

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

27 March 2019 (*)

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Harmonisation of fiscal legislation — Deduction of input tax — Immovable property acquired as capital goods — Sale and lease back — Adjustment of deductions of VAT — Principle of VAT neutrality — Principle of equal treatment)

In Case C-201/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Mons (Court of Appeal, Mons, Belgium), made by decision of 9 March 2018, received at the Court on 19 March 2018, in the proceedings

Mydibel SA

v

État belge,

THE COURT (Seventh Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur) and P.G. Xuereb, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mydibel SA, by W. Huber, avocat,
- the Belgian Government, by J.-C. Halleux, P. Cottin and C. Pochet, acting as Agents,
- the European Commission, by J. Jokubauskaitė and N. Gossement, 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 Articles 14, 15, 168, 184, 185, 187 and 188 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14) ('the VAT Directive'), and of the principles of value added

tax (VAT) neutrality and equal treatment.

2 The request has been made in proceedings between Mydibel SA and État belge (the Belgian State) concerning the adjustment of a deduction of VAT.

Legal context

3 Article 14 of the VAT Directive provides:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

(a) the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;

(b) the actual handing over of goods, pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.

3. Member States may regard the handing over of certain works of construction as a supply of goods.’

4 Article 15 of the VAT Directive provides:

‘1. Electricity, gas, heat or cooling energy and the like shall be treated as tangible property.

2. Member States may regard the following as tangible property:

(a) certain interests in immovable property;

(b) rights in rem giving the holder thereof a right of user over immovable property;

(c) shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof.’

5 Article 168 of the VAT Directive states:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods and services, carried out or to be carried out by another taxable person;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;

(e) the VAT due or paid in respect of the importation of goods into that Member State.'

6 Articles 184 to 189 of the VAT Directive are included in Title X, Chapter 5, entitled 'Adjustment of deductions'. Article 184 of that directive states:

'The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.'

7 Article 185 of the VAT Directive provides:

1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.'

8 Under Article 186 of the VAT Directive:

'Member States shall lay down the detailed rules for applying Articles 184 and 185.'

9 Article 187 of the VAT Directive provides:

1. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured.

Member States may, however, base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years.

2. The annual adjustment shall be made only in respect of one-fifth of the VAT charged on the capital goods, or, if the adjustment period has been extended, in respect of the corresponding fraction thereof.

The adjustment referred to in the first subparagraph shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired, manufactured or, where applicable, used for the first time.'

10 Article 188 of the VAT Directive states:

1. If supplied during the adjustment period, capital goods shall be treated as if they had been

applied to an economic activity of the taxable person up until expiry of the adjustment period.

The economic activity shall be presumed to be fully taxed in cases where the supply of the capital goods is taxed.

The economic activity shall be presumed to be fully exempt in cases where the supply of the capital goods is exempt.

2. The adjustment provided for in paragraph 1 shall be made only once in respect of all the time covered by the adjustment period that remains to run. However, where the supply of capital goods is exempt, Member States may waive the requirement for adjustment in so far as the purchaser is a taxable person using the capital goods in question solely for transactions in respect of which VAT is deductible.'

11 Article 189 of the VAT Directive provides:

'For the purposes of applying Articles 187 and 188, Member States may take the following measures:

- (a) define the concept of capital goods;
- (b) specify the amount of the VAT which is to be taken into consideration for adjustment;
- (c) adopt any measures to ensure that adjustment does not give rise to any unjustified advantage;
- (d) permit administrative simplifications.'

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

12 Mydibel's economic activity is the production of potato-based products and is, on that basis, subject to VAT. It is the owner of several buildings in respect of which it has deducted in full the taxes charged on construction, alteration and renovation invoices.

13 On 1 October 2009, in order to increase its liquidity, Mydibel and two financial institutions entered into sale and lease back transactions, not subject to VAT, relating to those buildings, which were divided into two lots. For each lot, Mydibel and those financial institutions entered into two notarially certified agreements. First, Mydibel entered into an agreement establishing an emphyteutic right over those buildings in favour of the two financial institutions, for a period of 99 years, subject to immediate payment of emphyteutic rent in the amount of EUR 9 630 000 for the first lot and EUR 2 700 000 for the second lot, and an annual emphyteutic rent of EUR 25. Second, it entered into a real property leasing agreement in respect of the buildings, under which the financial institutions granted Mydibel the use of the buildings at issue for a non-revocable period of 15 years, in return for payment of a quarterly rent, corresponding to an investment value of EUR 9 630 000 for the first lot and EUR 2 700 000 for the second lot, plus interest. Under that agreement, Mydibel enjoys, on expiry of the lease, a purchase option at a price corresponding to 10% of the investment value for the first lot and 3% of that value for the second lot.

14 Following a VAT inspection, carried out on 11 May and 8 June 2012 and covering the period from 1 January 2009 to 31 December 2010, the Belgian tax authorities disallowed, under the review mechanism, the initial deduction of VAT on the buildings at issue made on the basis of the sale and lease back transactions.

15 A statement of adjustment was submitted for agreement to Mydibel on 18 September 2012

and a report was drawn up on 22 November 2013 and notified on the same day, along with the adjustment decision. That decision concerns, first, an amount of EUR 981 381.28 for errors in deduction of VAT, second, a proportional fine of EUR 98 130 and, third, default interest as from 21 January 2011. By withholding the credit balance of Mydibel's VAT current account, the Belgian tax authorities received a total of EUR 1 363 971.20 as repayment of the amount of the adjustment.

16 On 1 April 2014 Mydibel brought an action for annulment of the adjustment decision and the report of 22 November 2013 before the tribunal de première instance du Hainaut (Court of First Instance, Hainaut, Belgium).

17 By judgment of 13 October 2015, the tribunal de première instance du Hainaut (Court of First Instance, Hainaut) declared the action admissible and partly well founded. It held that the fine was not due, ordered the Belgian State to reimburse to Mydibel all sums received on account of the cancelled fine, plus default interest, and dismissed the remainder of Mydibel's application.

18 On 4 March 2016 Mydibel brought an appeal against that judgment before the cour d'appel de Mons (Court of Appeal, Mons, Belgium).

19 The referring court is uncertain whether, in circumstances such as those at issue in the main proceedings, the provisions of the VAT Directive impose an obligation to adjust the deduction of VAT and, if so, whether such adjustment complies with the principles of VAT neutrality and equal treatment.

20 In those circumstances, the cour d'appel de Mons (Court of Appeal, Mons) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Articles 14, 15, 168, 184, 185, 187 and 188 of [the VAT Directive] be interpreted and applied as meaning that there is, or is not, to be a revision/adjustment of VAT on immovable property acquired as capital goods which was initially deducted correctly, where that immovable property acquired as capital goods was the subject of a sale and lease back transaction, given that:

- the sale and lease back is created by the combined and simultaneous grant of an emphyteutic right (being a temporary right in rem) by the taxable person to two financial institutions and of a lease by those two institutions to the taxable person;
- that sale and lease back is a purely financial transaction designed to increase the liquidity of the taxable person;
- the sale and lease back transaction was not subject to VAT;
- the immovable property acquired as capital goods remained in the possession of the taxable person and was used for the taxable activity of the taxable person in an uninterrupted and permanent manner both before and after the transaction?

(2) Does an interpretation and application of the abovementioned provisions leading to a revision/adjustment of the VAT initially deducted comply with the principle of neutrality of VAT and/or with the principle of equal treatment?'

Consideration of the questions referred

Question 1

21 By its first question, the referring court asks, in essence, whether Articles 184, 185, 187 and 188 of the VAT Directive must be interpreted as imposing an obligation to adjust VAT on a building

which was initially deducted correctly, where that property was the subject of a sale and lease back transaction not subject to VAT in circumstances such as those at issue in the main proceedings.

22 Articles 184 to 185 of the VAT Directive set out in general terms the conditions under which the national tax authorities must require an adjustment of the initial deduction of VAT. By contrast, Articles 187 to 189 of that directive provide for specific rules for the adjustment of VAT deductions as regards capital goods (see, to that effect, judgment of 11 April 2018, *SEB bankas*, C?532/16, EU:C:2018:228, paragraphs 25 to 28).

23 As a preliminary point, it must be stated that according to the order for reference the buildings at issue in the main proceedings are to be classified as ‘capital goods’, which it is for the referring court to ascertain in the light of national law. Under Article 189(a) of the VAT Directive, Member States may define the concept of ‘capital goods’. The Court has ruled that that concept covers goods used for the purposes of economic activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but are written off over several years (judgment of 16 February 2012, *Eon Aset Menidjmont*, C?118/11, EU:C:2012:97, paragraph 35 and the case-law cited).

24 In the first place, it should be examined whether an adjustment of the deduction of VAT is required under Articles 184 and 185 of the directive.

25 It follows from Article 184 of the VAT Directive that the initial deduction must be adjusted where it is higher or lower than that to which the taxable person was entitled. Under Article 185 of that directive, an adjustment must, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted.

26 Regarding the potential impact on the deduction of VAT made by a taxable person of events occurring after that deduction has been made, it is apparent from the case-law of the Court that the use to which the goods or services are put, or are intended to be put, determines the extent of the initial deduction to which the taxable person is entitled and the extent of any adjustments in the course of the following periods (judgment of 31 May 2018, *Kollroß and Wirtl*, C?660/16 and C?661/16, EU:C:2018:372, paragraph 54 and the case-law cited).

27 The adjustment mechanism provided for in Articles 184 to 186 of the VAT Directive is an integral part of the VAT deduction scheme established by that directive. It is intended to enhance the precision of deductions so as to ensure the neutrality of VAT, so that transactions effected at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies subject to VAT. That mechanism thus aims to establish a close and direct relationship between the right to deduct input VAT and the use of the goods or services concerned for taxable output transactions (judgment of 31 May 2018, *Kollroß and Wirtl*, C?660/16 and C?661/16, EU:C:2018:372, paragraph 55 and the case-law cited).

28 In the present case, it is apparent from the order for reference that the buildings at issue in the main proceedings were used by Mydibel in an uninterrupted and permanent manner for its economic activity. Furthermore, according to the information in that decision, while the sale and lease back operations at issue in the main proceedings gave rise to an emphyteutic rent to be paid immediately to Mydibel, that company for its part undertook to pay to the financial institutions concerned a quarterly rent during a 15-year period, the total amount of which corresponds to that of the emphyteutic rent, plus interest. It thus appears that Mydibel continued to use the transactions carried out for the purpose of the construction, alteration or renovation of the buildings at issue for its transactions subject to output tax. That observation indicates, subject to verification by the referring court, that there were no changes in the factors used to determine the amount of

the deductions made after the VAT return was made.

29 Contrary to what the European Commission claims in its written observations, the mere creation of an emphyteutic right not subject to VAT cannot be regarded as a change in the factors used to determine the amount of the deductions made after the VAT return was made. Such creation of a right does not in itself have the effect of breaking the close and direct relationship between the right to deduct input VAT and the use of the goods or services concerned for taxable output transactions.

30 It follows that, subject to verification by the referring court, Articles 184 and 185 of the VAT Directive do not require an adjustment of the initial deduction of VAT in circumstances such as those at issue in the main proceedings.

31 In the second place, it is necessary to consider whether the circumstances of the main proceedings are covered by the specific rules for the adjustment of VAT deductions as regards capital goods, in particular Articles 187 and 188 of the VAT Directive.

32 Article 187 of that directive describes certain detailed rules for the adjustment of VAT deduction as regards capital goods. In particular, it is clear from Article 187(1) of that directive that, as regards such goods, adjustment is spread over five years and that period may be extended up to 20 years for immovable property acquired as capital goods.

33 Under Article 188(1) of the VAT Directive, if supplied during the adjustment period, capital goods are to be treated as if they had been applied to an economic activity of the taxable person up until expiry of the adjustment period.

34 The Court has pointed out that the concept of '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 its owner (see, to that effect, judgment of 22 October 2015, *PPUH Stehcemp*, C-277/14, EU:C:2015:719, paragraph 44 and the case-law cited).

35 While it is for the national court to determine in each individual case, on the basis of the facts of the case, whether a given transaction in respect of property results in the transfer of the right to dispose of the property as owner (see, to that effect, judgment of 15 December 2005, *Centralan Property*, C-63/04, EU:C:2005:773, paragraph 63), the Court may, however, provide the national court with all indications that may assist it in that regard.

36 It is clear that the sale and lease back transactions at issue in the main proceedings are characterised by the combined and simultaneous grant, first, of an emphyteutic right by the taxable person to the two financial institutions at issue in the main proceedings and, second, of a lease of real property by those two institutions to the taxable person.

37 It must therefore be determined whether, in the context of the main proceedings, the grant of the emphyteutic right and of the leasing of real property must be considered separately or together.

38 The Court has ruled that there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (judgment of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 53 and the case-law cited).

39 It is for the national court to assess if, the contractual structure of the transaction notwithstanding, the evidence put before the court discloses the characteristics of a single

transaction (judgment of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 54).

40 In the present case, it is stated in the order for reference that the sale and lease back transactions at issue in the main proceedings are purely financial transactions designed to increase Mydibel's liquidity and that the buildings at issue in the main proceedings remained in the possession of Mydibel, which used them in an uninterrupted and permanent manner for the purposes of its taxable transactions. Those facts appear to indicate that, subject to verification by the referring court, each of those transactions forms a single transaction, since the creation of the emphyteutic right over the buildings at issue in the main proceedings is inseparable from the lease of real property covering those buildings.

41 It follows that, subject to verification by the referring court, each sale and lease back transaction at issue in the main proceedings constitutes a single transaction. In those circumstances, those transactions cannot be classified as 'supplies of goods' in so far as the rights transferred to the financial institutions at issue in the main proceedings following those transactions, namely the civil law emphyteutic rights reduced by the rights stemming from the leases of real property of which Mydibel is the beneficiary, do not empower them to dispose of the buildings at issue in the main proceedings as if they were their owners.

42 In the light of the foregoing, and subject to verification by the referring court, Articles 187 and 188 of the VAT Directive do not require an adjustment of the initial deduction of VAT in circumstances such as those at issue in the main proceedings.

43 In those circumstances, the answer to the first question is that, subject to verification of the relevant matters of fact and national law by the referring court, Articles 184, 185, 187 and 188 of the VAT Directive must be interpreted as not imposing an obligation to adjust VAT on a building which was initially deducted correctly, where that property was the subject of a sale and lease back transaction not subject to VAT in circumstances such as those at issue in the main proceedings.

Question 2

44 By its second question, the referring court asks, in essence, whether an interpretation of Articles 184, 185, 187 and 188 of the VAT Directive as imposing an obligation to adjust the VAT initially deducted in circumstances such as those at issue in the main proceedings complies with the principles of VAT neutrality and equal treatment.

45 Having regard to the answer to the first question, the second question arises only if the referring court, after verification, considers that the sale and lease back transactions at issue in the main proceedings constitute a change in the factors used to determine the amount of the deductions which were made after the VAT return was made, for the purposes of Article 185 of the VAT Directive, or a supply, for the purposes of Article 188 of that directive, and that there is therefore an obligation to adjust the VAT initially deducted in the circumstances of the main proceedings.

46 Such an obligation to adjust the VAT initially deducted complies, in any event, with the principles of VAT neutrality and of equal treatment.

47 In that regard, it suffices to observe that, in those circumstances, a taxable person who has entered into such a transaction not subject to VAT concerning a building which he owns is not, for VAT purposes, in a comparable situation to that of a taxable person who has remained the owner of a building without interruption since the completion of the works which gave rise to the right to

deduct input tax.

48 In those circumstances, the answer to the second question is that an interpretation of Articles 184, 185, 187 and 188 of the VAT Directive as imposing an obligation to adjust the VAT initially deducted in circumstances such as those at issue in the main proceedings complies with the principles of VAT neutrality and equal treatment.

Costs

49 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:

1. Subject to verification of the relevant matters of fact and national law by the referring court, Articles 184, 185, 187 and 188 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EU of 22 December 2009, must be interpreted as not imposing an obligation to adjust value added tax (VAT) on a building which was initially deducted correctly, where that property was the subject of a sale and lease back transaction not subject to VAT in circumstances such as those at issue in the main proceedings.

2. An interpretation of Articles 184, 185, 187 and 188 of Directive 2006/112, as amended by Directive 2009/162, as imposing an obligation to adjust the value added tax (VAT) initially deducted in circumstances such as those at issue in the main proceedings complies with the principles of VAT neutrality and equal treatment.

[Signatures]

* Language of the case: French.