

JUDGMENT OF THE COURT (Fourth Chamber)

12 July 2012 (\*)

(Sixth VAT Directive — Article 13B(g), read in conjunction with Article 4(3)(a) — Supply of buildings and land upon which they stand — Supply of a building undergoing work with the view to the creation of a new building by transformation — Continuation and completion of the work by the purchaser after the supply — Exemption from VAT)

In Case C-326/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 10 June 2011, received at the Court on 29 June 2011, in the proceedings,

**J.J. Komen en Zonen Beheer Heerhugowaard BV**

v

**Staatssecretaris van Financiën,**

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, L. Bay Larsen, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: V. Trstenjak,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 May 2012,

after considering the observations submitted on behalf of:

- J.J. Komen en Zonen Beheer Heerhugowaard BV, by B. Jongmans, advocaat,
- the Netherlands Government, by C.M. Wissels and J. Langer, acting as Agents,
- the European Commission, by L. Lozano Palacios and by P. van Nuffel 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 This reference for a preliminary ruling concerns the interpretation of Article 13B(g) 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 — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, ‘the Sixth VAT Directive’), read in conjunction with Article 4(3)(a) of that directive.

2 The reference has been made in the course of proceedings between J.J. Komen en Zonen Beheer Heerhugowaard BV (‘J.J. Komen’) and the Staatssecretaris van Financiën (State Secretary for Finance) regarding the exemption from transfer duty on the acquisition of a property, an exemption which depends, in Netherlands law, on whether the acquisition is subject to value added tax (‘VAT’).

## **Legal context**

### *European Union law*

3 Article 2(1) of the Sixth VAT Directive imposes VAT on the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.

4 Article 4(3) of that directive provides:

‘Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2 and in particular one of the following:

(a) the supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply or the period elapsing between the date of first occupation and the date of subsequent supply, provided that these periods do not exceed five years and two years respectively.

A “building” shall be taken to mean any structure fixed to or in the ground;

(b) the supply of building land.

“Building land” shall mean any unimproved or improved land defined as such by the Member States.’

5 Article 13 of the Sixth VAT Directive, entitled ‘Exemptions within the territory of the country’, provides under subsection B, entitled ‘Other exemptions’, inter alia:

‘Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);

(h) the supply of land which has not been built on other than building land as described in

Article 4(3)(b).’

*Netherlands law*

6 Article 11 of the Netherlands Law on turnover tax (Wet op de omzetbelasting) of 28 June 1968 (*Staatsblad* 1968, No 329), provides that:

‘1. Subject to conditions to be laid down by public administrative regulation the following shall be exempt from tax:

- (a) the supply of immovable goods and the rights over such property, with the exception of:
  - (1) the supply before or, at most, two years after, first occupation of buildings or parts of buildings and the land on which they stand as well as the supply of building land;
  - (2) supplies, other than the supplies described in point 1, to persons who use the immovable property for purposes that give rise to a right to deduct in part or in full tax pursuant to Article 15, provided that the transferor and the transferee have jointly submitted a request to that effect to the tax inspector and abide by the conditions laid down by ministerial order;

...

3. For the purposes of Paragraph 1(a), point 1:

- (a) A “building” shall be taken to mean any structure fixed to or in the ground;
- (b) “first occupation” is to be taken to mean occupation of a building after it has been transformed or renovated if the transformation or the renovation has created a finished property;
- (c) “the land on which they stand” is to be taken to mean any land commonly treated as belonging to the building or as being for its use.

4. For the purposes of applying point 1 of Paragraph 1(a), “building land” is to be taken to mean any land which has not been built on:

- (a) on which work is being or has been carried out;
- (b) which is being or has been improved with a view to exclusive use of the land;
- (c) in the vicinity of which improvements are being or have been made; or
- (d) for which a building permit has been granted;

with a view to constructing buildings on the land.’

7 Article 2(1) of the Law on the taxation of legal transactions (‘Wet op belastingen van rechtsverkeer’) provides that “[t]ransfer duty” is a tax levied in respect of the acquisition of immovable property located in the Netherlands or of rights over such immovable property’.

8 As provided in Article 15(1)(a) of that law, subject to conditions laid down by public administrative regulation, there is an exemption from transfer duty for the acquisition ‘by way of supply within the meaning of Point 1 of Article 11(1)(a) of the [Law on turnover tax] ... which is subject to turnover tax, unless the property is used to create revenue and the purchaser can deduct turnover tax in part or in full, in accordance with Article 15 of the [Law on turnover tax]’.

## **The dispute in the main proceedings and the question submitted for a preliminary ruling**

9 On 6 February 2004, J.J. Komen acquired, by notarial act, apartment rights ('appartementsrechten') to retail premises in the shopping mall De Blauwe Steen in Hoorn (Netherlands). The supply of that immovable property was considered to have been effected on that same date.

10 It is apparent from the order for reference that, with a view to the transformation of the immovable property in question into a new building, various demolition work had already been carried out at the request and for the account of the vendor before the acquisition by J.J. Komen of the retail premises. Following that acquisition, J.J. Komen continued the renovation and transformation work, so that the totality of the work carried out, both for the account of vendor and for that of J.J. Komen, resulted in the construction of a new building. At no time, in the context of that process of transformation of the building, did the work create a vacant plot of land.

11 On account of the supply of the immovable property, J.J. Komen received an assessment of outstanding transfer duty. Following an objection lodged against that assessment with the Inspector of Taxes, the latter upheld that assessment.

12 The action brought by J.J. Komen against that decision before the Rechtbank te Haarlem (District Court, Haarlem) was dismissed as unfounded. That court held, *inter alia*, that, at the time of the supply, the shopping mall was still in use and the work was not sufficiently advanced to justify a finding that a new building existed.

13 The appeal against that judgment by J.J. Komen before the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam) was dismissed by judgment of 19 May 2008, which upheld the facts found at first instance and held that the supply of the immovable property was exempt from VAT in accordance with Article 11(1)(a) of the Netherlands Law on turnover tax and therefore subject to transfer duty.

14 In addition, it is apparent from the documents before the Court that, on account of the damage to the building in issue in the main proceedings as a result of the demolition work commenced in September 2003, one of the shops in that building has not been paying rent since November 2003. In particular, access to that building is restricted and there is no longer lighting there.

15 However, taking into account, *inter alia*, the reports of the competent Inspector of Taxes, the Gerechtshof Amsterdam held that, at the time of the supply, the shopping mall was still accessible to the public and that at least one shop was in an operational state, so that the existing building must still be regarded as being fit for use.

16 J.J. Komen lodged an appeal on a point of law against that judgment claiming that the Sixth VAT Directive and, in particular, Articles 13B(g) and 4(3)(a) of the directive, must be interpreted as meaning that the supply of immovable property, such as that in issue in the main proceedings, should be liable to VAT.

17 According to the Advocate General before the referring court, the appeal must be upheld on the basis of, *inter alia*, the arguments derived from the judgment in Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, in which the Court took the intention of the parties to the transaction as a criterion for assessing the transaction for VAT purposes. Thus, according to the opinion of that Advocate General, in so far as the economic objective of the demolition work, which commenced before the sale of the building, was to obtain a new building, the extent to which the

transformation had advanced at the time of sale is no longer important and, therefore, the transaction must be classified as liable to VAT.

18 In response to those findings and in the light of the recent case-law of the Court of Justice arising from the judgment in *Don Bosco Onroerend Goed*, the referring court seeks to ascertain whether the supply of a building where the transformation — with a view to the creation of a new building — is ongoing, may be regarded as the supply of a new building before first occupation or rather the supply of an old building which was first occupied in the past. That court also seeks to ascertain whether the extent to which the transformation had advanced at the time of supply or the fact that it is the vendor or the purchaser who wishes to carry out the transformation and that that transformation is carried out by order and for the account of the vendor or of the purchaser or of both is relevant in this context.

19 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Article 13B(g), in conjunction with Article 4(3)(a), of the [Sixth VAT Directive] be interpreted as meaning that the supply of a building in respect of which, prior to its supply, the vendor had transformation work carried out with a view to the creation of a new building (refurbishment), work which was continued and completed by the purchaser after its supply, is not exempt from VAT?’

### **The question referred for a preliminary ruling**

20 It should be noted at the outset that, according to consistent case-law, the terms used to specify an exemption such as that set out in Article 13 of the Sixth VAT Directive are to be interpreted strictly, since that exemption constitutes an exception to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to define the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see *Don Bosco Onroerend Goed*, paragraph 25 and the case-law cited).

21 The VAT exemption set out in Article 13B(g) of the Sixth VAT Directive applies to supplies of old buildings or parts of buildings and the land on which they stand. However, in accordance with Article 4(3)(a) of that directive, Member States are entitled to make the supply, before first occupation, of a building or parts of building and the land on which they stand liable to VAT.

22 Pursuant to Article 4(3)(a) of that directive, Member States may determine the conditions of application of the criterion concerning first occupation to transformations of buildings and the land on which they stand.

23 Article 11 of the *Wet op de omzetbelasting* provides that the supply of immovable property is liable to VAT in the event of the transformation of an old building ‘if the transformation or the renovation has created a finished property’.

24 In the circumstances giving rise to the case in the main proceedings, it is necessary to consider the treatment for VAT purposes of a supply occurring during the period in which an old building is being transformed into a new building.

25 For that purpose, it must be determined whether, for VAT purposes, the supply, which occurred when only partial demolition work had been carried out by the vendor, with construction

work being carried out by the purchaser after that supply, must be exempt from VAT in accordance with Article 13B(g) of the Sixth VAT Directive or, on the contrary, liable to that tax in view of Article 4(3)(a) of that directive.

26 It must be noted, in that respect, that the facts of the case in the main proceedings differ from those which gave rise to the judgment in *Don Bosco Onroerend Goed*. In the case giving rise to that judgment, although the vendor supplied a plot of built-on land, it had undertaken to the purchaser to ensure the demolition of that building, so that the Court was able to find, at paragraph 39 of that judgment, that the supply actually concerned ‘land ready for construction’ and, at paragraph 42 of the same judgment, left it to the national court to determine whether such a transaction — which could not fall within the scope of Article 4(3)(a) of the Sixth VAT Directive — could, by contrast, be covered by the provisions of Article 4(3)(b) of that directive as a supply of building land.

27 According to the Netherlands government, until the last stone has been removed, the supply of immovable property composed of a plot of land and a partially demolished building must be regarded as a supply of an existing building, exempt, as such, from VAT. It is only after the first stone has been laid that the supply concerns a new building.

28 In the circumstances at issue in the main proceedings, only partial demolition work of the old building had been carried out before the supply, and the construction work had not been started, so that, according to that same government, the transaction at issue must be exempt from VAT as it concerns the supply of an existing building.

29 J.J. Komen claims that, in so far as the transformation work commenced before the date of the supply, the aim of that transformation being to obtain a new building, the extent to which the transformation had advanced is irrelevant to the answer to be given to the preliminary question.

30 J.J. Komen also claimed during the hearing that the common intention of the parties to create a new building results, inter alia, from the fact that the vendor obtained, before the supply and for its own account, a construction permit on the basis of which the work was continued by the purchaser after the supply. That information, it claims, is corroborated by the notarial deed of supply of 6 February 2004.

31 The European Commission considers that there can only be a question of the supply of a new building where the transformation work has been completed, or at least sufficiently advanced to have created a substantially different building suitable for occupation.

32 It must be noted that, in relation to building land, transformation work leading to the creation of a new building normally includes demolition work.

33 As regards the argument that it is also necessary to take into consideration the common intention of the parties which, it is said, was to create a new building, it must be noted that the Court has already held that the declared intention of the parties concerning the VAT liability of a transaction must be taken into consideration, in the course of an overall assessment of the circumstances of a transaction, provided that it is supported by objective evidence (see, to that effect, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24, and Case C-444/10 *Schriever* [2011] ECR I-11071, paragraph 38).

34 That evidence includes the extent to which the transformation work carried out by the vendor had advanced at the time of supply and, as appropriate, the use of the immovable property at issue on the same date.

35 In that context, it is, if necessary, for the competent national courts to ensure that the transaction is not a wholly artificial arrangement which does not reflect economic reality and is set up with the sole aim of obtaining a tax advantage (see, to that effect, Case C-504/10 *Tanoarch* [2011] ECR I-10853, paragraph 51 and the case-law cited).

36 In any event, it is clear from the very terms of Article 4(3)(a) of the Sixth VAT Directive that only the supply of a building before first occupation — a criterion whose conditions of application are determined by the Member States — falls within the scope of application of VAT in cases of transformation of buildings.

37 In the present case, it appears from the order for reference that the work carried out by the vendor related only to the partial demolition of the building which was the subject-matter of the supply and, it appears from the decisions of the Rechtbank te Haarlem and the Gerechtshof Amsterdam annexed to that decision, following findings of fact falling within their exclusive competence, that those courts found that the old building at issue in the main proceedings was, at least in part, used as such at the time of the supply, because the shopping mall at issue was still accessible to the public and at least one shop was operational.

38 It is important, in this respect, to note that in circumstances where it is thus apparent that, at the time of the supply of the building, only partial demolition work had been carried out by the vendor in the old building, which furthermore was still partially occupied, whereas the construction work to transform that building into a new building has been entirely carried out by the purchaser after the supply, the latter supply cannot be classified as the supply of a building and the land upon which it stands carried out before its first occupation in the context of a transformation of a building, within the meaning of Article 4(3)(a) of the Sixth VAT Directive.

39 In the light of the foregoing, the answer to the question is that Article 13B(g) of the Sixth Directive, read in conjunction with Article 4(3)(a) of that directive, must be interpreted as meaning that the VAT exemption provided for in that first provision covers a supply of immovable property consisting of a plot of land and an old building undergoing transformation into a new building, such as that in issue in the main proceedings, where, at the time of that supply, the old building had only undergone partial demolition work and was, at least in part, still used as such.

## **Costs**

40 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 (Fourth Chamber) hereby rules:

**Article 13B(g) 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 — Common system of value added tax: uniform basis of assessment, read in conjunction with Article 4(3)(a) of that directive, must be interpreted as meaning that the exemption from value added tax provided for in that first provision covers a supply of immovable property consisting of a plot of land and an old building undergoing transformation into a new building, such as that in issue in the main proceedings, where, at the time of that supply, the old building had only undergone partial demolition work and was, at least in part, still used as such.**

[Signatures]

\* Language of the case: Dutch.