61991J0020

Judgment of the Court (Third Chamber) of 6 May 1992. - Pieter de Jong v Staatssecretaris van Financiën. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - VAT assessment - Sixth VAT Directive. - Case C-20/91.

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Keywords

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Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Taxable transactions ° Application of goods forming part of the assets of a business for private use of the taxable person ° Construction, in pursuit of business and for private occupation, of a dwelling on land bought and owned in a private capacity ° Only the building taxable

(Council Directive 77/388, Arts 5(6) and 11A(1)(b))

Summary

Article 5(6) of the Sixth Directive (77/388), which assimilates to a supply made for consideration the application for private use by a taxable person of goods forming part of the assets of his business where those goods gave rise to a right to deduct VAT, must be interpreted as meaning that, when a taxable person (a building contractor) acquires land solely for his private use but erects on that land in the pursuit of his business a dwelling for his own use, only the house, and not the land, is to be regarded for the purposes of that provision as having been applied for his private use. The basis of assessment will then, in accordance with Article 11A(1)(b), comprise solely the value of the building and not that of the land.

Parties

In Case C-20/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden (Third Chamber) for a preliminary ruling in the proceedings pending before that court between

Pieter de Jong

and

Staatssecretaris van Financiën

on the interpretation of Articles 5(6) and 11A(1)(b) of 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),

THE COURT (Third Chamber),

composed of: F. Grévisse (President of the Chamber), J.C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: F.G. Jacobs,

Registrar: J.A. Pompe, Deputy Registrar,

after considering the written observations submitted on behalf of:

° the Netherlands Government, by B.R. Bot, Secretary-General, Ministry of Foreign Affairs,

° the German Government, by E. Roeder, acting as Agent

° the Commission of the European Communities, by J. Foens Buhl, Legal Adviser, and B.J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations from the Netherlands Government, represented by J.W. de Zwaan, acting as Agent, the German Government, represented by C.-D. Quassowski, acting as Agent, and the Commission, at the hearing on 24 January 1992,

after hearing the Opinion of the Advocate General at the sitting on 27 Febnruary 1992,

gives the following

Judgment

Grounds

1 By judgment of 19 December 1990, which was received at the Court Registry on 23 January 1991, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 5(6) and 11A(1)(b) of 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, "the Sixth Directive").

2 Those questions were raised in proceedings between Mr de Jong and the Staatssecretaris van Financiën following the issue of an assessment to value added tax ("VAT").

3 On 15 August 1978, Mr de Jong, a building contractor, made an exempt purchase of a plot of land with a building on it.

4 On 30 July 1979 he sold approximately half of the land to a third party, without charging VAT. He then demolished the existing building and constructed two dwellings, one ° completed in 1980 ° for the purchaser on the part of the land that had been sold, and the other ° completed in 1981 ° for himself on the other part of the plot.

5 Mr de Jong deducted, by way of input tax, the VAT that had been invoiced to him on the goods and services supplied for construction of the houses. When he put one of these dwellings to private use, he recorded on his VAT return by way of liability to tax ("output tax") an amount equal to the tax deducted ("input tax") on the goods and services used for the construction of the dwelling put to private use.

6 However, the Netherlands tax administration considered that, pursuant to Article 3(1)(g) of the Netherlands Law on turnover tax, the basis of assessment should include not only the value of the house but also the value of the land on which it had been built, since the house and the surrounding land should be regarded as a single supply of goods. It therefore issued a notice of assessment of liability to turnover tax in the sum of HFL 26 168, corresponding to 18% of the value of the land.

7 When the matter was brought before it, the Gerechtshof (Regional Court of Appeal), Amsterdam, confirmed the notice of assessment, rejecting Mr de Jong' s argument that the land had always formed part of his private assets and had not become part of his business assets when the house was built.

8 Mr de Jong appealed against the judgment of the Gerechtshof to the Hoge Raad der Nederlanden, contending that the lower court had incorrectly determined the basis of assessment under Article 8(4) of the Netherlands Law on turnover tax.

9 The Hoge Raad, considering that the application of the Netherlands provisions on turnover tax ought to conform with the Sixth Directive, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

"1. Is Article 5(6) of the Sixth Directive to be interpreted as meaning that a taxable person (a building contractor) who acquires land solely for his private use and subsequently erects on that land in the pursuit of his business a building (a dwelling) and finally puts the building together with the land on which it stands and possibly the surrounding land to his private use has applied goods forming part of his business assets for his private use within the meaning of the directive not only as regards the building, but as regards the building together with the land on which it stands and possibly the surrounding land?

2. Is the condition laid down in Article 5(6) of the Sixth Directive regarding the assimilation of the application of goods forming part of business assets for private use to a supply that the value

added tax on the goods in question or the component parts thereof has been wholly or partly deductible to be understood as meaning that where goods forming part of business assets have been applied for private use in the form of immovable property, consisting of a building and the land on which it stands and possibly the surrounding land, if there is no deductibility as regards the land there is no supply of goods either as regards the immovable property as a whole or as regards a part thereof, that is, the building?

3. If the answer to the second question is that the whole immovable property constitutes a supply of goods as provided for in Article 5(6) of the Sixth Directive, is Article 11A(1)(b) of the directive to be interpreted as meaning that the taxable amount laid down therein must be based on the cost price of the whole immovable property, that is to say including the cost price of the land, or is the amount limited to the part of the cost price with regard to which value added tax is deductible?"

10 Reference is made to the Report for the Hearing for a fuller account of the facts and legal background, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 The present case is concerned essentially with two provisions:

° Article 5(6) of the Sixth Directive, which provides:

"The application by a taxable person of goods forming part of his business assets for his private use ..., where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration ...";

° Article 11A(1)(b) of the Sixth Directive, which provides:

"the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply".

The first question

12 In its first question, the national court asks, essentially, whether a taxable person ° in this case a building contractor ° who acquires a plot of land solely for private purposes but then, in pursuit of his business, builds a dwelling on it to be occupied by him thereby applies goods forming part of his business assets for his private use within the meaning of Article 5(6) of the Sixth Directive.

13 In its written observations, the Netherlands Government contended that the construction of a dwelling on land made available to the undertaking for that purpose gave rise, for the purposes of turnover tax, to a new immovable property comprising the building and surrounding land. Consequently, it was that unit resulting, in that form, from the pursuit of the taxable person' s business activity that the latter had applied to his private use.

14 On the other hand, the German Government and the Commission argue, on the premise that the taxable person acquired the land for his private purposes and did not use it for business purposes, that the land never formed part of the assets of the undertaking and cannot therefore have been applied to private use. The fact that a person engaged in business builds, in his capacity as a taxable person, a dwelling for private use on land belonging to him personally does not have the effect of converting the land into a business asset.

15 It should be noted that the purpose of Article 5(6) of the Sixth Directive is to ensure equal treatment as between a taxable person who applies goods forming part of the assets of his business for private use and an ordinary consumer who buys goods of the same type. In pursuit of that objective, that provision prevents a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping the payment of VAT when he transfers to business use those goods from his business for private purposes and from thereby enjoying

advantages to which he is not entitled by comparison with an ordinary consumer who buys goods and pays VAT on them.

16 Those conditions for the application of Article 5(6) of the Sixth Directive are not satisfied where a building contractor, as in this instance, owns land in his own right and, in pursuit of his business, builds a dwelling on it for his own use.

17 Where a taxable person acquires goods solely for his private requirements, he is acting in a private capacity and not as a taxable person within the meaning of the Sixth Directive. Consequently, the various provisions of the Sixth Directive concerning the acquisition of goods by a business, in particular Article 17(2), which confers on taxable persons the right to deduct VAT, and the administrative and accounting rules laid down in Articles 18 and 22 of the Sixth Directive, do not apply.

18 Furthermore, the taxation of land in circumstances like those set out in the first preliminary question is not in conformity with the objective of equal treatment pursued by Article 5(6) of the Sixth Directive, since it would cause the tax burden to vary according to whether the building contractor built the house in pursuit of his business in the capacity of a taxable person or acted in the capacity of an ordinary consumer by arranging for a third party to build a house on his land. In the latter case, VAT would be payable under the Sixth Directive only on the price paid for the house, but not on the price paid for the land.

19 It follows that, regardless of whether the land and the building are inseparable under national legislation, it is necessary, contrary to the view expressed by the Netherlands Government in its written observations, to distinguish, for the purposes of Article 5(6) of the Sixth Directive, between the taxation of land which a taxable person owns in his private capacity and the taxation of a building which the taxable person has erected on that land in pursuit of his business.

20 As regards the taxation of land which a building contractor owns in his private capacity and on which, in pursuit of his business, he has built a dwelling for himself, it follows from the foregoing considerations that that land never formed part of the assets of the business and consequently could not have been applied for private use within the meaning of Article 5(6) of the Sixth Directive. The basis of assessment will be, in accordance with Article 11A(1)(b) of the Sixth Directive, the value of the building alone and not that of the land.

21 It must therefore be stated in reply to the first question that Article 5(6) of the Sixth Directive is to be interpreted as meaning that, when a taxable person (a building contractor) acquires land solely for his private use but erects on that land in the pursuit of his business a dwelling for his own use, only the house, and not the land, is to be regarded for the purposes of that provision as having been applied for his private use.

The second and third questions

22 As is expressly stated in the order for reference, the Hoge Raad sought an answer to the second and third questions only in the event of the first question being answered in the affirmative. Since the first question has been answered in the negative it is unnecessary to answer the second and third questions.

Decision on costs

Costs

23 The costs incurred by the German and Netherlands Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Third Chamber),

in reply to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 19 December 1990, hereby rules:

Article 5(6) of 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 is to be interpreted as meaning that, when a taxable person (a building contractor) acquires land solely for his private use but erects on that land in the pursuit of his business a dwelling for his own use, only the house, and not the land, is to be regarded for the purposes of that provision as having been applied for his private use.