Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 12 September 2012[1]

Case C-395/11

BLV Wohn- und Gewerbebau GmbH
v
Finanzamt Lüdenscheid

(Reference for a preliminary ruling from the Bundesfinanzhof (Federal Republic of Germany))

(Taxation — Value added tax — Right of a Member State, authorised to apply a derogating measure, to make use of it in part — Definition of 'construction work')

I – Introduction

1. In this case, the Bundesfinanzhof (Federal Finance Court) of the Federal Republic of Germany has made a reference to the Court of Justice for a preliminary ruling on the interpretation of Council Decision 2004/290/EC of 30 March 2004 authorising Germany to apply a measure derogating from Article 21 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.[2]

II – Legal context

A – *Union law*

2. Article 1 of Decision 2004/290 provides:

'By way of derogation from Article 21(1)(a) of Directive 77/388/EEC, as worded in Article 28(g) thereof, the Federal Republic of Germany is hereby authorised, with effect from 1 April 2004, to designate the recipients of the supplies of goods and services referred to in Article 2 of this Decision as the persons liable to pay VAT'.

3. Article 2 of Decision 2004/290 provides:

'In the following instances the recipient of the supply of goods and services may be designated as the person liable to pay VAT:

(1) where building-cleaning services are supplied to a taxable person, except where the recipient of the supply exclusively rents not more than two residences or where construction work is supplied to a taxable person;

1 — Original language: Italian.
2 — OJ 2004 L 94, p. 59.

(2) where immovable property is supplied to a taxable person under Article 13(B)(g) and (h) and where the supplier has exercised his right to tax the supply.'

4. Article 2 of the Sixth Council Directive 77/388/EEC[3] 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, provided, in the version applicable to this case:

'The following shall be subject to value added tax:

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 5(1) and (5) of Directive 77/388 provided, in the version applicable for the purposes of the decision in this case:

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

...

5. Member States may consider the following to be supplies within the meaning of paragraph 1:

...;

(b) the handing over of certain works of construction'.

6. Article 6 of Directive 77/388 provided, in the version applicable to this case:

'Supply of services

"Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

...'.

7. According to Article 1(7) of Council Directive 2006/69/EC[4] of 24 July 2006 amending Directive 77/388/EEC 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:

'(7) In Article 21(2), in the version set out in Article 28g, the following point shall be added:

"(c) where the following supplies are carried out, Member States may lay down that the person liable to pay tax is the taxable person to whom those supplies are made:

(i) the supply of construction work, including repair, cleaning, maintenance, alteration and demolition services in relation to immovable property, as well as the handing over of construction works considered to be a supply of goods by virtue of Article 5(5);

..."'

3 — OJ 1977 L 145, p. 1.

4 — OJ 2006 L 221, p. 9.

8. Article 199 of Council Directive 2006/112/EC[5] of 28 November 2006 on the common system of value added tax provides that:

‘1. Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

(a) the supply of construction work, including repair, cleaning, maintenance, alteration and demolition services in relation to immovable property, as well as the handing over of construction works considered to be a supply of goods by virtue of Article 14(3);

...’

B – *National law*

9. Paragraph 3(1), (4) and 9 of the Umsatzsteuergesetz (Law on turnover tax, the ‘UStG’) 2005 provides:

‘1. Supplies of goods by a trader are supplies by which either he or a third party on his behalf transfers to a customer or a third party on his behalf the right to dispose of goods in his own name (transfer of the power of disposal).

...

4. Where the trader has taken on the task of forming or processing an object and, to this end, uses materials which he himself procures, the supply shall be regarded as a supply of goods (supply of work) if the materials are more than merely accessories or other subsidiary items. This shall apply even if the objects are fixed to or in the ground.

...

9. Services are supplies which are not supplies of goods. ...’

10. Paragraph 13a(1)(1) of the UStG, in the version in force as of 1 April 2004, which is based on Decision 2004/290, establishes that, in the case referred to in Paragraph 1(1)(1), the trader is liable for the tax.

11. Paragraph 13b(1)(4) and the second sentence of Paragraph 13b(2) of the UStG, in the version applicable from 1 April 2004, provide:

‘(1) Tax shall become due on the issuing of the invoice, and at the latest at the end of the calendar month following the effecting of the supply, in respect of the following taxable transactions:

...

4. Supplies of pieces of work and supplies of services for the construction, repair, maintenance, alteration or demolition of structures, with the exception of planning and supervisory services.

...

5 — OJ 2006 L 347, p. 1.

(2) ... In the cases specified in subparagraph 1, first sentence, point 4, first sentence, the recipient of the supply shall be liable to the tax if he is a trader who makes supplies within the meaning of subparagraph 1, first sentence, point 4, first sentence

...'

12. Paragraph 48 of the Einkommensteuergesetz (Law on income tax) defines construction work as:

'... all output for the construction, repair, maintenance, alteration or demolition of structures'.

III – Facts of the case and questions referred

13. BLV Wohn- und Gewerbebau GmbH ('BLV'), which brought the action before the national court, is an undertaking that engages in the activity of acquiring land, providing it with basic infrastructure and building on it, and must be regarded as a trader within the meaning of the 2005 UStG and as a taxable person within the meaning of Directive 77/388 in the version applicable in the year in question.

14. In September 2004, the applicant engaged Rolf & Co. OHG ('Rolf & Co.'), as lead contractor, to build a residential block of six flats at a fixed price on land owned by BLV.

15. On 17 November 2005, Rolf & Co. issued a final invoice without indicating the VAT, referring to BLV as liable for the tax because it was the recipient of the supply.

16. BLV initially paid the VAT on the supply it had received in the tax year 2005, since, on the basis of Paragraph 13b(2), second sentence, of the UStG, in this case, that tax was payable by the recipient of the supply. [6]

17. Subsequently, BLV applied to the competent office (the Finanzamt [Tax Office] Lüdenscheid) for reimbursement of the tax paid, maintaining that the latter provision ought not to have been applied in the case at issue and, consequently, that liability for the tax lay solely with Rolf & Co.

18. The rejection by the Finanzamt of the application by BLV gave rise to this case; during the proceedings, the Bundesfinanzhof decided that there was a problem of interpretation in relation to Decision 2004/290 and referred the following questions to the Court for a preliminary ruling:

'(1) Does the term "construction work" within the meaning of Article 2(1) of Decision 2004/290/EC encompass not only services but also supplies of goods?

(2) If the authorisation to designate the recipient of the supply as the person liable for tax also extends to supplies of goods:

Is the authorised Member State entitled to exercise the authorisation merely partially in respect of certain subcategories, such as particular types of construction work, and in respect of supplies to certain recipients?

6 — In the VAT system, it is usually the person who makes the supply who is required to invoice for and pay the tax. However, in certain sectors (and primarily the construction sector, particularly in relations between contractors and subcontractors, as subcontractors frequently invoice for but do not pay VAT) recourse is increasingly had to the so-called reverse charge mechanism whereby the recipient of the supply is deemed to be liable for the VAT (in the example mentioned, the contractor). Article 27 of the Sixth Directive permits the Council to authorise the Member States to derogate from the directive in order to simplify the procedure for charging the tax or prevent evasion. Decision 2004/290 contains the authorisation for Germany to make use of the mechanism which I have just described, derogating from the provisions of the Sixth Directive which instead require the person making the supply to be deemed liable for the tax.

(3) If the Member State is entitled to form subcategories: is the Member State subject to restrictions when forming subcategories?

(4) If the Member State is not entitled to form subcategories generally (see Question 2 above) or on account of its failure to observe restrictions (see Question 3 above):

(a) What are the legal consequences of the impermissible formation of subcategories?

(b) Is the effect of the impermissible formation of subcategories that the provision of national law is not to be applied only to the benefit of particular taxable persons or in general?'

IV – Procedure before the Court

19. Written observations have been submitted by the Commission and the German and Finnish Governments.

V – The first question

20. By the first question referred, the Bundesfinanzhof asks whether the term construction work within the meaning of Article 2(1) of Decision 2004/290 encompasses not only services but also supplies of goods.

21. According to the court making the reference, the significance of this question stems from the fact that, in accordance with the German legislation and case-law, the transaction at issue (the construction of a building on another's land by a trader using its own materials) constitutes a supply of goods. Under German law, the reverse charge mechanism, whereby the person liable for the tax is the recipient of the supply (in this case BLV) and not the person who carried it out (Rolf & Co.), is to be applied in this case.

22. Still according to the court making the reference, that mechanism derogates from the Sixth Directive (which designates the supplier as the person liable for the tax) and, consequently, is admissible only in so far as Decision 2004/290 applies, the latter expressly permitting Germany, in accordance with Article 27 of that directive, to apply the reverse charge mechanism if construction work is provided to a taxable person (as is the case according to German law in this instance). If, therefore, the authorisation contained in Decision 2004/290 referred to the supply of services only and not to the supply of goods too, use of the reverse charge mechanism would no longer be permitted in this case, given that, in Germany, the construction of a building on another's land by a trader which uses its own materials constitutes a supply of goods. Consequently, BLV would no longer be the person liable for the tax, for Union law would have to be applied instead of German law and, as a general rule, under Union law, it is the person carrying out the supply and not the recipient who is liable for VAT.

23. In order to answer the question, it will be necessary to begin by defining the terms 'supply of goods' and 'supply of services' within the meaning of European Union law, so as to distinguish them with precision, then analyse the term construction work and, lastly, relate it to the supply of goods and the supply of services.

24. With regard to the first aspect, I would point out that, according to Article 2 of Directive 77/388, the supply of goods and services effected for consideration within the territory of the country by a taxable person acting as such is a taxable transaction. [7]

7 — In addition to imports of goods, transactions that are not relevant in this case.

25. Article 5 of Directive 77/388 defines a supply of goods as the transfer of the right to dispose of tangible property as owner.

26. According to Article 6, a supply of services means any transaction which does not constitute a supply of goods.

27. As is apparent from the Court's case-law in *Shipping & Forwarding Enterprise (Safe)*, the concept of a supply of goods 'does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property,'[8] even if legal ownership is not transferred.

28. That definition of the concept of supply follows from the objective of the directive 'which is designed inter alia to base the common system of VAT on a uniform definition of taxable transactions. This objective might be jeopardised if the preconditions for a supply of goods – which is one of the three taxable transactions – varied from one Member State to another, as do the conditions governing the transfer of ownership under civil law'.[9]

29. The supply of services, however, is defined, on a residual basis, as a transaction which does not constitute a supply of goods.

30. In view of the difficulty in classifying many transactions as the supply of goods or the supply of services, the Court has frequently endeavoured to identify a criterion to be used in order to make that classification.

31. It has not, however, succeeded in establishing an unequivocal distinguishing criterion, because of the very high number and range of transactions that may be subject to VAT,[10] and has ruled that in order to 'determine whether such transactions constitute supplies of goods or supplies of services, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features,'[11] and the transaction in question must be analysed in detail, in order to identify the predominant elements of the supply and distinguish them from those that are minor or ancillary.[12]

32. Moreover, it must also be borne in mind that parties frequently engage in extremely complex transactions displaying aspects that can be associated with both the supply of goods and the supply of services.

33. The fact that a single event relevant for tax purposes incorporates aspects of different kinds may imply either that a number of distinct (although perhaps connected) transactions have taken place, or that there is actually a single transaction which, since it incorporates at one and the same time aspects of different kinds, is mixed and must be classified as the supply of goods, or as the supply of services, for the purposes of applying value added tax.

8 — Case C-320/88 *Shipping & Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 7; see also Case C-435/03 *British American Tobacco and Newman Shipping* [2005] ECR I-7077, paragraph 35; and Case C-185/01 *Auto Lease Holland* [2003] ECR I-1317, paragraph 32.

9 — *Shipping & Forwarding Enterprise Safe*, cited in footnote 8, paragraph 8.

10 — Case C-349/96 *CPP* [1999] ECR I-973, paragraph 27.

11 — Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraph 12. To the same effect, see also Case C-88/09 *Graphic Procédé* [2010] ECR I-1049, paragraph 18; Case C-41/04 *Levob Verzekeringen* [2005] ECR I-9433, paragraphs 19 and 27; and Joined Cases C-322/99 and C-323/99 *Fischer and Brandenstein* [2001] ECR I-4049, paragraph 62.

12 — *Levob Verzekeringen*, cited in footnote 11, paragraphs 27 and 29.

34. The Court has already considered the distinction between single supplies, which include elements typical of the supply of goods and of the supply of services, and distinct supplies, ruling that 'where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply'. [13]

35. In so doing, it is necessary to take into account, firstly, as provided for under Article 2(1) of the Sixth Directive, that every transaction 'must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system,' [14] and that once the essential features of the transaction have been ascertained, it will then be necessary to determine 'whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply'. [15]

36. Therefore, although the general principle is that every formally distinct supply that could be separately provided should be subject to taxation on an individual basis, there are certain circumstances in which several distinct transactions must be assessed as a single transaction, where they are not independent of each other. [16]

37. The Court has clarified that a single supply comes into consideration particularly where one or more elements thereof are to be regarded as constituting the principal service, whilst one or more elements are to be regarded as ancillary services which share the tax treatment of the principal service; a service must be regarded as an ancillary service if it does not constitute for customers an aim in itself, but simply a means of better enjoying the principal service supplied. [17]

38. A single supply also exists where 'two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split'. [18]

39. Now that the distinction between the supply of goods and the supply of services (and between single and distinct transactions) has been clearly set out, it is necessary to define the term construction work, in order then to determine whether it must be classified as the supply of goods or the supply of services in the light of the abovementioned principles set out in the Court's case-law and the provisions of European Union law governing the subject.

40. In order to do this, it is necessary to bear in mind, first, that even the Second Council Directive 67/228/EEC [19] of 11 April 1967 on the harmonisation of the legislation of the Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax – contained, in Annex A(5), a list of a number of activities regarded as 'works of construction' (without, however, providing a general definition of the term), such as the construction of buildings, roads, bridges and ports etc. in performance of a building contract, earth-moving and planting of gardens, installation work (of central heating, for example) and repairs to buildings, other than current maintenance.

13 — *Levob Verzekeringen*, cited in footnote 11, paragraph 19. In the same terms, see Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 23.

14 — *Levob Verzekeringen*, cited in footnote 11, paragraph 20.

15 — *Levob Verzekeringen*, cited in footnote 11, paragraph 20.

16 — Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 51.

17 — Case C-276/09 *Everything Everywhere* [2010] ECR I-12359, paragraph 25; *Aktiebolaget NN*, cited in footnote 13, paragraph 28; and *CPP*, cited in footnote 10, paragraph 30.

18 — *Levob Verzekeringen*, cited in footnote 11, paragraph 22; see also Case C-94/09 *Commission* v *France* [2010] ECR I-4261, paragraph 15; *Graphic Procédé*, cited in footnote 11, paragraph 19; and Case C-572/07 *RLRE Tellmer Property* [2009] ECR I-4983, paragraphs 17 to 19.

19 — OJ, English Special Edition 1967, p. 16.

41. Furthermore, Article 6 of the subsequent Proposal for a Sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes (not subsequently included in the final text of the directive) listed as 'works of construction' all works relating to buildings, bridges, roads, ports and other structures fixed to the ground, such as demolition, construction, including foundations, supply of principal materials, fitting-out, incorporation of movable property in immovable property, including all installation works, extension, modification and renovation, repairs and maintenance, other than day-to-day maintenance, work on preparing and improving land, such as foundation for work on industrial and residential developments, division into plots, levelling, installation of water supply and sewers, electricity supply installations, supporting-walls and planting of gardens. [20]

42. Lastly, in seeking, by its request of August 2003, [21] the grant of the derogation at issue in regard to 'construction work', the Federal Republic of Germany referred specifically to the abovementioned Paragraph 48 of the Einkommensteuergesetz which, in defining the term 'construction work', makes clear that it consists of all output for the construction, repair, maintenance, alteration or demolition of structures.

43. I consider that, although they are not binding, the lists of 'works of construction' contained in the Second Directive and in the Proposal for a Sixth Directive are helpful for the purpose of interpreting the term 'construction work' employed in Decision 2004/290 because 'construction work' is nothing other than 'works of construction', which are characterised by the fact that they relate specifically to the construction sector (as is apparent from recital 2 in the preamble to that decision [22]) and, therefore, constitute 'works of construction' carried out by construction firms and involving the construction of buildings. [23]

44. It may therefore be stated, in the light of the content of the Second Directive, of the Proposal for the Sixth Directive and of the request from the State concerned, which led to the adoption of Decision 2004/290, that 'construction work' consists of building work such as the construction, maintenance, repair, alteration and demolition of buildings and other similar structures (the present case concerns the construction of a building).

45. It is, therefore, necessary to determine whether all the work referred to in points 43 and 44 must be classified as the supply of goods or as the supply of services, on the basis, as the Court has explained, of all the specific circumstances of the transactions at issue; that assessment must be made taking into account the characteristic and predominant elements of the supplies. [24]

46. No problem arises if, in order to carry out that work, *different traders* provide *different supplies*, inasmuch as each will be independently assessed and, consequently, classified, depending on the circumstances, as the supply of goods or as the supply of services.

20 — That list differs little from those applied in this area by the Member States. In France, for example, in the absence of a statutory definition, the Conseil d'État (CE, sect., 17 December 1976, No 94852) regards works of construction as transactions which contribute directly to the construction of a building, and the tax authority (Instr. 4 January 2010: BOI 3 a-1-10, 11 January 2010, No 57 et seq.) explained that such work consists in construction, demolition, repair, redevelopment, improvement, conversion and fitting-out in relation to developed and undeveloped land (the planting of gardens and earth-moving are listed).

21 — Submitted as Annex 1 to the German Government's observations.

22 — According to which: '[c]onsiderable value added tax (VAT) losses were established in the construction and in the building-cleaning businesses, where VAT was openly invoiced but not paid to the fiscal authorities, while the recipient exercised his right to deduct …'.

23 — It should be emphasised that in the German versions of the Sixth Directive and Decision 2004/290, the terms 'works of construction' and 'construction work' are both rendered as 'Bauleistungen'. Moreover, that term assumes a different shade of meaning in those two contexts given that, in the light of recital 2 in the preamble to Decision 2004/290, the 'Bauleistungen' in question concern the construction sector.

24 — *Aktiebolaget NN*, cited in footnote 13, paragraphs 21 and 27.

47. However, the question at issue concerns a situation in which the work is carried out by a *single taxable person* who provides *a single mixed supply* consisting of elements that can be classified as the supply of goods and as the supply of services: it is in the context of a transaction of that nature that it is necessary to determine whether the predominant element is that of the supply of goods or that of the supply of services.

48. It must first of all be borne in mind that the works of construction and construction work described above basically involve complex activities generally carried out using a business structure and, predominantly, the labour of those who carry out those activities.

49. The very terminology employed in points 40 to 44 (construction, maintenance, repair, alteration, demolition and fitting-out) demonstrates that central to these transactions is the activity of the trader, the purpose of which is to fulfil the commitments entered into, consisting in the supply of services, usually the provision of a business structure and, in any event, of labour, whereas, if it exists (and in the case of demolition, in principle, it will not), the supply of goods is a secondary element.

50. Moreover, if we consider the specific object to be achieved through those transactions and the way in which the latter are typically assessed by those who commission works, it is clear that the subject-matter of the contracts entered into is mainly the activity of those performing the contracts (and is therefore a supply of services), whereas the other aspects (linked to the supply of goods), such as, for instance, the handing over of the property constructed, remain ancillary and mark the point at which the contract has been met in full, but do not lie at its core.

51. Those considerations are borne out by an analysis of the situation forming the subject-matter of this case, that is to say the construction by a contractor, using its own materials, of a building on land owned by the client.

52. In this case, the two elements to be assessed, in determining which is the principal and which the subsidiary element within the single construction-based supply, are the activity carried out by the trader, who, according to the standard works contract,[25] uses his organisation and labour and that of his employees (supply of services), and the use of the contractor's materials which, on completion of the work, will become the client's property (supply of goods).

53. It is clear that the materials generally constitute the subsidiary element, if only because the purpose of the contract is not to transfer them to the client but definitively to transform them and produce an entirely new object. It would therefore be contradictory to attach principal significance to the materials, since they are simply a means of enabling the activity of construction to be carried out and, once it has been, they will cease to exist independently.

54. The same conclusions are reached if we consider the handing over of the building constructed on the land. As set out in point 50 above, this constitutes the concluding and ancillary aspect of a more complex process, and property in the building usually passes to the customer on completion of the building on the land owned by the customer, without any deed of assignment on the part of the contractor, but by virtue of the principle of accession.

55. These considerations clearly presuppose that, in actual fact, the elements of business structure and labour referred to in points 48, 49 and 52, which take the form of providing supplies of services, predominate over the element of the supply of goods, which, in the case at issue, takes the form of the materials supplied by the contractor.

25 — The account contained in the order for reference indicates that the parties in question concluded a works contract. I shall therefore focus on that type of contract and not on other potentially relevant contracts.

56. If the business structure and labour are the predominant elements – and this will generally entail use of the works contract format – then, as mentioned above, the supplies will be provided for the purpose of a substantive activity of production which will result in the construction of a structure that did not previously exist; it is an act of 'doing' that will be the main purpose of the activity and only in that case will there truly be a transaction involving 'works of construction' and, therefore, 'construction work'.

57. If, however, the core of the contract is the goods supplied or, at any event, not the activity of constructing but the acquiring of the property, then the essence of the contract will consist in giving and not in doing, and there will, in substance, be an act of transfer, usually a sale, that does not fall into the category of 'works of construction', and so 'construction work', but into that of the supply of goods.

58. It is for the court to establish whether there is a supply of services or a supply of goods, and it will be able to use multiple criteria, provided that it takes account of the fact that there is no main criterion more important than the others, inasmuch as in individual cases different circumstances can come into play and must be the subject of a comprehensive assessment.

59. For instance, the court may attach significance (a) to whether or not the element of the labour performed predominates over the physical materials, taking into account generally the value of the materials employed,[26] and (b) to the intention of the parties, with reference to whether the provision of the materials is merely a means of bringing the work to fruition and it is the labour performed that forms the purpose of the contract (as in a works contract), or whether the labour performed is the instrument for transforming the material, while attaining the *res* is the ultimate purpose of the contract (as is characteristic of a sale);[27] the court may, more generally, take notice of the obligations entered into by the parties and of the procedures for carrying out the transaction, such as the time taken, the [degree of] independence in carrying out the work and the nature of the guarantees accorded.

60. In particular, account may be taken of whether the work finished and handed over is a product with original features, that is to say, something new (which is characteristic of works of construction and construction work), or whether, on the contrary, it is mass-produced, like a prefabricated building.

61. Analysis of the wording of the Sixth Directive leads to the same conclusion as that set out in point 49 et seq.

62. First of all, the argument that 'construction work' falls into the category of the supply of services finds a clear formal equivalent, as noted by the Finnish Government, in Article 5(5)(b) of the directive, according to which Member States may consider to be the supply of goods 'the handing over of certain works of construction'.

63. In point of fact, had the legislature regarded 'works of construction' as the supply of goods and not the supply of services, it would have had no reason to give the Member States the option of classifying 'the handing over of certain works of construction' as the supply of goods.

26 — If the value of the material used were greatly to exceed the value of the work and constitute a significant component of the overall service, there might not be construction work but the sale of those materials.

27 — The court will assess whether the intention of the parties was the building itself or the building as the product of an activity; if it was the former, the supply will consist in the act of providing, if the latter, it will consist in the act of doing.

64. If, however, the legislature had taken the view that such transactions could sometimes constitute the supply of goods and sometimes the supply of services,[28] it ought logically, in contrast with what actually happened, to have accorded the Member States the power generally to treat such work as either supplies of goods or as supplies of services.

65. I cannot therefore agree with the German Government's contention that, in mentioning 'the handing over of certain works of construction', Article 5(5) of the Sixth Directive refers only to those works of construction that do not already constitute supplies of goods within the meaning of the Sixth Directive.

66. That argument is actually based on the assumption that works of construction usually constitute, by their nature, a supply of goods pursuant to the general provision under Article 5(1), but, setting aside the observations set out above, it fails to take account of the fact that, as explained in points 62 to 64, the sole reason for a provision like Article 5(5)(b) is in fact that, within the scheme of the Sixth Directive, 'works of construction'[29] constitute supplies of services.[30]

67. Moreover, when, within the ambit of the Sixth Directive, the Union legislature decided to attach independent significance to the point at which new buildings (such as the building at issue here) are transferred, it specifically designated the transfer a 'supply', as, for example, in Article 4(3)(a), on the basis of which Member States may also treat as a taxable person anyone who carries out on an occasional basis '(a) the supply before first occupation of buildings or parts of buildings and the land on which they stand'.[31]

68. However, in circumstances in which the delivery takes place on completion of a contractual event such as that at issue, it is considered not independently, but as an ancillary stage in the context of a broader and more complex transaction which incorporates the essential elements of the supply of services, so that the Sixth Directive uses the expression 'handing over' rather than 'supply' (as in Article 5(5)(b)).[32]

69. In addition, analysis of the text of Council Directives 2006/69 and 2006/112, both of which concern VAT, leads to classification of works of construction and construction work as supplies of services.

28 — Which ought plainly to have been determined by way of a specific assessment on a case-by-case basis.

29 — And thus also the 'construction work' which, as noted in point 43, is equated with 'works of construction'.

30 — The reason for introducing a provision like Article 5(5)(b) is that 'works of construction' are often characterised by the presence of a business structure designed to provide services which are accompanied, particularly in the construction sector, by the supply of materials and the handing over of a building, with or without the land on which it stands. It is, therefore, logical that the Member States should have been accorded the option of classifying as supplies of goods these complex transactions which, if assessed as a single unit, would have to constitute a supply of services.

31 — In fact, by using the expression 'before first occupation', that article refers to new buildings: see Case 73/85 *Kerrutt* [1986] ECR 2219, paragraph 16.

32 — That terminological distinction occurs in several language versions of the Sixth Directive, namely, the French version, which refers to 'livraison d'un bâtiment' (Article 4(3)(a)) and to 'délivrance de certains travaux immobiliers' (Article 5(5)(b)); the English version which makes a distinction between 'supply before first occupation of buildings' (Article 4(3)(a)) and 'the handing over of certain works of construction' (Article 5(5)(b)); the German version which employs the expressions 'die Lieferung von Gebäuden' (Article 4(3)(a)) and 'die Ablieferung bestimmter Bauleistungen' (Article 5(5)(b)); the Dutch version, which refers to 'de levering van een gebouw' (Article 4(3)(a)) and 'de oplevering van een werk in onroerende staat' (Article 5(5)(b)); and the Italian version, which sets 'la cessione, effettuata anteriormente alla prima occupazione, di un fabbricato' (Article 4(3)(a)) against 'la consegna di taluni lavori immobiliari' (Article 5(5)(b)).

70. Article 1(7) of Directive 2006/69 provides that in Article 21(2), in the version set out in Article 28g of the Sixth Directive, the following point is added:

‘(c) where the following supplies are carried out, Member States may lay down that the person liable to pay tax is the taxable person to whom those supplies are made:

(i) the supply of construction work [33] including repair, cleaning, maintenance, alteration and demolition services in relation to immovable property, as well as the handing over of construction works considered to be a supply of goods by virtue of Article 5(5);

…’

71. Under Article 199 of Directive 2006/112,

‘Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

(a) the supply of construction work [34] including repair, cleaning, maintenance, alteration and demolition services in relation to immovable property, as well as the handing over of construction works regarded as a supply of goods pursuant to Article 14(3);

…’

72. Even though those two directives postdate the Sixth Directive and do not govern the case at issue, I consider that, as observed by the Bundesfinanzhof, [35] the decision to include, alongside the transactions specifically listed in the articles cited in points 70 and 71, a specific reference to the handing over of construction works considered by the Member States to be a supply of goods pursuant to Article 5(5) of the Sixth Directive and Article 14(3) of Directive 2006/12, [36] demonstrates that works of construction and construction work are classified by the Union as the supply of services.

73. That construction work is by nature a supply of services may then be inferred from Article 2 of Decision 2004/290 which, in laying down that, in the instances set out in Article 2(1) and (2), the recipient of the supply of goods and services may be designated as the person liable to pay VAT, includes construction work in Article 2(1), together with building-cleaning services, and not in Article 2(2), alongside immovable property supplied to a taxable person under Article 13(B)(g) and (h) of the Sixth Directive.

74. Construction work is therefore listed in Article 2(1) of Decision 2004/290 relating to services (as is clear from the reference to cleaning services), in that it is regarded as a service, whereas the supplies for which the requested derogation was accorded were included in Article 2(2). [37]

33 — I should point out that the English and French versions use the terms ‘work’ and ‘travaux’, and the German version the term ‘Bauleistungen’.

34 — Here too, the English and French versions use the terms ‘work’ and ‘travaux’, and the German version ‘Bauleistungen’.

35 — Section (b)(cc) of the arguments set out in the order for reference concerning the first question referred.

36 — Which, without that specific qualification, would have constituted a supply of services.

37 — The German Government contends that, in point of fact, Article 2 of Decision 2004/290 cannot be construed in that way because Article 1 refers generically, and without setting limitations, to the supplies of goods and services referred to in Article 2 of the decision. I note that Article 2 merely elaborates further on Article 1 and simply sets out in detail, distinguishing between them in paragraphs (1) and (2) respectively, the supplies of goods and services forming the subject-matter of the derogation in question. Nor can I accept the German Government’s assessment of the fact that, during the process of drawing up Decision 2004/290, the Council working group dealing with it included in Article 1 not only the term services but also the term goods. The reason for this was that Article 2(2) sets out the transactions which may be classified as supplies of goods.

75. The selfsame conclusions are reached if account is taken of the Commission's working document of 10 June 2004[38] which, as the Commission has acknowledged,[39] formed the basis for the negotiations which resulted in the amendment of the Sixth Directive, in order to simplify the procedure for charging VAT and counter tax evasion and avoidance, and the repeal of the decision at issue.

76. At paragraph 4.1 of that document, the Commission explains that the work in question ('Arbeiten') basically constitutes the supply of services[40] and that the Member States which have implemented Article 5(5) of the Sixth Directive must also include in that definition the supplies of services which they have regarded as supplies of goods.[41]

77. Furthermore, paragraph 4.1 of the working document also contains a list of the derogations from the arrangements for determining the person liable for the tax laid down by the Sixth Directive, which were previously requested by some Member States and authorised by the Council (such as the derogation at issue), in order to make the recipient of the supply liable for the value added tax, with particular significance attaching to the derogation granted to Austria by Decision 2002/880/EC.[42]

78. This is because recital 2 in the preamble to Decision 2004/290 cites, referring specifically to it, the derogation granted to Austria, which also encompasses construction work ('Bauarbeiten') and includes in that category a number of transactions, referred to in the abovementioned working document, in which the element of the supply of services clearly predominates as a result of the business structure employed, such as the case of a subcontractor who carried out work in the construction and the metal-working or shipbuilding sectors, and supplied labour to a general contractor, to another subcontractor or, generally, to a company which carries out its own construction work.

79. A further argument in support of the view that works of construction and construction work are to be regarded as constituting supplies of services emerges from the Second Directive and from the proposal for the Sixth Directive cited in points 40 to 41.

80. In fact, it turns out that, during the *travaux préparatoires*, works of construction were classified, in Article 5(e), as supplies of goods, in line with the solution that had already been adopted under the Second Directive (Article 5(2)(e)), but that this solution was not taken up when the Sixth Directive was adopted.

81. This shows that the legislature at the time was perfectly aware of the problem in question and quite deliberately decided to change its earlier approach, set out in the Second Directive, whereby 'works of construction' were classified as supplies of goods.

82. The argument that works of construction and construction work should be regarded as supplies of services is also confirmed by the Opinion of Advocate General Jacobs of 16 April 1995 in *Armbrecht*,[43] according to which 'the power of the Member States to treat as a supply of goods (rather than services) the supply by a builder of works of construction on land to which he does not hold the title arises from a specific provision in Article 5(5)(b)', with the result that, without that provision and its application, works of construction would always constitute supplies of services.

38 — Annex 1 to the Commission's observations.

39 — P. 4 of the Commission's observations.

40 — Grundsätzlich nur Dienstleistungen gemeint sind.

41 — Mitgliedstaaten, die Artikel 5 Absatz 5 der Sechsten MwSt-Richtilinie umgesetzt haben, müssen in diese Definition auch die Dienstleistungen einbeziehen, die sie als Lieferung von Gegenständen betrachten.

42 — OJ 2002 L 306, p. 24. This is the Council Decision of 5 November 2002 authorising the Republic of Austria to apply a measure derogating from Article 21 of the Sixth Directive (77/388/EEC) on the harmonisation of the laws of the Member States relating to turnover taxes.

43 — Point 15 of the second Opinion in Case C-291/92 *Armbrecht* [1995] ECR I-2775.

83. Lastly, although I am aware that this argument is not decisive for the purposes of answering the question referred, I note that, in principle, construction work constitutes a supply of services in many [44] Member States. [45]

84. It therefore follows that, in the light of the considerations set out above, particularly by reason of the fact that the business structure and labour elements predominate over the element of the supply of materials (see points 55 to 57), the works of construction and construction work referred to in Article 5(5) of the Sixth Directive and Article 2(1) of Decision 2004/290 must be regarded as supplies of services.

85. Supported by the Commission, the German Government maintains that, in point of fact, the construction work under Decision 2004/290 could consist in supplies of goods and supplies of services without distinction and that, were they to be classified as supplies of services only, Decision 2004/290 would be deprived of all effectiveness, since much of the work at issue would not be encompassed by the derogation accorded, as it would consist in supplies of goods. This, therefore, would thwart the purpose of the decision at issue, namely, the prevention of tax evasion (some traders acting fraudulently might, for instance, fail to apply the reverse charge by recording the transaction as a supply of goods). [46]

86. On that point, I consider it appropriate to set out a number of considerations concerning the relevant German legislation and case-law.

87. According to Paragraph 3(4) of the UStG, the transactions at issue must be classified as supplies of goods if they are carried out by the trader using materials he has procured for himself, unless these are accessories or other subsidiary items.

88. In practice, the distinction between supplies of goods and supplies of services depends on whether the supply of materials by the builder is a predominant rather than a subsidiary element, and German case-law has interpreted that provision to the effect that, when the trader uses material which he has himself procured to construct a building on land belonging to another person, a supply of goods has taken place.

89. That explains why the German Government is inclined to the view that the effect of an interpretation that confines the scope of Decision 2004/290 to the supply of services only is to exclude from its ambit many transactions in the building sector.

44 — In Bulgaria, Finland, France, Italy, Poland, Romania, Sweden and the United Kingdom, for example. The Netherlands and Hungary have, however, opted to regard construction work as the supply of goods, specifically provided for under the Sixth Directive (Article 5(5)(b)) and confirmed by Directive 2006/112 (Article 14(3)); Spain has classified works of construction as supplies of services, unless the value of the materials used crosses the threshold of 33% of the statutory taxable amount, thus also availing itself of the option under Article 14(3) of Directive 2006/112. The decision by the Netherlands, Hungary and Spain to take advantage of the option provided for under Article 5(5)(b) of the Sixth Directive and Article 14(3) of Directive 2006/112 to classify works of construction and construction work as supplies of goods demonstrates that, in those countries also, without that derogation, such transactions would have constituted supplies of services.

45 — However, a different approach is apparently taken by Ireland, Greece, Portugal and Slovakia. Ireland applies the so-called 2/3 rule, according to which, if the value of the goods supplied under an agreement for the provision of services accounts for more than 2/3 of the total value of the agreement, the agreement is regarded as a supply of goods for the purposes of VAT. Greece classifies as the supply of goods work on immovable property under a building contract. Portugal, however, classifies the transaction as a supply of goods if the construction company provides all the materials, or the quantity of material supplied by the contractor is not significant. Slovakia, finally, regards construction work as the supply of services, but distinguishes from it the supply of construction work or part thereof under a building or similar contract, that is to say where a trader supplies the whole building and not specific services. Of those approaches, the approach taken by Slovakia remains consistent with the possibility of making use of the right to derogate under Article 5(5) of the Sixth Directive and Article 14(3) of Directive 2006/112, in a system within which that work constitutes the supply of services; the approach taken by Ireland and Portugal introduces a criterion distinguishing between the supply of goods and the supply of services, based on the significance automatically attached to a single criterion (the value of the goods) and one to which I shall return in points 92 to 94; whereas only the Greek approach takes a direction different from that indicated by the directives in the field.

46 — It is, furthermore, necessary to note that neither the German Government nor the Commission has specifically indicated what construction work should be regarded as by nature constituting a supply of goods (aside from the situation at issue in this case).

90. In fact, it is necessary to restate what has already been set out at point 48 et seq., namely, that works of construction and construction work constitute supplies of services, in that these are transactions carried out using a business structure and, in any event, with labour being the predominant factor, the purpose of which is not the supply of materials but the performance of building activity (in the case at issue).

91. That finding presupposes that the elements characteristic of the supply of services actually predominate over the elements typical of the supply of goods; if they do not, then what we have is a supply of goods, and not works of construction and construction work.

92. The problem raised by the Bundesfinanzhof turns on the fact that under German law, as is clear from the abovementioned law and case-law, account is not taken of all the elements of the individual case in assessing whether a transaction constitutes construction work, and thus a supply of services, or a supply of goods. Far from it, the law attaches exclusive significance to the materials supplied by the builder and the quantity of those materials, and the case-law takes no account of other criteria, but automatically classifies as supplies of goods transactions of the kind at issue in this case, merely because the contractor used his own materials.

93. However, that legislation and that case-law conflict with the case-law of the Court of Justice mentioned in point 31 and footnotes 11 and 12, for they do not distinguish supplies of services from supplies of goods by specifically determining, among the many elements in the case, those that are predominant and those that are subsidiary, but take as their sole point of reference whether or not the builder used his own materials.

94. In particular, although the national legislature may indicate to the courts the criteria to be applied to distinguish between supplies of goods and supplies of services, it may not impose just one criterion, nor may that distinction flow automatically from the presence or absence of just one specific element, without analysis of every other aspect of the case.

95. In the case at issue, therefore, the effect of classifying the construction work as a supply of services is not to prejudice the effectiveness of Decision 2004/290, since such work encompasses all those construction activities which culminate in the handing over of a building and display the features described above and, therefore, any complex transaction, such as the transaction at issue in this case,[47] with regard to which a problem of tax evasion may arise.[48]

96. A problem of tax evasion would in fact arise, were the argument of the German Government and the Commission, which would curtail the scope of the derogation, to be followed.

97. In point of fact, Article 199 of Directive 2006/112, which now regulates the reverse charge mechanism, specifically provides that it applies to transactions in the construction sector in relation to immovable property which are treated in the same way as the handing over of construction works regarded as a supply of goods pursuant to Article 14(3) (formerly Article 5(5) of the Sixth Directive).

47 — Which, looking only at the elements set out in the order for reference, seems to fall into the category of the supply of services, concerning, prima facie, a contract for the construction of a building.

48 — I do not agree with the Commission's contention that construction work includes supplies which, according to the definitions contained in the Sixth Directive, would be classified as supplies of goods, because it is based on the assumption, which must be rejected, that transactions such as the transaction at issue in this case always constitute supplies of goods.

98. It follows that, since this clearly indicates that, as already set out in point 72, the abovementioned transactions constitute supplies of services, if the construction of buildings and other similar transactions were classified in Germany as supplies of goods, they could no longer be covered by the reverse charge mechanism and the objective of combating tax evasion would be thwarted. [49]

99. In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the first question referred by the Bundesfinanzhof:

— the term 'construction work' within the meaning of Article 2(1) of Decision 2004/290 encompasses only supplies of services, in particular because the elements of business structure and labour predominate over the element of the supply of materials;

— in assessing whether a transaction constitutes construction work and therefore a supply of services, or a supply of goods, the court must consider all the circumstances of the individual case;

— Union law precludes national legislation and case-law which, for the purposes of the distinction in question, attach exclusive relevance to a single element, in particular the fact that the builder provided his own materials, and which automatically base the distinction between supplies of services and supplies of goods on the presence of that element;

— the national legislature may certainly indicate to the courts criteria to be applied in distinguishing between supplies of goods and supplies of services, but may not restrict the courts' power to distinguish between supplies of goods and supplies of services by specifically examining all the circumstances of the case.

100. The answer given to the first question makes it unnecessary to consider the second, third and fourth questions, since the national court asked for them to be considered only if construction work were deemed to encompass supplies of goods.

VI – Limiting the temporal effects of the judgment

101. The German Government has asked the Court, if it should find the national law at issue incompatible with Article 2(1) of Decision 2004/290, to limit the temporal effects of its judgment, for there would otherwise be serious economic repercussions for Germany's budget and, in any event, both the national authorities and the economic operators concerned believed in good faith that the German legislation was consistent with European Union law.

102. On that point, I would note that, according to the settled case-law of the Court of Justice, it is only exceptionally that the latter may, in application of the general principle of legal certainty inherent in the Community legal order, restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith. This may take place only when two essential criteria are satisfied, namely, that 'those concerned should have acted in good faith and there should be a risk of serious difficulties'. [50]

49 — On that point, I must reiterate that I cannot accept the German Government's claim that there are, in any event, supplies of goods other than those mentioned in Article 14(3) which would, however, fall within the category of works of construction and construction work. If that argument were well founded, there would in fact have been no reason for the specific reference to Article 14(3) contained in Article 199 of Directive 2006/112.

50 — Case C-2/09 *Kalinchev* [2010] ECR I-4939, paragraph 50; Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 51; and Case C-57/93 *Vroege* [1994] ECR I-4541, paragraph 21.

103. The Court has had recourse to that solution only 'in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission of the European Communities may even have contributed.' [51]

104. Moreover, it is settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling. [52]

105. In that connection, I consider, first, that the economic consequences cited in the German Government's observations will not arise or, at least, will not arise on the scale indicated; in point of fact, being supplies of services, transactions such as that forming the subject-matter of this case should generally fall within the scope of Decision 2004/290, with the consequent application of the reverse charge system, as they consist of construction work. [53] In any event, in those rare cases in which it is no longer possible to apply the reverse charge mechanism, the provider of the supply could be asked to pay the tax, as emphasised by the Finnish Government, which pointed out that there would be a loophole in the field of taxation, if the tax were no longer paid by the recipient of the transaction and the payment no longer made by the person who had carried out the transaction, since the transaction would not be taxed and the persons concerned would benefit from an unjustified advantage. [54]

106. Furthermore, in the light of the considerations set out above, to which I refer in full, I do not discern a situation of good faith on the part of the authorities and the economic operators concerned, for it was already apparent from Council Decision 2002/880 concerning Austria (to which Decision 2004/290 specifically refers) [55] which transactions were involved, and it was clear from their description that those transactions were supplies of services.

107. Due account must also be taken of the Commission's subsequent working document of 10 June 2004 (see point 75 of this Opinion), at least as of that date, [56] in which the Commission explained that the work at issue constituted, in essence, the supply of services.

108. The text of Article 5(5) of the Sixth Directive then plainly precluded the classification of works of construction and construction work as supplies of goods, particularly when it is borne in mind that the Sixth Directive did not reproduce the provision in the Second Directive and in the proposal for a Sixth Directive which categorised works of construction and construction work as supplies of goods.

109. I therefore consider that there are no valid reasons for the Court to limit the temporal effects of its judgment.

51 — Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 42.

52 — *Kalinchev*, cited in footnote 50, paragraph 52, and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 68.

53 — It certainly remains possible that the court will take the view that it is not construction work, after examining all the circumstances of the case, but I consider that, in almost all cases, those transactions that are already subject to the reverse charge mechanism will continue to be so, without need of tax adjustments.

54 — I do not believe that the providers of the supplies would suffer the damage alleged by the German Government. Apart from the fact that its argument is theoretical, I note that the ordinary arrangements for charging VAT to which the undertakings are usually subject would, in any event, apply. Any disputes could then easily be resolved by the parties before the courts, without any repercussions for the tax authorities.

55 — See points 77 and 78.

56 — Decision 2004/290 is dated 30 March 2004.

VII – Conclusion

110. On the basis of the foregoing considerations, I suggest that the Court should reply as follows to the questions referred by the Bundesfinanzhof:

(1) The term 'construction work' within the meaning of Article 2(1) of Decision 2004/290/EC of 30 March 2004 authorising Germany to apply a measure derogating from Article 21 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 encompasses only supplies of services, in particular because the elements of business structure and labour predominate over the element of the supply of materials.

(2) In assessing whether a transaction constitutes construction work and therefore a supply of services, or a supply of goods, the court must consider all the circumstances of the individual case.

(3) It is contrary to Union law for national legislation and case-law to attach, for the purposes of the distinction in question, exclusive relevance to a single element, in particular the fact that the builder provided his own materials, and automatically to base the distinction between supplies of services and supplies of goods on the existence of that element.

(4) The national legislature may certainly indicate to the courts criteria to be applied in distinguishing supplies of goods from supplies of services, but may not restrict the courts' power to distinguish between supplies of goods and supplies of services by specifically examining all the circumstances of the case.