Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

10 October 2013 *

(Sixth VAT Directive — Articles 13C and 20 — Supply of immovable property — Right to opt for taxation — Right to deduction — Adjustment of deductions — Recovery of sums due following adjustment of a VAT deduction — Taxable person liable for payment — Taxable person other than the person who initially applied the deduction and who is extraneous to the taxed transaction which gave rise to the deduction)

In Case C-622/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 28 October 2011, received at the Court on 5 December 2011, in the proceedings

Staatssecretaris van Financiën

v

Pactor Vastgoed BV,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 18 April 2013,

after considering the observations submitted on behalf of:

— Pactor Vastgoed BV, by M. van de Leur, belastingadviseur,

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

— Ireland, by E. Creedon, acting as Agent, and by C. Toland, BL,

— the Finnish Government, by M. Pere, acting as Agent,

— the European Commission, by G. Wils and L. Lozano Palacios, acting as Agents,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 30 May 2013,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 20 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 Staatssecretaris van Financiën (Secretary of State for Finances, 'the Staatssecretaris') and Pactor Vastgoed BV ('Pactor Vastgoed') concerning a demand for payment of additional turnover tax ('the VAT') issued to that company.

Legal context

European Union law

3 Article 4(3) of the Sixth Directive provides as follows:

'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 transactions:

(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, 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 these periods do not exceed five years and two years respectively.

"A building" shall be taken to mean any structure fixed to or in the ground;

...'

4 Article 13B of that Directive is worded as follows:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);

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

5 According to Article 13C of that directive:

‘Member States may allow taxpayers a right of option for taxation in cases of:

...

(b) the transactions covered in B(d), (g) and (h) above.

Member States may restrict the scope of this right of option and shall fix the details of its use.’

6 Article 17(2)(a) of that directive, in the version resulting from Article 28f thereof, 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’.

7 Article 20 of the Sixth Directive provides:

‘1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are cancelled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed, nor in the case of applications for the purpose of making gifts of small value and giving samples specified in Article 5(6). However, Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft.

...

3. In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. Such business activities are presumed to be fully taxed in cases where the delivery of the said goods is taxed; they are presumed to be fully exempt where the delivery is exempt. The adjustment shall be made only once for the whole period of adjustment still to be covered.

However, in the latter case, Member States may waive the requirement for adjustment in so far as the purchaser is a taxable person using the capital goods in question solely for transactions in respect of which [VAT] is deductible.

4. For the purposes of applying the provisions of paragraphs 2 and 3, Member States may:

...

— adopt any suitable measures with a view to ensuring that adjustment does not involve any unjustified advantage,

— permit administrative simplifications.

...'

8 Article 21 of the Sixth Directive, entitled 'Persons liable to pay tax to the authorities' provides as follows:

'The following shall be liable to pay [VAT]:

1. under the internal system:

(a) taxable persons who carry out taxable transactions ... The Member States may also provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax;

...'

9 Article 27(1) of that Directive reads as follows:

'The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain forms of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.'

10 Article 1 of Council Decision 88/498/EEC of 19 July 1988 authorising the Kingdom of the Netherlands to apply a measure derogating from Article 21(1)(a) of the Sixth Directive 77/388 (OJ 1988 L 269, p. 54), adopted under Article 27(1) of that directive, provides that, with regard to the transactions mentioned in Article 13B(g) and (h) of that directive, the Kingdom of the Netherlands, notwithstanding Article 21(1)(a) of that directive, is authorised to apply, in the context of the option for taxation provided for in Article 13C(b), a provision imposing liability for the VAT on the purchaser.

11 Decision 88/498 was repealed with effect from 1 January 2008 by Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388 as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations (OJ 2006 L 221, p. 9).

Netherlands law

12 Article 11 of the Law on turnover tax (Wet op de omzetbelasting) of 28 June 1968 (*Staasblad* 1968, No 329), in the version applicable in the main proceedings ('the 1968 Law'), provides:

'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 rights over such property, with the exception of:

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

(2) supplies, other than those referred to in subparagraph 1, to persons using the immovable property for purposes that give rise to a right to deduct tax in full or virtually in full pursuant to Article 15, provided that the undertaking making the supply and the one to which it is made have jointly submitted a request to that effect to the tax inspector and that, moreover, they observe the conditions laid down by ministerial decree;

…’

13 Article 12a of that law provides:

‘If improper use is made of the exception laid down in Article 11(1)(a)(2), because the person to whom the supply is effected does not use the immovable property for purposes that give rise to a right to deduct tax in full or virtually in full pursuant to Article 15, the tax deducted pursuant to Article 15 in connection with that supply by the supplier shall be the subject of a notice of additional assessment issued to the person to whom the supply was effected.’

14 Article 12(5) of that law provides:

‘In cases which must be defined by a general administrative measure and according to rules to be laid down by or pursuant to that measure, the tax is, in order to better ensure collection, collected from the person to whom the supply is made or the service provided.’

15 Under Article 24ba(1)(a) of the turnover tax implementation order 1968 (the Uitvoeringsbesluit omzetbelasting 1968) (‘the order’):

‘1. The following shall be designated as cases covered by Article 12(5) of the [1968 Law]:

(a) where an immovable property or a right to which such property is subject is supplied under the terms of Article 11(1)(a)(2) of the [1968 Law]’.

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

16 On 5 January 2000, an undertaking (‘the supplier’) delivered an immovable property to Pactor Vastgoed, who, in agreement with the supplier, opted, on the basis of Article 11(1)(a)(2) of the 1968 Law, for taxation of that supply.

17 That supplier had acquired that property several years previously, also opting for taxation of that acquisition. It had therefore deducted the VAT charged to it.

18 With effect from April 2000, Pactor Vastgoed leased that property. That transaction was exempt from VAT.

19 Pactor Vastgoed subsequently sold that property and supplied it at the beginning of the month of July 2000. That supply was exempt from VAT.

20 Taking the view that the supply made to Pactor Vastgoed did not satisfy the conditions referred to in Article 11(1)(a)(2) of the 1968 Law and that, consequently, that delivery should have been exempted from VAT, the Netherlands tax authorities, pursuant to Article 12a of that law, issued a notice of additional assessment in respect of VAT to that company for the period from 1 January to 31 December 2000, for an amount corresponding to the amount due following adjustment of the VAT deduction applied by the supplier on the occasion of the acquisition of the immovable property subsequently supplied to Pactor Vastgoed.

21 Pactor Vastgoed lodged an objection against that additional assessment.

22 Following the rejection of that objection, Pactor Vastgoed brought an action before the Rechtbank te ’s-Gravenhage (District Court, The Hague) against that rejection decision.

23 As that action was also dismissed, Pactor Vastgoed lodged an appeal against the decision of the Rechtbank te 's-Gravenhage before the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague), which set aside that judgment together with the additional assessment issued to that company.

24 The Staatssecretaris van Financiën brought an appeal on a point of law before the referring court against the judgment of the Gerechtshof te 's-Gravenhage.

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

'Does the Sixth Directive allow, in the event that the VAT initially deducted in accordance with Article 20 of that directive is adjusted in such a way that the amount of the deduction must be reimbursed in full or in part, that amount to be charged to a person other than the taxable person who applied the deduction in the past, in particular – as is the case when Article 12a of the [1968 Law] is applied – to a person to whom a property has been supplied by that taxable person?'

The question referred for a preliminary ruling

26 By its question the referring court asks, in essence, whether the Sixth Directive must be interpreted as precluding the recovery of amounts due following the adjustment of a VAT deduction from a taxable person other than the person who applied that deduction.

27 It should be borne in mind at the outset that the Kingdom of the Netherlands has, first, exercised the option provided for in subparagraph (b) of the first paragraph of Article 13C of the Sixth Directive, enabling Member States to allow taxpayers a right to elect taxation in the case of the transactions covered in Article 13B(g) of that directive, and, secondly, obtained, on the basis of Article 27 of that directive, an authorisation from the Council to apply, notwithstanding Article 21(1)(a) of that directive, a provision imposing liability for the VAT on the purchaser in the context of the option for taxation provided for by subparagraph (b) of the first paragraph of Article 13C of the Sixth Directive.

28 It is in that context that the supplies of the immovable property at issue in the main proceedings were taxed and that the VAT in relation to those supplies was paid by the supplier and, subsequently, by Pactor Vastgoed.

29 At issue in the main proceedings is whether the Netherlands tax authorities may require that the amounts due under the adjustment of the VAT deduction applied by the supplier when he acquired that immovable property, subsequently delivered to Pactor Vastgoed, should be claimed from the latter.

30 In that regard, it should be noted that the Sixth Directive contains no express indication concerning the taxable person liable for tax debts resulting from the adjustment of a VAT deduction.

31 However, it cannot be inferred from this that the Member States are, in the context of the details or procedures which they are to determine under the second subparagraph of Article 13C and Article 20(1) of that directive, free to decide which taxpayer must pay the VAT in such a context.

32 Indeed, the designation of the person liable for the amounts due following the adjustment of a VAT deduction does not constitute a 'detail' or 'procedure' within the meaning of those provisions, but rather, as is apparent from Article 21 of that directive, a substantive rule of the common VAT system established by that directive.

33 In that regard, it should be pointed out that the adjustment mechanism provided for in the Sixth Directive is an integral part of the VAT deduction scheme established by that directive (see Case C-234/11 *TETS Haskovo* [2012] ECR, paragraph 30, and Case C-257/11 *Gran Via Moineşti* [2012] ECR, paragraph 39).

34 According to the case-law of the Court of Justice, the rules laid down by that directive in respect of adjustment of deductions are intended to enhance the precision of deductions so as to ensure the neutrality of VAT, with the result that transactions effected at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies themselves subject to VAT. By those rules, that directive thus aims to establish a close and direct relationship between the right to deduct input VAT and the use of the goods and services concerned for taxable output transactions (see Case C-63/04 *Centralan Property* [2005] ECR I-11087, paragraph 57; *TETS Haskovo*, paragraph 31, and *Gran Via Moineşti*, paragraph 38).

35 Pursuant to Article 20(1)(a) of the Sixth Directive, the initial deduction is to be adjusted where it is higher or lower than that to which the taxable person was entitled.

36 That provision must be interpreted as meaning that, in the event of adjustment of a VAT deduction applied by a taxable person, the amounts due in that regard must be paid by that taxable person.

37 A contrary interpretation, according to which the adjustment of a VAT deduction relating to a supply of goods or of services could be imposed on a taxable person other than the person who benefited from that supply or that service, would be incompatible with the objectives, recalled in paragraph 34 of the present judgment, pursued in that regard by the Sixth Directive.

38 In that context, it must be observed that Article 21(1)(a) of that directive provides that the taxable person liable for VAT under the internal system is the person carrying out a taxable transaction (see order in Case C-395/02 *Transport Service* [2004] ECR I-1991, paragraph 23). Furthermore, as the Advocate General has pointed out in points 66 and 68 of his Opinion, that article lists exhaustively the cases in which a person other than that taxable person may be liable for payment of that tax.

39 However, the situation in the main proceedings does not correspond to any of those cases. In that regard, it should be noted that, contrary to the submissions of the Netherlands Government, the option of providing that a person, other than the taxable person, is to be held jointly and severally liable for payment of the tax, accorded to the Member States by that provision, cannot be interpreted as allowing them to impose a separate tax liability payable by that person.

40 Moreover, in the event of successive supplies of an immovable property, such as those at issue in the main proceedings, the fact that one of the taxable persons concerned did not, at the time of the supply in which it has participated, comply with the rules governing the exercise of the right of option referred to in second paragraph of Article 13C of the Sixth Directive cannot have the consequence of requiring that taxable person to pay the tax debt due following the adjustment of a VAT deduction applied by another taxable person in relation to one of those supplies in respect of which the first taxable person is extraneous.

41 In such a situation, the accuracy of deductions and the neutrality of VAT, which the rules relating to the adjustment of deductions are intended to ensure, would be compromised.

42 With regard to the situation described as unjust by the Netherlands Government, resulting from the fact that a taxable person who has supplied an immovable property is required to pay the amounts due in respect of the adjustment of the VAT deduction that it applied when acquiring that property, even though the person to whom it supplied that property has declared that it would use it for the purposes of its taxable transactions, it should be noted that, as the Advocate General has pointed out in point 89 of his Opinion, although, in accordance with the second paragraph of Article 13C of the

Sixth Directive, the Member States may restrict the scope of this right of option and fix the details of its use, they cannot, when exercising that option, impose on a taxable person obligations going beyond what is permitted by European Union VAT law.

43 However, as the Advocate General has pointed out in point 84 of his Opinion, in the main proceedings the situation of the supplier stems from the provisions of Netherlands law requiring the purchaser of an immovable property who has opted for taxation to use that property for the purposes of his taxable transactions.

44 Likewise, as regards the Netherlands Government's argument that Article 12a of the 1968 Law is intended, in accordance with Article 20(4) of the Sixth Directive, to ensure that adjustment does not involve any unjustified advantage, it should be noted that since, first, as is apparent from the documents submitted to the Court, the supply of the immovable property at issue in the main proceedings, concluded between the supplier and Pactor Vastgoed, was exempted from VAT with retrospective effect from 5 January 2000 and, secondly, the VAT relating to that supply, paid and deducted by Pactor Vastgoed, was cancelled, that company did not obtain an 'unjustified advantage' within the meaning of Article 20(4) of that directive. Accordingly, that company cannot, on the basis of that provision, be held liable to pay the VAT due following adjustment of a deduction applied by the supplier in connection with another transaction with which that company is extraneous, namely the supplier's initial acquisition of that immovable property.

45 Finally, it should be noted that pursuant to Decision 88/498, which permitted the Kingdom of the Netherlands to apply, notwithstanding Article 21(1)(a) of the Sixth Directive, a provision imposing liability for the VAT on the purchaser in the context of the option for taxation provided for in subparagraph (b) of the first paragraph of Article 13C of that directive, is not intended to ensure that the amounts payable following the adjustment of a VAT deduction are paid by a taxable person other than the person who applied that deduction, but that, in the context of a supply of an immovable property, such as that at issue in the main proceedings, the VAT relating to that supply is paid and deducted by one and the same taxable person, namely the purchaser of the property concerned.

46 Consequently, as regards the main proceedings, although Decision 88/498 allowed the supplier and, subsequently, Pactor Vastgoed, as purchasers of the immovable property concerned, to be liable for VAT in respect of the acquisition transactions in question, it cannot, however, justify making Pactor Vastgoed liable to pay the amounts due following the adjustment of the VAT deduction applied by the supplier in the context of a transaction to which Pactor Vastgoed was extraneous, namely the initial acquisition of the immovable property by the supplier.

47 The answer to the question referred for a preliminary ruling is therefore that the Sixth Directive must be interpreted as precluding the recovery of amounts due following the adjustment of a VAT deduction from a taxable person other than the person who applied that deduction.

Costs

48 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 (Second Chamber) hereby rules:

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 the recovery of amounts due following the adjustment of a value added tax deduction from a taxable person other than the person who applied that deduction.

[Signatures]