Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

19 July 2012*

(Sixth VAT Directive — Article 6(2), first subparagraph, (a) and (b), Article 11A(1)(c) and Article 17(2) — Part of a capital item forming part of the assets of a business — Temporary use for private purposes — Permanent alterations to that item — Payment of VAT in respect of the permanent alterations — Right to deduct)

In Case C-334/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 11 June 2010, received at the Court on 12 July 2010, in the proceedings

X

v

Staatssecretaris van Financiën,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, M. Ilešič, E. Levits and J.-J. Kasel (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Netherlands Government, by C.M. Wissels and M. Noort, acting as Agents,

— the European Commission, by W. Roels and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2012,

gives the following

* Language of the case: Dutch.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 6(2), first subparagraph, (a) and (b), Article 11A(1)(c) and Article 17(2) 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 X ('the taxable person'), a partnership of taxable persons for the purposes of value added tax ('VAT'), and the Staatssecretaris van Financiën concerning the deduction, by that taxable person, of input VAT on expenses relating to permanent alterations made, with a view to temporary use for private purposes by the taxable person, to a capital item forming part of the assets of his business.

Legal context

3 Article 6(2) of the Sixth Directive provides:

'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 value added tax 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.'

4 Article 11A(1)(c) of the Sixth Directive provides:

'A. *Within the territory of the country*

1. The taxable amount shall be:

…

(c) in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services'.

5 Article 17(2)(a) of the Sixth 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) value added tax due or paid within the territory in respect of goods or services supplied or to be supplied to him by another taxable person'.

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

6 As is apparent from the order for reference, the taxable person is a partnership without legal personality in the form of a commercial partnership composed of two natural persons. In the year 2000, the taxable person ran a wholesale undertaking dealing in car paint. In 1999, the two founders of the taxable person purchased a commercial warehouse which they used immediately for the purposes of their economic activities.

7 At the beginning of 2000 part of the attic of the warehouse was adapted for temporary occupation by the two partners and their children pending completion of a commercial residence adjacent to the warehouse. With that in mind, two dormer windows, a vestibule, a bathroom and a toilet were installed. VAT was charged for that work.

8 For 23 months, during the work and following its conclusion, the taxable person used the attic as a dwelling. Thereafter the attic was adapted for business purposes and used, as envisaged, as an office and instruction area.

9 The taxable person deducted the VAT relating to the costs of the alterations. The Tax Inspectorate took the view that that deduction was incorrect, with the exception of the VAT deducted for the installation of the bathroom and toilet, since the taxable person had demonstrated plausibly that the installation of these two facilities also served the business purposes of the undertaking.

10 The taxable person brought an action against that decision. The first instance court held that the installation of the dormer windows and of a vestibule was carried out purely for the purposes of occupation and that at no time had it been stated or demonstrated plausibly that that work had been carried out for the benefit of the undertaking, with the result that there was no entitlement to a deduction.

11 The same court took the view that the taxable person was not entitled to deduct VAT under Article 17 of the Sixth Directive either, because the installed facilities had not been used for taxable transactions. Furthermore, Article 6(2), first subparagraph, (a), of the Sixth Directive was not applicable on the ground that the alteration work was to be regarded as a supply of a service, and it could not be claimed that, in respect of this service, there had been a 'use of goods forming part of the assets of a business … for purposes other than those of [the] business'. Lastly, Article 6(2), first subparagraph, (b), of the Sixth Directive was not applicable either, because that provision excludes services not supplied by the taxable person itself.

12 In support of its appeal in cassation before the Hoge Raad der Nederlanden, the taxable person submits that, in the present case, Article 6(2), first subparagraph, (a) or (b), of the Sixth Directive is applicable. In that regard, he states that he temporarily used part of a capital item forming part of the assets of the business for purposes other than those of the business, which therefore constituted a taxable transaction for the purposes of that provision. The taxable amount on that transaction consists of the costs incurred by the taxable person in carrying out the supply of services, including not only the purchase costs but also the costs of maintenance and improvement. Inasmuch as those costs form part of the basis for the levying of VAT on private use, then, under the neutrality principle, not only the VAT levied on the purchase costs but also the VAT levied on the costs of maintenance and improvement are immediately deductible in full.

13 The Hoge Raad der Nederlanden states that, in the present case, it is common ground that, following its purchase, the warehouse was used for business purposes. It is also common ground that, as of a certain point in time, part of that warehouse was used temporarily for private purposes and that — purely with a view to that use — work was carried out on the premises. The parties did not

indicate whether the taxable person was charged VAT on the purchase of the warehouse nor did the lower courts come to any conclusion in this regard. The national court concludes that it is necessary to examine both possibilities.

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

‘1. Regard being had to Article 6(2), first subparagraph, (a) and (b), Article 11A(1)(c) and Article 17(2) of the Sixth Directive, is a taxable person who makes temporary use for private purposes of part of a capital item of his business entitled to deduct the input VAT levied on expenditure incurred in respect of permanent alterations carried out exclusively with a view to that use for private purposes?

2. For the purpose of answering this question, does it make any difference whether the taxable person was charged VAT, which he deducted, on the acquisition of the capital item?’

Consideration of the questions referred

15 By its questions, which it is appropriate to deal with together, the national court asks, in essence, whether Article 6(2), first subparagraph, (a) and (b), Article 11A(1)(c) and Article 17(2) of the Sixth Directive are to be interpreted as meaning that, first, a taxable person who makes temporary use for private purposes of part of a capital item forming part of the assets of his business is entitled, under those provisions, to deduct the input VAT on the expenditure incurred in carrying out permanent alterations to that item even though those alterations were carried out with a view to that use for private purposes and, secondly, that right to deduct exists irrespective of whether the taxable person was charged VAT and deducted that VAT upon the acquisition of the capital item to which those alterations were made.

16 With a view to answering those questions, first, it must be stated that the national court has specified that the dispute in the main proceedings is limited to the right to deduct linked to certain alterations made to an item which forms, in its entirety, part of the assets of the business and, more precisely, to the permanent installation of two dormer windows and a vestibule. Those alterations may, for the reasons elaborated on by the Advocate General in points 59 to 63 of her Opinion, be regarded as having created a separate capital item.

17 Secondly, it is important to bear in mind that it is apparent from the case-law that it is the acquisition of an item by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the item is put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 and the extent of any adjustments in the course of the following periods (Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 15). By contrast, where a taxable person acquires goods solely for his private requirements, he is acting in a private capacity and not as a taxable person within the meaning of the Sixth Directive (Case C-20/91 *de Jong* [1992] ECR I-2847, paragraph 17).

18 It must therefore be examined to what extent, in a situation such as that at issue in the main proceedings, a taxable person may be considered to have acted ‘as such’ if he has had permanent alterations made to an item which have created a new capital item.

19 In that regard, it is apparent from the case-law that it is in particular a taxable person’s intention, confirmed by objective evidence, to use an item or a service for business purposes which makes it possible to determine whether, at the time when he carries out the input transaction, the taxable

person is acting as such and must therefore be entitled to deduct the VAT payable or paid in respect of that item or services (see, to that effect, *Lennartz*, paragraph 8 and Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 34).

20 As regards the intention of the taxable person in the main proceedings, it must be stated, first, as is apparent from the order for reference, that the tax authorities took the view that the dormer windows and the vestibule, unlike the other features which were used to adapt part of the warehouse for use as a dwelling, were installed for exclusively private purposes.

21 Secondly, as the Advocate General correctly stated in point 88 of her Opinion, the order for reference also supports the conclusion that, from the time when the alterations began, the use of the part of the warehouse which was adapted for use as a dwelling was planned only to be temporary. Moreover, it is apparent from the first instance judgment that it was also known beforehand that that part of the warehouse was subsequently going to be readapted in order to be used exclusively for business purposes as an office and instruction area.

22 In the main proceedings, it does not therefore appear to be clearly established that, at the time when the alterations at issue were carried out, the taxable person had the intention of using them exclusively for his private purposes.

23 As regards the objective evidence which may be used to assess whether, in a particular case, a taxable person has acquired goods for the purposes of his economic activity, it must be borne in mind that that evidence includes, inter alia, the nature of the goods concerned and the period between the acquisition of those goods and their use for the purposes of the taxable person's economic activity (see, to that effect, *Lennartz*, paragraph 21).

24 Although it is for the national court to determine the factual situation in a particular case, the Court may provide it with any guidance as to interpretation that is helpful to it in disposing of the case.

25 In that regard, it must, first, be pointed out that, as regards the nature of the capital item at issue in the main proceedings consisting of the dormer windows and the vestibule, it cannot be disputed that the dormer windows and the vestibule may, generally, be used both for private and for business purposes.

26 Secondly, inasmuch as the capital item at issue in the main proceedings was left in place and as it was after the change in the use of the part of the warehouse which was temporarily used as a dwelling, that item may be regarded as having been subsequently used for business purposes. That is all the more true as that item is an integral part of a building which forms, in its entirety, part of the assets of the business.

27 Lastly, the period of 23 months, during which the capital item at issue in the main proceedings, like the other goods which were used to adapt part of the warehouse for use as a dwelling, was used for exclusively private purposes, cannot, having regard to the durable nature of that item and its foreseeable lifespan, generally be considered to constitute evidence which supports the conclusion that the taxable person did not have the intention of using that item for the purposes of his business.

28 If, in the main proceedings, the national court comes to the conclusion that, at the time when the costs for the alterations at issue were incurred, the taxable person did not have the intention of using the capital item resulting from those alterations for the purposes of his business, then he cannot be entitled to deduct the VAT relating to the alterations.

29 By contrast, if the national court, in the light of the guidance as to interpretation provided by the Court, were to find that the taxable person had the intention of using the capital item at issue in the main proceedings for the purposes of his business, then three factors would still have to be dealt with.

30 First, as the Advocate General stated in point 67 of her Opinion, it is necessary to examine whether the fact that a capital item is at first used only for private purposes and subsequently only for business purposes may preclude the right to deduct from arising.

31 The Court has already held that the fact that goods acquired for the purposes of an economic activity are not used immediately for those economic activities is not, in principle, capable of affecting the right to deduct the input VAT (see, to that effect, *Lennartz*, paragraphs 14 and 15).

32 The interpretation that the use of an item forming part of the assets of the business initially only for private purposes and subsequently only for business purposes cannot affect the right to deduct input VAT is moreover consistent with the principle of fiscal neutrality which forms an integral part of the common system of VAT.

33 It is apparent from the case-law relating to the mixed use of capital goods that varies over time that any interpretation to the contrary could lead to the taxable person being denied deduction of input VAT in respect of subsequent taxable business uses, despite the taxable person's initial wish to treat the goods in question, in their entirety, as forming part of the assets of the business, with future transactions in mind. In such a situation, the taxable person would not be relieved entirely of the burden of the tax relating to the item which he uses for the purposes of his economic activity and the taxation of his business activities would lead to double taxation contrary to the principle of fiscal neutrality inherent in the common system of VAT, of which the Sixth Directive forms part (see, to that effect, Case C-460/07 *Puffer* [2009] ECR I-3251, paragraphs 45 and 46).

34 It follows that a use such as that envisaged in the main proceedings may be regarded as constituting mixed use, within the meaning of the case-law, of a capital item which forms part of the assets of the business.

35 Secondly, it is important, in order to determine whether the taxable person may deduct the input VAT in its entirety, to analyse to what extent a capital item such as that at issue in the main proceedings, namely dormer windows and a vestibule, may be regarded as having been used for the purposes of his taxable transactions.

36 In that regard, the national court referred inter alia to two provisions.

37 As regards, first, Article 6(2), first subparagraph, (a), of the Sixth Directive, it must be borne in mind that, under that provision, the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff is treated as a supply of services for consideration.

38 Since, in the situation envisaged, the capital item at issue in the main proceedings forms, in its entirety, part of the assets of the business, its use for private purposes must be treated as a supply of services for consideration within the meaning of Article 6(2), first subparagraph, (a), of the Sixth Directive and taxed as such.

39 As regards, secondly, the question of whether Article 6(2), first subparagraph, (b), of the Sixth Directive may apply in a situation such as that at issue in the main proceedings, it is sufficient to point out that that provision does not refer to the supply of an item forming part of the assets of the business, but to supplies of services carried out by the taxable person himself for his own private use or that of his staff.

40 Since, in the present case, the output transaction which may be considered to have been carried out by the taxable person constitutes, as is apparent from paragraph 37 of this judgment, the use of an item forming part of the assets of a business for the private purposes of the taxable person, Article 6(2), first subparagraph, (b), of the Sixth Directive does not apply.

41 Thirdly, it must be stated that the issue of whether or not an item which forms part of the assets of a business and of which a capital item such as that at issue in the main proceeding, namely the dormer windows and vestibule, is a permanent integral part has given rise to a right to deduct has no bearing on the deductibility of the VAT relating to that capital item.

42 That issue has a bearing only on the calculation of the taxable amount of the output transaction carried out by the taxable person. In the present case, if the taxable person was charged VAT on the purchase of the warehouse, the taxable amount for the private use of the attic will consist of a part of the costs of acquiring the warehouse and of the expenditure in respect of the alterations. By contrast, if the taxable person was not charged VAT on the purchase of the warehouse, the taxable amount relating to the private use of part of the warehouse will consist solely of the expenditure in respect of the alterations.

43 In the light of all of the foregoing, the answer to the questions referred is that Article 6(2), first subparagraph, (a) and (b), Article 11A(1)(c) and Article 17(2) of the Sixth Directive must be interpreted as meaning that, first, a taxable person who makes temporary use for private purposes of part of a capital item forming part of the assets of his business is entitled, under those provisions, to deduct the input VAT on the expenditure incurred in carrying out permanent alterations to that item even though those alterations were carried out with a view to that temporary use for private purposes and, secondly, that right to deduct exists irrespective of whether the taxable person was charged VAT and deducted that VAT upon the acquisition of the capital item to which those alterations were made.

Costs

44 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 (First Chamber) hereby rules:

Article 6(2), first subparagraph, (a) and (b), Article 11A(1)(c) and Article 17(2) 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, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as meaning that, first, a taxable person who makes temporary use for private purposes of part of a capital item forming part of the assets of his business is entitled, under those provisions, to deduct the input value added tax on the expenditure incurred in carrying out permanent alterations to that item even though those alterations were carried out with a view to that temporary use for private purposes and, secondly, that right to deduct exists irrespective of whether the taxable person was charged VAT and deducted that VAT upon the acquisition of the capital item to which those alterations were made.

[Signatures]