Provisional text

JUDGMENT OF THE COURT (First Chamber)

30 September 2021 (*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 392 – Margin taxation scheme – Scope – Supply of buildings and building land purchased for resale – Taxable person for whom the VAT on the purchase of buildings was not deductible – Resale subject to VAT – Concept of ‘building land’)

In Case C?299/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d’État (Council of State, France), made by decision of 25 June 2020, received at the Court on 6 July 2020, in the proceedings

Icade Promotion SAS, formerly Icade Promotion Logement SAS,

v

Ministère de l’Action et des Comptes publics,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, L. Bay Larsen, C. Toader and M. Safjan, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Icade Promotion SAS, formerly Icade Promotion Logement SAS, by P. Tournès and A. Abadie, avocats,

– the French Government, by E. de Moustier and E. Toutain, acting as Agents,

– the European Commission, by F. Dintilhac and A. Armenia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 392 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 Icade Promotion SAS, formerly Icade Promotion Logement SAS, and the Ministère de l’Action et des Comptes publics (Ministry of Public Action and Public Accounts, France) (‘the tax authorities’) concerning the latter’s refusal to refund the value added tax (VAT) paid by that company in respect of sales of building land to private individuals in 2007 and 2008.

Legal context

European Union law

The VAT Directive

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

‘The following transactions shall 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 that directive provides:

‘“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 12 of that directive reads as follows:

‘1. Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions:

(a) the supply, before first occupation, of a building or parts of a building and of the land on which the building stands;

(b) the supply of building land.

2. For the purposes of paragraph 1(a), “building” shall mean any structure fixed to or in the ground.

Member States may lay down the detailed rules for applying the criterion referred to in paragraph 1(a) to conversions of buildings and may determine what is meant by “the land on which a building stands”.

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 those

periods do not exceed five years and two years respectively.

3. For the purposes of paragraph 1(b), “building land” shall mean any unimproved or improved land defined as such by the Member States.’

6 Article 73 of that directive provides:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

7 Article 135 of the VAT Directive reads as follows:

‘1. Member States shall exempt the following transactions:

…

(j) the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1);

(k) the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1);

…’

8 Article 137(1) of that directive states:

‘Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

…

(b) the supply of a building or of parts thereof, and of the land on which the building stands, other than the supply referred to in point (a) of Article 12(1);

(c) the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1);

…’

9 Under Title XIII of that directive, entitled ‘Derogations’, Chapter 1, entitled ‘Derogations applying until the adoption of definitive arrangements’, includes Article 392, which provides:

‘Member States may provide that, in respect of the supply of buildings and building land purchased for the purpose of resale by a taxable person for whom the VAT on the purchase was not deductible, the taxable amount shall be the difference between the selling price and the purchase price.’

Implementing Regulation No 282/2011

10 Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 (OJ 2011 L 77, p. 1), as amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 (OJ 2013 L 284, p. 1) ('Implementing Regulation No 282/2011'), provides in Article 13b thereof:

'For the application of [the VAT] Directive, the following shall be regarded as "immovable property":

…

(b) any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved;

…'

11 Article 31a of Implementing Regulation No 282/2011 provides:

'1. Services connected with immovable property, as referred to in Article 47 of [the VAT] Directive, shall include only those services that have a sufficiently direct connection with that property. Services shall be regarded as having a sufficiently direct connection with immovable property in the following cases:

(a) where they derive from an immovable property and that property makes up a constituent element of the service and is central to, and essential for, the services supplied;

(b) where they are provided to, or directed towards, an immovable property, and they are intended, legally or physically, to alter the characteristics of that property.

2. Paragraph 1 shall cover, in particular, the following:

…

(d) the construction of permanent structures on land, as well as construction and demolition work performed on permanent structures such as pipeline systems for gas, water, sewerage and the like;

…'

French law

12 Article 257 of the Code général des impôts (General Tax Code), in the version in force at the material time, provided:

'The following shall also be subject to value added tax:

…

(6) Subject to (7):

(a) Transactions which relate to buildings … and the outcome of which must be included in the tax base pertaining to income tax in respect of industrial and commercial profits;

…

(7) Transactions pertaining to the construction or supply of buildings.

Those transactions are taxable even when they are not commercial in nature.

1. The following are, inter alia, included:

(a) Sales … of building land …;

The first subparagraph covers, inter alia, land in respect of which, within four years of the date of the instrument recording the operation, the purchaser … obtains a building permit or planning permission or begins the work necessary for the construction of a building or group of buildings or for the construction of new premises on top of existing buildings.

Those provisions do not apply to land acquired by natural persons for the construction of buildings which those persons use for residential purposes.

…

(b) Sales of buildings …'

13 Under Article 268 of the General Tax Code, in the version in force at the material time, provided:

'As regards the transactions referred to in Article 257(6), the amount subject to value added tax shall be the difference between:

(a) First, the price stated and the relevant associated costs and expenses, or the market value of the property if it is higher than the price together with relevant associated costs and expenses;

(b) Second, …

– … any and all sums paid by the transferor for the purchase of the property;

…'

14 Article 231(1) of Annex 2 to the General Tax Code, in the version in force at the material time, stated:

'Persons referred to in Article 257[(6)] of the General Tax Code may not deduct the tax paid on the price of purchase or construction of buildings …'

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

15 Icade Promotion, a property developer, purchased land which had not been built on from non-taxable persons (private individuals or local authorities). Those purchases were therefore not subject to VAT.

16 Initially, after dividing the land into lots and connecting those lots to grids and network services, such as the road, water, electricity, gas, sewer and telecommunications networks, Icade Promotion sold the lots to private individuals as building land, with a view to the construction of buildings for residential use.

17 Subsequently, Icade Promotion subjected those transfers, which were carried out during the period from 1 January 2007 to 31 December 2008, to the margin taxation scheme under Article

257(6) and Article 268 of the General Tax Code (‘the margin scheme’).

18 Thereafter, Icade Promotion submitted an administrative application to the tax authorities for the refund of VAT paid under the margin scheme in the amount of EUR 2 826 814 for 2007 and EUR 2 369 881 for 2008. Icade Promotion claimed that the transfers at issue could not be subject to VAT on the basis of Article 257(7) of the General Tax Code, since they consisted in the sale of building land to individuals with a view to the construction of residential buildings, and that they did not fall within the margin scheme laid down by the combined provisions of Article 257(6) and Article 268 of that code, as a result of which no VAT was due.

19 Following the rejection of its application by the tax authorities, Icade Promotion brought an action against that rejection before the tribunal administratif de Montreuil (Administrative Court, Montreuil, France), which dismissed that action as unfounded by judgment of 27 April 2012.

20 Icade Promotion appealed against that judgment before the cour administrative d’appel de Versailles (Administrative Court of Appeal, Versailles, France), which dismissed that appeal by judgment of 18 July 2014, on the ground that the administrative application was inadmissible.

21 By decision of 28 December 2016, the Conseil d’État (Council of State, France), on appeal brought by Icade Promotion, set aside in part the judgment of the cour administrative d’appel de Versailles (Administrative Court of Appeal, Versailles) and referred the case back to that court which, by its second judgment of 19 October 2017, dismissed the appeal brought by Icade Promotion against the judgment of the tribunal administratif de Montreuil (Administrative Court, Montreuil) of 27 April 2012.

22 Icade Promotion therefore brought an appeal before the referring court.

23 In order to challenge the application of the margin scheme to the transfers at issue in the main proceedings, on the basis of Article 257(6) and Article 268 of the General Tax Code, Icade Promotion submits that making those transfers subject to the margin scheme was, in two respects, incompatible with Article 392 of the VAT Directive.

24 First of all, Article 392 of the VAT Directive permits Member States to make the supply of building land subject to a margin scheme only where the taxable person that carries out the supply has paid VAT when purchasing the land without having any right to deduct it. In that regard, Icade Promotion relies, in particular, on the English-language version of Article 392 of the VAT Directive, which expressly provides for ‘non-deductibility of VAT’ on purchase.

25 Secondly, according to Icade Promotion, Article 392 of the VAT Directive permits Member States to make the supply of building land subject to a margin scheme only where the taxable person who carries out the supply does no more than purchase and resell the land as it is. Therefore, that provision is not applicable to transactions involving the sale of building land that, since its purchase, has undergone development.

26 It is apparent from the order for reference that, in response to those arguments, the cour administrative d’appel de Versailles (Administrative Court of Appeal, Versailles) found that the absence of a ‘right of deduction’ at the time of the purchase referred to in Article 392 of the VAT Directive covers cases in which the purchase was not subject to VAT. Furthermore, according to that court, the reference in that article to supplies of building land ‘purchased for the purpose of resale’ neither is intended nor has the effect of excluding purchases of land which has not been built on and is then resold as building land.

27 In those circumstances, the Conseil d’État (Council of State) decided to stay the

proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 392 of [the VAT Directive] of 28 November 2006 to be interpreted as reserving the application of the margin scheme to transactions for the supply of buildings the purchase of which has been subject to VAT, without the taxable person who subsequently resells the property having had the right to deduct that tax, or does it permit that scheme to be applied to transactions for the supply of buildings the purchase of which has not been subject to VAT, either because that purchase [is not subject to] VAT or because, [although it is nominally subject to] VAT, [an exemption applies]?

(2) Is Article 392 of [the VAT Directive] to be interpreted as excluding the application of the margin scheme to transactions for the supply of building land in the following two cases:

– where that land, purchased as land that has not been built on, becomes building land in the [intervening period] between [its purchase] and [resale] by the taxable person;

– where that land, in the [intervening period] between [its purchase] and [resale] by the taxable person, is developed, in the sense that it is divided into [lots] or works are carried out in order [to connect it to various networks] (roads, drinking water, electricity, gas, sewage, telecommunications)?’

Consideration of the questions referred

The first question

28 By its first question, the referring court asks, in essence, whether Article 392 of the VAT Directive must be interpreted as limiting the application of the margin scheme to transactions involving the supply of buildings whose purchase was subject to VAT without the taxable person reselling them having had the right to deduct that tax at the time of that purchase, or as permitting the application of that scheme also to transactions involving the supply of buildings on whose purchase no VAT was paid, either because that purchase is not subject to VAT or because, although it is nominally subject to VAT, an exemption applies.

29 It should be noted at the outset that there are differences between the language versions of Article 392 of the VAT Directive. Thus, the French-language version of that provision refers only to the absence of a ‘right of deduction’ without specifying whether that absence is due only to the fact that the original transaction was not subject to VAT or that it was, without, however, subsequently giving rise to a right of deduction. By contrast, the English-language version of that provision refers to ‘VAT on the purchase’, stating that it ‘was not deductible’, suggesting that the transfer of such land should, in principle, be subject to VAT.

30 In that regard, it should be borne in mind that, where there is a divergence between the various language versions of a provision of EU law, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part (judgment of 8 October 2020, *United Biscuits (Pensions Trustees) and United Biscuits Pension Investments*, C?235/19, EU:C:2020:801, paragraph 46 and the case-law cited).

31 It should also be noted that the taxation scheme provided for in Article 392 of the VAT Directive constitutes a derogation from the general scheme of that directive and must, therefore, be interpreted strictly. However, that does not mean that the terms used to define that derogating regime must be construed in such a way as to deprive it of its effects. The interpretation of those terms must be consistent with the objectives pursued by that arrangement and with the requirements of tax neutrality (see, by analogy, judgment of 29 November 2018, *Mensing*,

C?91/17, EU:C:2018:968, paragraphs 22 and 23 and the case-law cited).

32 In that context, it must be recalled, as regards the general scheme of the VAT Directive, that, according to the fundamental principle underlying the VAT system, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (judgment of 30 May 2013, *X*, C?651/11, EU:C:2013:346, paragraph 45 and the case-law cited).

33 It should also be noted that the VAT Directive draws a clear distinction between, on the one hand, supplies of building land, which are subject to VAT and, on the other, supplies of land which has not been built on, which are exempt from VAT.

34 Under Article 12(3) of the VAT Directive, ‘building land’ means, for the purposes of paragraph 1(b) of that article, any unimproved or improved land defined as such by the Member States. The Member States, when defining what land is to be regarded as ‘building land’, must have regard to the objective pursued by Article 135(1)(k) of the VAT Directive, which seeks to exempt from VAT only supplies of land which has not been built on and is not intended to support a building (see, to that effect, judgment of 17 January 2013, *Woningstichting Maasdriel*, C?543/11, EU:C:2013:20, paragraph 30 and the case-law cited).

35 Thus, it must be held that, in the light of Article 135(1)(k) of the VAT Directive, read in conjunction with Article 2(1)(a) thereof, any supply of building land effected for consideration by a taxable person acting as such must, in principle, be subject to VAT, either in accordance with the general scheme of Article 73 of the VAT Directive, which provides that VAT is to be calculated on the basis of the consideration for the supply of goods or services, that is to say, the sale price, or, by derogation for those Member States which have provided for that option, in accordance with the margin scheme laid down in Article 392 of the VAT Directive, pursuant to which the taxable amount is made up of the difference between the sale price and the purchase price.

36 As regards the objective pursued by the VAT Directive, it must be borne in mind that the purpose of that directive is, inter alia, to guarantee the principle of tax neutrality which precludes, first, supplies of similar goods which are in competition with each other from being treated differently for VAT purposes and, secondly, traders carrying out the same transactions from being treated differently in relation to the levying of VAT (judgment of 17 January 2013, *Woningstichting Maasdriel*, C?543/11, EU:C:2013:20, paragraph 31).

37 The purpose of the margin scheme is to ensure compliance with that principle in so far as that system is intended to compensate for the persistence of non-deductible VAT.

38 In that regard, it is apparent from the explanatory memorandum to the proposal for the Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (COM(73) 950 final) that a reduced taxable amount could be taken account of where an item which has already borne the definitive VAT charge (for example, a residential building which becomes a ‘consumed’ good following its first occupation), subsequently re-enters the ‘commercial circuit’, and is therefore once again subject to VAT. That explanatory memorandum states that, in that case, ‘to take account of this “re-commercialisation” of the building, which would involve an unduly heavy tax burden on the business of the property dealer, it was necessary to tax it otherwise than under the general rules and to provide … that Member States may treat as the chargeable amount for value added tax the difference between the sale price and the purchase price’.

39 Taxation of the total sale price at the end of the first final consumption would, failing a possibility of deduction, lead to the inclusion in the basis of assessment not only the price which

already includes the definitive VAT charge, but also the amount of that VAT. That would lead to the definitive VAT charge for the entire economic circuit depending, inter alia, on the number of successive final consumptions and the prices then paid. By contrast, the application of the margin scheme makes it possible to mitigate the persistence of VAT and to restore tax neutrality.

40 Thus, the application of that taxation scheme to transactions carried out following a first final consumption makes it possible to ensure that the tax charge based on the second final consumption is determined under the same conditions as that based on the first consumption. This ensures the proper functioning of the VAT regime since it applies to goods liable to be the subject of several final consumptions interrupting the chain of deduction.

41 It should be noted that the Court has already ruled on a scheme similar to that at issue in the main proceedings, namely the margin scheme pertaining to second-hand goods. The Court has held that to tax, on its overall price, the supply by a taxable dealer of second-hand goods, where the price at which that dealer purchased those goods includes a sum of input VAT which was paid by a person falling within one of the categories identified in Article 314(a) to (d) of the VAT directive and which neither that person nor the taxable dealer was able to deduct, would lead to double taxation (judgment of 3 March 2011, *Auto Nikolovi*, C?203/10, EU:C:2011:118, paragraph 48).

42 In that context, it is important to point out that the purchase of building land by a taxable person with a view to resale is not necessarily subject to VAT.

43 To interpret Article 392 of the VAT Directive only as meaning that it reserves the application of the margin scheme solely to supplies of building land whose purchase was subject to VAT, without the taxable person reselling that land having had the right to deduct that tax, and that it therefore precludes that scheme from applying to a purchase which was not subject to VAT, at the time when that land is reintegrated into an economic process with a view to being the subject of a second consumption, would lead to supplies of similar goods, which are in competition with each other, and the traders making those supplies, being treated differently for VAT purposes.

44 By contrast, apart from the situation referred to in the preceding paragraph, the contextual and teleological interpretation set out in paragraphs 36 to 42 of the present judgment does not make it possible to justify the application of the derogating provision laid down in Article 392 of the VAT Directive to transactions involving the supply of land whose purchase has not been subject to that tax. That is the case with the purchase of building land where its original vendor is a private individual who merely manages his private assets, without that transfer playing a part in the performance of any economic activity, or with the purchase of land which has not been built on which is, according to Article 135(1)(k) of the VAT Directive, wholly exempt from VAT.

45 In the latter case, as the Advocate General observed in point 77 of his Opinion, there would be no risk of double taxation in the event of the resale of such land, even if it had in the meantime become ‘taxable’ as building land. Similarly, as a result of its exemption from VAT, land which has not been built on cannot be the subject of ‘final consumption(s)’ within the meaning of the VAT Directive, as a result of which the question of its ‘re-entry’ into the commercial circuit does not arise. Thus, in both those situations, the assumption of VAT ‘remaining embedded’ in such property as a result of an earlier tax charge is not founded.

46 In the light of the foregoing, the answer to the first question is that Article 392 of the VAT Directive must be interpreted as allowing the margin scheme to be applied to transactions involving the supply of building land both where the purchase thereof was subject to VAT, without the taxable person who sold it being entitled to deduct that tax, and where the purchase of that property was not subject to VAT even though the price at which the taxable dealer purchased

those goods incorporated an amount of VAT, paid as input VAT by the initial seller. However, apart from in the latter situation, that provision does not apply to transactions involving the supply of building land on whose initial purchase no VAT was paid, either because that purchase is not subject to VAT or because an exemption applies.

The second question

47 By its second question, the referring court seeks, in essence, to ascertain whether Article 392 of the VAT Directive must be interpreted as precluding the application of the margin scheme to transactions involving the supply of building land where the purchased land which has not been built on has become, between the time of its purchase and the time at which it is resold by the taxable person, building land and where that land, between the time of its purchase and the time at which it is resold by the taxable person, has been the subject of alterations, such as its partitioning into lots or the carrying out of works for the connection of those lots to grids and networks, including, inter alia, the gas and electricity networks.

48 As regards, first of all, the question relating to land purchased which has not been built on, it should be noted, as is apparent from paragraph 31 above, that, since it constitutes an exception to the general principle of the VAT Directive that VAT must in principle be levied on the price charged between the parties, Article 392 of that directive must be interpreted strictly, without, however, rendering that provision meaningless.

49 Furthermore, it should be noted that, under Article 12(3) of the VAT Directive, ‘building land’ means any unimproved or improved land defined as such by the Member States.

50 However, as is apparent from the case-law referred to in paragraph 34 of the present judgment, the VAT Directive limits the discretion of the Member States as regards the scope of the concept of ‘building land’. In that context, Member States must comply with the objective pursued by Article 135(1)(k) of that directive, which is to exempt from VAT only supplies of land which has not been built on and is not intended to support a building.

51 Furthermore, the definition of ‘building land’ is also limited by the scope of the concept of ‘building’, defined very broadly by the EU legislature in the first subparagraph of Article 12(2) of the VAT Directive as including ‘any structure fixed to or in the ground’.

52 It is apparent from all the above that, having regard to the fact that the concept of ‘building land’ covers both unimproved and improved land, the decisive criterion for the purposes of distinguishing between building land and land which has not been built on is whether, at the time of the transaction, the land in question is intended to support a building.

53 It is clear from Article 392 of the VAT Directive that the derogating margin scheme applies only to building land which, defined as such by the Member States as land intended to support buildings, is purchased with a view to resale. By contrast, the resale of purchased land which has not been built on, on the ground that it is not intended to support a building and is, in principle, exempt from VAT, must be excluded from the scope of that article.

54 It should further be noted that, in order to ensure compliance with the principle of fiscal neutrality, it is necessary that all land which has not been built on and which is intended to support a building and is, therefore, intended to be built on, be covered by the national definition of ‘building land’ (see, to that effect, judgment of 17 January 2013, *Woningstichting Maasdriel*, C?543/11, EU:C:2013:20, paragraph 31).

55 In the present case, it is for the referring court to determine, taking into account the national

legislative definitions and all the circumstances in which the transactions at issue in the main proceedings took place, whether the land purchased by Icade Promotion falls within the concept of ‘building land’ or whether, on the contrary, it is land which has not been built on and which, being exempt from VAT, does not fall within the scope of Article 392 of the VAT Directive.

56 As regards, secondly, the question whether that article precludes the application of the margin scheme to a supply of building land where, between the time of purchase and the time at which it is resold by the taxable person, that land has undergone alterations, such as its partitioning into lots or the carrying out of works enabling it to be served by various grids and networks, it is admittedly true that Implementing Regulation No 282/2011 classifies as ‘immovable property’ any ‘building’ or ‘construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved’ such as ‘the construction of permanent structures on land, as well as construction and demolition work performed on permanent structures such as pipeline systems for gas, water, sewerage and the like’.

57 However, the fact that such improvements constitute ‘immovable property’ within the meaning of Implementing Regulation No 282/2011 has no bearing on the classification of land thus improved as ‘building land’. Article 12(3) of the VAT Directive clearly provides that even improved land falls within the concept of ‘building land’ in so far as it is defined as such by the Member States. In other words, the improvement of land, such as by way of its connection to electricity, gas, water, or other networks, cannot lead to a change in its legal classification as a ‘building’, that is, as a construction fixed to or in the ground by way, in particular, of foundations.

58 Furthermore, while Article 12(2) of the VAT Directive defines a building very broadly as ‘any structure fixed to or in the ground’, the fact remains that that provision refers to Article 12(1)(a) of that directive, which refers to ‘the supply of buildings or parts of buildings before first occupation’. Thus, it cannot be concluded that mere connection to grids and networks may fall within the concept of ‘building’.

59 Although it follows, in essence, from paragraphs 32 and 33 of the judgment of 16 November 2017, *Kozuba Premium Selection* (C?308/16, EU:C:2017:869), that a building which has undergone conversion or upgrade works must be subject to the general VAT regime since those works have generated added value, just as the initial construction of the building did, that case-law cannot, however, be applied by analogy to the case in the main proceedings. In the case which gave rise to that judgment, the question whether the upgrade works at issue had generated added value was decisive in determining whether the supply of the building at issue was subject to VAT. By contrast, in the case in the main proceedings, the question at issue is not whether the supply of land is subject to VAT, but whether a derogating provision laying down a reduced tax regime is applicable.

60 Although Article 392 of the VAT Directive refers to the ‘supply of building land purchased for the purpose of resale’, it cannot be concluded that those terms prohibit works to the land by the taxable dealer, provided that that land can be classified as building land upon resale. Such a conclusion is apparent neither from the intentions of the EU legislature concerning that provision, nor from the contextual interpretation thereof.

61 Therefore, where undeveloped land is regarded as building land under the national legislation of the Member State concerned, the works carried out to that land for the purposes of its improvement, the land thus remaining earmarked to be built on, have no effect on its classification as ‘building land’ as long as those improvements cannot be classified as ‘buildings’.

62 In the light of the foregoing, the answer to the second question is that Article 392 of the VAT Directive must be interpreted as precluding the application of the margin scheme to transactions

involving the supply of building land where the land purchased that has not been built on has become, between the time of its purchase and the time at which it is resold by the taxable person, building land. That provision does not, however, preclude the application of the margin scheme to transactions involving the supply of building land where that land has been subject, between the time of its purchase and the time at which it is resold by the taxable person, to alterations such as its partitioning into lots or the carrying out of works for the connection of those lots to grids and networks, including, inter alia, the gas and electricity networks.

Costs

63 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 392 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as allowing the margin scheme to be applied to transactions involving the supply of building land both where the purchase thereof was subject to value added tax (VAT), without the taxable person who sold it being entitled to deduct that tax, and where the purchase of that property was not subject to VAT even though the price at which the taxable dealer purchased those goods incorporated an amount of VAT, paid as input VAT by the initial seller. However, apart from in the latter situation, that provision does not apply to transactions involving the supply of building land on whose initial purchase no VAT was paid, either because that purchase is not subject to VAT or because an exemption applies.**

2. **Article 392 of Directive 2006/112 must be interpreted as precluding the application of the margin scheme to transactions involving the supply of building land where that purchased land which has not been built on has become, between the time of its purchase and the time at which it is resold by the taxable person, building land. That provision does not, however, preclude the application of the margin scheme to transactions involving the supply of building land where that land has been subject, between the time of its purchase and the time at which it is resold by the taxable person, to alterations such as its partitioning into lots or the carrying out of works for the connection of those lots to grids and networks, including, inter alia, the gas and electricity networks.**

[Signatures]

* Language of the case: French.