JUDGMENT OF THE COURT (Tenth Chamber)

22 June 2016 (*)

(Reference for a preliminary ruling — Value added tax — Input tax — Deduction)

In Case C?267/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 29 May 2015, received at the Court on 5 June 2015, in the proceedings

Gemeente Woerden

v

Staatsecretaris van Financiën,

THE COURT (Tenth Chamber),

composed of F. Biltgen, President of the Chamber, A. Borg Barthet (Rapporteur) and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Gemeente Woerden, by R. Brouwer, belastingadviseur,

– the Netherlands Government, by J. Langer, M. Bulterman and M. Gijzen, acting as Agents,

– the European Commission, by H. Kranenborg and L. Lozano Palacios, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, ‘the VAT Directive’).

2 The request has been made in proceedings between Gemeente Woerden (Municipality of Woerden, Netherlands) and Staatsecretaris van Financiën (Secretary of State for Finance, Netherlands) concerning a notice of additional assessment for value added tax (VAT) for the period of 1 January 2005 to 30 November 2008.

Legal context

EU law

3 Article 2(1)(a) of the VAT Directive provides:

‘The following are to be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such’.

4 Article 9(1) of the VAT Directive is worded as follows:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

5 Article 11 of the VAT Directive provides:

‘After consulting the advisory committee on value added tax …, each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

…’

6 Article 13(1) of the VAT Directive states:

‘States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.’

7 Under Article 72 of the VAT Directive:

‘For the purposes of this Directive, “open market value” shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm’s length within the territory of the Member State in which the supply is subject to tax.

Where no comparable supply of goods or services can be ascertained, “open market value” shall

mean the following:

(1) in respect of goods, an amount that is not less than 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;

(2) in respect of services, an amount that is not less than the full cost to the taxable person of providing the service.'

8 Article 80 of the VAT Directive provides:

'1. In order to prevent tax evasion or avoidance, Member States may in any of the following cases take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value:

(a) where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177;

…

For the purposes of the first subparagraph, legal ties may include the relationship between an employer and employee or the employee's family, or any other closely connected persons.

2. Where Member States exercise the option provided for in paragraph 1, they may restrict the categories of suppliers or recipients to whom the measures shall apply.

…'

9 Article 168 of the VAT Directive provides:

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

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

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

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

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

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

Netherlands law

10 Article 3 of the Wet op de Omzetbelasting 1968 (Law on turnover tax) of 28 June 1968 (Stb. 1968, No 329), in the version applicable to the facts at issue in the main proceedings ('Law on turnover tax'), is worded as follows:

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

(a) the transfer of the right to dispose of property as owner;

…

3. The following shall be considered to be a supply for consideration within the meaning of Article 1(a):

…

(b) the application by an entrepreneur for the purposes of his business of goods produced in the course of such business, where the tax chargeable on such goods, had they been acquired from another entrepreneur, would not be wholly deductible;

…’

11 Article 7 of the Law on turnover tax provides:

‘1. Any person who pursues an economic activity independently shall be considered to be an entrepreneur.

…

4. Natural persons and bodies within the meaning of the General law on State taxation which are entrepreneurs within the meaning of this article, which reside or are established in the Netherlands or which have a permanent establishment there and are bound by financial, economic and organisational links such that they constitute a unit, are regarded, whether or not at the request of one or more of them, by decision, subject to appeal, of the inspector, as a single entrepreneur from the first day of the month following the month during which the inspector reached that decision. The rules governing the formation, alteration or termination of the single taxable unit may be established by ministerial decree.

…’

12 Article 8 of the Law on turnover tax states:

‘1. The tax shall be calculated according to the price.

2. The price is the total amount — or, in so far as the consideration is not formed by a monetary sum, the total value of the consideration — which is invoiced for the supply of the goods or services, excluding VAT. If, as regards the supply of goods or services, the amount paid is greater than the amount invoiced, the amount paid shall be taken into consideration.

3. As regards the entrepreneurs referred to in Article 3(3) and in Article 3a(1), the price shall be determined on the basis of the purchase price of the goods or of similar goods or, in the absence of a purchase price, on the basis of the cost price, determined at the time of supply.

4. In respect of supplies referred to in Article 4(3), the price is determined on the basis of the ordinary value of the service. The amount, excluding VAT, that the entrepreneur concerned would have to pay at the time of the supply of the service, under conditions of fair competition, to an independent provider of services in the Netherlands shall be considered to be the ordinary value.

…’

13 Article 109 of the Wet op het primair onderwijs (Law on primary education) of 2 July 1981 (Stb. 1983, No 727), in the version applicable to the facts at issue in the main proceedings, is worded as follows:

‘Installations relating to the grant by the competent authority on the basis of Articles 108 or 110 of a lease of a school not maintained by the municipality cannot be imposed on the municipality.’

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

14 The Municipality of Woerden ordered the construction of two buildings intended for multipurpose use. It deducted almost all the VAT invoiced in respect of the works supplied.

15 The Stichting Gebouwen Beheer Woerden (Building Management Foundation, Woerden, ‘the Foundation’) was formed on 6 February 2007. Its management board comprises five members, of whom one is appointed by the Municipality of Woerden, three by the boards of each of the educational institutions which use the buildings managed by the Foundation, and one by the Stichting Kindercentra Midden Nederland (Foundation for Children’s Centres, Central Netherlands). The objective of the Foundation is to manage buildings and to promote co-operation between the users of the buildings.

16 Rather than grant a lease over the buildings at issue, the Municipality of Woerden decided to sell them to the Foundation. The two buildings, of which the second was divided into two plots, were sold for an amount corresponding to approximately 10% of the cost price. VAT was charged on the sale price. The purchase price owed by the Foundation was converted into an interest-bearing loan.

17 In respect of the transfer of ownership over the first building, transfer duty was levied on an amount effectively corresponding to the building’s cost price. In respect of the second building, the act of transfer states that the grant of the first right over the apartments results in transfer tax on an amount effectively corresponding to the entire cost price of that building.

18 The Foundation then granted the use of part of the buildings at issue without consideration to three institutions providing special primary education. Leases over the other parts were granted for consideration to various tenants. The grant of those leases for consideration is exempt from VAT, except for the lease of the sports facilities.

19 The Inspector took the view that the Municipality of Woerden had not supplied the two buildings at issue within the meaning of Article 3(1)(a) of the Law on turnover tax, but had leased them to the Foundation on a VAT-exempt basis. According to the Inspector, the Municipality of Woerden was therefore liable to pay VAT on the basis of Article 3(3)(b) of that law. The Inspector claimed the VAT by a notice of additional assessment.

20 On 25 April 2013, ruling on the appeal brought by the Municipality of Woerden and on the cross-appeal of the Inspector, the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam, Netherlands) held that there had actually been a supply within the meaning of Article 3(1)(a) of the Law on turnover tax.

21 The Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) nevertheless held that the sale price invoiced by the Municipality of Woerden related solely to the parts of the buildings at issue that the Foundation attributed to the taxable leases. It therefore concluded that the Municipality of Woerden had acted as an entrepreneur within the meaning of the Law on

turnover tax solely in respect of those parts and, accordingly, that it was entitled to deduct only the VAT charged at the time of the supply of the buildings, namely approximately 10%.

22 The Municipality of Woerden brought an appeal on a point of law against the judgment of the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam). The Secretary of State for Finance also brought a conditional cross-appeal on a point of law.

23 In its appraisal of the case, the referring court rejects the assessment of the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam) according to which the Municipality of Woerden supplied certain parts of the buildings at issue as an entrepreneur and did not supply other parts in that capacity.

24 The referring court considers that the sale price of the buildings at issue was directly related to their supply and that the Municipality of Woerden thus made those supplies for consideration and therefore as an economic activity.

25 Furthermore, the referring court rejects the ground of appeal brought by the Secretary of State for Finance that the Municipality of Woerden did not act as an entrepreneur within the meaning of the Law on turnover tax at the time of the supply of the buildings at issue, but acted as a public authority.

26 The referring court also considered whether there has been abuse of rights. However, since the management of and responsibility for the buildings was vested in the Foundation, the referring court excluded the existence, in the present case, of abuse of rights.

27 The referring court nevertheless considered, of its own motion, whether, on the basis of the VAT Directive, the Municipality of Woerden is entitled to deduct a fraction only of the VAT charged at the time of the supply of those buildings given that, on the basis of the Law on primary education of 2 July 1981, in the version applicable to the facts at issue in the main proceedings, it is not to pass on the charges relating to accommodation for schools to educational institutions and that the Foundation granted the use of parts of the buildings at issue without consideration to educational institutions providing special primary education.

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

‘In a case such as the present, in which a taxable person has had a building constructed and has sold that building for a price which does not cover all of the costs, while the purchaser of the building has given a certain part thereof to a third party for the latter’s use free of charge, is that taxable person entitled to deduct all of the VAT invoiced in respect of the construction of the building, or only a part thereof, in proportion to the parts of the building which the purchaser uses for economic activities (in the present case, the grant of a lease for consideration)?’

The question referred for a preliminary ruling

29 By its question, the referring court asks, in essence, whether the VAT Directive must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, in which a taxable person has had a building constructed and has sold that building for a price less than the cost of constructing it, that taxable person is entitled to deduct all of the VAT paid in respect of the construction of that building, or only a part of that tax in proportion to the parts of the building which its purchaser uses for economic activities.

30 The Court notes in that regard that, according to settled case-law, the right of taxable persons to deduct the VAT due or paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU law (see judgments of 8 January 2002 in *Metropol and Stadler*, C?409/99, EU:C:2002:2, paragraph 42, and of 6 September 2012 in *Tóth*, C?324/11, EU:C:2012:549, paragraph 23).

31 In that regard, it is apparent from the case-law of the Court that the right of deduction provided for in Article 167 et seq. of the VAT Directive is an integral part of the VAT scheme and in principle may not be limited. In particular, the right of deduction is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see judgments of 21 March 2000 in *Gabalfrisa and Others*, C?110/98 to C?147/98, EU:C:2000:145, paragraph 43; of 26 May 2005 in *Kretztechnik*, C?465/03, EU:C:2005:320, paragraph 33; of 22 December 2010 in *Dankowski*, C?438/09, EU:C:2010:818, paragraph 22, and of 6 December 2012 in *Bonik*, C?285/11, EU:C:2012:774, paragraph 26).

32 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject to VAT (judgment of 6 December 2012 in *Bonik*, C?285/11, EU:C:2012:774, paragraph 27).

33 It is apparent from the case-law of the Court that VAT applies to each production or distribution transaction after deduction of the VAT directly borne by the various cost components (judgment of 6 December 2012 in *Bonik*, C?285/11, EU:C:2012:774, paragraph 28). It follows that, as regards VAT, each transaction must be the subject of a specific evaluation, independently of the VAT due on previous or subsequent transactions.

34 As regards the material conditions to be met for a right to deduct to arise, the Court has held that it is apparent from Article 168(a) of the VAT Directive that the goods and services relied on to give entitlement to that right must be used by the taxable person for the purposes of his own taxed transactions, and that, as inputs, those goods or services must be supplied by another taxable person (judgment of 6 September 2012 in *Tóth*, C?324/11, EU:C:2012:549, paragraph 26).

35 Since Article 168 of the VAT Directive does not impose any other condition relating to the use by the person to whom the goods and services at issue are supplied, it must be concluded that, provided the two conditions mentioned in the preceding paragraph are satisfied, a taxable person is, in principle, entitled to deduct input tax.

36 In that regard, the VAT Directive does not subject the right to deduct to a condition related to the use of the goods and services at issue by the person who receives those goods and services from the taxable person, since that would imply that every transaction of a taxable person with a purchaser or a lessee who does not carry out an economic activity, such as private individuals, would limit the taxable person’s right to deduct input tax.

37 Furthermore, a condition according to which the use of the goods or services at issue by their purchaser or lessee determines whether a supplier has the right to deduct input tax would mean that the taxable person’s right to deduct would depend on the subsequent actions of the purchaser or lessee who would always be capable of changing the use of the property in the short or long term.

38 According to the order for reference, the Municipality of Woerden must be classified as a

taxable person within the meaning of the VAT Directive. Moreover, it appears from that decision that the buildings at issue were supplied to the Municipality of Woerden by another taxable person and that that municipality used those buildings in the course of a taxable transaction, namely the supply of those buildings for consideration to the Foundation.

39 It follows that the Municipality of Woerden has the right to deduct input tax in its entirety, regardless of the use that the purchaser or lessee makes of the goods supplied by it.

40 As regards the fact that, in the case in the main proceedings, the taxable person supplied goods at a price which did not cover its full cost, it should be noted that the Court has held that the result of an economic transaction is irrelevant for the right to deduct provided that the activity itself is subject to VAT (see, to that effect, judgments of 20 January 2005 in *Hotel Scandic Gåsabäck*, C?412/03, EU:C:2005:47, paragraph 22, and of 9 June 2011 in *Campsa Estaciones de Servicio*, C?285/10, EU:C:2011:381, paragraph 25).

41 Moreover, it follows from the case-law of the Court that if the supply price is lower than the cost price, the deduction cannot be limited in proportion to the difference between the supply price and the cost price, even if the supply price is considerably lower than the cost price, unless it is purely symbolic (see, to that effect, judgment of 21 September 1988 in *Commission* v *France*, 50/87, EU:C:1988:429, paragraph 16).

42 It follows from all of the foregoing considerations that the answer to the question referred is that the VAT Directive must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, in which a taxable person has had a building constructed and has sold that building for a price less than the cost of constructing it, that taxable person is entitled to deduct all of the value added tax paid in respect of the construction of that building, and not only a part of that tax in proportion to the parts of the building which its purchaser uses for economic activities. The fact that that purchaser allows parts of the building at issue to be used without charge is of no importance in that regard.

Costs

43 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 (Tenth Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, in which a taxable person has had a building constructed and has sold that building for a price less than the cost of constructing it, that taxable person is entitled to deduct all of the value added tax paid in respect of the construction of that building, and not only a part of that tax in proportion to the parts of the building which its purchaser uses for economic activities. The fact that that purchaser allows the building at issue to be used without charge is of no importance in that regard.

[Signatures]

* Language of the case: Dutch.