OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 26 January 2012 (1)

Joined Cases C?621/10 and C?129/11

ADSITS Balkan and Sea Properties

and

OOD Provadinvest

v

Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

(References for a preliminary ruling
from the Administrativen Sad Varna (Bulgaria))

(VAT — Transactions between connected persons — Scope of Member States' option under Directive 2006/112/EC to tax on the basis of open market value — Possibility of direct application of the directive if national legislation goes beyond the scope of the option)

1. In these references for a preliminary ruling, the Administrativen Sad Varna (Administrative Court, Varna) (Bulgaria) seeks guidance on the limits of the option under Article 80(1) of Directive 2006/112, (2) whereby Member States may in certain circumstances depart from the general rule that the taxable amount is the actual consideration obtained by the supplier and instead assess value added tax ('VAT') on the open market value of the supply. It also wishes to know whether Bulgarian legislation exercising that option in a wider range of circumstances is compatible with Directive 2006/112 and, if not, whether Article 80(1) has direct effect and may be applied directly by a national court.

EU VAT legislation

2. The general principle of the VAT system is set out in Article 1(2) of Directive 2006/112:

'The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly

by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.'

3. Article 73 of Directive 2006/112 (3) lays down the general rule on the determination of the taxable amount for VAT:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, [(4)] 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.'

4. Article 80 of Directive 2006/112 provides for a possible further exception to that general rule:

'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; [(5)]

(b) where the consideration is lower than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177 and the supply is subject to an exemption under Articles 132, 135, 136, 371, 375, 376, 377, 378(2), 379(2) or Articles 380 to 390b; [(6)]

(c) where the consideration is higher than the open market value and the supplier 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.

...'

5. It is helpful to understand why the optional exception was introduced. (7)

6. Generally, economic operators have no incentive to fix prices on the basis of the amount of VAT which their supplies will bear, particularly where both parties are taxable persons with a full right to deduct input tax. (8) Where that is not so, there may be situations in which, if supplier and customer agree on an artificially inflated or reduced price, the overall VAT burden is reduced and less VAT is collected. Two types of situation are of particular relevance.

7. The first is when the customer does not enjoy a full right of deduction of input VAT (he may be a final consumer, or a taxable person who uses his inputs for the purpose of making exempt supplies or who is a 'mixed' supplier enjoying only a proportional right of deduction (9)). It is in such a customer's interest to pay less VAT on goods and services he receives by acquiring them at artificially low prices. That is the situation addressed by Article 80(1)(a) of Directive 2006/112.

8. The second is when the supplier is a 'mixed' taxable person whose right to deduct input tax

depends on the proportion of taxed supplies among his total outputs. The proportion of input tax which he can deduct will increase if the value of his exempt outputs is artificially lowered or that of his taxed outputs artificially raised (the situations addressed in Article 80(1)(b) and (c) respectively (10)).

9. Arrangements of that kind are, however, unlikely unless the two parties are so closely connected that the actual price charged, exclusive of VAT, is not of overall financial significance to them — in normal circumstances, it makes no commercial sense for a supplier to agree to an artificially low price or for a customer to agree to an artificially high price. In Article 80(1) of Directive 2006/112, the option to tax on the basis of open market value is thus limited to supplies 'involving family or other close personal ties, management, ownership, membership, financial or legal ties'.

10. 'Open market value' is defined in Article 72 of Directive 2006/112 as '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'.

Bulgarian VAT legislation

11. The referring court mentions a number of provisions of the Zakon za danak varhu dobavena stoynost (Law on value added tax, 'the ZDDS') of 2006. In particular:

– under Article 27(3)(1), for any supply between connected persons, the taxable amount is the open market value;

– under Article 45(1), transfers of ownership of, or limited real rights in, immovable property are exempt supplies;

– by virtue of Article 45(5)(2), Article 45(1) does not apply to transfers of ownership of, or other real rights in, equipment, machines, accessories or buildings which are firmly attached to the ground or installed underground, or to the letting thereof;

– under Article 70(5), no right to deduct input VAT arises in the case of tax charged unlawfully.

12. Other relevant rules are in the 'additional provisions' of the Danachno-osiguritelen protsesualen kodeks (Code of Tax and Social Security Procedure, 'the DOPK'). In particular:

– Paragraph 1(3) defines 'connected persons' for the purposes of Article 27(3)(1) of the ZDDS (in greater detail than in Article 80(1) of Directive 2006/112, but within the latitude afforded by that provision);

– under Paragraph 1(8), the 'open market value' is the consideration, exclusive of VAT and excise duties, which would be applied under the same conditions for the same or similar goods or services in a legal transaction between unconnected persons;

– Paragraph 1(10) lists five methods for the determination of open market value, to be applied in accordance with instructions issued by the Ministry of Finance.

Facts, procedure and questions referred

Case C?621/10 Balkan and Sea Properties

13. In 2009, ADSITS Balkan and Sea Properties (‘Balkan and Sea’), a real estate investment trust, purchased various properties in the town of Ravda from Ravda tur EOOD, for a total price of BGN 21 318 852. (11) The latter was a single-member private limited liability company, connected to Balkan and Sea within the meaning of Paragraph 1(3) of the additional provisions of the DOPK. VAT was charged on the price (12) and Balkan and Sea sought to deduct that tax from its output VAT.

14. An appraisal commissioned by the tax authority concluded that the open market value of the properties was BGN 21 216 300. The authority therefore took the view that the value of the transaction had been inflated by BGN 102 552, that the VAT charged on the latter amount was a tax charged unlawfully within the meaning of Article 70(5) of the ZDDS and that no right to deduct therefore arose in respect of that portion of the tax, amounting to BGN 20 510.42. (13)

15. Balkan and Sea’s challenge to that assessment is now before the referring court, which asks:

‘1. Is Article 80(1)(c) of [Directive 2006/112] to be interpreted as meaning that where there are supplies between connected persons, in so far as the consideration is higher than the open market value, the taxable amount is the open market value of the transaction only if the supplier does not qualify for the full right to deduct the VAT chargeable on the purchase or production of the goods which are supplied?

2. Is Article 80(1)(c) of [Directive 2006/112] to be interpreted as meaning that, if the supplier has exercised the full right to deduct VAT on goods and services which are the subject of subsequent supplies between connected persons at a price which is higher than the open market value, and that right to deduct input VAT has not been corrected under Articles 173 to 177 of that Directive, [(14)] a Member State is not permitted to adopt measures whereby the taxable amount is exclusively the open market value?

3. Does Article 80(1) of [Directive 2006/112] constitute an exhaustive list of cases representing the circumstances in which the Member States may take measures whereby the taxable amount in respect of supplies is to be the open market value of the transaction?

4. Is a provision of national law such as Article 27(3)(1) of [the ZDDS] permissible in cases other than those listed in Article 80(1)(a), (b) and (c) of [Directive 2006/112]?

5. In a case such as the present does Article 80(1)(c) of [Directive 2006/112] have direct effect, and may the domestic court apply it directly?’

Case C?129/11 Provadinvest

16. OOD Provadinvest (‘Provadinvest’) is a limited liability company which leases plots of agricultural land for the operation of greenhouses consisting of steel structures covered with polyethylene foil (or of polyethylene structures — the precise nature of the structures is not entirely clear from the order for reference). In 2009, it sold three such plots, each with an area of around six hectares, together with the greenhouse structures erected on them and all improvements and permanent crops. Two of those plots were sold to one of its shareholders and the third to its representative officer. The price paid was BGN 25 000 in each case, and no VAT was indicated on the invoices.

17. The plots, greenhouse structures, improvements and crops were appraised by a valuer, who determined the open market value of the greenhouse structures on the three plots as totalling

BGN 392 700.

18. On that basis, the tax authority took the view that the transactions comprised both exempt supplies (plots of land) and taxable supplies (accessories, improvements and crops). For the latter, since the parties were connected within the meaning of Paragraph 1(3) of the additional provisions of the DOPK, the taxable amount was the open market value determined by the valuer. The tax authority therefore assessed the VAT due at BGN 78 540.

19. Provadinvest's challenge to that assessment is now before the referring court, which asks:

'1. Is Article 80(1)(a) and (b) of [Directive 2006/112] to be interpreted as meaning that, where there are supplies between connected persons, in so far as the consideration is lower than the open market value, the taxable amount is the open market value of the transaction only if the supplier or the acquirer does not qualify for the full right to deduct the input tax chargeable on the purchase or production of the goods which are supplied?

2. Is Article 80(1)(a) and (b) of [Directive 2006/112] to be interpreted as meaning that, if the supplier has exercised the full right to deduct the input tax on goods and services which are the subject of subsequent supplies between connected persons at a value which is lower than the open market value, and that right to deduct input tax has not been corrected under Articles 173 to 177 of the Directive [(15)] and the supply is not subject to a tax exemption within the meaning of Articles 132, 135, 136, 371, 375, 376, 377, 378(2), 379(2) and 380 to 390 of the Directive, a Member State is not permitted to adopt measures whereby the taxable amount is exclusively the open market value?

3. Is Article 80(1)(a) and (b) of [Directive 2006/112] to be interpreted as meaning that, if the acquirer has exercised the right to deduct in full the input tax on goods and services which are the subject of supplies between connected persons with a lower value than the open market value, and that right to deduct input tax has not been corrected under Articles 173 to 177 of the directive, a Member State is not permitted to adopt measures whereby the taxable amount is exclusively the open market value?

4. Does Article 80(1) of [Directive 2006/112] constitute an exhaustive list of cases representing the circumstances in which a Member State is permitted to take measures whereby the taxable amount in respect of supplies is to be the open market value of the transaction?

5. Is a provision of national law such as Article 27(3)(1) of [the ZDDS] permissible in cases other than those listed in Article 80(1)(a), (b) and (c) of [Directive 2006/112]?

6. In a case such as the present does Article 80(1)(a) and (b) of [Directive 2006/112] have direct effect, and may the domestic court apply it directly?'

20. Written observations have been submitted to the Court by the Bulgarian Government in Case C?621/10 and by the Commission in both cases. Neither Balkan and Sea nor Provadinvest has submitted observations. No hearing has been requested, and none has been held.

Assessment

Preliminary remarks

21. No issue has been raised as to the admissibility of the references for a preliminary ruling, but it must be acknowledged that the orders for reference do not set out the circumstances of the main proceedings in as much detail as could be wished for. In particular, it would have been preferable if the referring court had, in each case, stated more explicitly the extent to which each

party to the transactions in fact enjoyed and/or exercised a right to deduct input VAT.

22. However, it is apparent from the orders for reference that the relevant provision of national law, Article 27(3)(1) of the ZDDS, does not lay down any condition as to the extent to which connected parties must enjoy a right to deduct in order for it to apply. Moreover, the wording of the questions themselves indicates that the referring court considers that the circumstances of the main proceedings, while falling within the scope of Article 27(3)(1) of the ZDDS, fall outwith that of Article 80(1)(a), (b) or (c) of Directive 2006/112, at least on a strict and literal interpretation of their terms — in other words that the relevant parties to the transactions in both cases enjoyed a full right of deduction.

23. The first question referred in both cases asks, essentially, whether the option in Article 80(1) of Directive 2006/112 is confined to cases in which the supplier or the customer, as the case may be, does not have a full right of deduction. The second question in Case C?621/10 and the second and third in Case C?129/11 ask whether, in cases where such supplier or customer, as the case may be, has exercised a full right of deduction, Member States are precluded from taking open market value as the taxable amount. The third question in Case C?621/10 and the fourth in Case C?129/11 ask whether Article 80(1) contains an exhaustive list of circumstances in which a Member State may take open market value as the taxable amount. The fourth question in Case C?621/10 and the fifth in Case C?129/11 ask whether a national provision under which open market value is to be taken as the taxable amount in all transactions between connected parties is permissible in cases other than those listed in Article 80(1).

24. Those questions all seek to ascertain the scope of the option available under Article 80(1), and I shall address them together.

25. The last question referred in each case asks whether the provisions of Article 80(1) have direct effect, and whether they can be applied directly by national courts. It raises different issues, and I shall address it separately.

26. Finally, I shall consider two points which, although not raised in the orders for reference, may assist the referring court in reaching a final decision: in Case C?621/10, the assessment of open market value and, in Case C?129/11, the extent to which the transactions should properly be treated as exempt or taxable.

The scope of the option available under Article 80(1)

27. It seems to me clear — and both the Bulgarian Government and the Commission share that view — that the option available under Article 80(1) of Directive 2006/112 is limited to the circumstances set out unambiguously in its provisions. Consequently, a Member State may not adopt legislation under which the taxable amount is to be the open market value in all transactions between connected persons, whether those circumstances are present or not.

28. First, Article 73 of Directive 2006/112 lays down a clear general rule, to the effect that the taxable amount is to be the actual consideration for the transaction. That consideration is the subjective value: the value actually received, and not a value estimated according to objective criteria. (16) Any provision which derogates from a general rule — as does Article 80 of Directive 2006/112 — must be interpreted strictly. (17)

29. Second, Article 80(1) of Directive 2006/112 states that the purpose of the optional derogation is ‘to prevent tax evasion or avoidance’. That aim is further clarified in recitals 3 in the preamble to Directive 2006/69 — ‘to ensure that there is no loss of tax through the use of connected parties to derive tax benefits’ — and 26 in the preamble to Directive 2006/112 — ‘[t]o

prevent loss of tax revenues through the use of connected parties to derive tax benefits'.

30. When goods or services are supplied at an artificially low or high price between parties who both enjoy a full right of deduction in connection with the transaction — that is to say, when both supplier and customer make only taxable outputs — there is no evasion or avoidance of tax at that stage. As far as the transaction in question is concerned, the tax is entirely neutral for both parties, and will remain so whatever the price charged. Nor can any tax be 'lost' at that stage. It is only when the supply chain comes to an end with the final consumer — or to a partial end with a 'mixed' taxable person enjoying a proportional right of deduction — that an artificially low or high price can lead to a loss of tax revenue. It is only at that point that the total amount of VAT due on the whole supply chain definitively 'crystallises' — and that amount is proportional only to the final price, irrespective of amounts charged earlier in the chain. (18)

31. Third, recitals 3 in the preamble to Directive 2006/69 and 26 in the preamble to Directive 2006/112 state that Member States should be able to intervene 'in specific limited circumstances'. That limitation was made more explicit in Article 11A(6) of the Sixth Directive, which stated that the option could apply 'only in any of the following circumstances'. Although the word 'only' no longer appears in Article 80(1) of Directive 2006/112, it is clear from recital 3 in the preamble to the latter that no material change was made by the recasting of the text.

32. Finally, Article 80(2) of Directive 2006/112 explicitly authorises Member States which exercise the option to *restrict* the categories of suppliers or recipients to whom the measures are to apply. By necessary implication, there is no authorisation to *extend* those categories to, for example, taxable persons who have a full right of deduction.

33. Consequently, Article 80(1)(a), (b) and (c) comprise an exhaustive list of the circumstances in which a Member State may levy VAT on a transaction on the basis of its open market value rather than of the consideration actually paid. Those provisions do not authorise a Member State to take such an approach where the supplier or customer, as the case may be, has a full right of deduction.

34. It follows that a national provision which requires VAT to be levied on the basis of open market value in all cases where the parties are connected is not authorised by the option available under Article 80(1), at least to the extent that it covers cases where the relevant party to the transaction has a full right of deduction.

35. I note in that regard that, in 2010, the Bulgarian Government received a letter of formal notice from the Commission asserting that Article 27(3) of the ZDDS was incompatible with Articles 73 and 80 of Directive 2006/112. It accepts the Commission's complaint and has undertaken to amend the provision by 1 January 2012.

Consequences of incompatibility of national legislation

36. In its last question in each case, the referring court asks whether Article 80(1) of Directive 2006/112 has direct effect, and whether national courts can apply it directly. The Bulgarian Government and the Commission have addressed that question as concerning, in effect, the extent to which Balkan and Sea and/or Provadinvest may rely on Article 80(1) in order to challenge the tax authority's assessments. That, however, does not seem to me to be the best starting-point.

37. From my analysis of the previous questions, I have concluded that a national provision which requires VAT to be levied on the basis of open market value in all cases where the parties are connected is not authorised by the option available under Article 80(1), at least to the extent that it covers cases where the relevant party to the transaction has a full right of deduction. (19)

38. In accordance with consistent case?law, it is for the national court, to the full extent of its discretion under national law, to interpret and apply national law in conformity with EU law. (20) That obligation applies even when other conditions enabling an individual to rely on the direct effect of a directive are absent. (21) Where such an interpretation is not possible, that court must disapply any provision of domestic law to the extent that it is incompatible with EU law. (22)

39. In the first place, therefore, it will be for the national court to seek to interpret Article 27(3) of the ZDDS in such a way as to reconcile it with a correct exercise of the option in Article 80 of Directive 2006/112. If that is possible, then there will be no further issue of compatibility with the directive or of giving direct effect to any of its provisions. If it is not possible, then the national provision must be disapplied.

40. In the latter case, it is necessary to envisage two possibilities. Either the relevant parties to the transactions in the cases in the main proceedings enjoyed a full right of deduction, so that those cases did not fall within any of the circumstances set out in Article 80(1), or they did not enjoy a full right of deduction and the cases fell within those circumstances.

41. If the relevant parties enjoyed a full right of deduction, there is simply no scope for Article 80(1) to have direct effect or to be applied directly to cases to which, on its own terms, it does not apply. By contrast, Article 73 of Directive 2006/112, which has direct effect, (23) can be relevant. Article 80(1) allows Member States to introduce a derogation from the general rule as to the determination of taxable value. In the absence of such a derogating rule, the general rule in Article 73 of Directive 2006/112 must apply. (24) It can therefore be relied upon by taxable persons and applied directly by national courts in order to ensure that, except in cases for which the directive provides for a derogation, the taxable amount is the actual consideration obtained.

42. If, on the other hand, the relevant parties did not enjoy a full right of deduction, the further question arises whether it is the State or the individual who seeks to rely on the direct effect of Article 80(1).

43. In the former case, it must be remembered that a Member State cannot rely, against an individual, on the provisions of a directive or on its own failure validly to exercise an option available under a directive. (25)

44. Where, however, an individual seeks to rely on the direct effect of a directive provision against a Member State which has failed to implement that provision correctly, it is settled case?law that such reliance is, in principle, possible where the provisions of the directive are sufficiently clear, precise and unconditional. (26)

45. In that regard, it may be open to question whether the terms of a merely optional provision which has been incorrectly implemented by a Member State can be described as ‘sufficiently clear, precise and unconditional’ for that purpose.

46. However, I do not think it necessary, or even appropriate, to address that issue in the context of the present cases.

47. It is true that, in theory, the customer in a transaction falling within the circumstances set

out in Article 80(1)(c) of Directive 2006/112, even though he had agreed to pay an artificially inflated price, might still seek to rely, against the tax authority, on the provisions of that paragraph in order to have VAT applied on the basis of the open market value. If such a customer did not himself have a full right of deduction, it would be to his advantage to pay less VAT on the transaction.

48. That is not, however, the case in either of the disputes which gave rise to the requests for a preliminary ruling. According to settled case?law, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. (27) In the present regard, the question is not merely hypothetical in relation to the main proceedings but also rather unlikely to arise in the normal course of events, since it would mean that one of two connected parties who had agreed on an artificial price, with a view to obtaining a joint overall benefit, had gone back on the agreement between them.

49. In those circumstances, I do not propose to consider that hypothesis, but to turn to two final matters which, although not raised by the referring court, may be of relevance to the main proceedings.

Assessment of open market value

50. In any of the circumstances set out in Article 80(1) of Directive 2006/112 Member States may take measures to ensure that the taxable amount is the open market value. One of the conditions for doing so is that the actual consideration should be lower or higher than the open market value — namely ‘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’.

51. In view of that definition, and of the fact that, in Case C?621/10, Balkan and Sea acquired the property concerned at a price which exceeded the licensed valuers’ assessment by less than 0.5%, while Bulgarian legislation provides for five methods of determining open market value, it may still be necessary for the national court to consider whether, on a proper interpretation of the national rules, the price concerned can truly be said to be higher than the open market value.

Taxable or exempt nature of the transactions

52. The Commission queries the tax authority’s assessment of the transactions in Case C?129/11 as comprising both exempt and taxable supplies. I agree that the referring court should examine that assessment in the light of the relevant provisions of Directive 2006/112 and, if appropriate, disapply any national provisions which lead to a result which is not compatible with the directive. The relevant directive provisions are as follows.

53. Article 12 provides:

‘1. Member States may regard as a taxable person anyone who carries out, on an occasional basis, … 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.’

54. Article 135(1) of Directive 2006/112 requires Member States to exempt certain transactions from VAT, including, in particular:

‘(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);

(l) the leasing or letting of immovable property.’ (28)

55. The first question is whether the greenhouses were buildings for the purposes of Article 12(1)(a) of Directive 2006/112, that is to say, whether they corresponded to the definition of ‘any structure fixed to or in the ground’ in the first subparagraph of Article 12(2). That is of course a matter for the national court, and may depend on the precise nature of the construction. However, it seems not unlikely that the greenhouses may have corresponded to that definition, at least if they were steel-framed.

56. If the greenhouses were buildings, each transaction must be treated as a single supply because, for the purposes of VAT, buildings or parts of buildings and the land on which they stand cannot be dissociated from each other. (29)

57. In that case, the next question is whether the supply of land and buildings was ‘before first occupation’ or met such other criteria as may have been prescribed by national law, within the respective two- or five-year limits laid down in the third subparagraph of Article 12(2). In that regard, it seems relevant that Provadinvest argued before the national court that the greenhouses had been in use for over 30 years.

58. If the supply was ‘before first occupation’ or met other validly applicable criteria, it may be regarded as taxable under Article 12(1)(a). If it was not, it must be exempted under Article 135(1)(j), subject to the exercise of any possible right to opt for taxation.

59. If the greenhouses were not buildings for the purposes of Article 12(1)(a), it must still be considered whether the transactions are to be regarded as distinct transactions whose VAT treatment is to be assessed separately or as single complex transactions comprising a number of elements.

60. According to settled case?law, where a transaction comprises a bundle of elements, regard must be had to all the circumstances in order to determine whether there are two or more distinct supplies or one single supply. Although every transaction must normally be regarded as distinct

and independent, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. There is a single supply in particular where two or more elements supplied are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split, or where one or more elements constitute the principal supply, while other elements are ancillary. It will be for the national court to determine whether that is so in the main proceedings. (30)

61. If the national court decides in that light that there were separate supplies of land and of other elements, the tax authority's approach would appear to be correct.

62. If, however, it decides that each transaction was a single complex supply comprising a principal element and ancillary elements, it seems likely that the principal element was the supply of land, and the VAT treatment should be based on that supply.

63. In either of those cases, it may have to be determined whether the land was building land defined as such by the Member State in accordance with Article 12(3) of Directive 2006/112. If so, the supply may be taxed under Article 12(1)(b). If not, it must be exempted under Article 135(1)(k), again subject to the exercise of any possible right to opt for taxation.

Conclusion

64. I am therefore of the opinion that the Court should answer the questions raised by the Administrativen Sad Varna to the following effect:

Article 80(1)(a), (b) and (c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax comprise an exhaustive list of the circumstances in which a Member State may levy VAT on a transaction on the basis of its open market value rather than of the consideration actually paid.

Those provisions do not authorise a Member State to take such an approach where the supplier or customer, as the case may be, has a full right of deduction.

A national provision which requires VAT to be levied on the basis of open market value in all cases where the parties are connected is incompatible with Article 80(1) of Directive 2006/112, at least to the extent that it covers cases where the relevant party to the transaction has a full right of deduction.

It is for the national court, to the full extent of its discretion under national law, to interpret and apply such a national provision in conformity with Article 80(1) of Directive 2006/112. Where such an interpretation is not possible, that court must disapply the provision to the extent that it is incompatible with that paragraph.

Article 73 of Directive 2006/112 has direct effect and can be relied upon by taxable persons, and applied directly by national courts, in order to ensure that, except in cases for which the directive provides for a derogation, the taxable amount is the actual consideration obtained.

If a Member State has not validly exercised the option available under Article 80(1) of Directive 2006/112, it may not rely on the provisions of that paragraph against a taxable person in order to tax a transaction on the basis of its open market value.

ANNEX I

See point 38 et seq. of the Opinion

ANNEX II

See point 55 et seq. of the Opinion

1 – Original language: English.

2 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – Previously Article 11A(1)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, amended on numerous occasions; 'the Sixth Directive').

4 – Those articles lay down specific rules for determining the taxable amount in cases of, respectively, disposal or retention of business assets, private use of business assets or services, transfer to another Member State and supply by a taxable person of a service for the purposes of his business.

5 – Articles 167 to 169 concern the right of taxable persons to deduct input VAT on supplies used for their taxable outputs; Articles 170 and 171 concern refunds of VAT in certain cross-border transactions; Articles 173 to 175 lay down a system of proportional deduction where taxed inputs are used for both taxed and exempt outputs; and Articles 176 and 177 provide for the possibility that some categories of input VAT may not be deductible.

6 – Articles 132, 135 and 136 provide for certain categories of supply to be exempt from VAT (without deduction of input tax) in all Member States (see also point 54 below); the other articles cited allow individual Member States to continue to apply certain other such exemptions, by way of derogation.

7 – In 2006, as Article 11A(6) of the Sixth Directive; see Article 1(3) of Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations (OJ 2006 L 221, p. 9). recitals 1 and 3 in the preamble to Directive 2006/69 set out its aim of replacing a number of derogations granted to individual Member States by a general enabling provision; Member States should be able to intervene as regards the value of supplies and acquisitions in specific limited circumstances, to ensure that there is no loss of tax through the use of connected parties to derive tax benefits. See also the explanatory memorandum accompanying the proposal for that directive (COM(2005) 89 final), in particular at pp. 5 and 6.

8 – Under Articles 167 and 168 of Directive 2006/112, essentially, taxable persons have a right to deduct, at the time when it becomes chargeable, any VAT due or paid on supplies made to them,

provided that those supplies are used for the purposes of their taxed output transactions. VAT is thus fiscally neutral for the traders concerned (see also Case C?174/08 *NCC Construction Danmark* [2009] ECR I?10567, paragraph 39 et seq. and case?law cited).

9 – Since the right to deduct under Articles 167 and 168 of Directive 2006/112 is confined to cases where the supplies are used for the purposes of taxed output transactions, supplies used for the purposes of exempt outputs do not give rise to deduction. Where the use of input supplies cannot be allocated to particular output supplies made by a taxable person whose outputs are both taxed and exempt, Article 173 et seq. of Directive 2006/112 provide for proportional deduction determined by the ratio between taxed and exempt supplies.

10 – It may be noted that property transactions (sales, leases or lets) may be either taxable or exempt pursuant to Article 135(1)(j) to (l) or Article 137(1)(b) to (d) — see point 54 below.

11 – The value of the Bulgarian lev was, at the relevant time, approximately half that of the euro.

12 – From which it may be deduced that the transaction was not exempt pursuant to Article 135(1)(j) or (k), or else that an option for taxation pursuant to Article 137(1)(b) or (c) had been exercised.

13 – The relevant rate of VAT being 20%.

14 – The reference to a ‘correction’ pursuant to those articles is perhaps not the best choice of wording, in that the articles cited concern proportional deduction and restrictions on the right of deduction — see footnote 5 above.

15 – See footnote 14 above.

16 – See Case C?412/03 *Hotel Scandic Gåsabäck* [2005] ECR I?743, paragraph 21 and case?law cited; Case C?285/10 *Campsa Estaciones de Servicio* [2011] ECR I?5059, paragraph 28.

17 – See, for example, Case C?41/09 *Commission* v *Netherlands* [2011] ECR I?831, paragraph 58 and case?law cited.

18 – See Article 1(2) of Directive 2006/112.

19 – For a succinct summary of the reasoning which follows, in tabular form, see Annex I to this Opinion.

20 – See, for example, Joined Cases C?395/08 and C?396/08 *Bruno and Others* [2010] ECR I?5119, paragraph 74.

21 – See, to that effect, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraphs 26 and 27.

22 – See, for example, *Bruno and Pettini and Others*, cited in footnote 20 above, paragraph 74.

23 – See Case C?62/00 *Marks & Spencer* [2002] ECR I?6325, paragraph 47.

24 – See *Campsa Estaciones de Servicio*, cited in footnote 16, paragraph 40.

25 – See, for example, Case C?227/09 *Accardo and Others* [2010] ECR I?10273, paragraphs 44 to 47 and case?law cited. In order to use such an option, Member States must make the choice to rely on it (see Joined Cases C?180/10 and C?181/10 *S?aby and Others* [2011] ECR I?8461,

paragraph 33).

26 – See, for example, Case C?150/99 *Stockholm Lindöpark* [2001] ECR I?493, paragraphs 30 and 31 and case?law cited.

27 – See, for example, the order in Case C?155/11 PPU *Mohammed Imran* [2011] ECR I?5095, paragraph 21 and case?law cited.

28 – The requirement to exempt is not absolute in these cases, as, under Article 137(1)(b) to (d), Member States may allow taxable persons a right of option for taxation in each of these cases. For a succinct summary of the reasoning which follows, in tabular form, see Annex II to this Opinion.

29 – Case C?400/98 *Breitsohl* [2000] ECR I?4321, paragraph 50.

30 – See, for example, Joined Cases C?497/09, C?499/09, C?501/09 and C?502/09 *Bog and Others* [2011] ECR I?1457, paragraph 51 et seq. and case?law cited.