Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

7 November 2024*

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Supply of land that has only the foundations of residential housing structures in place – Classification – Article 12 – Concepts of 'building land' and 'building or parts of a building' – Criterion of the 'first occupation' of a building)

In Case C-594/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vestre Landsret (High Court of Western Denmark), made by decision of 20 September 2023, received at the Court on 26 September 2023, in the proceedings

Skatteministeriet

v

Lomoco Development ApS,

Holm Invest Aalborg A/S,

I/S Nordre Strandvej Sæby,

Strandkanten Sæby ApS,

THE COURT (Seventh Chamber),

composed of F. Biltgen, President of the First Chamber, acting as President of the Seventh Chamber, M.L. Arastey Sahún (Rapporteur), President of the Fifth Chamber, and J. Passer, Judge,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Lomoco Development ApS, Holm Invest Aalborg A/S, I/S Nordre Strandvej Sæby and Strandkanten Sæby ApS, by C. Bachmann, advokat,

* Language of the case: Danish.

– the Danish Government, by C. Maertens, acting as Agent, and by S. Horsbøl Jensen, advokat,

– the Czech Government, by L. Březinová, M. Smolek and J. Vláčil, acting as Agents,

– the European Commission, by J. Jokubauskaitė and U. Nielsen, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12(1)(a) and (b) and Article 135(1)(j) and (k) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between the Skatteministeriet (Ministry of Taxation, Denmark), on the one hand, and Lomoco Development ApS, Holm Invest Aalborg A/S, I/S Nordre Strandvej Sæby ('NSS') and Strandkanten Sæby ApS, on the other, concerning the value added tax (VAT) payable on the supply of land that has the foundations of residential housing structures in place.

Legal context

European Union law

3 Article 2(1)(a) of the VAT Directive provides:

'The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such'.

4 Article 9(1) of that 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.'

5 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.’

6 Article 135 of that 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);

…’

7 Under Article 371 of the VAT Directive:

‘Member States which, at 1 January 1978, exempted the transactions listed in Annex X, Part B, may continue to exempt those transactions, in accordance with the conditions applying in the Member State concerned on that date.’

8 The transactions referred to in that list include, in point (9), ‘the supply before first occupation of a building, or parts thereof, or of the land on which it stands and the supply of building land, as referred to in Article 12’.

Danish law

The Law on VAT

9 Under Paragraph 13(1)(9) of the lovbekendtgørelse nr. 966 med senere ændringer (Consolidation Law No 966, as amended) of 14 October 2005, in the version in force until 31 December 2010 ('the Law on VAT'), the supply of immovable property was, without exception, exempt from VAT. Paragraph 13(1)(9) of the Law on VAT was based on the so-called 'standstill' clause laid down in Article 371 of the VAT Directive.

10 From 1 January 2011, that exemption was repealed in part, with Paragraph 13(1)(9) of the Law on VAT, as amended by lov nr. 520 (Law No 520) of 12 June 2009 ('the amended Law on VAT'), reading as follows:

'The following goods and services shall be exempt from tax:

…

(9) the supply of immovable property. However, the following shall not be covered by the exemption:
   (a) the supply of a new building or of a new building and the land on which the building stands;
   (b) the supply of building land, whether improved or unimproved, and in particular the supply of built-on land.'

11 Paragraph 13(3) of the amended Law on VAT provides:

'The [Skatteministeren (Minister for Taxation, Denmark)] may lay down detailed rules concerning the delimitation of immovable property within the meaning of point 9 of subparagraph 1.'

12 Under Section 2.1.1 of the explanatory memorandum to the draft Law No L 203 of 22 April 2009, subsequently adopted as Law No 520 of 12 June 2009:

'No transitional arrangements shall be envisaged for new immovable property, since Law [No 520 of 12 June 2009] applies to new immovable property only if the construction or extension/conversion began after the entry into force of the law. The moment at which a new construction is deemed to begin shall be when the foundations start to be cast.'

The VAT regulation

13 The Minister for Taxation exercised the power conferred by Paragraph 13(3) of the amended Law on VAT to delimit the transactions subject to VAT as opposed to those exempt from VAT, by means of the bekendtgørelse nr. 1370 om ændring af bekendtgørelse om merværdiafgiftsloven (Regulation No 1370 amending the regulation on the law on value added tax) of 2 December 2010, as amended by bekendtgørelse nr. 808 om merværdiafgift (Regulation No 808 on value added tax) of 30 June 2015 ('the VAT regulation').

14 Paragraph 54(1) and (2) of the VAT regulation provides:

'[1.] The concept of "building" referred to in Paragraph 13(1)(9)(a) of the [amended Law on VAT] shall mean structures fixed to or in the ground that are completed for the purpose for which they are intended. The supply of parts of such a building shall also be deemed to be a supply of a building.

2. A building, within the meaning of paragraph 1, shall be new before first occupation. A building is also new at the date of the first supply after occupation if the supply takes place less than five years after the date of completion of the building. For the second and subsequent supplies which take place within five years following the completion of the building, the building shall also be new if the supply takes place before the building has been used through occupation for a period of two years and the first supply is covered by Paragraph 29 of the [amended] VAT Law.'

15 Paragraph 134(3) and (4) of that regulation states:

'3. Paragraph 13(1)(9)(a) of the [amended] Law on VAT shall apply to new buildings and to new buildings together with the land on which the buildings stand, referred to in Paragraph 54 of this regulation, if construction began on or after 1 January 2011 …

4. The date of commencement of the construction of new buildings and the extension of existing buildings corresponds to the start of the casting of the foundations …'

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

16 In 2006, NSS acquired an immovable property used until that time as a camping site. In 2008, NSS divided that immovable property into several plots and, in January 2009, connections for electricity, water, heating and sewerage were installed on some of those plots.

17 In autumn 2010, on the basis of building permits that NSS had obtained from the competent authority, the casting of foundations began on some of those plots. Those foundation works were completed before 1 January 2011.

18 On 1 January 2015, NSS transferred ownership of 16 plots with foundations in place to a company governed by Danish law. Those plots were then sold to individuals.

19 In respect of five of those plots, a residential housing structure was subsequently erected on the foundations cast in 2010. In respect of eight other plots, a residential housing structure was erected, but not on the foundations cast in 2010. In respect of the remaining three plots, the foundations cast in 2010 still exist but no structure has been erected on them.

20 By decision of 28 September 2017, SKAT (Tax Authority, Denmark) ordered NSS to pay VAT on the supply of the 16 plots with foundations in place, taking the view that it constituted a supply of 'building land' subject to VAT under Paragraph 13(1)(9)(b) of the amended Law on VAT.

21 NSS challenged that decision before the Landsskatteretten (National Tax Tribunal, Denmark), which found, by a decision of 1 September 2021, that the supply of those 16 plots did not constitute a transaction subject to VAT under Paragraph 13(1)(9)(b) of the amended Law on VAT, but rather a transaction exempt from VAT in accordance with Paragraph 13(1)(9) of the

Law on VAT, which exempted from VAT all supplies of immovable property. In that regard, the National Tax Tribunal found, inter alia, that NSS had begun to cast the foundations on those 16 plots before 1 January 2011 and that the same plots had been acquired by NSS before the submission of the draft law which became Law No 520 of 12 June 2009.

22 On 1 December 2021, the Ministry of Taxation brought an action against the decision of the National Tax Tribunal before the Retten i Aalborg (Aalborg District Court, Denmark), which referred the case to the Vestre Landsret (High Court of Western Denmark), which is the referring court, on account of the questions of principle which it raises.

23 The referring court notes that, according to the Ministry of Taxation, in order to determine what constitutes a 'building' for VAT purposes, it is necessary to refer to the wording of Article 12(2) of the VAT Directive, which states that building means 'any structure fixed to or in the ground'. In everyday language, a 'structure' in the form of a 'building' is characterised by the fact that it consists of several parts which form a whole intended for a specific use.

24 According to that ministry, having regard to Article 12(1)(a) of the VAT Directive, which refers to 'the supply, before first occupation, of a building or parts of a building and the land on which the building stands', a building (or a part of a building) is characterised by the fact that it may be occupied and therefore used for the purposes for which it is intended. According to that ministry, a building (or a part of a building) cannot be used unless it is completed to such an extent that its putting into service, if necessary in part, were possible.

25 That ministry submits that the third subparagraph of Article 12(2) of that directive allows the use of criteria other than that of first occupation to define the concept of 'building', in particular the period which elapsed between the date of completion of the building and the date of the first supply. That provision implies that an uncompleted structure cannot be regarded as a building.

26 Thus, according to the Ministry of Taxation, a residential housing structure cannot be regarded as completed and as capable of being occupied if only the foundations of the building have been cast. Nor can such foundations constitute 'parts of a building' within the meaning of Article 12 of the VAT Directive, since there is a supply of parts of a building only if the parts supplied can be occupied. That would be the case where the supply takes place in stages, for example, in the case of the supply of flats within a residential housing structure.

27 The referring court states that, according to NSS, when the casting of the foundations on the 16 plots began, they passed from the status of 'building land' to that of 'building or parts of a building and the land on which the building stands'. It is undisputed that the foundations on those plots were fully usable at the time of the supply of those plots in 2015.

28 According to NSS, foundations are included in the very broad concept of 'building', within the meaning of Article 12 of the VAT Directive, defined as 'any structure fixed to or in the ground'. Paragraph 54 of the VAT regulation, which adds the condition that the structures must be 'completed for the purpose for which they are intended', limits that concept in breach of the VAT Directive.

29 Lastly, NSS submits that the criterion of first occupation and the alternative criteria laid down in the third subparagraph of Article 12(2) of the VAT Directive are intended to determine the moment when supplies of buildings and of land may be subject to VAT, and not the moment when a structure becomes a 'building'.

30 The referring court takes the view that the case-law of the Court does not make it possible to determine whether land with foundations in place for the purpose of building a residential housing structure must be regarded, for VAT purposes, as building land or as a building or parts of a building together with the land on which the building stands.

31 In those circumstances, the Vestre Landsret (High Court of Western Denmark) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with [the combined provisions] of Article 135(1)(j), and Article 12(1)(a) and (2) of the [VAT Directive] [read in conjunction with the combined provisions of] Article 135(1)(k), and Article 12(1)(b) and (3) of [that] directive for a Member State, in circumstances such as those in the main proceedings, to consider a supply of land on which, at the time of supply, a pre-cast foundation has been constructed and on which a residential building is only subsequently constructed by other owners to be a sale of building land subject to VAT?'

Consideration of the question referred

32 By its question, the referring court asks, in essence, whether Article 12 of the VAT Directive must be interpreted as meaning that a supply of land that, at the date of that supply, has only the foundations of residential housing structures in place, constitutes a supply of 'building land' within the meaning of that article.

33 It must be recalled, first of all, that the VAT Directive establishes a common system of VAT based on, inter alia, a uniform definition of taxable transactions (judgment of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869, paragraph 24 and the case-law cited).

34 According to Article 2(1)(a) of that directive, the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT.

35 Pursuant to Article 9(1) of that directive, 'taxable person' means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis is in particular to be regarded as an 'economic activity'.

36 The VAT Directive thus takes into account the professional and regular nature of the exercise of economic activities as general criteria for attributing persons the status of taxable person for VAT purposes. However, those criteria are adapted in relation to immovable property transactions, since, in accordance with Article 12(1), that directive allows Member States also to regard as a taxable person anyone who supplies, on an occasional basis, a building or part of a building and the land on which it stands, before its first occupation (Article 12(1)(a)), or the supply of building land (Article 12(1)(b)) (see, to that effect, judgment of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869, paragraph 27).

37 In accordance with Article 12(3) of that directive, 'building land', for the purposes of paragraph 1(b) of Article 12, means any land, unimproved or improved, defined as such by the Member States.

38 However, the VAT Directive limits the discretion of the Member States as regards the scope of the concept of 'building land'. In that context, Member States must comply with the objective pursued by Article 135(1)(k) of that directive, which is to exempt from VAT only supplies of land which has not been built on and is not intended to support a building (see, to that effect, judgment of 30 September 2021, *Icade Promotion*, C-299/20, EU:C:2021:783, paragraphs 34 and 50 and the case-law cited).

39 Furthermore, the definition of 'building land' is also limited by the scope of the concept of 'building', defined very broadly by the EU legislature in the first subparagraph of Article 12(2) of the VAT Directive as including 'any structure fixed to or in the ground' (judgments of 4 September 2019, *KPC Herning*, C-71/18, EU:C:2019:660, paragraph 54, and of 30 September 2021, *Icade Promotion*, C-299/20, EU:C:2021:783, paragraph 51).

40 It follows that land with a structure in place that must be classified as a 'building' within the meaning of that provision cannot be classified as 'building land'.

41 In the present case, it is common ground that the land at issue in the main proceedings had in place, at the time of its supply, only the foundations of residential housing structures. Therefore, it is necessary to determine whether those foundations constitute, as such, a 'building' or 'parts of a building', within the meaning of Article 12 of the VAT Directive, in which case that land could no longer be regarded as 'building land'.

42 It is apparent from the request for a preliminary ruling that that clarification is necessary since the supply of building land is subject to VAT. By contrast, although, in principle, the supply of a building or parts of a building is also subject to VAT, it appears that, first, until 31 December 2010, the Kingdom of Denmark applied, pursuant to Article 371 of the VAT Directive, an exemption from VAT in respect of all supplies of immovable property and, second, in accordance with the applicable national legislation, supplies of buildings the construction of which had begun on that date continue to benefit from that exemption. Since the foundations built on the land at issue in the main proceedings were cast in 2010, NSS claims that the supply of that land is exempt from VAT.

43 In that regard, it must be borne in mind that the Court has held that Article 12(3) of the VAT Directive clearly provides that even improved land falls within the concept of 'building land' in so far as it is defined as such by the Member States. In other words, the improvement of land, such as by way of its connection to electricity, gas, or water, cannot lead to a change in its legal classification as a 'building', that is, as a construction fixed to or in the ground by way, in particular, of foundations (judgment of 30 September 2021, *Icade Promotion*, C-299/20, EU:C:2021:783, paragraph 57).

44 Furthermore, while Article 12(2) of the VAT Directive defines a building very broadly as 'any structure fixed to or in the ground', the fact remains that that provision refers to Article 12(1)(a) of that directive, which refers to 'the supply of buildings or parts of buildings before first occupation'. Thus, it cannot be concluded that mere connection to grids and networks may fall within the concept of 'building' (judgment of 30 September 2021, *Icade Promotion*, C-299/20, EU:C:2021:783, paragraph 58).

45 The Court has thus emphasised, in the context of the very broad definition of the concept of 'building', within the meaning of Article 12(2) of the VAT Directive, the importance of the reference to Article 12(1)(a) of that directive, which refers to the criterion of the 'first occupation' of a building.

46 For its part, Article 135(1)(j) of the VAT Directive provides for an exemption from VAT in favour of the supply of buildings, other than those referred to in Article 12(1)(a) thereof. Accordingly, those provisions, in practice, make a distinction between old buildings, the sale of which is not, in principle, subject to VAT, and new buildings, the sale of which is subject to VAT, whether carried out in the context of an economic activity carried out on a permanent or occasional basis (judgment of 9 March 2023, *État belge and Promo 54*, C-239/22, EU:C:2023:181, paragraph 20 and the case-law cited).

47 The *ratio legis* of those provisions is the relative lack of added value generated by the sale of an old building (judgment of 9 March 2023, *État belge and Promo 54*, C-239/22, EU:C:2023:181, paragraph 21 and the case-law cited), in contrast to the sale of a new building, the added value of which is the result of construction work that leads to a substantial modification of what physically exists as a result of the transition from immovable property without a building, or even undeveloped land, to a habitable building (judgment of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869, paragraph 55).

48 As is clear from the preparatory documents for the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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), which remain relevant for the interpretation of the VAT Directive in the context of the exemptions laid down in Article 135(1)(j) thereof, the criterion of the 'first occupation' of a building must be understood as corresponding to the first use of the property by its owner or tenant. The preparatory documents state that that criterion was included as determining the point in time when the product was likely to leave the production process and enter into the consumption sector (judgment of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869, paragraph 41).

49 Having regard to the case-law referred to in paragraphs 43 to 48 above, it must be held that the foundations of residential housing structures cannot be classified as a 'building' or as 'parts of a building' within the meaning of Article 12(1)(a) of the VAT Directive.

50 It is true that the foundations of a building are one of the component elements of a building and may therefore constitute, in everyday language, a 'part of a building'.

51 In addition, the first subparagraph of Article 12(2) of that directive defines a building very broadly as 'any structure fixed to or in the ground'. Thus, it cannot be ruled out that that definition, taken in isolation, could be interpreted as encompassing the foundations.

52 However, as the Court has pointed out in the judgment of 30 September 2021, *Icade Promotion* (C-299/20, EU:C:2021:783, paragraph 58), the fact remains that that provision refers to Article 12(1)(a) of that directive, which refers to the criterion of 'first occupation'.

53 As recalled in paragraph 48 above, that criterion must be understood as corresponding to that of the first use of the property by its owner or tenant, it being understood that it was adopted by the EU legislature as determining the point in time when a product was likely to leave the production process and enter into the consumption sector.

54 Mere foundations of residential housing structures are not capable of being in 'occupation' defined in this manner. In addition, and in any event, the casting of such foundations does not mark the end of the construction process of the building and its entry into the consumption sector.

55 In the light of Article 12(1)(a) of the VAT Directive, even 'parts of a building' must be capable of being occupied and, therefore, must have left the production process, which may, for example, be the case where a building consisting of several parts or units, such as flats, is constructed in stages, with the result that some of those parts or units may be occupied while other parts are still under construction. In that regard, the Court has previously emphasised that account must be taken of the effective use to which a property is put at the time of supply (see, to that effect, judgment of 4 September 2019, *KPC Herning*, C-71/18, EU:C:2019:660, paragraphs 43, 45 and 48 and the case-law cited).

56 Moreover, in accordance with the third subparagraph of Article 12(2) of the VAT Directive, 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.

57 Like the criterion of first occupation, those alternative criteria are intended, as is apparent from the case-law cited in paragraph 46 above, to distinguish new buildings, subject in principle to VAT, from old buildings, exempt from VAT in accordance with Article 135(1)(j) of the VAT Directive.

58 The first of those alternative criteria refers to the 'completion of the building', namely an event which falls well beyond the initial stage of the casting of the foundations. The second of those criteria uses, for its part, the same concept as the default criterion referred to in Article 12(1)(a) of the VAT Directive, namely 'first occupation', and must therefore be interpreted in the same way as that default criterion.

59 It should also be noted that NSS and the three other defendant companies in the main proceedings rely, in their written observations, on several judgments of the Court in order to support their interpretation that foundations constitute a building within the meaning of the first subparagraph of Article 12(2) of the VAT Directive. However, none of those judgments can call into question the interpretation set out in paragraph 49 above.

60 First of all, in the judgment of 30 September 2021, *Icade Promotion* (C-299/20, EU:C:2021:783, paragraph 57), the Court held that the improvement of land, such as by way of its connection to electricity, gas, water, or other networks, cannot lead to a change in the legal classification of that land as a 'building', that is, as a construction fixed to or in the ground by way, in particular, of foundations. In so doing, the Court merely stated that the foundations are a means of fixing a structure to or in the ground, and not that they constitute, as such, a building.

61 Next, it is true that, in the judgment of 8 June 2000, *Breitsohl* (C-400/98, EU:C:2000:304, paragraphs 46 and 54), the Court stated, with regard to a structure comprising completed foundations and a floor partially completed, that it concerned a supply of a building or a part of a building and the land on which a building stands before first occupation. However, and as NSS and the three other defendant companies in the main proceedings acknowledge in their written observations, that case did not concern the interpretation of the concept of 'building' or 'parts of buildings', within the meaning of the first subparagraph of Article 4(3) of Sixth Directive 77/388, which was the provision equivalent, in that directive, to the first subparagraph of Article 12(2) of the VAT Directive, with the result that that additional statement by the Court does not suffice to invalidate the findings resulting from the interpretation of that latter provision set out, in particular, in paragraphs 52 to 55 above.

62 Lastly, in the judgment of 16 January 2003, *Maierhofer* (C-315/00, EU:C:2003:23, paragraphs 32 and 33), the Court held that single-storey and two-storey buildings standing on a concrete base erected on concrete foundations sunk into the ground, even though they were capable of being dismantled or moved, constituted 'immovable property'. Thus, the assessment of the Court in that judgment related to completed buildings, not to their foundations.

63 In the light of all the foregoing considerations, the answer to the question referred is that Article 12 of the VAT Directive must be interpreted as meaning that a supply of land that, at the date of that supply, has only the foundations of residential housing structures in place, constitutes a supply of 'building land' within the meaning of that article.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Seventh Chamber) hereby rules:

Article 12 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as meaning that a supply of land that, at the date of that supply, has only the foundations of residential housing structures in place, constitutes a supply of 'building land' within the meaning of that article.

[Signatures]