OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 11 September 2012 (1)

Case C?299/11

Staatssecretaris van Financiën

v

Gemeente Vlaardingen

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

(VAT – Taxable transactions – Application by a taxable person for the purposes of his business of goods produced ‘in the course of such business’)

1. ‘There is no such thing as a good tax.’ This pithy quote is widely attributed to Sir Winston Churchill. The present case then raises the question whether, in the context of what is referred to as ‘deemed supply’, the Netherlands authorities’ taxing of the land as such was – when viewed from the taxable person’s perspective – if not a ‘good tax’, at least a ‘lawful tax’ under the Sixth VAT Directive. (2)

2. There appears to be a great deal of uncertainty in the Netherlands regarding the interpretation of and the applicability of the Dutch rules implementing (parts of) the provisions concerning supplies which may be treated as supplies made for consideration. Indeed, the outcome of the present reference for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) could mean that businesses have paid too much VAT in the past because the value of own land has been included in the taxable amount for the deemed supply. (3) The Hoge Raad therefore decided to seek guidance concerning the interpretation of the relevant provision of the Sixth Directive: Article 5(7)(a). The reference has arisen in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and the Gemeente Vlaardingen (the Municipality of Vlaardingen; ‘the Municipality’).

3. In particular, the question arises whether the Sixth Directive permits the tax authorities to treat certain transactions as a supply for consideration (a deemed supply), assimilating to ‘the supply of a good’ the production, by a third party, of an immovable property consisting of a (building) work completed on the taxable person’s (the Municipality’s) own land, and to include in the VAT charge the value of the land even if that land was previously used by that taxable person for exempt business purposes (renting out of pitches to sports associations) and the taxable person did not enjoy a VAT deduction in respect of that land. (4)

I – **Legal framework**

A – *European Union law*

4. Article 5(7)(a) of the Sixth Directive provided as follows:

‘Member States may treat as supplies made for consideration:

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

5. Article 11(A)(1)(b) of the Sixth Directive provided as follows with regard to the taxable amount:

‘A. *Within the territory of the country*

1. The taxable amount shall be:

(b) in respect of supplies referred to in Article 5(6) and (7), the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply’.

6. With effect from 1 January 2007, the Sixth Directive was replaced by Council Directive 2006/112/EC. (5) Article 18 of Directive 2006/112 corresponds, in essence, to Article 5(7) of the Sixth Directive.

B – *National law*

7. Article 3(1)(h) of the Wet op de omzetbelasting 1968 (Law on Turnover Tax 1968) (‘the Wet OB’) initially read as follows when the Wet OB entered into force on 1 January 1969:

‘1. Supply of goods shall mean:

…

(h) the use for business purposes of goods produced in-house in cases where, had the goods been acquired from a trader, the tax on the goods would not have been deductible or would not have been wholly deductible; goods which are produced to order, with the materials being provided, shall be treated as goods produced in-house.’

8. Article 3(1)(h) of the Wet OB was later supplemented and, at the material time, read as follows: (6)

‘1. Supply of goods shall mean:

…

(h) the use for business purposes of goods produced in-house in cases where, had the goods been acquired from a trader, the tax on the goods would not have been deductible or would not have been wholly deductible; goods which are produced to order, with the materials, *including land* , being provided, shall be treated as goods produced in-house; *excluded from the application of this point is land which has not been built on other than building land as described in Article 11(4).*’

9. In the Netherlands this is called ‘the integration tax’.

10. Under Article 8(3) of the Wet OB:

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

II – **Facts and the question referred**

11. The Municipality is a trader within the meaning of the Wet OB and owns several sports complexes, including a number of playing fields. For years, it has been renting out those grass pitches to sports associations, exempt from VAT.

12. In 2003 the Municipality instructed contractors to replace the grass pitches with korfball pitches and football pitches with an artificial grass surface, and with handball pitches with an asphalt surface (‘the pitches’).

13. After that work had been completed in 2004, the pitches were again rented out by the Municipality exempt from VAT, and in fact they were rented out to the very same sports associations as before.

14. The amount charged by the contractors to the Municipality in respect of the work carried out by them totalled EUR 1 547 440, of which EUR 293 993 was for VAT. The Municipality did not immediately deduct the latter amount from its turnover tax return.

15. The Inspector regarded the renting out of the pitches by the Municipality – an exempt supply under Article 11(1)(b) of the Wet OB – as the use for business purposes of goods produced to order, with the materials and, in particular, the (sub) soil ‘being provided’, within the meaning of Article 3(1)(h) of the Wet OB. According to the Inspector, that meant that the Municipality is considered to have supplied the pitches, in respect of which VAT has become payable, subject to the deduction of the VAT charged to the Municipality by the contractors. The Inspector then issued the Municipality with a notice of additional assessment in respect of the period from 1 January to 31 December 2004. The Municipality lodged an objection against that assessment, but it was upheld by decision of the Inspector.

16. The action brought by the Municipality contesting that decision was dismissed as unfounded by the Rechtbank te ’s-Gravenhage (District Court, The Hague). The Municipality then lodged an appeal with the Gerechtshof te ’s-Gravenhage (Regional Court of Appeal, The Hague) against the decision of the Rechtbank.

17. Before the Gerechtshof, the Inspector took the position that the notice of additional assessment in question was set too high. It was considered possible, therefore, for the purposes of the appeal, to work on the basis of a notice of additional assessment for VAT in the amount of EUR 116 099, calculated as follows:

Costs of construction of the pitches

Value of ground

Taxable amount

EUR 1 547 440

EUR 610 940 +

EUR 2 158 380

19% VAT on EUR 2 158 380

Deduction in respect of construction

VAT payable

EUR 410 092

EUR 293 993 –

EUR 116 099

18. On 26 June 2009 the Gerechtshof set aside the decision of the Rechtbank, declared the action contesting the Inspector's decision to be well founded, and set aside that decision as well as the additional assessment. In particular, the Gerechtshof ruled that Article 3(1)(h) of the Wet OB is contrary to Article 5(7)(a) of the Sixth Directive, in that it also regards as a supply for the purposes of VAT the use of goods which the trader has had produced by third persons from materials provided by the trader, including land. The Staatssecretaris van Financiën lodged an appeal in cassation against that ruling before the Hoge Raad der Nederlanden.

19. Against that background, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court:

'Must Article 5(7)(a) of the Sixth Directive, read in conjunction with Articles 5(5) and 11(A)(1)(b) [thereof], be interpreted as meaning that, upon the occupation of immovable property by a taxable person for exempt purposes, a Member State may charge VAT in a case where:

– that immovable property consists of a (building) work completed on the taxable person's own land and to his own order by a third person for consideration, and

– that land was previously used by the taxable person for (the same) exempt business purposes, and the taxable person did not previously enjoy a VAT deduction in respect of that same land,

with the result that (the value of that) same land becomes included in the VAT charge?'

III – **Appraisal**

A – *Principal arguments of the parties*

20. The Municipality submits that the question referred should be answered in the negative. It contends that, where a taxable person – such as the contractor in this case – produces a good with the materials provided by his customer (the Municipality), production of the good should be considered to have taken place 'in the course of [the taxable person's] business' and not in the course of the customer's business. In so far as that production of the good is subject to VAT under Article 5(5) of the Sixth Directive – implemented by Article 3(1)(c) of the Wet OB – the same good

may not, at the same time, be treated (7) as having been produced in the course of the business of the customer.

21. The Municipality also states that Article 5(7)(a) of the Sixth Directive seeks to ensure equal fiscal treatment as between taxable persons who purchase goods from another taxable person (‘goods acquired’) and taxable persons who produce goods in the course of their own business (‘goods produced’). In order to ensure equal treatment, it is sufficient that the VAT deducted be restored. It is not necessary, however, for the tax burden to be distributed equally between goods acquired and goods produced. In support of its position, the Municipality is also relying on legislative documents which led to the adoption of the Second Council Directive 67/228/EEC, (8) as well as the Sixth Directive.

22. In any event, to impose VAT in the way in which this was done in the case before the referring court – where it was imposed on the land-value of the pitches belonging to the taxable person and where those pitches are applied by the latter for the purposes of an exempt business – would considerably increase the tax burden on that taxable person and would be in breach of fiscal neutrality, a principle inherent in the VAT system.

23. The Netherlands Government submits that, by using terms such as ‘produced, constructed, extracted, processed, purchased or imported’ in Article 5(7)(a) of the Sixth Directive, the EU legislature chose to employ a very broad formulation. In addition, the expression ‘in the course of such business’ shows that it is possible to place on the same footing (i) ‘the supply of a good’ and (ii) ‘the production of a good’ by a third party with own materials put at its disposal, as soon as it becomes apparent that that good was ordered by the taxable person in the course of his business.

24. The Netherlands Government contends that Article 5(7)(a) of the Sixth Directive succeeded Article 5(3)(b) of the Second Directive, which provided that ‘the following shall be treated as supply against payment: … the use for the needs of his undertaking, by a taxable person, of goods produced or extracted by him or by another person on his behalf’. The terms ‘produced or extracted by him or by another person on his behalf’ were replaced in the Sixth Directive by more broad terms. There can be no doubt, therefore, that the Sixth Directive allows certain transactions to be treated as supplies for consideration, as was done in this case.

25. Besides, in spite of the fact that – unlike Article 5(3)(b) of the Second Directive – Article 5(7)(a) of the Sixth Directive does not contain the terms ‘by him or by another person on his behalf’, it is clear that Article 5(7)(a) encompasses all the situations in which a taxable person acquires goods, that is to say, it also covers a situation where the work, carried out on the taxable person’s behalf, took place on the pitches owned by that person. However, what that provision does not cover is a situation where that taxable person has had a good produced by a third party with material which was already in the possession of that third party.

26. Next, the Netherlands Government states that, in a case such as this, treating the transaction at issue as a supply for consideration is consistent with the principle of the neutrality of VAT: when a third party produces goods on a taxable person’s behalf with materials belonging to the latter, that ‘assimilation’ ensures that the value of the goods (9) will be taken into account when VAT is calculated. In the light of the principle of fiscal neutrality, this is necessary in order to ensure that the tax burden is the same as where the taxable person produces the goods with his own material or where a third party produces the goods with his material and then sells those goods to the taxable person.

27. Lastly, the Netherlands Government argues that the treatment of the transaction at issue as a supply for consideration is valid even if the land of the taxable person put at the disposal of a third party for the purposes of the work carried out on the taxable person’s behalf was previously

used for the taxable person's exempt activities.

28. Accordingly, the Netherlands Government submits that the question referred should be answered to the effect that Article 5(7)(a) of the Sixth Directive is to be interpreted as allowing a Member State to categorise as an operation comparable to the supply of a good the completion and supply by a third party, on the taxable person's behalf and on his own land, of an immovable property consisting of a (building) work and, as a consequence, to take it into account for the purposes of VAT. It makes no difference in that regard that the taxable person previously used the land for exempt business purposes and that he did not previously enjoy a VAT deduction in respect of that land.

29. The Commission argues, in essence, that the Court should state in answer to the question referred that Article 5(7)(a) of the Sixth Directive does not permit Member States to treat as supplies made for consideration the application by a taxable person, for the purposes of the exempt transactions, of a good produced in the course of that person's business by a third party with materials being provided, if the materials have already previously been applied to those non-taxable needs of the taxable person.

B – *Analysis*

30. By its question, the Hoge Raad is asking whether Article 5(7)(a) of the Sixth Directive, read in conjunction with Articles 5(5) and 11(A)(1)(b) thereof, should be interpreted as meaning that, upon the occupation of immovable property (sports pitches) by a taxable person (the Municipality) for exempt purposes – that is to say, the renting out of those pitches to sports associations – the Netherlands tax authorities may charge VAT where those sports pitches consist of a work completed on the Municipality's own land and to its own order by a third person for consideration, even though that land was previously used by the Municipality for the same exempt purposes, and the Municipality did not previously enjoy a VAT deduction in respect of that land, with the result that the value of the land becomes included in the VAT charge. (10)

31. First of all, I would preface my remarks by recalling that, according to the structure of the system introduced by the Sixth Directive, input taxes on goods or services used by a taxable person for his taxable transactions are deductible. The deduction of input taxes is linked to the collection of output taxes. (11) Where goods or services acquired by a taxable person are used for the purposes of transactions which are exempt or which do not fall within the scope of VAT, no output tax can be collected and no input tax can be deducted. (12)

32. In such a situation, it is clear that the taxable person may not recover VAT paid in the course of purchasing goods of which he makes use.

33. On the other hand, some taxable persons do not purchase goods which they use in the course of their business from other taxable persons (option 1); instead, they prefer to produce those goods themselves (option 2); or they choose to have a third party produce them at their premises (option 3, which is the one relevant in this case).

34. Goods which are acquired in accordance with option 3 are sometimes used for exempt business purposes. That was precisely the situation here.

35. When we consider the relevant national law, it can be deduced from the legal history of Article 3(1)(h) of the Wet OB that, through the introduction of that provision in 1969, the Dutch legislature was seeking to implement, in the Wet OB, the provisions of Article 5(3)(b) of the Second Directive.

36. Article 5(3)(b) stated that ‘the following shall be treated as supply against payment: … (b) the use for the needs of his undertaking, by a taxable person, of goods produced or extracted by him or by another person on his behalf’.

37. Article 5(3)(b) of the Second Directive was taken over in the Sixth Directive. However, it should be pointed out that the terms in which the two provisions are framed do not entirely correspond.

38. Article 5(7)(a) of the Sixth Directive (13) provides that ‘Member States may treat as supplies made for consideration: (a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the [VAT] on such goods, had they been acquired from another taxable person, would not be wholly deductible’. In other words, Article 5(7)(a) covers only transactions which are carried out ‘for the purposes of the business of the taxable person’ and the phrase from Article 5(3)(b) of the Second Directive that goods may be produced or extracted ‘by another person on his behalf’ has been removed. It may be added that Article 5(7)(a) is also applicable to goods which have been ‘constructed, processed, purchased or imported’ for the purposes of the business of the taxable person.

39. Suffice it to say that, in spite of that slight textual difference, I fail to see why and how Article 5(7)(a) of the Sixth Directive would seek to have a different purpose or effect vis-à-vis Article 5(3)(b) of the Second Directive. Indeed, there is nothing in the Sixth Directive to suggest this.

40. It follows from the documents before the Court that, in the present case, the tax inspector regarded the first occupation of the pitches – that is to say, the renting out of those pitches – by the Municipality as the supply of goods within the meaning of Article 3(1)(h) of the Wet OB, since it concerns the use, for business purposes, of the pitches, which had been produced by third persons to the order of the Municipality, with the latter providing its own natural grass pitches. The term ‘goods produced’ in Article 3(1)(h) of the Wet OB also covers structures fixed to or in the ground.

41. Moreover, the application of Article 3(1)(h) of the Wet OB requires that a work of construction, together with the land, must be regarded as a single item of (immovable) property. On that basis, the tax inspector included the value of the land in the taxable amount in respect of the pitches, with the result that, ultimately, VAT is also being charged on the value of the Municipality’s old natural grass pitches.

42. The question arises, therefore, as to whether Article 3(1)(h) of the Wet OB, applied to the present situation, is compatible with the powers which were granted to Member States under Article 5(7)(a) of the Sixth Directive.

43. In particular, as the referring court makes clear, certain questions arise as to the meaning and precise scope of Article 5(7)(a) of the Sixth Directive in the circumstances of the present case.

44. At first sight, it would appear that so far the Court of Justice has been asked only once about the rule governing the treatment, pursuant to Article 5(7)(a) of the Sixth Directive, of certain transactions as supplies for consideration: in *Gemeente Leusden and Holin Groep.* (14) In that judgment, however, the Court clearly focused on other rules laid down in the Sixth Directive. As regards the provision which concerns us here, the Court limited itself to stating that Article 5(7)(a), just like Article 20(2) of the Sixth Directive, has the ‘economic effect’ of obliging a taxable person to pay amounts equivalent to the deductions to which he was not entitled (paragraph 90).

45. As regards the aim of Article 5(7)(a) of the Sixth Directive, which relates to the supply of ‘goods’, I would say that – just like the aim of the similar provision regarding self-supplies of ‘services’: Article 6(3) (15) – it is to prevent distortion of competition. (16) The taxable person who carries out exempt activities may either purchase the goods used for those activities from third parties, and pay on that purchase VAT which is not deductible, or he may produce those goods himself, in which case, under Article 5(7)(a) of the Sixth Directive, he must pay VAT, likewise not deductible, on the value of those goods. As the Netherlands Government and the Commission correctly point out, a taxable person who carries on an activity exempt from VAT, and who may not therefore deduct the tax paid at the previous stage on goods acquired for the purposes of that activity, would, by producing those goods in the course of his business, enjoy an economic advantage over a trader who carries out the same non-taxable activity but who cannot – or does not want to – produce the goods necessary for that purpose himself. Provision was therefore made for the taxable person producing the goods in the course of his business to be subject to VAT also.

46. Paragraph 7 of Annex A to the Second Directive makes it clear that Article 5(3)(b) of that directive (and thus also Article 5(7)(a) of the Sixth Directive) seeks to ensure equality of taxation between, on the one hand, goods purchased and intended for the needs of the business, and in respect of which there is no entitlement to immediate or complete deduction, and, on the other hand, goods produced or extracted by the taxable person or on his behalf by a third person, which are also used for the same needs – which is the situation in the main proceedings.

47. Indeed, the above clearly constitutes an application of the principle of fiscal neutrality, which is inherent in the VAT system (17) and constitutes nothing less than a fundamental principle of that system. (18) The primary purpose of that principle is to ensure the equal treatment of taxable persons. (19)

48. The next point I would make is that the present case raises the question whether the sports pitches at issue, after being re-surfaced with artificial grass or asphalt, may be regarded as goods ‘produced’ anew, within the meaning of Article 5(7)(a) of the Sixth Directive – which appears to be the position of the Netherlands tax authorities and the Netherlands Government, as well as of the referring court – or whether they are to be regarded as the same goods, which have simply been improved or developed.

49. I would say that it is far from obvious that the sports pitches constitute goods which were ‘produced’ anew. In fact, I am not at all convinced that they actually do.

50. In that connection, the order in *V.O.F. Dressuurstal Jespers* (20) recalls that, in *Van Dijk’s Boekhuis* (21) – after pointing out that ‘in common usage the concept of making an article implies the creation of an article that did not previously exist’ – the Court held that the production of goods from customers’ materials only takes place where a contractor produces a new article from the materials entrusted to him by his customer.

51. I would add that the Court also made it clear in *Van Dijk’s Boekhuis* (22) that a new article is produced when the work of the contractor results in an article ‘whose function, according to generally accepted views, is different from that of the materials provided. It is for the national court, having regard to the use which may be made of the article, to decide whether or not a new article has been produced’.

52. Prima facie it would appear that that was not the case here, in so far as it is difficult to see how the sports pitches – by virtue of being covered by artificial grass or by asphalt – became goods which did not previously exist.

53. In fact, it should be added that, in *Van Dijk's Boekhuis*, (23) the Court explained that repairs (at issue in that case), however radical, which simply restore to the article entrusted to the contractor the function which it previously had, without resulting in the creation of a new article, do not amount to the production of goods from customers' materials.

54. In spite of the fact that the work done on the sports pitches at issue had more impact than simple reparation or improvement, to my mind the fact remains that these are still sports pitches rented out to the very same sports associations – and so they conserve the same function within the meaning of the case?law cited above. (24)

55. Be that as it may, it will not be for the Court of Justice but for the referring court to assess that particular issue in detail, inter alia, having regard to the use which is made of the new pitches, and make a finding on the facts. Accordingly, the present opinion must be based on, and limit itself to, the facts as found by the referring court and as set out in the order for reference.

56. It would appear from the order for reference that the Hoge Raad found that these were goods produced anew.

57. I would say that the referring court may well have come to that conclusion because of the scale of the work done on the sports pitches. In that connection, it is worth mentioning that the costs related to the laying of the artificial grass surface and of the asphalt surface would appear to amount to almost two and a half times the value of the land.

58. The Commission is right when it points out in that respect that the referring court should perhaps reassess that particular issue – not least because, if the sports pitches at issue in the main proceedings were, despite everything, to be definitively assessed by the referring court as not constituting new goods, then it would in any event be impossible to have recourse to Article 5(7)(a) of the Sixth Directive.

59. In consequence, the following considerations are relevant only if the referring court confirms that the new sports pitches are indeed to be regarded as goods produced anew, within the meaning of Article 5(7)(a) of the Sixth Directive.

60. As the Commission correctly suggested, the next question is whether Article 5(7)(a) of the Sixth Directive is also applicable to goods covered by the second part of Article 3(1)(h) of the Wet OB: 'goods which are produced to order, with the materials, *including land …*'. (25)

61. In my view, the answer is, in principle, yes. The expression 'in the course of such business' in Article 5(7)(a) of the Sixth Directive does not necessarily cover only goods produced by the business itself. Undoubtedly, that expression may also cover goods produced by a third party with the materials provided by the taxable person.

62. However, in order to avoid double taxation, it is necessary to take account – in the context of calculating the amount due – of the fact that the taxable person will have already paid VAT on the invoice established by the third party for the production of his goods. This, it would appear, is what the Netherlands tax authorities did in the case before the referring court. They took into account the fact that an invoice had already been paid with VAT.

63. Indeed, as regards the treatment, pursuant to Article 5(6) and (7) of the Sixth Directive, of certain transactions as supplies for consideration, that treatment takes place at the moment when the good (or service) produced in the course of a business is applied by the taxable person for the purposes of his exempt activities.

64. It is my belief that, contrary to the position defended by the Netherlands Government, in a case such as this – where, before their transformation or integration into a new good, the materials had already been applied by the taxable person (the Municipality) for the purposes of his exempt activities – the tax authorities must take this fact into account in the context of the application of Article 5(7)(a) of the Sixth Directive. In other words, the value of those materials (the land as such) may no longer be included in the basis of assessment for the purposes of the calculation of VAT.

65. At the hearing, the Commission put forward a good example in this regard. Let us suppose that the Municipality does not own sports pitches, but would like to do so in order to rent them out. In such circumstances, two situations are conceivable: either (a) it buys sports pitches which are ready for use and thus pays VAT on the purchase price, which would include the value of the land and the cost price of the works necessary to develop those pitches; or (b) the Municipality owns land which is available for use. Let us suppose that, in situation (b), the Municipality owns land in a forest. Thus, it could prepare and develop that land in order to convert it into sports pitches. Once those sports pitches are rented out, that is, applied by the taxable person for the purposes of his business, with the application of Article 5(7)(a) of the Sixth Directive, VAT would also be due for the whole – including the value of the land.

66. To my mind, that corresponds to identical tax treatment of two situations: purchase of ready-for-use sports pitches, on the one hand, and development of these on one's own land, on the other.

67. However, in the case before the referring court, the land in question is not only currently in use for sports pitches, but was also used for those purposes in the past. The fact that the sports pitches at issue have for years been rented out to (the same) sports associations is clear from the documents before the Court.

68. It follows that those pitches have already been applied by the Municipality for the purposes of its business. What is important is that the application of the land by the taxable person for the purposes of his business may not be construed more than once as a supply made for consideration.

69. Otherwise, a risk of double taxation and a risk of endangering the principle of fiscal neutrality would arise. As the Commission correctly pointed out at the hearing, if the Municipality had cleared its forest of trees and, in the first instance, had developed the corresponding land and covered it with a simple natural grass surface in order to convert it into sports pitches, and later, in the second instance, it had decided after some years to cover it with artificial grass – then, on the Netherlands Government's interpretation, both those transactions would be hit by VAT. It follows that, according to that government, VAT should be levied on the value of the land twice.

70. In my view, therefore, the Member States should not be allowed, for the purposes of the application of Article 5(7)(a) of the Sixth Directive, to take account of the value of the materials where these have already been applied by the taxable person in the past for the purposes of his business.

71. At the hearing, the Netherlands Government argued that the VAT system was, in any event, not ideal. (26) However, I consider (as does the Commission) that in case of doubt, where different

interpretations are possible, it is necessary to defend the interpretation which best enables double taxation to be avoided.

72. Similarly, the Netherlands Government submitted at the hearing that, in any event, the approach I advocate in this Opinion is not relevant here in so far as there was no double taxation in the case before the referring court, because VAT on the sports pitches in question had never been paid.

73. The Municipality sought to refute what the Netherlands Government had said about the VAT not having been paid on the land. It argued that – in spite of the fact that the sports pitches had already been developed a long time ago – the fact remains that, under the regime applicable at the time, the Municipality had also paid the integration tax. Although Article 3(1)(h) of the Wet OB, in the version currently in force, provides for a derogation for land which is not building land, that derogation was not possible at the material time. The Municipality was adamant, therefore, that it had paid VAT on the land as well as on the cost of developing that land and converting it into the original sports pitches.

74. Suffice it to say that, in my view, the relevant criterion is a different one. The key question is not whether or not VAT had already been paid on those pitches, but whether the pitches (the materials) had already been applied by the taxable person in the past for the purposes of his business.

75. As the sports pitches at issue had already been rented out ‘for years’ before their improvement, the situation in the case before the referring court is completely different, from an economic point of view, to the situation which would come about if the Municipality were to buy new pitches from a third party today. It is my belief, therefore, that the situation in the main proceedings should not be treated as a supply for consideration. As the Commission correctly pointed out, such a conclusion is entirely consistent with the VAT system.

76. Indeed, the only economic activity which was carried out was the laying of the artificial grass surface and the asphalt surface on behalf of the Municipality. VAT was levied on that activity, a tax which the Municipality could not deduct in so far as its own activity – renting out the pitches to sports associations – is exempt. Thus, no other good or service was produced or supplied which would be subject to VAT.

77. Before concluding, I would first observe that the above finding is not called into question by Article 5(5) of the Sixth Directive, to which the preliminary question also refers. Under that provision, ‘Member States may consider the handing over of certain works of construction to be supplies within the meaning of paragraph 1.’

78. In my view, however, the Commission is correct in pointing out that Article 5(5) of the Sixth Directive has no bearing on the questions raised in the present case. I would add that, in any event, the referring court has not explained why it decided to refer to it.

79. Nor, secondly, is my assessment called in question by Article 11(A)(1)(b) of the Sixth Directive, which is likewise referred to in the preliminary question. The latter provision merely defines what ‘the taxable amount’ is to mean under the Sixth Directive. Indeed, it states that, in respect of supplies referred to in Article 5(6) and (7), the taxable amount is to be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply.

80. Suffice it to point out that the application of Article 11(A)(1)(b) of the Sixth Directive is predicated upon the existence of the situation referred to in Article 5(7)(a).

81. It follows from all the foregoing considerations that Article 5(7)(a) of the Sixth Directive should be interpreted as meaning that, upon the occupation of immovable property by a taxable person for exempt purposes, a Member State may charge VAT where that immovable property consists of a (building) work completed on the taxable person's own land and to his own order by a third person for consideration, with the result that (the value of) that land becomes included in the VAT charge – unless the land in question has already been applied in the past for the same exempt purposes of his business.

IV – **Conclusion**

82. For the reasons given above I am of the view that the question referred by the Hoge Raad der Nederlanden should be answered as follows:

Article 5(7)(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 should be interpreted as meaning that, upon the occupation of immovable property by a taxable person for exempt purposes, a Member State may charge VAT in a case where:

that immovable property consists of a building work completed on the taxable person's own land and to his own order by a third person for consideration,

with the result that the value of that land becomes included in the VAT charge;

unless the land in question has already been applied in the past for the same exempt purposes of his business.

1 – Original language: English.

2 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended.

3 – See PricewaterhouseCoopers, *Should own land be included in the taxable amount?*, 20 October 2011.

4 – For more detail, see the factual background of the case and the full wording of the question referred in point 11 et seq. below.

5 – Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). Directive 2006/112 replaced, as from 1 January 2007, European Union law on VAT, including the Sixth Directive.

6 – Changes in italics.

7 – Under Article 5(7)(a) of the Sixth Directive, implemented by Article 3(1)(h) of the Wet OB.

8 – Directive of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967(I), p. 16).

9 – Here, the property value of the land/sports pitches.

10 – Of the national cases relating to Article 5(7)(a), the closest which my research has allowed me to find is the UK House of Lords case in: *Robert Gordon's College v Customs and Excise Commissioners* [1996] 1 WLR 201 (HL) [VAT – Supply of goods or services – Taxpayer supplying exempt educational services – Development of land for use as school playing fields – Contractors' charges for development – Taxpayer granting lease to wholly owned subsidiary company – Grant of non-exclusive licence for use of playing fields by taxpayer – Whether self-supply by taxpayer – Whether development charges deductible as input tax – The Sixth Directive Arts 5(7)(a), 6(3)]. In that connection, see also McKay, H., 'Back to College', *British Tax Review BTR* 321, 1996, available via Westlaw UK: as Lord Hoffmann said, Articles 5(7)(a) and 6(3) permit the self-supply of goods and services to be treated as a taxable transaction where, *had the goods or services been acquired from a third person*, VAT on them would not have been wholly deductible. The italicised hypothesis could apply only if goods or services had not actually been received from a third person but, in fact, had been brought into existence (like the building constructed on his own land) by the taxpayer himself. If the goods or services have been acquired from a third person, then the question of whether or not the input tax payable on that acquisition is deductible is to be determined in the ordinary way; that is to say, by determining whether it can be attributed to a taxable supply. There is no room for any hypothetical determination of what the position would have been if the goods or services had been acquired from a third person. The purpose of Articles 5(7)(a) and 6(3) is to permit legislation by Member States to prevent the distortions which would occur in the market if a taxpayer could gain a tax advantage by acquiring goods or services in one way rather than another: that is to say, by supplying them to himself rather than acquiring them from a third party. In *Robert Gordon's College*, the use which the College made of the new sports ground was pursuant to services (the licence) supplied to it by a third party (Countesswells). In Lord Hoffmann's opinion, therefore, there could be no room for a self-supply charge within the terms of the Sixth Directive. Accordingly, the italicised hypothesis could not apply.

11 – In short, output tax is payable on the goods or services supplied by the person carrying on a business and input tax is payable on goods or services supplied to that person for the purposes of that business.

12 – See Case C?184/04 *Uudenkaupungin kaupunki* [2006] ECR I?3039, paragraph 24, and Case C?72/05 *Wollny* [2006] ECR I?8297, paragraph 20. See also Case C?435/05 *Investrand* [2007] ECR I?1315.

13 – Now Article 18(a) of Directive 2006/112.

14 – Joined Cases C?487/01 and C?7/02 [2004] ECR I?5337. See also Joined Cases C?322/99 and C?323/99 *Fischer and Brandenstein* [2001] ECR I?4049, paragraph 56 and the case?law cited (as regards Article 5(6) of the Sixth Directive), and *Uudenkaupungin kaupunki*, cited in footnote 12, paragraph 30 (as regards Article 20 and Articles 5 and 6 of the Sixth Directive).

15 – Under that provision of the Sixth Directive: ‘In order to prevent distortion of competition and subject to the consultations provided for in Article 29, Member States may treat as a supply of services for consideration the supply by a taxable person of a service for the purposes of his undertaking where the [VAT] on such a service, had it been supplied by another taxable person, would not be wholly deductible.’

16– Concerning the prevention of distortion of competition, see, inter alia, Case C?288/07 *Isle of Wight Council and Others* [2008] ECR I?7203.

17 – See, inter alia, Case C?283/95 *Fischer* [1998] ECR I?3369, paragraph 27, and Case C?216/97 *Gregg* [1999] ECR I?4947, paragraph 19.

18 – See Case C?29/08 *SKF* [2009] ECR I?10413, paragraph 67 and the case?law cited.

19 – See, inter alia, Case C?174/08 *NCC Construction Danmark* [2009] ECR I?10567, paragraph 41; Case C?262/08 *CopyGene A/S* [2010] ECR I?5053, paragraph 64; and Joined Cases C?259/10 and C?260/10 *Rank Group* [2011] ECR I?10947, paragraph 61. See also Case C?240/05 *Eurodental* [2006] ECR I?11479, paragraph 55.

20 – Case C?233/05, order of 1 June 2006, paragraph 27.

21 – Case 139/84 [1985] ECR 1405, paragraphs 20 and 21.

22 – Cited in footnote 21, paragraph 22.

23 – Cited in footnote 21, paragraph 23.

24 – See footnotes 20 and 21.

25 – Emphasis added.

26 – The Netherlands Government adds that it is mainly because of the exemptions that the system is not ideal and sometimes results in double taxation on certain elements of the cost price.