JUDGMENT OF THE COURT (First Chamber)

28 April 2016 (*)

(Reference for a preliminary ruling — Taxation — VAT — Taxable transactions — Application for the purposes of the business of goods acquired ‘in the course of the business’ — Treatment as supplies effected for consideration — Taxable amount)

In Case C?128/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands, Netherlands), made by decision of 21 February 2014, received at the Court on 18 March 2014, in the proceedings

Staatssecretaris van Financiën

v

Het Oudeland Beheer BV,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 July 2015,

after considering the observations submitted on behalf of:

– Het Oudeland Beheer BV, by A. J. de Ruiter, belastingadviseur,

– the Netherlands Government, by K. Bulterman, C.S. Schillemans and M. Noort, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 15 October 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(3)(b) and (7)(a) and Article 11A(1)(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 request has been made in proceedings between the Staatssecretaris van Financiën (Secretary of State for Finance, Netherlands) and Het Oudeland Beheer BV ('Oudeland') concerning the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive, made by Oudeland.

Legal context

EU law

3 Although the Sixth Directive was repealed and replaced, from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), having regard to the date of the facts at issue in the case in the main proceedings, the case continues to be governed by the Sixth Directive.

4 Under Article 2 of the Sixth Directive:

'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 ...'

5 Article 5 of the Sixth Directive, entitled 'Supply of goods', provides:

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

...

3. Member States may consider the following to be tangible property:

...

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

...

5. Member States may consider the handing over of certain works of construction to be supplies within the meaning of paragraph 1.

…

7. Member States may treat as supplies made for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the value added tax on such goods, had they been acquired from another taxable person, would not be wholly deductible;

...'

6 Article 11 of the Sixth Directive states:

'A. Within the territory of the country

1. 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 a[t] the time of supply;

...'

7 Article 13 of that directive, headed 'Exemptions within the territory of the country', states:

'B. Other exemptions

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);

...

C. Options

Member States may allow taxpayers a right of option for taxation in cases of:

(a) letting and leasing of immovable property;

...

Member States may restrict the scope of this right of option and shall fix the details of its use …'

8 Article 17 of the Sixth Directive, headed 'Origin and scope of the right to deduct', provides:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. 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 in respect of goods or services supplied or to be supplied to him by another taxable person;

...

(c) value added tax due under Articles 5(7)(a) and 6(3).

...

5. As regards goods and services to be used by a taxable person both for transactions covered

by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

...'

Netherlands law

9 Article 3 of the Wet op de Omzetbelasting 1968 (Law on turnover tax 1968), in the version applicable to the case in the main proceedings ('the Wet OB'), provides:

'1. The following shall be considered to be supplies of goods: ...

(c) the supply of items of immovable property by the person who completed them, with the exception of land which has not been built on other than building land …

...

(h) the use for business purposes of goods produced in-house in cases where, had the goods been acquired from a trader, the tax on the goods would not have been deductible or would not have been wholly deductible; goods which are produced to order, with the materials, including land, being provided, shall be treated as goods produced in-house; land which has not been built on other than building land is excluded from the application of this subsection ...

...

2. The grant, transfer, modification, waiver or termination of limited rights over immovable property, with the exception of mortgages and ground rent, must also be viewed as a supply of goods, save where the total consideration plus turnover tax amounts to less than the economic value of those rights. The economic value shall not be less than the cost price of the immovable property to which the right relates, including turnover tax, which would be produced were that right to be created by an independent third party at the time of the transaction'.

10 Article 8(3) and (5) of the Wet OB provides:

'3. With regard to the supply of goods as described in Article 3(1)(g) and (h), and Article 3a(1), the consideration shall be the amount, exclusive of turnover tax, which would have to be paid for the goods if, at the time of supply, they were to be acquired or produced in the condition in which they are at that time.

...

5. An order of general application may determine the extent to which:

...

(b) costs relating to title encumbered by a rentcharge, a long leasehold, a right of superficies, an easement, apartments, shares in a company holding land (*lidmaatschapsrechten*) and other similar rights form part of the consideration;

...'

11 Article 5 of the Uitvoeringsbesluit omzetbelasting 1968 (Turnover Tax Implementation Order, 'the Implementation Order') states:

‘1. Upon the grant, transfer, waiver or termination of a long leasehold, of a right of superficies or easement, the value of the ground rent, of the remuneration or of the rent forms part of the consideration, provided that this is not higher than the fair market value of the property to which the right relates. The economic value shall not be less than the cost price of the immovable property to which the right relates, including turnover tax, which would be produced were that right to be created by an independent third party at the time of the transaction.

...

5. The value of ground rent, remuneration, rent or compensation shall be determined in accordance with Annex A of the present order.

...’

12 Annex A of the Implementation Order states:

‘...

(b) The value of ground rent, remuneration, rent or compensation which expires after a certain period is the annual amount multiplied by the number of years during which the payments must be made ...’

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

13 On 8 March 2004, Oudeland concluded, as lessee, a long leasehold agreement over a plot of land and an office building under construction on that land (‘the office building in question’), in return for payment of rent due in advance of each year (‘the annual ground rent’). The term of the lease was set at 20 years for an annual ground rent of EUR 330 000.

14 In accordance with Article 3(2) of the Wet OB, a provision based on Article 5(3)(b) of the Sixth Directive, the grant of a long leasehold was treated as the supply of immovable property for the purposes of levying value-added tax (VAT) and therefore subject to that tax. Under Article 8(5)(b) of that law, read in conjunction with Article 5(5) of the Implementation Order, the taxable amount of a supply such as that at issue in the main proceedings includes the value of the long leasehold, calculated in accordance with Annex A(b) of the Implementation Order, that is, the capitalised value of the ground rent as a whole. In the present case, the value of the long leasehold was set at EUR 3 844 500.

15 As a result, VAT was charged on the grant of the long leasehold at issue in the main proceedings. Oudeland paid the tax in the amount of EUR 730 455 to the trader with which it concluded the long leasehold agreement in question and deducted that amount in its VAT return for March 2004.

16 Following the grant of the long leasehold, Oudeland had the construction of the office building in question completed, whereupon it was delivered to Oudeland as completed office premises. The cost of completing the office premises was EUR 1 571 749. Of that amount, Oudeland paid and immediately deducted EUR 298 632 in VAT. During the completion of the building, the first annual ground rent fell due and was paid by Oudeland.

17 Oudeland granted ordinary leases over the office building in question from 1 June 2004. In accordance with the applicable national legislation, which is based on Article 13C(a) of the Sixth Directive, Oudeland opted, for part of the office building and with the agreement of its lessees, to waive the VAT exemption available for the leasing of immovable property. The remainder of the

building leased was exempted from VAT.

18 Oudeland assumed that the grant of a lease over the office building in question had to be treated as a supply, for the purposes of its business, of goods produced in the course of such business, within the meaning of Article 3(1)(h) of the Wet OB and of Article 5(7)(a) of the Sixth Directive. It paid VAT on the part of the building covered by the VAT exemption, in respect of which it therefore had no right of deduction. In its VAT return, Oudeland had calculated the taxable amount of the supply at issue in the main proceedings as the whole cost, excluding VAT, of completing the building plus the annual ground rent already due at the time of the supply.

19 The tax authorities took the view that the taxable amount of the grant of the lease over the office building at issue had to be based on the cost of completing the building plus the capitalised value of the ground rent as a whole. A notice of additional assessment, for the period of 1 to 30 June 2004, was issued to Oudeland for an amount equal to the difference between the taxable amount calculated by Oudeland and the taxable amount calculated by the tax authorities. Despite the objection lodged by Oudeland, the notice was maintained.

20 Since the action brought by Oudeland against the decision rejecting its objection was dismissed as unfounded in a judgment of the Rechtbank te ’s-Gravenhage (District Court, The Hague, Netherlands), Oudeland brought an appeal against that judgment before the Gerechtshof te ’s-Gravenhage (Regional Court of Appeal, The Hague, Netherlands).

21 That appellate court held that, under Article 8(3) of the Wet OB, the taxable amount of the supplies, within the meaning of Article 3(1)(h) of that law, included the cost price of the land that Oudeland held under the long leasehold agreement concluded and that, in that regard, it was necessary to take as a basis the value that the land had for Oudeland at the time of the supply referred to in Article 3(1)(h) of the Wet OB. In addition, according to that court, that value could not be equated to the value that the land would have represented at that time to an owner but had to be limited to the annual ground rent paid prior to completion of the office building in question.

22 The Gerechtshof te ’s-Gravenhage (Regional Court of Appeal, The Hague) therefore set aside the judgment of the Rechtbank te ’s-Gravenhage (District Court, The Hague), annulling the decision of the tax authorities to reject Oudeland’s objection and the notice of additional assessment issued to that company.

23 The Secretary of State for Finance brought an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against the judgment of the regional court of appeal.

24 The appeal on a point of law concerning the parties in the main proceedings relates to how the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive, should be calculated. Whereas Oudeland submits that only those costs incurred by the date of supply, namely the amount of the annual ground rent which had fallen due by that date, and the cost of completing the office building in question, should be included in the taxable amount, the Secretary of State for Finance submits that the taxable amount of the value of the long leasehold should be based on the capitalised value of the ground rent as a whole.

25 The referring court wishes to know whether, in accordance with the judgment of 8 November 2012 in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698), the elements of the cost price on which VAT has been paid, namely the value of the long leasehold and the cost of completing the office building in question, should be excluded from the taxable amount and whether the same applies where a taxable person has, on the basis of the national legislation, deducted immediately and in full the VAT paid.

26 If the elements of the cost price referred to in the previous paragraph must be included in the taxable amount referred to in Article 8(3) of the Wet OB, read in conjunction with Article 11A(1)(b) of the Sixth Directive, the referring court wishes to know how that taxable amount must be calculated in relation to a long leasehold and, in particular, how the value of ground rent due over time under a long leasehold is included in the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive.

27 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 11A(1)(b) of the Sixth Directive be interpreted as meaning that the cost price of land or other substances or materials in respect of which the taxable person has paid VAT in respect of their acquisition, in this case through the grant of a right in rem to use immovable property, is not part of the taxable amount in respect of a supply within the meaning of Article 5(7)(a) of the Sixth Directive? Is the position different if the taxable person has deducted this VAT on the basis of national law — whether or not in conflict with the Sixth Directive in that respect — upon that acquisition?

(2) In a case such as the present one, in which land with a building under construction is acquired with the grant of a right in rem referred to in Article 5(3)(b) of the Sixth Directive, must Article 11A(1)(b) of the Sixth Directive be interpreted as meaning that the value of the ground rent, that is to say the value of the annual amounts to be paid for the duration or remainder of the duration of the right in rem, is part of the taxable amount of a supply within the meaning of Article 5(7)(a) of the Sixth Directive?’

The questions referred for a preliminary ruling

The first question

28 By its first question, the referring court asks, in substance, whether Article 11A(1)(b) of the Sixth Directive must be interpreted as meaning that the value of a right in rem granting its holder a right of use over immovable property and the cost of completing the office building built on the land in question may be included in the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive, where the taxable person has already paid VAT on that value and on those costs, but also deducted the VAT immediately and in full.

29 Under Article 5(7)(a) of the Sixth Directive, Member States may treat as supplies made for consideration the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible.

30 That option allows Member States to develop their tax law in such a way that businesses which, owing to the fact that they are engaged in an activity which is exempt from VAT, cannot

deduct the VAT that they have paid on acquiring their business goods are not placed at a disadvantage as compared with competitors engaged in the same activity who use goods which they have obtained without paying VAT, by producing the goods themselves or, more generally, by obtaining them in the course of their business (judgment of 8 November 2012 in *Gemeente Vlaardingen*, C?299/11, EU:C:2012:698, paragraph 26).

31 As a preliminary point, it should be recalled that, as the Advocate General has noted in paragraph 42 of his Opinion, the application of Article 5(7)(a) of the Sixth Directive is subject to three cumulative conditions.

32 In the first place, the relevant goods must be ‘goods produced, constructed, extracted, processed, … in the course of [the] business [of a taxable person]’. The Court has held that, for the option of treating such goods as supplies made for consideration to be applied so that any inequality relating to VAT is actually eliminated between taxable persons which have acquired their goods from another taxable person and those who have acquired them in the course of their business, Article 5(7)(a) of the Sixth Directive covers not only goods entirely produced, constructed, extracted or processed by the business concerned itself, but also goods produced, constructed, extracted or processed by a third party with materials provided by that business, since the option of treating such goods as supplies made for consideration must be capable of being extended to all goods completed or improved by the third party (see, to that effect, judgments of 8 November 2012 in *Gemeente Vlaardingen*, C?299/11, EU:C:2012:698, paragraphs 27 and 28, and 10 September 2014 in *Gemeente ’s-Hertogenbosch*, C?92/13, EU:C:2014:2188, paragraph 28).

33 In the second place, the taxpayer must have applied the goods for the purposes of his business.

34 In the third place, the acquisition of the goods from another taxable person must not have given rise to a right of the first taxable person to deduct the VAT in full.

35 Having regard to the foregoing, it must be noted that, in the present case, having, first, acquired, through the conclusion of a long leasehold agreement, a right over the land in question and the office building under construction on that land, paid VAT on that acquisition and deducted the VAT in its VAT return for March 2004, and, second, had the construction of that building completed, paid VAT on the cost of completing the building and deducted the VAT, Oudeland leased the office building, waiving only part of the VAT exemption available for leases of immovable property.

36 Since the leasing by Oudeland of the building once completed was regarded as the application, for the purposes of its business, of goods acquired in the course of such business and since the building had, in part, been used for purposes other than taxable transactions, the grant of the leases was accordingly treated as a supply, within the meaning of Article 5(7)(a) of the Sixth Directive and subject to VAT.

37 In accordance with Article 11A(1)(b) of the Sixth Directive, the taxable amount, in respect of the transactions referred to, inter alia, in Article 5(7)(a) of the Sixth Directive, is to be ‘the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined a[t] the time of supply’.

38 The Court has stated, in that regard, that it clearly follows from Article 11A(1)(b) that it is only in the absence of a purchase price for the goods or similar goods that the taxable amount is the ‘cost price’ (judgment of 23 April 2015 in *Property Development Company*, C?16/14, EU:C:2015:265, paragraph 37).

39 In that regard, the referring court states that it is agreed between the parties in the present case that there is no purchase price of goods similar to the office building in question. Consequently, regard must be had to the cost price.

40 However, the referring court wishes to know whether the elements of the cost price on which VAT has been paid, namely the value of the long leasehold and the cost of completing the office building in question, must be excluded from the taxable amount, even if the taxable person has, on the basis of the national legislation, deducted immediately and in full the VAT paid on the grant of the long leasehold and on the completion of the building.

41 In that regard, the Court has stated that the option of treating certain applications as supplies made for consideration cannot be used in order to charge VAT on the value of goods on which the taxable person has already, in the context of an earlier tax period, paid VAT (see, to that effect, judgment of 8 November 2012 in *Gemeente Vlaardingen*, C?299/11, EU:C:2012:698, paragraph 32).

42 Such repeated taxation would be incompatible both with the essential characteristic of VAT that it be imposed on the added value of the goods or services concerned, since the tax payable on a transaction is calculated after the tax paid on the preceding transaction has been deducted (see, inter alia, judgments of 16 December 1992 in *Beaulande*, C?208/91, EU:C:1992:524, paragraph 14; 17 September 1997 in *UCAL*, C?347/95, EU:C:1997:411, paragraph 34, and 29 April 2004 in *GIL Insurance and Others*, C?308/01, EU:C:2004:252, paragraph 33), and with the aim of the above option, which is, it is true, intended to enable Member States to charge VAT on the application of goods for the purposes of activities exempt from VAT, but in no way authorises Member States to levy VAT several times on the same element of the value of those goods (judgment of 8 November 2012 in *Gemeente Vlaardingen*, C?299/11, EU:C:2012:698, paragraph 32).

43 As, in essence, the Advocate General noted in paragraph 49 of his Opinion, where VAT paid on the elements of the cost price has subsequently been deducted, the taxation resulting from treating goods as supplies made for consideration does not lead to repeated taxation of the same value. Only where the VAT on such elements remains chargeable to the taxable person because he has not deducted them are those elements not to be included in the taxable amount on the basis of Article 5(7)(a) of the Sixth Directive.

44 In that regard, the Court has held that, in no case, may the taxable amount referred to in Article 11A(1)(b) of the Sixth Directive include an element of value on which the taxable person has already paid VAT without subsequently being able to deduct it (see judgment of 23 April 2015 in *Property Development Company*, C?16/14, EU:C:2015:265, paragraph 42 and the case-law cited).

45 It follows, as the Advocate General noted in paragraph 50 of his Opinion, that elements of value on which the taxable person has already paid VAT, but deducted it, may be included in the taxable amount referred to in Article 11A(1)(b) of the Sixth Directive.

46 Accordingly, having regard to all of the foregoing considerations, the answer to the first question is that Article 11A(1)(b) of the Sixth Directive must be interpreted as meaning that the

value of a right in rem granting its holder a right of use over immovable property and the cost of completing an office building built on the land in question may be included in the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive, where the taxable person has already paid VAT on that value and on that cost, but also deducted the VAT immediately and in full.

The second question

47 By its second question, the referring court asks, in essence, whether, in a situation such as that at issue in the main proceedings, where land and a building under construction on that land have been acquired with the grant of a right in rem granting its holder a right of use over such immovable property, must Article 11A(1)(b) of the Sixth Directive be interpreted as meaning that the value of that right in rem to be taken in account in calculating the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive, corresponds to the value of the amount to be paid in consideration each year for the whole term of the long leasehold agreement granting the right in rem or to the value of the amount to be paid during the remainder of the lease.

48 In the first place, as has been stated in paragraphs 38 and 39 above, it is only in the absence of a purchase price for the goods or similar goods that the taxable amount is the ‘cost price’ and, in the present case, there is no purchase price of goods similar to the office building in question.

49 Accordingly, the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive, is, in the case in the main proceedings, to be the cost price.

50 In the second place, it is clear on the face of the wording of Article 11A(1)(b) of the Sixth Directive that the cost price, and the purchase price of the goods or similar goods, must be determined at the time of supply, within the meaning of Article 5(7)(a) of that directive.

51 In the third place, under the national legislation implementing the option laid down in Article 5(3)(b) of the Sixth Directive, the grant of the long leasehold at issue in the present case has been treated as the supply of goods. As regards the grant of a long leasehold for a term of 20 years, such as that at issue in the main proceedings, in accordance with the applicable national legislation, the consideration for that supply is determined on the basis of a fixed annual amount multiplied by the number of years during which the payments must be made, the resulting sum being then corrected or capitalised at the time of the grant of the right, in accordance with the requirements of the national legislation. In the present case, the grant of a long leasehold gave rise to a single payment of the VAT chargeable on the total amount of the consideration thereby determined.

52 It must be added that the detailed rules for determining that consideration are not the subject of the questions posed by the referring court, since the value of that consideration has not been contested in the case in the main proceedings.

53 Since it follows from the answer to the first question that the payment of VAT on the value of a long leasehold does not prevent that value from being taken into account in the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive, in so far as the VAT was deducted immediately and in full, and it is not contested that that value forms one of the elements of the cost price, it must be determined whether the value of the long leasehold as a whole should be taken into account, as submitted by the Netherlands Government, or only part of the value of the long leasehold.

54 In that regard, it should be noted that a long leasehold is limited in time and that, as has

been stated in paragraph 51 above, the value of the consideration for the grant of a long leasehold is determined according to the term stipulated in the long leasehold agreement.

55 If the supply, within the meaning of Article 5(7)(a) of the Sixth Directive, does not take place at the same time as the grant of the long leasehold, but later, the value of that right to be taken into account in the taxable amount corresponds to the residual value of the right at the time of its supply (see, by analogy, judgments of 17 May 2001 in *Fischer and Brandenstein*, C?322/99 and C?323/99, EU:C:2001:280, paragraph 80, and 8 May 2013 in *Marinov*, C?142/12, EU:C:2013:292, paragraph 32).

56 The residual value of a long leasehold is determined according to the remainder of the lease and includes the value of the annual amounts yet to be paid under the lease as corrected or capitalised according to the same method used to determine the value of the long leasehold.

57 This interpretation is supported by the aim of the option that Article 5(7)(a) of the Sixth Directive grants the Member States, as stated in paragraph 30 above.

58 If, at the time that the supply, within the meaning of Article 5(7)(a) of the Sixth Directive, takes place, a competitor were, for the remainder of the long leasehold agreement concluded by Oudeland, granted a long leasehold agreement over the same property, in order to apply the office building in question for the purposes of the same business as that of Oudeland, the cost price of the long leasehold would correspond, for the competitor, to the value of that right at the time of its grant and therefore to its residual value.

59 To consider, as submitted by the Netherlands Government, that the full value of the long leasehold corresponding to the consideration at the time of its grant should be taken into account, would ignore the fact, as noted by the Advocate General in paragraph 70 of his Opinion, that the value of a long leasehold decreases, in general, proportionally with the passage of time, and would, in effect, ignore the rule that the cost price must be determined at the time the supply takes place, within the meaning of Article 5(7)(a) of the Sixth Directive.

60 Similarly, although the amount of annual rent already due represents the amount paid by Oudeland under the long leasehold, that amount does not represent the value of the leasehold at the time of its supply, within the meaning of Article 5(7)(a) of the Sixth Directive.

61 Having regard to the foregoing considerations, the answer to the second question is that in a situation such as that at issue in the main proceedings, where land and a building under construction on that land have been acquired with the grant of a right in rem granting its holder a right of use over such immovable property, Article 11A(1)(b) of the Sixth Directive must be interpreted as meaning that the value of that right in rem to be taken into account in calculating the taxable amount of a supply, within the meaning of Article 5(7)(a) of the Sixth Directive, corresponds to the value of the amount to be paid in consideration each year during the remainder of the long leasehold agreement granting the right in rem, as corrected or capitalised according to the same method used to determine the value of the grant of the long leasehold.

Costs

62 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 (First Chamber) hereby rules:

1. **Article 11A(1)(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 meaning that the value of a right in rem granting its holder a right of use over immovable property and the cost of completing the office building built on the land in question may be included in the taxable amount of a supply, within the meaning of Article 5(7)(a) of that directive, as amended, where the taxable person has already paid value added tax on that value and that cost, but also deducted the value added tax immediately and in full.**

2. **In a situation such as that at issue in the main proceedings, where land and a building under construction on that land have been acquired with the grant of a right in rem granting its holder a right of use over such immovable property, Article 11A(1)(b) of Sixth Directive 77/388, as amended, must be interpreted as meaning that the value of that right in rem to be taken in account in calculating the taxable amount of a supply, within the meaning of Article 5(7)(a) of that directive, corresponds to the value of the amount to be paid in consideration each year for the remainder of the long lease granting the right in rem, as corrected or capitalised according to the same method used to determine the value of the grant of the long leasehold.**

[Signatures]

* Language of the case: Dutch.