OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 1 March 2012 (1)

Case C-334/10

X

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Value added tax — Sixth Directive — Deduction of input tax — Alterations to a commercial building with a view to using parts of it temporarily for private purposes — Taxation of private use)

I – **Introduction**

1. Within the extensive line of case-law on deduction of input tax in the common system of VAT, a specialist field soon developed with its own extensive case-law, which is concerned only with deduction of input tax in respect of the acquisition of capital goods which are used for both the taxable person's business and private purposes. (2) This relates in particular to buildings and passenger vehicles which a taxable person uses for both business and private purposes over a number of years. Only the business use of those goods is relevant to the taxation of the value added by business activity and only to that extent, therefore, must the input tax on those goods be neutralised. However, the technical and practical implementation of that simple principle presents many difficulties.

2. In this regard, the right to deduct input tax has been clarified in respect of buildings which have, from the outset, been constructed for both business and private purposes. Here, the taxable person has the possibility, firstly, of claiming full deduction of input tax on the construction of the building, but must, to offset this, subsequently pay tax on the private use of the building. (3) As a result, the original deduction of input tax will be partially corrected in the course of time.

3. What is the situation, however, (and this is the question being asked in the present reference for a preliminary ruling) with deduction of input tax in respect of subsequent alterations to a building which is at first used purely for business purposes but is then partially used, and only temporarily, as a private residence?

II – **Legal framework**

A – *EU law*

4. Article 17 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (4) in the version applicable for the year 2000 (5) ('the Sixth Directive') regulates the 'Origin and scope of the right to deduct' in extract as follows:

'…

(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 within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country;

…'

5. The taxable person's transactions are normally taxed under Article 2 of the Sixth Directive, which, in extract, reads:

'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;

…'

6. Article 6(2) of the Sixth Directive extends the tax liability under Article 2(1) of the Sixth Directive as follows:

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

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

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

…'

7. Chapter VIII 'Taxable Amount' of the Sixth Directive contains Article 11, which provides:

'A. Within the territory of the country

1. The taxable amount shall be:

…

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

…'

B – *Netherlands law*

8. According to the referring court, Article 15 of the Wet op de omzetbelasting 1968 (Law of 1968 on turnover tax) entitles the undertaking to deduct input tax in respect of services provided for the undertaking's purposes.

III – **Facts and questions referred**

9. The legality of subsequent charging of turnover tax for the year 2000 is at issue in the main proceedings.

10. The taxable person is a general partnership without legal personality although it is, as such, the applicant in the dispute in the main proceedings. In the year 2000, it ran a wholesale undertaking dealing in car paint. Its sole partners are a married couple.

11. In 1999, the married couple purchased a warehouse and used it for the purposes of the wholesale business. At the beginning of 2000, part of the attic of the warehouse was adapted for temporary occupation by the two partners and their children. With this in mind, they installed two dormer windows, a vestibule, a bathroom and a toilet. VAT was charged for this work.

12. For 23 months, the two partners used the adapted attic as a dwelling. Thereafter, the attic was adapted for business purposes (the dormer windows, vestibule, bathroom and toilet being retained) and used as an office and instruction area.

13. The taxable undertaking deducted the VAT charged on the alteration work on the attic in full. However, the Dutch tax authorities refused to allow the deduction in so far as it related to the work on the dormer windows and the vestibule, as only the installation of the bathroom and toilet served the business purposes of the undertaking.

14. The court of first instance upheld that decision on the grounds that the work on installation of the dormer windows and the vestibule was carried out purely for the purposes of occupation by the two partners.

15. The taxable undertaking has lodged an appeal in cassation against that decision with the Hoge Raad der Nederlanden, which has referred the following questions to the Court of Justice for a preliminary ruling:

'Regard being had to Article 6(2), first subparagraph, (a) and (b), Article 11A(1)(c) and Article 17(2) of the Sixth Directive, is a taxable person who makes temporary use for private purposes of part of a capital item of his business entitled to deduct the VAT levied on expenditure incurred in respect of permanent alterations carried out exclusively with a view to that use for private purposes? For the purpose of answering this question, does it make any difference whether the taxable person was charged VAT, which he deducted, on the acquisition of the capital item?'

16. In the proceedings before the Court of Justice, written observations have been submitted by the Dutch Government and the European Commission. There was no oral hearing.

IV – **Legal assessment**

17. Both questions, which I shall henceforth address jointly, concern the existence of a right to deduct input tax in the particular situation explained by the referring court.

18. The conditions governing the right to deduct input tax flow, in the present case, from Article

17(2)(a) of the Sixth Directive. Under that provision, a taxable person must, firstly, have purchased services from another taxable person on which he has paid VAT (input transactions). Secondly, those input transactions must be used for the purposes of his taxable transactions (output transactions).

19. The input transactions in respect of which the entitlement to deduct input tax is disputed in the present case are only those services which were obtained for the alteration of the attic with a view to the installation of two dormer windows and a vestibule ('alterations').

20. However, the subject-matter of the questions referred is not the right to deduct input tax in respect of the acquisition of the already existing building to which the alterations were made. The VAT treatment of the acquisition of that building is (in the context of the second question) significant only in so far as it might affect the deduction of input tax in respect of the alterations.

21. Under Article 17(2) of the Sixth Directive, the alterations must be used for taxable output transactions in order for them to be eligible for deduction of input tax. As the alterations were made initially for private purposes but a subsequent business use occurred when the attic was used as an office and instruction room, the case-law on deduction of input tax in respect of capital items which are partly for private use must also be taken into account, as all the parties to the proceedings have rightly stated.

22. I shall first explain that case-law, as its conditions for the deduction of input tax cannot be inferred directly from the provisions of the Directive (A), and shall then go on to examine whether it is applicable in the present case (B).

A – *The case-law on deduction of input tax in respect of capital items which are partly for private use*

1. Purpose to which a capital item is assigned

23. According to settled case-law (which can ultimately be traced back to the *Lennartz* judgment), (6) where capital goods are used both for business and for private purposes, the taxpayer has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes. (7)

24. Where a taxable person chooses to wholly treat the capital item as forming part of the assets of his business, the input VAT due on the acquisition of the goods is, in principle, immediately deductible in full. (8)

25. This applies not only to the input tax which is applicable to the purchase of finished goods, but also (which is particularly relevant in the case of buildings) to the input tax due on the construction of buildings (9) in respect, for example, of the acquisition of building materials or the use of building services. In this case, questions concerning the treatment of the goods and their use necessarily relate to the constructed asset and not to the services used in its construction.

2. Use for taxable output transactions

26. As a consequence of the full allocation of a mixed-use asset to the business, the use of the asset, in so far as it is for private purposes, is taxable under Article 6(2)(1)(a) (in conjunction with Article 2(1)) of the Sixth Directive. (10) This is designed to prevent the taxable person from gaining an unfair advantage to which he is not entitled by comparison with the final consumer (11) and to

prevent non-taxation of the taxable person’s final consumption for private purposes. (12)

27. In view of this, the use of the asset for private purposes constitutes a taxable output transaction within the meaning of Article 17(2)(a) of the Sixth Directive. (13) The conditions for deducting input tax under that provision are also, therefore, fulfilled in respect of the privately used part of the capital item. On the other hand, if taxation of the private use is not possible, no deduction of input tax can be granted in that respect, even if the capital item has been wholly assigned for private purposes. Such a situation can arise where the conditions for the application of Article 6(2), first subparagraph, (a), of the Sixth Directive have not been fulfilled. (14)

28. Moreover, according to the *Puffer* judgment, the case-law on deduction of input tax in respect of capital goods used partly for private purposes cannot be applied where, although the capital asset is used partly for private and partly for business purposes, the taxable person makes business-related use of the asset only for exempt output transactions. (15) Although, in such a case, there is mixed use of the asset, there are no business-related taxable transactions. From this it follows that, according to the case-law, the business use of the goods must be taxed (at least partially) for there to be any entitlement to deduct input tax in respect of a mixed-use capital asset.

29. Consequently, the taxation of both business and private use must be examined for the purposes of assessing the deduction of input tax in respect of the acquisition or construction of a capital asset used partially for private purposes.

3. Meaning and purpose

30. The case-law set out above has been called into question in principle on many occasions, but it has been repeatedly confirmed by the Court after thorough examination. (16)

31. The reason for allowing the taxable person in the case of mixed use of a capital asset to allocate the asset in its entirety to the business and therefore, in principle, to deduct input tax in full despite the fact that the asset is partly for private use is that it enables him to make subsequent alterations to its use by increasing the proportion used for business purposes without incurring tax disadvantages. (17)

32. If, in respect of mixed use of capital goods, the taxable person were able to allocate only part of the goods to the extent of their business use, deduction of input tax in respect of the privately used part would be definitively ruled out. The privately used part of the goods would continue to form part of private assets. Subsequent use for business purposes of the part of the goods allocated to private assets is not capable of giving rise to a right to deduct. The Sixth Directive provides for no adjustment mechanism to that effect. (18)

33. The EU legislature has, in the meantime, solved this problem by means of Council Directive 2009/162/EU of 22 December 2009 amending various provisions of Directive 2006/112/EC on the common system of value added tax, (19) although only in relation to later periods than those relevant to the main proceedings. (20) Under Article 168a, which was inserted into Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (21) currently in force, the right to deduct input tax is now only partially accorded in relation to immovable property for mixed use (and, in the case of the Member States, optionally also in respect of other goods), although this partial exclusion of the right to deduct input tax is linked to the possibility of adjustment in respect of subsequent changes in proportion of use.

B – *Application of the case-law in the present case*

34. It therefore remains to be clarified whether, under the case-law set out above on deduction of input tax in respect of capital goods used partly for private use, a taxable person is allowed, in the situation in question in the main proceedings, to deduct input tax in full in respect of alterations.

35. As the Commission rightly stated, there would be no doubt on this point if the alterations had been made before the building was acquired. On acquiring a building which was to be used partly as a warehouse and partly as a dwelling, the taxable person would have been entitled to allocate the building in its entirety to his business, so that he would have had the right to deduct input tax in full, while the use of the dwelling for private purposes would have been taxable subsequently.

36. The same would have applied in the event that the taxable person had constructed the building himself and from the outset used part of the building for residential purposes.

37. Against that background, it must be determined whether the mere fact that the alterations were made only subsequently can give rise to a different legal assessment. In this regard, it must be established, firstly, whether the taxable person is entitled to allocate capital goods entirely to the business assets in respect of the alterations (see 1 below). Secondly, the taxation of both the business and the private use of the capital goods must be examined (see 2 below).

1. Allocation of capital goods to the business

38. As has already been explained, the right to deduct input tax in respect of services provided for the construction of a capital item is based on the allocation of the constructed capital item to the business assets. (22) The right to wholly allocate the constructed item to the business assets must exist. Only then will a basic right to full deduction of input tax exist in respect of the services provided for its construction.

39. As the alterations in the present case were made to an already existing building, it is necessary to clarify what must be regarded as the constructed capital item in this respect (see (a) and (b) below) before the entitlement to allocate it entirely to the business can be examined (see (c) below).

a) Uniform or separate treatment of the alterations

40. In the present case, there are two possible approaches: the alterations may be considered as (subsequent) construction costs relating to the building or as construction costs relating to a separate capital item.

41. If the alterations are regarded as part of the construction costs of the whole building, the right to deduct input tax depends on the purpose ascribed to the building to which the alterations were made. If the building was entirely allocated to the business, input tax could, in principle, be deducted in full in respect of the alterations.

42. Against this background, the fact that the alterations were made in order to construct a dwelling to be used purely for private purposes would be irrelevant from the outset, since, if a taxable person acquires a number of goods and services for the construction of a building, under the case-law on deduction of input tax in respect of capital goods used partially for private purposes, deduction of input tax is likewise not assessed individually in respect of each input transaction. (23)

43. On the contrary, a taxable person may allocate the building that he constructed entirely to the business. Consequently, he is, in principle, entitled to deduct input tax in full in respect of all

input transactions relating to the construction of the building. This applies even though individual input transactions (such as the supply of a window which is installed in the privately used area) can normally be identified as serving only private purposes.

44. Even the *Bakcsi* case-law cited by the referring court does not directly oppose treatment of subsequent alterations jointly with the original construction costs. In that case, the Court found that the purpose to which a capital item is assigned is not relevant to the question whether a right to deduct input tax exists in respect of input transactions for the use and maintenance of that capital item. (24) Accordingly, the right to deduct input tax in respect of input transactions which, for example, relate to the use and maintenance of a building must be assessed separately from the matter of whether that building is assigned to the business.

45. However, the referring court has itself already pointed out that the costs incurred in making the alterations in the present case cannot be classified as costs of use or maintenance. (25) In my view too, the alterations are not input transactions which are carried out for the purpose of using or maintaining the building in the course of business, but form part of the building itself, whilst changing its form and scope of use. The *Bakcsi* judgment is therefore not applicable here.

46. Nevertheless, the principle follows from that case-law that the assignment of an input transaction to the business must, in principle, be considered separately in respect of each input transaction.

47. This approach also reflects the settled case-law on taxation of output transactions. According to that case-law, it follows from Article 2 of the Sixth Directive that every supply or transaction must normally be regarded as distinct and independent. (26)

48. The case-law should also be noted which states that only a person who acts in his capacity as a taxable person when performing an input transaction may be entitled to deduct input tax. (27) Where a person acquires goods solely for his private requirements, he is acting in a private capacity and not as a taxable person within the meaning of the Sixth Directive. (28)

49. If, however, deduction of input tax in respect of any subsequent alterations were to be made dependent on the purpose to which the building is assigned, it would also have to be allowed in the case of subsequent alterations which were made permanently and for purely private purposes. This would not, in my view, be in accordance with the aforementioned case-law, as an input transaction which is used in its entirety on a long-term basis for private purposes cannot be regarded as the action of a taxable person. Otherwise, it would no longer be possible to draw the necessary distinction in the VAT system between a person’s action as a taxable person and as a private person.

50. Moreover, the consequences of adopting a uniform approach to the VAT treatment of the building and subsequent alterations are also not compatible with the principle of tax neutrality. In accordance with that principle, a person must bear the burden of VAT only when it relates to goods or services which are used by him for his private consumption and not for his taxable business activities. (29)

51. However, adopting a uniform approach to the building and subsequent alterations would also have the consequence that a taxable person who made permanent alterations to a building purely for business purposes could not claim any input tax deduction in this respect if the building had previously been assigned entirely to his private assets. The taxable person would ultimately have to bear the burden of the VAT paid on the alterations even though the result of those alterations would be used for his business activities.

52. Against this background, the uniform treatment of input transactions relating to the construction of a mixed-use building implicitly recognised by the case-law on deduction of input tax in respect of capital goods used partly for private purposes (30) constitutes an exception which is justified for practical reasons in view, in particular, of the proximity in time of the building services provided. That overall assessment takes into account the fact that, in view of the many input transactions that are required for the construction of a building, assigning each individual input transaction to private or business purposes respectively would give rise to substantial problems of classification and considerable administrative expense. However, the same does not apply in respect of the relationship of the original construction of a building with subsequent alterations, which can be considered separately, as they are immediately separable items and are not closely linked in time.

53. Moreover, it has long been recognised in the Court's case-law that different parts of one and the same item can be assigned to private or business assets. (31) From a VAT perspective, there is therefore nothing unusual in treating individual parts of a building differently.

54. Consequently, deduction of input tax in respect of subsequent alterations to a capital item should not be dependent on the purpose to which the capital item itself is assigned. In this respect, I share the view of the Dutch Government that the mere fact that the building was, as such, assigned to the taxable person's business assets does not automatically result in the alterations also being classified as business assets.

b) Treatment of alteration work as a separate capital item

55. If deduction of input tax in respect of the subsequent alterations is therefore to be regarded in principle as independent of how the building is assigned, the question then arises whether the alterations have produced a separate capital item.

56. In this regard, the more appropriate viewpoint would appear to be that all alteration work contributing to the construction of the dwelling in the attic has, when combined, resulted in the construction of a separate asset in the form of the dwelling. This would not merely include the dormer windows and the vestibule, which were installed as a result of the alterations at issue in the main proceedings. The installed bathroom and toilet, in respect of which the taxable person was already entitled to deduct input tax, would then form part of that separate capital item.

57. Whether the construction of the dormer windows and vestibule must be separated from the construction of the bathroom and toilet for the purposes of determining the relevant capital item is a factual matter which must be assessed by the referring court. The decisive factor in making that assessment is whether the alteration work relating to the dormer windows, vestibule, bathroom and toilet is closely linked materially and in time in a manner comparable to services provided for the construction of a building.

58. In any event, there is, in my view, no convincing reason for not regarding the installed dwelling as a whole, or the dormer windows and vestibule taken separately, as a separate capital item.

59. As Advocate General Mengozzi has already argued, the essential elements of the definition of ‘capital goods’, which is to be used in connection with the case-law on deduction of input tax where capital goods are used partly for private purposes, are the durable nature of the goods and the attendant writing-off of their acquisition costs. (32) These elements would apply both to the constructed dwelling and to the dormer windows and vestibule constructed as a result of the alterations at issue here.

60. This finding also does not alter the fact that both the dwelling and the dormer windows and vestibule form part of another capital item.

61. Although, for reasons relating to the simplicity of the common scheme of VAT, Advocate General Mengozzi has argued against applying the case-law on deduction of input tax, in respect of in part privately used capital items, to items which are incorporated into the capital goods after these are acquired and increase their value, and in favour of apportioning the input tax directly, he was referring in this regard only to maintenance expenditure, in other words, the replacement of an already existing part of a capital item by a new one. (33)

62. The present case, on the other hand, does not concern such maintenance expenditure but the construction of new parts of a building which were not there before. As the construction of new parts of a building for mixed use should not occur too often, it cannot also be expected that the consideration for VAT purposes of several capital items within a building represents too complex a task.

63. In view of the finding that even the dormer windows and vestibule constitute in themselves a separate capital item, there is ultimately no need to examine whether the principles of the case-law on capital goods used partially for private purposes must also be applied to non-capital goods. (34)

c) Partial private use

64. Finally, the basic right to deduct input tax in full in respect of the alterations still depends on the constructed capital item (in this case the installed dwelling or the dormer windows and vestibule) being used both for business and private purposes. In that case, the capital item could be fully assigned to the business.

65. If the referring court finds that the installed dwelling as a whole must be regarded as a separate capital item, it could be assigned to the business, as it seem to be established in the main proceedings that parts of the installed dwelling (namely the bathroom and toilet) were also used for business purposes from the beginning. (35) The alterations made to install the dormer windows and vestibule at issue in the main proceedings would then form part of the construction of an item which was used both for private and for business purposes. In that case, the installed dwelling should not be treated differently from a private building constructed for mixed use. The purpose which the installation of the dormer windows and vestibule served when viewed in isolation would be irrelevant, since the mixed use of the capital item as a whole is decisive. (36)

66. However, the referring court’s question is concerned only with deduction of input tax in respect of alterations made only with a view to private use. In the light of my previous findings, the question is justified in so far as the dormer windows and vestibule are a separate capital item. In order to answer the question referred in the event that the referring court should come to this conclusion in its assessment of the facts, I will continue this examination on the premise that the dormer windows and vestibule constitute a separate capital item.

67. This case contains a specific feature not found in the previous case-law on deduction of input tax in respect of capital goods that are used partially for private use. The dormer windows and vestibule were used successively for different purposes. According to the facts set out by the referring court, the married couple used the dormer windows and vestibule at first only for private purposes as part of their private dwelling and subsequently only for business purposes when their attic was used as an office and instruction room. It must therefore be examined in more detail below whether, in such a case, it is possible to assume mixed use according to the case-law on deduction of input tax in respect of capital goods used partially for private use.

i) The *Lennartz* judgment

68. In this connection, the Dutch Government rightly pointed out the need to examine whether the married couple were acting in any way as a taxable person when they purchased the services for the alterations, since only a person acting in his capacity as a taxable person can be entitled to deduct input tax when performing an input transaction. (37) According to the case-law, where a taxable person acquires goods solely for his private requirements, he is acting in a private capacity and not as a taxable person within the meaning of the Sixth Directive. (38)

69. If one is guided merely by the initial use, the married couple would have paid for the alterations only for private purposes, thus not acting as a taxable person, and would not therefore be entitled to deduct input tax.

70. If one is guided merely by the initial use, the case-law on deduction of input tax in respect of capital goods used partially for private purposes would be inapplicable. There would be no mixed use, nor (alongside private use) any taxable business use of the capital goods.

71. In answering the question whether initially purely private and subsequently purely business use may be regarded from the outset as partial business use, I think it is helpful to go back to where it all began: the *Lennartz* judgment.

72. In that judgment, the Court laid the basis for the now settled case-law on deduction of input tax in respect of investment goods used partially for private purposes. In that judgment, the Court also dealt with questions relating to business use that commences only subsequently. The Court found that only the capacity in which a person is acting at the time when he performs the input transactions can determine the existence of the right to deduct. (39) A person who acquires goods for the purposes of an economic activity does so as a taxable person, even if the goods are not used immediately for such purposes. (40)

73. Whether input transactions are entered into for subsequent business purposes is thus a question of fact which must be determined in the light of all the circumstances of the case, including the nature of the goods concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person’s economic activity. (41)

74. Although that judgment was delivered right at the beginning of the development of the case-law on deduction of input tax in respect of mixed use of capital goods, it already lays the foundations for it.

75. As has already been shown, the reason for developing the case-law on deduction of input tax in respect of capital goods used partially for private purposes was that the taxable person had no possibility of adjustment in the event of his subsequently using for business purposes goods allocated to his private assets. If a taxable person obtains goods as part of his private assets, deduction of input tax must be definitively ruled out, even if those goods are subsequently used for

business purposes. (42)

76. In view of this, it would be unjustified to fully refuse to allow a taxable person who is incurring investment expenditure which it is established is being incurred — not immediately but subsequently — entirely for business purposes to deduct input tax in that respect. Use for, at first, purely private purposes, then purely business purposes, is the situation with the most tax disadvantages that a taxable person can encounter when altering the use of goods and its prevention is the reason for the development of the case-law on capital goods used partially for private purposes.

77. These conclusions drawn from the origin of the case-law also seem to me to be in accordance with the most recent judgment in this regard in *Puffer.*

78. Although the Court found in that judgment that taxable persons who perform only tax-exempt transactions cannot deduct input tax in respect of capital goods used partially for private purposes, in that situation, a taxable person, because his activity is exempt from tax, never performs taxable transactions, not even in the future. According to the meaning and purpose of the case-law on capital goods used partially for private purposes, there is also no reason to apply it in respect of a wholly tax-exempt activity, since, under Article 17(2) of the Sixth Directive, the use for business purposes of a capital item can at no time give rise to deduction of input tax.

79. However, that is not the situation in this case. The car paint business run by the taxable person is not a tax-exempt activity.

ii) Evidence of subsequent business use

80. Clearly, according a right to fully allocate a capital item to business assets, even though it was initially for purely private use, is open to a certain risk of abuse.

81. This is particularly so in view of the fact that, according to the case-law, the purpose of the acquisition of an input transaction is determined solely by the use intended by the taxpayer, confirmed by objective evidence, at the time of its acquisition and not from the subsequent actual use of the input transaction. The Court has expressly confirmed this in respect of a taxable person’s first investment expenditure before the actual exploitation of his business begins. (43) There is no reason, in my opinion, to take a different view in respect of subsequent investment expenditure incurred in the course of normal business activity.

82. It must be emphasised, however, that, also according to that case-law, there must be objective evidence of the taxable person’s intention to use an at first purely privately used capital item subsequently for business purposes. Objective criteria specified by the *Lennartz* judgment were the nature of the goods and the period up to their intended use for business purposes. (44)

83. From this it must be concluded that there are capital items, such as a sauna subsequently installed in the warehouse of a car paint wholesaler, which, by nature, can normally be used in the business undertaking only for private purposes. It will also be harder to provide objective evidence of the intention of subsequent business use the further in the future that use occurs.

84. It should also be emphasised that the mere possibility of subsequent business use is in no way sufficient. Such an assumption would open up deduction of input tax to all input transactions acquired by a taxable person. Business use planned in the future must be specific and verifiable. It must be assumed in this respect that an initial private use at first suggests that the goods are intended to be used only for private purposes. The taxable person must refute this assumption by means of objective evidence.

85. It is established in the present case that the alterations were made initially only for private purposes, namely the installation of parts of a dwelling. The premises were then used as an office and instruction room for business purposes. As both the vestibule and the dormer windows remained after the premises were altered for business purposes, the altered premises were subsequently used for business purposes.

86. However, it is not, in my view, clear from the presentation of the facts in the main proceedings whether the subsequent business use was already intended when the alterations were carried out, in other words, when the input transactions were acquired, and corroborated by objective evidence.

87. On the one hand, the question referred mentions alterations which were made exclusively with a view to private use. If this is understood to mean that business use of the input transactions was not planned at the time when the alterations were made, deduction of input tax can, to that extent, be ruled out from the outset. At the time when the input transactions were performed, the married couple would not have acted as a taxable person as the acquisition of the service would have been purely for private purposes. There would then be no entitlement to deduct input tax in respect of the alterations.

88. On the other hand, according to the referring court’s account, the use of part of the warehouse as a dwelling for the married couple was, from the beginning, planned only as a temporary arrangement. To that extent, the married couple may have had plans about how the alterations would be used after they vacated the dwelling. Moreover, the lower court’s decision, which was submitted together with the reference for a preliminary ruling, could be understood as meaning that the subsequent business use was intended from the beginning. (45)

89. Ultimately, therefore, the referring court must decide the factual question whether there was an intention, from the outset, to use the dormer windows and vestibule subsequently for business purposes and whether this was corroborated by objective evidence.

2. Use for taxable output transactions

90. If the referring court finds that there was an intention since the input transactions were acquired to use the dormer windows and vestibule for mixed purposes or accepts that the installed dwelling as a whole constitutes the relevant capital item, then, according to the case-law on deduction of input tax in respect of capital goods used partially for private purposes, the taxable company would have been entitled to allocate those goods entirely to the business.

91. In order also to have the right to deduct input tax in full, the taxable person should have intended, under Article 17(2)(a) of the Sixth Directive, to use the alterations entirely for taxable output transactions. This is dependent, in the present case, on the intended use of the constructed capital item.

92. In so far as the capital item was intended to be used for business purposes (in the case of the installed dwelling, in respect of the part business use of the bathroom and toilet, in the case of

the dormer windows and vestibule, from their use as part of the office and instruction room), the output transactions are taxable under Article 2(1) of the Sixth Directive as part of the taxable person's business activities.

93. In so far as the capital item was intended to be used for private purposes, output transactions are taxable under the conditions laid down in Article 6(2), first subparagraph, in conjunction with Article 2(1) of the Sixth Directive.

a) Use of goods under Article 6(2), first subparagraph, (a), of the Sixth Directive

94. Under Article 6(2), first subparagraph, (a), of the Sixth Directive, the use of goods forming part of the assets of a business for the private use of the taxable person is taxable.

95. If the installed dwelling or the dormer windows and vestibule constitute an independent capital item which may be entirely allocated to the business, its use for the needs of the married couple is independently taxable.

96. In view of the independent nature of the capital item, it is irrelevant whether the capital item to which the installed dwelling or the dormer windows and vestibule are actually linked was eligible for full or partial deduction of VAT. Therefore the answer to the second question referred by the Hoge Raad must be that it makes no difference to the answer to the first question whether the taxable person was charged VAT, which it deducted, on the acquisition of the capital item.

97. In any case, the private use of the installed dwelling or dormer windows and vestibule in the present case is also not exempt from tax.

98. Although, in Case C-436/10 *BLM*, the Court still has to rule on whether Article 13B(b) of the Sixth Directive, which exempts the leasing of immovable property from VAT, is applicable to the use of part of a building for private purposes which is, in principle, taxable under Article 6(2), first subparagraph, (a), of the Sixth Directive, the question is being asked in that case with regard to the particular situation of a user of part of the building who is legally separate from the taxable company.

99. In the present case, firstly, the taxable company has no separate legal personality. Secondly, the questions referred assume that the taxable person is using the capital item for himself and not for another person. The Court has already ruled in such a case that the tax exemption provided for by Article 13B(b) of the Sixth Directive is not applicable to the taxable event specified in Article 6(2), first subparagraph, (a), thereof. (46)

100. As a result, the intended use of the relevant capital item for private purposes is also taxable under Article 2(1) in conjunction with Article 6(2), first subparagraph, (a) of the Sixth Directive.

b) Supplies of services carried out free of charge by the taxable person under Article 6(2), first subparagraph, (b), of the Sixth Directive

101. On the other hand, the conditions laid down in Article 6(2), first subparagraph, (b), of the Sixth Directive do not apply in the present case.

102. The output transactions are not to be regarded as the married couple's use of the services provided in connection with the alterations, as has, to some degree, been suggested. Those services must have been provided for the taxable company in order to establish a right to deduct input VAT. They therefore constitute the input transactions.

103. The output transactions consist rather in the use of the goods constructed as a result of the

input transactions, that is to say, the installed dwelling or the dormer windows and vestibule. Since, therefore, the goods used are assigned to the business, only the conditions laid down in Article 6(2), first subparagraph, (a), of the Sixth Directive apply in this regard.

V – **Conclusion**

104. In the light of the foregoing considerations, I propose that the Court should reply to the questions referred for a preliminary ruling by the Hoge Raad as follows:

A taxable person who makes temporary use for private purposes of part of a capital item of his business is entitled, under Article 17(2) of the Sixth Directive, to deduct the VAT levied on expenditure incurred in respect of permanent alterations carried out exclusively with a view to that use for private purposes and which give rise to a separate capital item, where, at the time when the alterations are made, the taxable person has the intention, corroborated by objective evidence, to use the capital item thereby created for the purposes of his taxable business transactions even if that use is to occur only after the private use. That entitlement to deduct VAT exists irrespective of whether the taxable person was charged VAT, which he deducted, on the acquisition of the capital item to which the alterations were made.

1 – Original language: German.

2 – Firstly in Case C-97/90 *Lennartz* [1991] ECR I-3795 and most recently in judgment of 16 February 2012 in Case C-118/11 *Eon Aset Menidjmunt*.

3 – See in detail, in this regard, point 23 et seq.

4 – OJ 1977 L 145, p. 1.

5 – Article 17 of the Sixth Directive, in the version resulting from Article 28f thereof, is applicable for the year 2000, which version was incorporated by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and, in so far as is relevant here, amended by Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18). This version is relevant for the purposes of the present case, as the alterations in respect of which the right to deduct input tax is disputed in the main proceedings were made in the year 2000.

6 – Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 35.

7 – Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraph 20; Case C-415/98 *Bakcsi* [2001] ECR I-8131, paragraph 25; Case C-269/00 *Seeling* [2003] ECR I-4101, paragraph 40; Case C-25/03 *HE* [2005] ECR I-3123, paragraph 46; Case C-434/03 *Charles and Charles-Tijmens* [2005] ECR I-7037, paragraph 23; Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039, paragraph 34; Case C-72/05 *Wollny* [2006] ECR I-8297, paragraph 21; Case C-515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie* [2009] ECR I-839, paragraph 32; and Case C-460/07 *Puffer* [2009] ECR I-3251, paragraph 39 and Eon Aset Menidjmunt (footnote 2, paragraph 53).

8 – *Puffer* (footnote 7, paragraph 40) and the case-law cited; see *Lennartz* (footnote 2, paragraph 35).

9 – *Seeling* (footnote 7, paragraphs 43 and 47); *Wollny* (footnote 7, paragraph 24); and *Puffer* (footnote 7, paragraph 42).

10 – *Puffer* (footnote 7, paragraph 41) and the case-law cited.

11 – *Wollny* (footnote 7, paragraph 32) and *Puffer* (footnote 7, paragraph 54); see, to this effect, Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 33.

12 – Case 50/88 *Kühne* [1989] ECR 1925, paragraph 29.

13 – *Puffer* (footnote 7, paragraph 41) and the case-law cited.

14 – See, to this effect, Case C-515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie* [2009] ECR I-839, paragraphs 38 to 40; according to that case-law, the right to deduct input tax does not exist in so far as the capital item is used for an activity which does not fall within the scope of VAT but cannot be regarded as being 'other than for business purposes' under the conditions laid down in Article 6(2), first subparagraph, (a), of the Sixth Directive.

15 – See, to this effect, *Puffer* (footnote 7, paragraph 49).

16 – *Charles and Charles-Tijmens* (footnote 7 above), and *Puffer* (footnote 7 above); see, specifically in the case of immovable property, *Seeling* (footnote 7 above).

17 – See Opinion of Advocate General Jacobs in Case C-193/91 *Mohsche* [1993] ECR I-2615, point 18, and in Case C-291/92 *Armbrecht* [1995] ECR I-2775, points 39 and 49.

18 – *Puffer* (footnote 7 above, paragraph 44). In view of this, any financial (liquidity) advantages arising for the taxable person from this provision by comparison with a final consumer must be accepted; see to this effect *Puffer* (footnote 7 above, paragraphs 55 to 57); see also *Wollny* (footnote 7 above, paragraph 38).

19 – OJ 2010 L 10, p. 14.

20 – Directive 2009/162/EU had to be transposed by 1 January 2011 under Article 2 thereof.

21 – OJ 2006 L 347, p. 1.

22 – See point 25 above.

23 – See point 25 above.

24 – See *Bakcsi* (footnote 7, paragraph 33).

25 – Reference for a preliminary ruling, paragraph 3.4.6.

26 – Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 35 and the case-law cited; see Case C-349/96 *CPP* [1999] ECR I-973, paragraph 29, on services.

27 – See, to this effect, *Lennartz* (footnote 2 above, paragraph 8), and Case C-378/02 *Waterschap Zeeuws Vlaanderen* [2005] ECR I-4685, paragraph 32.

28 – Case C-20/91 *de Jong* [1992] ECR I-2847, paragraph 17.

29 – See *HE* (footnote 7 above, paragraph 48).

30 – See *Seeling* (footnote 7 above, paragraphs 43 and 47); *Wollny* (footnote 7 above, paragraph 24) and *Puffer* (footnote 7 above, paragraph 42).

31 – *Armbrecht* (footnote 7 above, paragraphs 19 and 20).

32 – See Opinion of Advocate General Mengozzi in Case C-515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie* [2009] ECR I-839, point 67.

33 – See Opinion in *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (footnote 32 above, point 73).

34 – See Opinion in *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (footnote 32 above, point 59 et seq.).

35 – See in this regard paragraph 2.5 of the judgment of the Gerechtshof te Leeuwarden of 7 September 2007 in Case BK 1024/04, which was submitted as the decision of the lower court with the reference for a preliminary ruling.

36 – See points 42 and 43 above.

37 – See to this effect *Lennartz* (footnote 2, paragraph 8) and *Waterschap Zeeuws Vlaanderen* (footnote 27, paragraph 32).

38 – *de Jong* (footnote 28, paragraph 17).

39 – See to this effect *Lennartz* (footnote 2, paragraph 8), see also Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039, paragraph 38.

40 – *Lennartz* (footnote 2, paragraph 14).

41 – See to this effect *Lennartz* (footnote 2, paragraph 21); *Bakcsi* (footnote 7, paragraph 29); and Eon Aset Menidjmunt (footnote 2, paragraph 58).

42 – Opinion of Advocate General Jacobs in Case C-434/03 *Charles and Charles-Tijmens* [2005] ECR I-7037, point 75.

43 – See Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraphs 34 and 35; see also Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 45 and the case-law cited.

44 – *Lennartz* (footnote 2, paragraph 21).

45 – See judgment of the Gerechtshof te Leeuwarden of 7 September 2007, BK 1024/04, paragraph 2.3.

46 – *Seeling* (footnote 7).