JUDGMENT OF THE COURT (Sixth Chamber)

18 July 2013 (*)

(Requests for a preliminary ruling – Sixth VAT Directive – Article 6(2), first paragraph, point (a) and Article 13(B)(b) – Right to deduction – Capital goods belonging to legal persons made partly available to their managers for private use – No rent payable in money, but taking into account of a benefit in kind for income tax purposes)

In Joined Cases C-210/11 and C-211/11,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Belgium), made by decisions of 7 April 2011, received at the Court on 9 May 2011, in the proceedings

État belge

v

Medicom SPRL (C-210/11),

Maison Patrice Alard SPRL (C-211/11),

THE COURT (Sixth Chamber),

composed of M. Berger, President of the Chamber, A. Borg Barthet and J.-J. Kasel (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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

– the Hungarian Government, by K. Szíjjártó and by M. Fehér and G. Koós, acting as Agents,

– the European Commission, by C. Soulay and W. Roels, acting as Agents,

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) ('the Sixth Directive').

2 The requests have been made in proceedings between the Belgian State, on the one hand, and Medicom SPRL ('Medicom') (Case C-210/11) and Maison Patrice Alard SPRL ('MPA') (Case C-211/11), on the other, both being companies governed by Belgian law, concerning the deduction of input value added tax ('VAT') paid in respect of real property used partly for private use by the managers of those companies.

Legal context

European Union law

3 The first paragraph of Article 6(2) of the Sixth Directive provides:

'The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.'

4 Article 11(A)(1) to (3) of the Sixth Directive provides:

'The taxable amount shall be:

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

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

(c) in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services;

…'

5 Under Article 13(B)(b) of the Sixth Directive, the Member States are to exempt from tax 'the leasing or letting of immovable property'.

6 Article 17(2) of the Sixth Directive, in the version resulting from application of Article 28f of that directive, provides:

'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…’

Belgian law

7 Article 19(1) of the Belgian Value Added Tax Code (code de la taxe sur la valeur ajoutée) (‘the VAT Code’), in the version applicable to the two sets of main proceedings, provides:

‘The use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or, more generally, for purposes other than those of his business shall be treated as a supply of services for consideration where the VAT on that asset is wholly or partly deductible.’

8 Under point (2) of Article 44(3) of the VAT Code, ‘the leasing and letting of immovable property and the assignment of leases of immovable property and the use thereof in accordance with Article 19(1) …’ are to be exempt from VAT.

9 Article 1 of Royal Decree No 3 of 10 December 1969, on deductions for the application of VAT (*Moniteur belge* of 12 December 1969, p. 9), provides:

‘1. Subject to the application of Article 45(1a), (2) and (3) of the [VAT] Code, the taxable person shall be entitled to make deductions of taxes on goods and services used to effect transactions referred to in Article 45(1)(1) to (5) of the Code, in accordance with Articles 2 and 4 of the present Decree.

Where the taxable person, in the course of his economic activities, effects other transactions which do not give rise to entitlement to deduction, he shall comply, for the determination of the deductions, with Articles 46 and 48 of the [VAT] Code and with Articles 12 to 21 of the present Decree.

2. Under no circumstances shall there be a deduction for taxes on goods and services which a taxable person intends for private use or purposes other than those coming within his economic activity.

Where a good or service is intended to be partially used for such purposes, the deduction shall not be allowed in so far as it is put to that use. The extent thereof shall be determined by the taxable person under the supervision of the authorities.’

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

Case C-210/11

10 In Case C-210/11, it is apparent from the order for reference that Medicom is a company having legal personality, subject to VAT for the provision of research, organisation and advisory services relating to the typing, translating and publishing of medical reports for pharmaceutical companies, and horse livery. Medicom had a building constructed to be used specifically for its activities, which was also used rent-free for residential purposes by its managers and their family. In its VAT returns, Medicom deducted all the VAT relating to the construction costs of the building.

11 In their report of 3 September 1997, the competent tax authorities found that the building was being used at a rate of 50% for private use by the managers of Medicom and that ‘a benefit in kind was claimed’ for them for that use. Considering that only half of the VAT on the construction

of that building could be deducted, it issued an order to Medicom for payment of the VAT unduly deducted in the return relating to the second quarter of 1997.

12 Subsequently, the managers of Medicom acknowledged that, in the tax years 1997 and 1998, they had used two thirds of the building in question for private use. In those circumstances, on 16 November 2000 the competent tax authorities rejected the application for the VAT deduction for 1996 and, on 15 January 2001, issued a fresh order to Medicom.

13 As the action brought by Medicom against those orders was dismissed at first instance, Medicom appealed to the Cour d'appel de Liège (Court of Appeal, Liège) (Belgium). By judgment of 24 March 2006 that court annulled the contested decisions, applying the interpretation of the Sixth Directive endorsed by the Court of Justice in Case C-269/00 *Seeling* [2003] ECR I-4101 to the case before it.

Case C-211/11

14 In Case C-211/11, it is apparent from the order for reference that MPA is a company having legal personality, subject to VAT for activities relating to catering and the organisation of receptions. In 1991, it had a building constructed to be used specifically for its activities and in which its manager also resided with his family, rent-free. In its VAT returns, MPA deducted all the VAT relating to the construction costs of the building.

15 Considering that only part of the VAT could be deducted since part of the building was being used for residential purposes for the manager, on 6 November 1995 the competent tax authorities issued an order in respect of MPA.

16 The court at first instance before which MPA had brought an action for annulment of that order upheld the action. The appeal brought by the competent tax authorities against the judgment at first instance was dismissed by the Cour d'appel de Bruxelles (Court of Appeal, Brussels) (Belgium) by judgment of 4 January 2006, on the grounds, inter alia, that the making available of part of the building free of charge to the manager for residential purposes was primarily in the interests of the taxable business carried on in the building by the taxable person, with the result that that part of the building could be regarded as constituting capital goods in respect of which VAT could thus be deducted for construction, maintenance, repair or improvement.

17 In both sets of proceedings, the competent tax authorities appealed to the Cour de cassation (Court of Cassation) (Belgium), arguing, inter alia, first of all, that *Seeling* could not be applied to situations such as those at issue in those proceedings. Next, the making available of part of a building for the private use of a company manager falls to be treated as a benefit in kind for income tax purposes, with the result that it cannot be considered to be a 'free of charge' making available or a 'rent-free' situation. Lastly, the direct and immediate link required under Article 17(2) and (5) of the Sixth Directive between an input transaction and a taxed output transaction for the entitlement to a deduction to occur is not a function of the purpose pursued by the taxable person and is lacking in the present case. Moreover, it is for the taxable person to demonstrate that he is entitled to the deduction, which proof has not been made out.

18 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions, which are worded identically in Cases C-210/11 and C-211/11, to the Court for a preliminary ruling:

'(1) Are [point (a) of the first paragraph of Article 6(2)] and [Article 13(B)(b)] of [the Sixth Directive] to be interpreted as precluding the private use by the managers, administrators or members and their families of a company with legal personality that is liable to tax of all or part of a

property forming part of the assets of the company and thus treated as forming, in its entirety, part of the assets of the business, from being treated as an exempt supply of services, on the basis that it constitutes a leasing or letting of immovable property within the meaning of Article 13(B)(b), where there is no provision for payment of rent in money as consideration for that use, which amounts to a benefit in kind that is taxed as such for the purpose of the managers' income tax and such use is therefore regarded for tax purposes as the consideration for a proportion of the work performed by the managers, administrators or members?

(2) Are those provisions to be interpreted as meaning that that exemption applies in such circumstances where the company fails to prove that there is an essential link between the operation of the business and the making available of all or part of the property to the managers, administrators or members and, if so, is an indirect link sufficient?'

19 By order of the President of the Court of 28 June 2011, Cases C-210/11 and C-211/11 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred for a preliminary ruling

Consideration of the first question

20 By its first question, the referring court asks, in essence, whether point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive must be interpreted as precluding the making available of part of immovable property belonging to a legal person to its manager for his private use, without there being provision for the beneficiaries of that arrangement to pay a rent in money by way of consideration for the use of that property, from constituting an exempted letting of immovable property within the meaning of that directive, and whether the fact that the making available of that property is deemed, under the relevant national income tax legislation, to be a benefit in kind stemming from the beneficiaries' performance of their corporate duties or under their contract of employment is of import in that regard.

21 In order to answer that question, it is appropriate to bear in mind the settled case-law of the Court, according to which a taxable person may choose whether or not to integrate into his business, for the purposes of applying the Sixth Directive, part of an asset which is given over to his private use (see, inter alia, Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraph 20, and *Seeling*, paragraph 40).

22 If the taxable person chooses to treat capital goods used both for business and private purposes as business goods, the VAT due as input tax on the acquisition of those goods is in principle wholly and immediately deductible (see, inter alia, Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 26, and *Seeling*, paragraph 41).

23 It follows from point (a) of the first paragraph of Article 6(2) and from Article 11A(1)(c) of the Sixth Directive that the use of capital goods for the private use of a taxable person or of his staff or for purposes other than those of his business, where the input VAT paid on such goods is wholly or partly deductible, is treated as a supply of services for consideration and is taxed on the basis of the cost of providing the services (see *Lennartz*, paragraph 26, and *Seeling*, paragraph 42).

24 Accordingly, where a taxable person chooses to treat an entire building as forming part of the assets of his business and subsequently uses part of that building for his private purposes or those of his staff, on the one hand, he is entitled to deduct the input VAT paid on all construction costs relating to that building and, on the other, he is subject to the corresponding obligation to pay VAT on the amount of expenditure incurred to effect such use.

25 As regards the cumulative application of point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive in the case of private use by the taxable person or his staff of part of a building forming in its entirety part of the assets of a business, the Court has held that those provisions preclude national legislation which – despite the fact that the characteristics of the leasing or the letting of immovable property for the purposes of Article 13(B)(b) are not present – treats as a supply of services exempt from VAT under that provision the private use, by the staff of a taxable person which is a legal person, of part of a building constructed or owned by virtue of a right *in rem* in immovable property, held by that taxable person, where the input tax on that business asset is deductible (see, to that effect, *Seeling*, paragraph 56, and Case C-436/10 *BLM* [2012] ECR, paragraph 31).

26 Therefore, in order for there to be letting of immovable property within the meaning of Article 13(B)(b) of the Sixth Directive, all the conditions characterising that transaction must be satisfied, that is to say, the landlord of property must have assigned to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it (Case C-409/98 *Mirror Group* [2001] ECR I-7175, paragraph 31; Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 21; and *Seeling*, paragraph 49).

27 Article 13(B)(b) of the Sixth Directive constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person and it must therefore be interpreted strictly. If one of the conditions referred to in the preceding paragraph is not fulfilled, that provision may not be applied by analogy on the ground that private use of immovable property forming part of the assets of a business for residential purposes most closely resembles a letting within the meaning of that provision from the point of view of final consumption (see, to that effect, *Seeling*, paragraphs 44 and 45).

28 Regarding more specifically the condition that there must be a payment of rent, without calling into question the case-law to the effect that the concept of ‘supply of goods … effected for consideration’ within the meaning of Article 2(1) of the Sixth Directive requires the existence of a direct link between the service provided and the consideration received (see, inter alia, Case C-40/09 *Astra Zeneca UK* [2010] ECR I-7505, paragraph 27), it should be observed that the absence of rent being paid cannot be compensated for by the fact that, for income tax purposes, that private use of immovable property forming part of the assets of the business is viewed as constituting a benefit in kind and therefore, in some way, as part of the remuneration which the beneficiary has given up by way of consideration for having the immovable property in question being made available to him.

29 First of all, as the Court held in paragraph 45 of *Seeling*, Article 13(B)(b) of the Sixth Directive cannot be applied by analogy by equating a benefit in kind, evaluated for the calculation of income tax, with rent, as suggested by the Belgian Government.

30 Next, contrary to the assertions made by the Belgian Government, situations such as those at issue in the main proceedings cannot be compared with the facts at issue in the case which gave rise to the judgment in *Astra Zeneca UK*. As evidenced by paragraphs 29 to 31 of that judgment, it was established that, in that case, there was a direct link between the provision of retail vouchers by Astra Zeneca Ltd to its employees and the part of the cash remuneration which the employees had to give up as consideration for that provision. In the cases at hand here, by contrast, it is not established either that the managers have suffered a reduction in salary corresponding to the value of having the building in question being made available to them or certain that part of the work done by those managers can be regarded as consideration for having the building in question being made available to them (see, by analogy, Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraphs 15 and 16).

31 Lastly, it is apparent from paragraph 15 of the judgment in *BLM* that the Court was aware that, under the national legislation at issue in the case giving rise to that judgment, which was, moreover, identical to the legislation at issue in the cases in the main proceedings here, private use for residential purposes of immovable property made available to a director of the company BLM SA, without any rent in the form of money being charged, was treated as a benefit in kind for the purposes of income tax for natural persons, calculated as a lump sum. That treatment, which was not referred to in paragraphs 23 to 30 of that judgment, clearly had no bearing on the Court's interpretation.

32 Such an interpretation is not called into question by the fact that the Court held, in paragraph 32 of *BLM*, that it was for the referring court to determine whether, in a situation such as that at issue in the case before it, a finding could be made that there was a letting of immovable property for the purposes of Article 13(B)(b) of the Sixth Directive.

33 It is common ground that it is for the national courts, which alone are competent to assess the facts, to establish, in the light of the specific circumstances of each case, the essential characteristics of the transaction in question in order to classify it under the Sixth Directive (see, to that effect, Case C-530/09 *Inter-Mark Group* [2011] ECR I-10675, paragraph 32). Since it is not for the Court of Justice to rule on the action in the main proceedings, it must leave it to the referring court to do so, bearing in mind that there may be evidence other than that contained in the file submitted to the Court, liable to prove that all the features of letting for the purposes of Article 13(B)(b) of the Sixth Directive were present in the case before it.

34 In the light of the foregoing considerations, the answer to the first question is that point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive must be interpreted as precluding the making available of part of immovable property belonging to a legal person to its manager for his private use, without there being provision for the beneficiaries of that arrangement to pay a rent in money by way of consideration for the use of that property, from constituting an exempted letting of immovable property within the meaning of that directive; the fact that the making available of that property is deemed, under the relevant national income tax legislation, to be a benefit in kind stemming from the beneficiaries' performance of their corporate duties or under their contract of employment is of no import in that regard.

Consideration of the second question

35 By its second question, the referring court asks, in essence, whether point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive must be interpreted as meaning that, in situations such as those at issue in the main proceedings, the issue whether or not the making available of all or part of the property in its entirety forming part of the assets of the business to managers, administrators or members of that business is directly linked to the

operation of the business is of relevance for the determination of whether that making available comes within the exemption provided for in the latter provision.

36 It should be borne in mind in that regard that, according to the Court's settled case-law, it is the acquisition of the goods by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 of the Sixth Directive and the extent of any adjustments in the course of the following periods (*Lennartz*, paragraph 15). By contrast, where a taxable person acquires goods solely for his private requirements, he is acting in a private capacity and not as a taxable person for the purposes of that directive (Case C-20/91 *de Jong* [1992] ECR I-2847, paragraph 17).

37 It is also apparent from the case-law referred to in paragraphs 21 to 24 above that a taxable person who chooses to treat an entire building as forming part of the assets of his business and who subsequently uses part of that building for private purposes is, on the one hand, entitled to deduct the input VAT paid on all the construction costs for that building and, on the other, subject to the corresponding obligation to pay VAT on the full cost incurred to effect such use.

38 Contrary to the assertions made by the Belgian Government, in such a situation the taxable person is under no obligation to prove that the making available of all or part of the building in its entirety forming part of the assets of the business to his managers, administrators or members is done 'for the purposes of his taxable transactions' within the meaning of Article 17(2) of the Sixth Directive.

39 Once a taxable person has chosen to treat the entire building as forming part of the assets of his business, he may, as permitted under point (b) of the first paragraph of Article 6(2) of the Sixth Directive, use it for purposes other than those of his business and cannot be required to show that that use is for the purposes of his taxable transactions. The taxable person is accordingly not required to show that there is a direct and immediate link between the private use of the building in question and his taxable economic activities.

40 It follows that the answer to the second question is that point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive must be interpreted as meaning that, in situations such as those at issue in the main proceedings, the issue whether or not the making available of all or part of the property in its entirety forming part of the assets of the business to managers, administrators or members of that business is directly linked to the operation of the business is of no relevance for the determination of whether that making available comes within the exemption provided for in the latter provision.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **Point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as precluding the making available of part of immovable property belonging to a legal person to its manager for his private use, without there being provision for the beneficiaries of that arrangement to pay a rent in money by way of consideration for the**

use of that property, from constituting an exempted letting of immovable property within the meaning of that directive; the fact that the making available of that property is deemed, under the relevant national income tax legislation, to be a benefit in kind stemming from the beneficiaries' performance of their corporate duties or under their contract of employment is of no import in that regard.

2. **Point (a) of the first paragraph of Article 6(2) and Article 13(B)(b) of the Sixth Directive 77/388, as amended by Directive 95/7, must be interpreted as meaning that, in situations such as those at issue in the main proceedings, the issue whether or not the making available of all or part of the property in its entirety forming part of the assets of the business to managers, administrators or members of that business is directly linked to the operation of the business is of no relevance for the determination of whether that making available comes within the exemption provided for in the latter provision.**

[Signatures]

* Language of the case: French.