Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

23 April 2015 *

(Reference for a preliminary ruling — Taxation — Sixth VAT Directive — Article 11A — Application of goods treated as a supply for consideration — Application of a building for an activity exempt from VAT — Taxable amount for that application — Interim interest paid during the construction of the building)

In Case C-16/14,

REQUEST for a preliminary ruling Article 267 TFEU from the Hof van beroep te Gent (Belgium), made by decision of 7 January 2014, received at the Court on 16 January 2014, in the proceedings

Property Development Company NV

v

Belgische Staat,

THE COURT (Third Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Property Development Company NV, by M. Vanden Broeck and S. Geluyckens, advocaten,

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

— the Greek Government, by K. Paraskevopoulou and M. Skorila, acting as Agents,

— the Finnish Government, by S. Hartikainen, acting as Agent,

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

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

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 11A 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 (OJ 1977 L 145, p. 1 and corrigendum OJ 1977 L 149, p. 26; 'the Sixth Directive').

2 The request has been made in proceedings between Property Development Company NV ('Prodeco') and the Belgische Staat concerning liability for value added tax ('VAT') arising from the application of a building for rental activity.

Legal context

EU law

3 The Sixth Directive was repealed and replaced, with effect from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, given the date at which the material facts arose, the dispute in the main proceedings remains governed by the Sixth Directive.

4 Article 2 of the Sixth Directive stated:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

5 Article 4 of that directive provided:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2 …

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services … The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

…'

6 Title V of the Sixth Directive was entitled 'Taxable transactions' and comprised Articles 5 to 7 thereof, respectively entitled 'Supply of goods', 'Supply of services' and 'Imports'.

7 Article 5 of the directive was worded as follows:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

…

6. The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the [VAT] on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business shall not be so treated.

7. Member States may treat as supplies made for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible;

(b) the application of goods by a taxable person for the purposes of a non-taxable area of activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a);

…'

8 Article 11 of that directive provided:

'A. Within the territory of the country

1. The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies …

(b) in respect of supplies referred to in Article 5(6) and (7), the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined as the time of supply;

…

2. The taxable amount shall include:

(a) taxes, duties, levies and charges, excluding the [VAT] itself;

(b) incidental expenses such as commission, packing, transport and insurance costs charged by the supplier to the purchaser or customer. Expenses covered by a separate agreement may be considered to be incidental expenses by the Member States.

…'

9 Articles 18, 73 and 74 of Directive 2006/112 correspond respectively to Articles 5(7), 11A(1)(a) and 11A(1)(b) of the Sixth Directive.

Belgian law

10 Under Article 12(1) of the Law establishing the Code on Value Added Tax of 3 July 1969 (*Belgisch Staatsblad* of 17 July 1969, p. 7046) in the version applicable to the main proceedings ('the VAT Code').

'The following shall be treated as supplies effected for consideration:

…

3. the use by the taxpayer as capital goods of goods which it has constructed, had constructed by someone else on its behalf, manufactured, acquired or imported, otherwise than as capital goods or for which, with the application of VAT, real rights have been established in its favour or have been assigned or retroceded to it, where the VAT on the asset or the component parts thereof is wholly or partially deductible;

…'

11 By Article 12(1)(3), the Belgian legislature intended to make use of the possibility offered by Article 5(7)(a) and (b) of the Sixth Directive.

12 Article 26 of the VAT Code provides:

'In respect of supplies of goods and services, tax shall be calculated on the basis of everything which constitutes the consideration which has been or is to be obtained by the supplier of the goods or services from the person for whom that supply of goods or services is made or from a third party, including subsidies directly linked to the price of such supplies.

The taxable amount shall include the amounts which the supplier of the goods or services charges to the person for whom that supply is made as commission, insurance or transport costs, irrespective of whether they are covered by a separate debit note or agreement.

The taxable amount shall also include taxes, duties, levies and charges.'

13 Article 33(1) of that code states:

'The taxable amount shall be:

1. with regard to the supplies referred to in … Article 12, the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of those supplies, taking into account where appropriate Article 26(2) and (3) …

…'

14 Article 22a, first paragraph, of the Royal Decree of 8 October 1976 on annual accounts for undertakings (*Belgisch Staatsblad* of 19 October 1976, p. 13460) and Article 38 of the Royal Decree of 30 January 2001 implementing the Companies Code (*Belgisch Staatsblad* of 6 February 2001, p. 3008) states:

'Interest on capital borrowed to finance intangible or tangible assets may be included in the acquisition value thereof only where it relates to the period before the actual use of those fixed assets.'

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

15 Between 1991 and 1994, Prodeco had constructed an office building with the intention of selling it. That building accordingly appeared as stock in the accounts. In valuing that stock, in accordance with the valuation rules laid down by it Prodeco included the interim interest as an asset.

16 The interim interest comprised interest paid at the rate payable under the loan agreement entered into for the purpose of construction of the building, on the amounts of the loan released during construction.

17 Prodeco deducted the VAT that it had paid on supplies of goods and services in connection with the construction of the building.

18 In anticipation of the sale of the building in question, which finally took place in 2000, Prodeco had rented out parts of it from and after 1995. In the course of that economic activity it took no account the application of Article 12(1)(3) of the VAT Code in its tax declarations, a matter which was treated as an infringement of that provision during a check carried out by the Belgian tax authorities in 1998.

19 Prodeco paid part of the amount of VAT demanded by the Belgian tax authorities, namely EUR 1 178 498, representing the total amount of VAT previously deducted from the incoming invoices relating to the construction of the building.

20 However, it refused to pay the other part of the VAT also demanded by the Belgian tax authorities, namely EUR 554416.67. That amount was calculated on the basis of interest paid by Prodeco under the loan agreement which enabled it to finance the construction of the building.

21 In 2004, an order for payment was served on Prodeco for the last mentioned amount of VAT. It brought proceedings challenging the payment order before the Rechtbank van eerste aanleg te Antewerpen (Court of First Instance, Antwerp) which dismissed the action by judgment of 9 May 2008.

22 Prodeco brought an appeal against that judgment before the Hof van beroep te Antwerpen (Court of Appeal, Antwerp). By judgment of 16 February 2010, that court declared the appeal well founded as far as concerns the interim interest which, in the view of that court, does not form part of the taxable amount in cases where Article 12(1)(3) of the VAT Code applies.

23 The Belgian tax authorities brought an appeal in cassation against that judgment. By judgment of 19 January 2012, the Hof van Cassatie (Court of Cassation) set aside that judgment as regards the question of interim interest and referred the case to the Hof van beroep te Gent (Court of Appeal, Ghent).

24 The Hof van beroep te Gent observes that, in support of its decision that interim interest must be part of the taxable amount, the Hof van Cassatie relied on the judgment in *Muys' en De Winter's Bouw- en Aanemingsbedrijf* (C-281/91, EU:C:1993:855). In that judgment, the Court held that, where a supplier of goods or services grants his customer deferral of payment of the price in return for payment of interest until delivery, that interest constitutes part of the consideration obtained for the supply of goods or services within the meaning of Article 11A(1)(a) of the Sixth Directive.

25 The Hof van beroep te Ghent takes the view that, although the Hof van Cassatie gave a clear ruling, the question remains whether or not interim interest must be taken into consideration.

26 According to the Hof van beroep te Gent, the judgment in *Muys' en De Winter's Bouw- en Aanemingsbedrijf* (C-281/91, EU:C:1993:855), concerning the interpretation of Article 11A(1)(a) of the Sixth Directive, is not necessarily relevant in a case such as that in the main proceedings. Interim

interest should be regarded rather as being part of the 'cost price' which appears among the reference values mentioned in Article 11A(1)(b) of the Sixth Directive, or should be treated as 'incidental expenses' within the meaning of Article 11A(2).

27 Article 35(4) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) points in favour of that conclusion. That provision, which was transposed into Belgian law by Article 22a, first paragraph, of the Royal Decree of 8 October 1976 relating to the annual accounts of undertakings, stated that '[i]nterest on capital borrowed to finance the production of fixed assets may be included in production costs to the extent that it relates to the period of production'.

28 Moreover, the principle of neutrality should also be taken into account. In that regard, the Hof van beroep te Gent draws attention to the fact that interim interest is not subject to VAT and, therefore, unlike supplies and services occasioned by the construction of the building, could not be subject to a deduction of VAT.

29 In those circumstances, the Hof van beroep te Gent decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is interim interest which, according to Article 35(4) of [Fourth Directive 78/660], may be included in production costs to the extent that it relates to the period of production, part of the taxable amount of an application within the meaning of Article 5(6) of [the Sixth Directive], that is to say, part of the "cost price" within the meaning of Article 11A(1)(b) of the Sixth Directive and/or incidental expenses within the meaning of Article 11A(2) thereof ?'

30 By letter of 8 October 2014, the Court Registry sent a request for clarifications to the referring court as regards, in particular, whether, in the view of that court, the taxable transaction at issue in the main proceedings is covered by the situation referred to in Article 5(6) of the Sixth Directive or one of the situations referred to in Article 5(7) thereof. The referring court was also requested to verify whether the relevant reference value in the case in the main proceedings is the cost price or the purchase price of similar goods.

31 In its answer, received at the Court on 11 February 2015, the referring court stated that the application by Prodeco of the building at issue for the economic activity exempt from VAT, comprising its rental, falls within the situation referred to in Article 5(7)(b) of the Sixth Directive and that, among the reference values mentioned in Article 11A of the Sixth Directive, the reference value relevant for the resolution of the dispute in the main proceedings is the purchase price of similar goods within the meaning of Article 11A(1)(b).

Consideration of the question referred for a preliminary ruling

32 Having regard to the answer of the referring court to the request for clarifications by the Court of Justice, the question referred must be understood as asking whether Article 11A(1)(b) of the Sixth Directive must be interpreted as meaning that, in a case such as that at issue in the main proceedings, the taxable amount for the calculation of the VAT on an application, within the meaning of Article 5(7)(b) thereof, of a building constructed by the taxable person must include the interim interest paid during its construction.

33 It must be recalled, first of all, that the rule laid down in Article 11A(1)(b) of the Sixth Directive, according to which the taxable amount in respect of supplies referred to in Article 5(6) and (7) thereof, is to be 'the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined as the time of supply', derogates from the general rules laid down in Article 11A(1)(a) thereof, according to which the taxable amount of transactions subject to VAT is to

be ‘everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies’ (see, by analogy, judgment in *Marinov*, C-142/12, EU:C:2013:292, paragraph 31).

34 The transactions referred to in Article 5(6) and (7) of the Sixth Directive consist, inter alia, of the application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or, as in the present case, their application for an economic activity exempt from VAT. In each of those cases involving treatment of a transaction as one effected for consideration, no true consideration which may serve as the taxable amount for the calculation of VAT is actually obtained by the taxable person from a purchaser, a customer or a third party, with the consequence that the general rule laid down in Article 11A(1)(a) cannot be applied (see, to that effect, judgment in *Campsa Estaciones de Servicio*, C-285/10, EU:C:2011:381, paragraphs 26 and 27).

35 Next, it must be observed that, if the goods which are the subject of an application within the meaning of Article 5(6) and (7) of the Sixth Directive have been purchased by the taxable person, the taxable amount for the calculation of the VAT on that application is, according to Article 11A(1)(b) thereof, to be the purchase price of those goods. For that purpose, ‘purchase price of the goods’ means the residual value of the goods at the time of the allocation (judgments in *Fischer and Brandenstein*, C-322/99 and C-323/99, EU:C:2001:280, paragraph 80, and *Marinov*, C-142/12, EU:C:2013:292, paragraph 32).

36 As regards the criterion mentioned in that provision of the ‘purchase price of similar goods’, it follows from the interpretation given in the preceding paragraph that that criterion enables the taxable amount of an application, within the meaning of Article 5(6) and (7) of the Sixth Directive, to be determined in cases where the goods which were the subject of that application were not obtained by the taxable person by means of a purchase.

37 As to the remainder, it follows from Article 11A(1)(b) that it is only in the absence of a purchase price for the goods or similar goods that the taxable amount is the ‘cost price’.

38 Accordingly, in the case in the main proceedings, which concerns an application, referred to in Article 5(7)(b) of the Sixth Directive, of a building that the taxable person did not purchase, but which it had constructed, and in relation to which there are similar goods on the market, the referring court’s finding that the relevant taxable amount for the calculation of VAT on that application is the sale price of similar buildings at the time the application was made is completely consistent with Article 11A(1)(b) of the Sixth Directive.

39 For the purposes of the calculation based on that taxable amount, it is important that the goods whose purchase price is taken into consideration are buildings whose location, size and essential characteristics are similar to those of the building at issue (see, by analogy, judgment in *Gemeente Vlaardingen*, C-299/11, EU:C:2012:698, paragraph 30).

40 However, it is irrelevant whether the purchase price of similar buildings includes interim interest which, depending on the circumstances, may have been paid during their construction. Unlike the criterion of cost price laid down in Article 11A(1)(b) of the Sixth Directive as the taxable amount in the absence of a purchase price, the criterion of the purchase price of similar goods enables the tax authority to base its calculation on the market price of that type of goods at the time the application of the building at issue was made, without having to examine in detail which components of the value gave rise to those prices.

41 For the same reason, the actual interim interest paid by the taxable person itself during the construction of the building at issue is, in a case such as that in the main proceedings, irrelevant for the determination of the taxable amount.

42 Finally, it must be recalled that, in no case, may the taxable amount referred to in Article 11A(1)(b) of the Sixth Directive include an element of value on which the taxable person has already paid VAT without subsequently being able to deduct it. It is for the national court to carry out the necessary verifications in that regard (judgments in *Gemeente Vlaarrdingen*, C-299/11, EU:C:2012:698, paragraphs 31 to 33, and *Gemeente 's Hertogenbosch*, C-92/13, EU:C:2014;2188, paragraph 35).

43 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 11A(1)(b) of the Sixth Directive must be interpreted as meaning that, in a case such as that at issue in the main proceedings, the taxable amount for the calculation of VAT on an application, within the meaning of Article 5(7)(b) thereof, of a building that the taxable person has constructed is to be the purchase price, at the time the application is made, of buildings whose location, size and other essential characteristics are similar to those of the building in question. In that regard, it is irrelevant whether part of the purchase price is represented by interim interest.

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 (Third Chamber) hereby rules:

Article 11A(1)(b) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax must be interpreted as meaning that, in a case such as that at issue in the main proceedings, the taxable amount for the calculation of VAT on an application, within the meaning of Article 5(7)(b) thereof, of a building that the taxable person has constructed, is to be the purchase price, at the time the application is made, of buildings whose location, size and other essential characteristics are similar to those of the building in question. In that regard, it is irrelevant whether part of the purchase price is due to interest on borrowed capital.

[Signatures]