.

1. On the wording of the terms 'droit à déduction à l'occasion de l'acquisition' (right of deduction of VAT on the purchase)

41. The applicant submits that the margin scheme for the taxation of immovable property is applicable only if the taxable dealer has incurred VAT at the time of purchase and is unable to deduct it. However, according to the applicant, the application of that scheme should be excluded where that purchase was subject to VAT which the taxable dealer was able to deduct or where VAT was not charged on that purchase.

42. The applicant's interpretation relies, in particular, on the English- language version of Article 392 of the VAT Directive, which specifically refers to the 'non-deductibility of VAT' on the purchase,[5] in order to conclude that that article covers only situations in which the purchaser did indeed initially bear such a tax and was subsequently unable to deduct it.

43. For its part, the French Government considers that it is appropriate to rely on the literal interpretation of the French-language version of Article 392 of the VAT Directive, which makes no reference to the VAT charged on the sale of land intended for resale. It follows, according to that government, that the wording used in the French-language version ('droit à déduction à l'occasion de l'acquisition' (right of deduction on the purchase)) may encompass both a situation in which the sale was not subject to that tax (hence the absence of a right to deduct) and a situation in which, on the contrary, the initial sale was subject to VAT but the taxable person was not entitled to deduct it.

44. A reading of the different language versions of Article 392 of the VAT Directive shows differences in the terms used and therefore those differences may raise questions of interpretation. The French-language version of that provision refers solely to the absence of a 'droit à déduction' (right of deduction) without specifying whether the absence of that right is simply due to the fact that the initial transaction was not subject to VAT or whether it was subject to VAT without entitlement being conferred for it to be deducted subsequently.[6] However, the English-language version of that provision refers specifically to 'the VAT borne upon the purchase, stating that it 'was not deductible', thus leaving little doubt as to the fact that the sale of that land should, in principle, be subject to VAT.[7]

[5] The English-language version of Article 392 of the VAT Directive reads as follows: 'Member States may provide that, in respect of the supply of buildings and building land purchased for the purpose of resale by a taxable person for whom *the VAT on the purchase was not deductible*, the taxable amount shall be the difference between the selling price and the purchase price' (emphasis added).

[6] That wording was also used in other language versions of Article 392 of the VAT Directive, including the German- ('kein Recht auf Vorsteuerabzug'), Greek- ('δεν είχε δικαίωμα έκπτωσης κατά την αγορά'), Spanish- ('no haya tenido derecho a deducción'), Italian- ('non ha avuto diritto alla detrazione') and Dutch- ('geen recht op aftrek') language versions.

[7] That wording was also used in other language versions of Article 392 of the VAT Directive, including the Bulgarian- ('за което ДДС върху покупката не подлежи на приспадане'), Hungarian- ('nem volt adólevonásra jogosult'), Polish- ('który nie miał prawa do odliczenia VAT przy nabyciu'), Romanian- ('care nu a fost deductibilă TVA la cumpărare') and Finnish- ('ei ollut oston arvonlisäveron vähennysoikeutta') language versions.

45. In view of the variations in the different language versions of Article 392 of the VAT Directive, it should be recalled that, according to the settled case-law of the Court, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. [8]

46. It should also be recalled that, where there is divergence between the various language versions of an EU text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. [9]

2. Contextual interpretation of the terms 'droit à déduction à l'occasion de l'acquisition' (right of deduction of VAT on the purchase)

47. According to the settled case-law of the Court, the origins of a provision of EU law may also provide information relevant to its interpretation. [10] It is therefore appropriate to look at the situation as it was at the time the VAT Directive was adopted, in order to see whether there is any information that might shed light on its content and facilitate its interpretation.

48. In that regard, the Commission submits that, in accordance with its interpretation of Article 392 of the VAT Directive in 1992, the VAT margin scheme must apply to land which has been purchased without VAT.

49. More specifically, the Commission points out that, in its report to the Council of the European Union [11] on the transitional provisions, with regard to the derogation provided for in Article 28(3)(f) of the Sixth Directive, 77/88/EEC, [12] it stated that 'this Article allows the Member State to use the difference between the selling price and the purchase price as the taxable amount for buildings and building land purchased for the purpose of resale by a taxable person for whom tax was not deductible on the purchase. The derogation therefore applies to taxable persons who trade in buildings not newly constructed or in building land the purchase of which fell outside the scope of VAT'.

50. According to the Commission, that interpretation is also consistent with the logic set out in the explanatory memorandum to the Sixth VAT Directive, which was repealed by the VAT Directive, in accordance with which a reduced taxable amount could be applied in the event that goods for which VAT has already been paid under the definitive system (for example a residential building which has been 'consumed' by virtue of the first occupation thereof) are subsequently reintroduced into the 'commercial circuit' and are again subject to VAT. Thus, to take account of that re-commercialisation of the building which would involve an unduly heavy tax burden on the business of the property dealer, it was necessary to tax it otherwise than under the general rules and to provide that Member States may treat as the chargeable amount for VAT the difference between 'the sale price and the purchase price'. [13]

8 See judgment of 12 September 2019, *A and Others* (C-347/17, EU:C:2019:720, paragraph 38 and the case-law cited).

9 See, to that effect, judgment of 8 October 2020, *United Biscuits (Pensions Trustees) and United Biscuits Pension Investments* (C-235/19, EU:C:2020:801, paragraph 46 and the case-law cited).

10 See judgment of 12 December 2019, *G.S. and V.G. (Threat to public policy)* (C-381/18 and C-382/18, EU:C:2019:1072, paragraph 55 and the case-law cited).

11 Report on the transitional provisions resulting from Article 28(3) of the Sixth Directive 77/388/EEC, and Article 1(1) of the Eighteenth Directive 89/465/EEC, presented in accordance with Article 3 of the Eighteenth Council Directive of 18 July 1989 (SEC(92) 1006 final).

12 Council Directive 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 VAT Directive').

13 Proposal for a Sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes – Common system of value added tax: uniform basis of assessment (COM(1973) 950 final).

51. Despite the fact that the contextual interpretation of Article 392 of the VAT Directive appears to reveal the intentions of the EU legislature as regards the scope of the derogating margin taxation scheme, I consider that, by limiting my analysis to that interpretation alone, I risk giving a partial and incomplete answer to the question referred for a preliminary ruling. Therefore, I take the view that the derogating margin taxation scheme should not apply only to the situation set out by the Commission on the basis of the contextual interpretation, namely the purchase and subsequent resale of building land purchased without VAT by a taxable person trading in such goods, but it should also apply where the taxable dealer has incurred VAT on the purchase and is unable to deduct it. The teleological interpretation of the wording 'droit à déduction à l'occasion de l'acquisition' (right of deduction of VAT on the purchase), which I shall now address, confirms that position, while allowing a full response to be given to the referring court.

3. Teleological interpretation of the terms 'droit à déduction à l'occasion de l'acquisition' (right of deduction of VAT on the purchase)

(a) Taxation of the margin as a derogating scheme from the ordinary legal rules on the taxation of sales of 'building land' based on its selling price

52. Before carrying out a detailed analysis of the objectives of the VAT Directive and of Article 392 thereof, I consider it necessary to establish whether that directive is intended to apply to land such as that at issue in the present case.

53. In the first place, it should be recalled that the VAT margin scheme provided for in Article 392 of the VAT Directive is a scheme which derogates from the principle established in Article 73 of that directive, in accordance with which VAT is calculated on the basis of the supply obtained, namely the selling price.

54. Therefore, the supply of building land by a taxable person is subject to VAT, in principle, in accordance with the ordinary legal rules, under Article 9(1) and Article 12(1) of the VAT Directive, or, by way of derogation for Member States which have made provision for this option, in accordance with the margin taxation scheme provided for in Article 392 of that directive.

55. The latter provision gives Member States the option to provide for a scheme for taxation of the margin (and not of the selling price like the common system) in which the taxable amount is the difference between the selling price and the purchase price.

56. Since it is a derogation from the general principle of the VAT Directive that VAT must in principle be levied on the price charged between the parties, Article 392 of that directive must be construed narrowly, without, however, rendering that provision meaningless. [14]

57. In the second place, it is also important to note that the VAT Directive draws a clear distinction between, on the one hand, supplies of building land which (like immovable property) fall within the scope of the general system and are subject to VAT and, on the other, supplies of land which has not been built on, which are exempt from that tax. [15]

[14] See, by analogy, judgments of 29 November 2018, *Mensing* (C-264/17, EU:C:2018:968, paragraphs 22 and 23), and of 5 September 2019, *Regards Photographiques* (C-145/18, EU:C:2019:668, paragraph 32).

[15] See, to that effect, judgment of 17 January 2013, *Woningstiching Maasdriel* (C-543/11, EU:C:2013:20, paragraph 30 and the case-law cited).

58. Thus, under Article 12(3) of the VAT Directive, 'building land', for the purposes of paragraph 1(b) of that article, means any unimproved or improved land defined as such by the Member States. The Member States, when defining what land is to be regarded as being 'building land', must have regard to the objective pursued by Article 135(1)(k) of that directive, which seeks to exempt from VAT only supplies of land which has not been built on and is not intended to support a building. [16]

59. Member States' discretion in defining what constitutes 'building land' is also limited by the scope of the concept of a 'building', defined very broadly by the EU legislature in the first subparagraph of Article 12(2) of the VAT Directive as 'any structure fixed to or in the ground'. [17]

60. In the light of the foregoing, I take the view that the intention of the EU legislature was to reserve the tax exemption solely for the sale of land which has not been built on and to make any supply of building land for consideration by a taxable person subject to VAT, either on the selling price in accordance with the ordinary legal rules or on the margin in accordance with the derogating scheme.

(b) Interpretation of the terms 'droit à déduction' (right of deduction) in the light of the objective of fiscal neutrality pursued by the VAT Directive

61. Both the French Government and the applicant point out that one of the purposes of the VAT Directive is to guarantee the principle of fiscal neutrality and that Article 392 of that directive should be interpreted in the light of that principle. However, the parties concerned appear to interpret that principle differently.

62. First of all, it should be recalled that, according to the case-law of the Court, the principle of fiscal neutrality precludes treating similar supplies of goods, which are in competition with each other, differently for VAT purposes and, furthermore, precludes economic operators who carry out the same activities from being treated differently as far as the levying of VAT is concerned. [18]

63. According to the applicant, liability to VAT on the margin is an application of the principle of neutrality of VAT in order to compensate for the residue of non-deductible VAT. Thus, that derogation is justified in order to avoid double taxation, namely liability to pay tax on a price which includes VAT incurred on the purchase of the land which the taxable dealer was unable to deduct. In order to mitigate that residue of VAT and not charge VAT on a selling price which includes the VAT which has not been deducted on the purchase of the land, Article 392 of the VAT Directive allows only the margin, namely the difference between the selling price and the purchase price, to be taxed. The margin is therefore reduced by the VAT that was not recovered at the time of purchase in order to restore tax neutrality. Accordingly, the applicant considers that taxation calculated on the overall selling price obtained by an undertaking supplying land, although, at the time of purchase, it was unable to deduct the VAT which remains incorporated in the purchase price, would result in double taxation.

[16] See, to that effect, judgments of 17 January 2013, *Woningstiching Maasdriel* (C-543/11, EU:C:2013:20, paragraph 30), and of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660, paragraph 53).

[17] See judgment of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660, paragraph 54).

[18] See judgment of 17 January 2013, *Woningstiching Maasdriel* (C-543/11, EU:C:2013:20, paragraph 31 and the case-law cited).

64. On the contrary, according to the applicant, there is no justification, in the light of the objective assigned to the VAT margin scheme, for that scheme to apply to the sale of land the purchase of which was not subject to VAT or, where applicable, where the VAT has been recovered. If that were the case, the taxable dealer would, in the applicant's view, enjoy an unjustified financial and competitive advantage, to the detriment of public finances.

65. For its part, the French Government submits that the interpretation proposed by the applicant is contrary to the principle of fiscal neutrality, on the one hand, and the essential characteristics of VAT, on the other.[19] The implementation of those essential characteristics would, in order to ensure the neutrality of VAT, lead to special arrangements being made for certain specific goods which, after having been the subject of a first final consumption, are reintegrated into an economic process of production or distribution for the purpose of being the subject of a second final consumption.

66. The French Government submits that, in such situations, taxation on the total selling price following that first consumption would, in the absence of the ability to deduct the VAT, lead to the basis of assessment including not only a price that is already subject to a definitive VAT burden but also the amount of that burden itself. This would also mean that the definitive VAT burden would depend on the economic system, inter alia the number of successive final consumptions and the prices paid, contrary to the objective of neutrality pursued.

67. That interpretation is also adopted by the Commission, which relies on the explanatory memorandum to the Sixth VAT Directive, cited in points 48 to 50 of this Opinion.

68. It is therefore possible, in my view, to infer from the intentions of the EU legislature that the reduced basis of assessment provided for by the VAT margin scheme is intended to be applied, first of all, in the event that goods whose purchase fell outside the scope of VAT (for example residential buildings, goods which have been 'consumed' by virtue of their first occupation) are subsequently reintroduced into the 'commercial circuit' and are again subject to VAT.

69. I also note that such an interpretation is consistent with the Court's case-law on the taxation of second-hand goods, which are subject to an arrangement which is similar to that at issue in the case in the main proceedings. Thus, the Court has held that to tax, on their overall price, the supply of second-hand goods from a taxable dealer, where the price at which that dealer purchased those goods includes a sum of input VAT which was paid by a person who was not able to deduct it (like the taxable dealer), would lead to double taxation.[20]

[19] The essential characteristics of VAT are, as the French Government points out, first, that VAT applies generally to transactions relating to goods or services, secondly, that it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied, thirdly, that it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place, and, fourthly, that the amounts paid during the preceding stages of the production and distribution process are deducted from the VAT payable by a taxable person, with the result that that tax applies, at any given stage, only to the value added at that stage and the final burden of that tax rests ultimately with the consumer (see judgment of 12 June 2019, *Oro Efectivo*, C-185/18, EU:C:2019:485, paragraph 23).

[20] See judgment of 3 March 2011, *Auto Nikolovi* (C-203/10, EU:CU:2011:118, paragraph 48). See also, to that effect, judgments of 1 April 2004, *Stenholmen* (C-320/02, EU:C:2004:213, paragraph 25), and of 8 December 2005, *Jyske Finans* (C-280/04, EU:C:2005:753, paragraph 38).

70. Such an interpretation also makes it possible to ensure that the principle of fiscal neutrality is applied in accordance with the case-law of the Court, by guaranteeing both that similar supplies of goods, which are in competition with each other, are not treated differently for VAT purposes and that economic operators who carry out the same activities are not treated differently as far as the levying of VAT is concerned. [21]

71. Therefore, first, not all purchases of building land by a taxable person for the purpose of resale, within the meaning of Article 392 of the VAT Directive, are necessarily subject to VAT. The purchase of building land is not subject to VAT, for example, where the original vendor is an individual who is merely managing his private property, that is to say exercising his right of ownership, without that sale falling within the scope of the performance of any economic activity by the person concerned. [22]

72. Secondly, to hold that Article 392 of the VAT Directive should be interpreted solely as reserving the application of the margin taxation scheme only to supplies of building land the purchase of which was subject to VAT, without the taxable person who subsequently resells it being entitled to deduct that tax, and to therefore exclude the application of that scheme where that purchase was not subject to VAT (in the event that that land is reintegrated into an economic process for the purpose of being the subject of a second consumption), would lead to similar supplies of goods, which are thus in competition with each other, and the economic operators who carry them out, being treated differently for VAT purposes. Of those similar supplies of building land, only the former would be subject to the margin taxation system, whereas the latter would be subject to the common system of VAT.

73. I also note that, despite the similarities between its method of calculation and other taxes on income from immovable property, such as tax on capital gains from immovable property, [23] that are found in many Member States, the VAT margin scheme provided for in Article 392 of the VAT Directive does not make liability to tax conditional on a specific holding period. I consider that such a criterion would make it possible, on the one hand, to define clearly and precisely the scope of that derogating scheme and, on the other, to ensure that it is applied uniformly and transparently to all economic operators involved in the transactions covered by that article.

74. In the light of the foregoing, it is clear to me that the VAT margin scheme is applicable in the situation advocated by the French Government and the Commission in which the purchase of building land or a building intended for resale is not subject to VAT, whereas the purchase price paid by the taxable dealer in fact incorporates an amount of non-deductible input VAT which was paid by the original (non-taxable) vendor.

75. Following the reasoning set out in points 70 to 72 of this Opinion, I take the view that Article 392 of the VAT Directive must also apply in the situation mentioned by the applicant in which a taxable person purchases building land under the common system of VAT without being able, for any reason whatsoever, to deduct the input VAT before reselling that land. In the present case, the application of the VAT margin scheme in such a situation would also make it possible to ensure the principle of fiscal neutrality by avoiding double taxation.

[21] See point 62 of this Opinion.

[22] Judgment of 15 September 2011, *Slaby and Others* (C-180/10 and C-181/10, EU:C:2011:589, paragraph 50).

[23] See, inter alia, Articles 150 U and 150 VD of the French General Tax Code; Article 90(10) of the Belgian code des impôts sur les revenus 1992 (1992 Income Tax Code); Article 41(5) of the kodikas forologias isodimatos (Income Tax Code (Greece), N.4172/2013, Law 4172/2013 (FEK A'167/23.8.2013) as amended by Law 4254/2014 (FEK A'85/07.04.2014)).

76. However, neither the literal interpretation nor the contextual and teleological interpretation can justify the application of that derogating scheme to land which has not been built on which, in the present case, is fully exempt from VAT. Therefore, neither the isolated purchase or successive purchases of land which has not been built on may be subject to VAT.

77. It follows that there would be no risk of double taxation in the event of the resale of such land, even if in the meantime it had become 'taxable' as building land. Similarly, as it is exempt from VAT, land which has not been built on may not be the subject of 'final consumption' within the meaning of the VAT Directive, and therefore the question of its 'reintroduction' into the commercial circuit does not arise. Therefore, in those two situations, the assumption that VAT 'remains incorporated' in such goods as a result of any previous taxation does not arise.

78. In the light of the foregoing, I consider that, in a situation such as that in the case in the main proceedings, the sale of building land which was previously land which had not been built on should fall within the scope of the common system of VAT on the selling price under Article 9(1) and Article 12(1) of the VAT Directive and not the derogating scheme provided for in Article 392 of that directive.

79. To conclude, it seems to me that the application of Article 392 of the VAT Directive should be reserved for buildings and building land purchased for the purpose of resale in the following two situations: where their purchase was subject to VAT, without the taxable person who subsequently resells them being entitled to deduct that tax, or even where their purchase was not subject to VAT, because that transaction did not fall within the scope of VAT, even though the price paid by the taxable dealer to purchase those goods incorporates an amount of input VAT which was paid by the original (non-taxable) vendor.

80. Such an interpretation would make it possible to guarantee the objectives and effectiveness of Article 392 of the VAT Directive while giving it a restrictive interpretation as it is a derogating scheme.

81. In the light of the foregoing, I propose that the answer to the first question should be that Article 392 of the VAT Directive must be interpreted as allowing the margin taxation scheme to be applied to transactions for the supply of building land both where its purchase was subject to VAT, without the taxable person who subsequently resells it being entitled to deduct that tax, and where its purchase was not subject to VAT on the ground that that transaction did not fall within the scope of VAT, where the price at which the taxable dealer purchased those goods includes an amount of input VAT which was paid by the original (non-taxable) vendor. However, that provision does not apply to transactions for the supply of building land the initial purchase of which as land which had not been built on was exempt from the scope of the VAT Directive.

C. The second question referred for a preliminary ruling

82. By its second question, the referring court seeks to ascertain, in essence, whether Article 392 of the VAT Directive must be interpreted as excluding the application of the margin taxation scheme to transactions for the supply of building land in the following two cases:

– where that land, purchased as land which has not been built on, becomes building land in the time between it being purchased and resold by the taxable person;

– where that land, in the time between it being purchased and resold by the taxable person, is developed, in the sense that it is divided into parcels or works are carried out in order to install various services (roads, drinking water, electricity, gas, sewage, telecommunications).

83. I would like to note at this early opportunity that the analysis which led to the proposed answer to the first question appears to answer the second question in its entirety, in that Article 392 of the VAT Directive applies only where the purchase by the taxable dealer concerns land which has already been classified as building land by the tax legislation at the time of purchase. Therefore, the VAT margin scheme would not apply to supplies of building land the initial purchase of which as land which had not been built on did not fall within the scope of the VAT Directive.

84. I shall nevertheless examine the question referred in its entirety in order to enable the Court to give a useful answer to the national court.

1. The application of Article 392 of the VAT Directive to 'building land' initially purchased as 'land which has not been built on'

85. By its first sub-question, the referring court asks, in essence, whether Article 392 of the VAT Directive must be interpreted as allowing the application of the margin taxation scheme to transactions for the supply of building land where that land was not built on when purchased by the taxable dealer.

86. In that regard, it should be recalled that the VAT Directive draws a clear distinction between 'building land' and 'land which has not been built on' by treating them differently for tax purposes. The legal rules governing the sale of such land were described in points 57 to 60 of this Opinion.

87. The wording of Article 392 of the VAT Directive appears to reserve, without any ambiguity, the derogating margin taxation scheme for 'building land' only where it is 'purchased for the purpose of resale'. Such an interpretation is also confirmed by the contextual and teleological interpretation of Article 392 of that directive. [24]

88. Therefore, the scope of that provision appears to be clearly limited to land which, from the outset, is intended to support a building and which was already classified as 'building land' by the national legislation at the time of its purchase. It follows that land which has not been built on and which is not intended to support a building, which, in principle, is exempt from VAT, should be excluded from the scope of that provision. In other words, the change in the legal classification of land such as that at issue in the case in the main proceedings appears to exclude the application of the margin taxation scheme, which presupposes that the goods purchased and those resold are legally identical.

89. That interpretation is also consistent with the principle that, as a derogating scheme, Article 392 of the VAT Directive must be interpreted strictly. [25]

[24] See points 47 to 81 of this Opinion.

[25] See point 56 of this Opinion.

90. In the light of the foregoing, I propose that the answer to first sub-question of the second question should be that Article 392 of the VAT Directive must be interpreted as meaning that the margin taxation scheme cannot apply to transactions for the supply of building land where that land was not built on when purchased by the taxable dealer.

2. The application of Article 392 of the VAT Directive to building land where that land has been developed

91. By its second sub-question, the referring court seeks to ascertain, in essence, whether Article 392 of the VAT Directive excludes the application of the margin taxation scheme to the supply of building land where that land, in the time between it being purchased and resold by the taxable person, is developed, in the sense that it is divided into parcels or works are carried out in order to install various services (roads, drinking water, electricity, gas, sewage, telecommunications).

92. This sub-question leads me to consider whether the words 'purchased for the purpose of resale', used in Article 392 of the VAT Directive, imply resale of the goods in their current state without extensive work being undertaken, as the Commission submits, or, on the contrary, whether such work does not preclude the application of that provision, in accordance with the French Government's interpretation.

93. For its part, the applicant considers that some of the changes made, such as the division of a plot of land into parcels, do not prevent the application of the VAT margin scheme, whereas, by contrast, if more extensive works are carried out on that land (such as those undertaken to enable various services to be installed), this would preclude the application of that scheme.

94. In view of the proposed answer to the first sub-question of the second question, which is to exclude the application of Article 392 of the VAT Directive to land intended for resale that was initially purchased as land which had not been built on, I consider that this question has no legal relevance in the present case.

95. However, in order to enable the Court to provide a useful response to the referring court, I shall consider a situation in which the land which is the subject of the resale was not classified specifically as land 'which has not been built on' by the national legislation at the time of its initial purchase and may, accordingly, be regarded as 'building land', in view of the limited differences which may exist, in practice, between those two types of land.

96. Having regard to the fact that it is for the Member States to define what land is to be regarded as 'building land', the French Government seems to suggest that undeveloped land such as that which was the subject of the resale in the case in the main proceedings could possibly be classified as 'building land' from the time of its initial purchase.

97. Therefore, the French Government submits that, where undeveloped land is regarded as building land, according to the definition adopted by the Member State concerned, alterations made to it to make it a developed plot, which thus is still intended to be built on, have no bearing on its classification as 'building land' as long as those developments cannot be classified as 'buildings'. According to that government, that position is confirmed by the case-law of the Court. [26]

[26] See judgment of 4 September 2019, *KPC Herning* (C-71/18, EU:C:2019:660, paragraph 53 and the case-law cited).

98. In line with that reasoning, it could be argued that any alterations to the land in question have no bearing on the application of Article 392 of the VAT Directive (regardless of their extent) as long as the land retains its status as 'building land'.

99. However, for the reasons which I shall set out below, I consider that such reasoning cannot succeed.

100. In the first place, I would like to recall that the Member States' discretion in defining what constitutes 'building land' is limited by the VAT Directive itself.[27] I therefore consider the scenario put forward by the French Government to be hypothetical, while observing that it risks being contrary to the provisions of the VAT Directive.

101. Moreover, to adopt such an interpretation would disregard not only the objectives of the VAT margin scheme but also the basic principles of the VAT Directive, and in particular the principle which provides for the taxation of the 'added value' created, in particular by works such as those described in the second question referred for a preliminary ruling.

102. In that regard, I note that, interpreted literally, the words 'purchased for the purpose of resale' point to resale of the goods in their current state without extensive works being carried out. Therefore, it would appear that the VAT margin scheme covers only successive sales of immovable property. Even if certain interventions or works cannot be excluded, Article 392 of the VAT Directive does not appear to cover large-scale works which are likely not only to change the commercial characteristics of the goods in question but also to create 'added value' which is liable to be taxed in full in accordance with the common system of VAT.

103. That would also appear to be confirmed by the case-law of the Court, according to which a building that has been converted or upgraded should be subject to the common system of VAT since those operations have added value, in the same way as the initial construction of the building.[28]

104. I am of the opinion that such reasoning must be applied by analogy to the present case. Therefore, the margin taxation scheme should not apply in the case of substantial alterations to goods, creating added value, which should, in principle, be subject to the common system of VAT on the selling price.

105. In the second place, the interpretation proposed by the French Government appears to overlook the fact that the nature of the work carried out by the applicant is likely to result in a change to the legal classification of the land in question, which would become 'buildings' in the light of EU law and the case-law of the Court and, accordingly, preclude the application of the VAT margin scheme.

106. In that regard, as far as the scope of the VAT Directive is concerned, the Implementing Regulation classifies as 'immovable property' any 'building' or 'construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved', such as 'the construction of permanent structures on land, as well as construction and demolition work performed on permanent structures such as pipeline systems for gas, water, sewerage and the like'.[29]

[27] See points 58 and 59 of this Opinion.

[28] See, by analogy, judgment of 16 November 2017, *Kozuba Premium Selection* (C-308/16, EU:C:2017:869, paragraphs 32 and 33).

[29] See Article 13b(b) and Article 31a(2)(d) of the Implementing Regulation.

107. Therefore, the construction carried out by the applicant, such as, for example, installing services, providing a road or connecting various services, appears to fall within the concept of 'building' as it is in the ground.

108. As rightly noted by the applicant and the Commission, the characteristics of the land have therefore been altered through the construction, or even the commencement of building works to construct a new building, and this is not merely the purchase and resale of land.

109. In the light of the foregoing, I consider that the words 'purchased for the purpose of resale', used in Article 392 of the VAT Directive, imply resale of the goods in their current state without extensive work being carried out. This also appears to be in keeping with the spirit of the margin taxation scheme, which is a derogating scheme that must be interpreted strictly.

110. Lastly, for the sake of completeness, it is also necessary to examine whether my proposed answer to this sub-question would remain the same if, in the time between the initial purchase and the resale, the applicant did not carry out work such as that described in the second question, but merely divided that land into parcels. This appears to be the first part of the referring court's second sub-question.

111. Following the reasoning set out in points 104 to 106 of this Opinion, the division of land into parcels which is not accompanied by either a building permit being obtained or development works being carried out, such as those undertaken by the applicant, cannot change the legal status of the land in the light of EU law and the case-law of the Court.

112. Therefore, the division in the land register of a plot of land to allow it to be sold in several parcels should not, in principle, create added value which would justify it being subject to the common system of VAT on the selling price. Moreover, if no work has been carried out, that land cannot be classified as a 'building'.

113. It follows that the division of a plot of land resulting from a simple change to the land register allowing the resale of several parcels may be subject to the VAT margin scheme provided for in Article 392 of the VAT Directive. However, I would emphasise that, unlike the facts of the case in the main proceedings, such an interpretation presupposes that the land which is divided into parcels in the land register and subsequently resold has been classified as 'building land' since its acquisition.

114. In the light of the foregoing, I propose that the answer to the second sub-question of the second question should be that the derogating margin taxation scheme provided for in Article 392 of the VAT Directive does not apply to the resale of land which, in the time between it being purchased and resold, is developed, in the sense that works are carried out in order to install various services (roads, drinking water, electricity, gas, sewage, telecommunications). However, Article 392 of that directive applies in the case where, in the time between the initial purchase of building land and its resale, the alterations to that land are limited to its division into parcels.

VI. Conclusion

115. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Conseil d'État (Council of State, France) as follows:

(1) Article 392 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as allowing the application of the margin taxation scheme to transactions for the supply of building land both where its purchase was subject to value added tax (VAT), without the taxable person who subsequently resells it being entitled to deduct that tax, and where its purchase was not subject to VAT on the ground that that transaction did not fall within the scope of VAT, where the price at which the taxable dealer purchased those goods includes an amount of input VAT which was paid by the original (non-taxable) vendor. However, that provision does not apply to transactions for the supply of building land the initial purchase of which as land which had not been built on was exempt from the scope of that directive.

(2) Article 392 of Directive 2006/112 must be interpreted as meaning that the margin taxation scheme cannot apply to transactions for the supply of building land where that land was not built on when purchased by the taxable dealer.

The derogating margin taxation scheme provided for in Article 392 does not apply to the resale of land which, in the time between it being purchased and resold, is developed, in the sense that works are carried out in order to install various services (roads, drinking water, electricity, gas, sewage, telecommunications). However, Article 392 applies in the case where, in the time between the initial purchase of building land and its resale, the alterations to that land are limited to its division into parcels.