OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 30 May 2013 (1)

Case C?622/11

Staatssecretaris van Financiën

v

Pactor Vastgoed BV

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

(Sixth VAT Directive — Article 20 — Right to deduction — Adjustment of deductions — Supply of an immovable property by a supplier to a property company — Recovery of the VAT due following adjustment of a deduction from a taxable person other than the person who initially made the deduction and who is extraneous to the taxed transaction which gave rise to the deduction)

Table of contents

1. This request for a preliminary ruling referred by the Hoge Raad der Nederlanden (Supreme Court) (Netherlands) relates to the interpretation to be given to Article 20 of the Sixth Directive 77/388/EEC, (2) and essentially concerns the question whether an economic operator other than the taxable person initially making a deduction, and extraneous to the taxed transaction giving rise to that deduction may be required to effect an adjustment of a deduction of value added tax (‘VAT’).

2. The Staatssecretaris van Financiën (Secretary of State for Finances, hereinafter ‘the Staatssecretaris’) is in dispute with Pactor Vastgoed BV, the party required to effect the adjustment, on that question in the main proceedings.

I – **Legal background**

A – *EU law*

3. Article 13B of the Sixth Directive, which is entitled ‘Exemptions within the territory of the country’, provides:

‘Without prejudice to other [Union] provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(g) the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a);

…’

4. Under Article 13C of the Sixth Directive:

‘Member States may allow taxpayers a right of option for taxation in cases of:

…

(b) the transactions covered in B(d), (g) and (h) above.

Member States may restrict the scope of this right of option and shall fix the details of its use.’

5. Article 17 of the Sixth Directive, entitled ‘Origin and scope of the right to deduct’, provides:

‘1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

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) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

…’

6. Article 20 of the Sixth Directive is worded as follows:

‘1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are cancelled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed, nor in the case of applications for the purpose of making gifts of small value and giving samples specified in Article 5(6). However, Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft.

…

3. In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. Such business activities are presumed to be fully taxed in cases where the delivery of the said goods is taxed; they are presumed to be fully exempt where the delivery is exempt. The adjustment shall be made only once for the whole period of adjustment still to be covered.

However, in the latter case, Member States may waive the requirement for adjustment in so far as the purchaser is a taxable person using the capital goods in question solely for transactions in respect of which value added tax is deductible.

4. For the purposes of applying the provisions of paragraphs 2 and 3, the Member States may:

…

– adopt any suitable measures with a view to ensuring that adjustment does not involve any unjustified advantage,

– permit administrative simplifications.

…'

7. Article 21 of the Sixth Directive, entitled 'Persons liable to pay tax to the authorities', provides:

'The following shall be liable to pay [VAT]:

1. under the internal system:

(a) taxable persons who carry out taxable transactions other than those referred to in Article 9(2)(e) and carried out by a taxable person resident abroad. When the taxable transaction is effected by a taxable person resident abroad Member States may adopt arrangements whereby tax is payable by someone other than the taxable person residing abroad. Inter alia a tax representative or other person for whom the taxable transaction is carried out may be designated as such other person. The Member States may also provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax.

(b) persons to whom services covered by Article 9(2)(e) are supplied and carried out by a taxable person resident abroad. However, Member States may require that the supplier of services shall be held jointly and severally liable for payment of the tax.

(c) any person who mentions the [VAT] on an invoice or other document serving as invoice;

2. on importation: the person or persons designated or accepted as being liable by the Member States into which the goods are imported.'

8. Article 27(1) of the Sixth Directive provides:

'The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.'

9. Article 1 of Council Decision 88/498/EEC of 19 July 1988, (3) adopted on the basis of aforementioned Article 27(1), provides that, with regard to the transactions mentioned in Article 13B(g) and (h) of the Sixth Directive, the Kingdom of the Netherlands, notwithstanding Article 21(1)(a) of that directive, is authorised to apply, in the context of the option for taxation provided for by Article 13C(b), a provision imposing liability for the VAT on the purchaser. (4)

B – *Netherlands law*

10. Article 11 of the Law of 1968 relating to turnover tax (5) ('the Law') provides:

'1. Subject to conditions to be laid down by public administrative regulation the following shall

be exempt from tax:

(a) the supply of immovable property and rights over such property, with the exception of:

(1) the supply before or, at most, two years after, first occupation of buildings or parts of buildings and the land on which they stand as well as the supply of building land;

(2) supplies, other than those referred to in subparagraph 1, to persons using the immovable property for purposes that give rise to a right to deduct tax in full or virtually in full pursuant to Article 15, provided that the undertaking making the supply and the one to which it is made jointly submitted a request to that effect to the inspector and that, moreover, they observe the conditions laid down by ministerial decree;

...'

11. Article 12(1) of the Law states:

'The tax shall be collected from the undertaking which effects the supply or the service.'

12. Article 12a of the Law provides as follows:

'If improper use is made of the exception laid down in Article 11(1)(a)(2), because the person to whom the supply is effected does not use the immoveable property for purposes that give rise to a right to deduct tax in full or virtually in full pursuant to Article 15, the tax deducted pursuant to Article 15 in connection with that supply by the supplier shall be the subject of a notice of additional assessment issued to the person to whom the supply was effected.'

II – **The main proceedings and the question referred for a preliminary ruling**

13. Pactor Vastgoed is a company active, in particular, in the property sector and as such is subject to VAT within the meaning of Article 4(1) of the Sixth Directive.

14. A notice of additional assessment in respect of VAT was issued to Pactor Vastgoed for the period from 1 January to 31 December 2000. After Pactor Vastgoed lodged an objection, the amount of the additional assessment was maintained by decision of the Inspector of Taxes. The Rechtbank te 's-Gravenhage (District Court, The Hague) dismissed the action against that decision. Pactor Vastgoed appealed against that judgment to the Gerechtshof te 's-Gravenhage (Court of Appeal of The Hague). The Gerechtshof te 's-Gravenhage set aside the judgment of the Rechtbank te 's-Gravenhage, declared the action brought before the Rechtbank te 's-Gravenhage against the Inspector of Taxes' decision to be well founded, and annulled the decision of the Inspector of Taxes as well as the notice of additional assessment. The Staatssecretaris then brought an appeal on a point of law before the referring court against the judgment of the Gerechtshof te 's-Gravenhage.

15. It is apparent from the file submitted to the Court that this reference for a preliminary ruling originated in three transactions.

16. First, an initial transaction consisting in the sale, some years prior to 2000, of an immovable property by an owner ('taxable person 1') to a supplier ('taxable person 2'). As the parties opted for taxation, taxable person 2 deducted the VAT invoiced to him.

17. Next, there was a second transaction comprising the supply, on 5 January 2000, by taxable person 2 of that same property to Pactor Vastgoed ('taxable person 3'), who, in agreement with the supplier, also opted for taxation of that supply. In accordance with the requirement laid down in

Article 11(1)(a), second indent, of the Law, Pactor Vastgoed declared on that occasion that it would use the immovable property to supply services conferring total or near total entitlement to deductions, known as the ‘90% criterion’. None the less, with effect from April 2000, Pactor Vastgoed leased the property on a VAT-exempt basis.

18. Finally there was a third transaction, comprising the sale, at the beginning of July 2000, by Pactor Vastgoed of the property to a third party, also free of VAT.

19. The Inspector of Taxes considered that Pactor Vastgoed had not, consequently, observed the condition tied to the option, which required the property to be used in a manner rendering it liable to tax. Accordingly, the supply to Pactor Vastgoed ought to have been exempt from VAT. (6)

20. According to the Inspector of Taxes, Article 12a of the Law was applicable. On the basis of that article, he issued the additional assessment in respect of taxable person 3, calculating it on the basis of the amount of VAT previously deducted by taxable person 2 on acquisition of the immovable property from taxable person 1, an amount which had to be adjusted as it was a supply that should have been exempt. (7)

21. With regard to the transaction between taxable persons 2 and 3, the Inspector of Taxes considered that, with retroactive effect to 5 January 2000, the immovable property was supplied to Pactor Vastgoed on a VAT-exempt basis and that, consequently, the tax on that supply and the deduction had to be annulled which, according to the Netherlands Government, entailed no material consequence for Pactor Vastgoed. Pactor Vastgoed should have annulled both the VAT unduly paid and the undue deduction.

22. Moreover, the VAT previously deducted by taxable person 2 ought also to be adjusted for the remaining years of exempt use. On the supply to taxable person 3, it was presumed that the immovable property would continue to be used in a manner giving rise to tax liability, so that the VAT deducted previously could be maintained for the period of adjustment still to run.

23. That adjusted VAT, for an amount of no less than EUR 259 820, was sought to be recovered from Pactor Vastgoed by the Inspector of Taxes.

24. As stated at point 14 of this Opinion, the Gerechtshof te ’s-Gravenhage set aside the judgment of the Rechtbank te ’s-Gravenhage upholding the decision of the Inspector of Taxes. In the context of the appeal on a point of law by the Staatssecretaris to the referring court against the judgment of the Gerechtshof te ’s-Gravenhage, Pactor Vastgoed maintained that the adjusted VAT ought to have been collected not from it but from the supplier. In Pactor Vastgoed’s view, Article 12a of the Law, which is the basis for collecting the adjusted VAT from it, runs counter to the Sixth Directive.

25. Conversely, the Staatssecretaris maintained that the Gerechtshof te ’s-Gravenhage erred in law in adjudging that Article 12a of the Law could not be used as a basis for issuing to the purchaser of an immovable property (taxable person 3) the notice of additional assessment to an amount of VAT in respect of which taxable person 2 had enjoyed a deduction, following a previous acquisition from taxable person 1.

26. In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the Sixth Directive allow, in the event that the VAT initially deducted in accordance with Article 20 of the Sixth Directive is adjusted in such a way that the amount of the deduction must be reimbursed in full or in part, that amount to be charged to a person other than the taxable person

who applied the deduction in the past, in particular … to a person to whom a property has been supplied by that taxable person?'

27. Written observations have been submitted by Pactor Vastgoed, the Netherlands Government, Ireland, the Finnish Government and the Commission. At the hearing on 18 April 2013, all those parties except the Finnish Government made oral observations.

III – **Analysis**

A – *Doubts as to the interpretation of Article 12a of the Law*

28. Before coming to the parties' arguments it must be noted, as is apparent from the order for reference, that doubts are being expressed in the Netherlands concerning the question whether or not Article 12a of the Law can be used as a basis for issuing to a purchaser of an immovable property a notice of additional assessment to an amount of VAT in respect of which the supplier of the property benefited from a deduction which must be adjusted.

29. Both the Advocate General in the main proceedings and the referring court itself take the view that the wording of Article 12a of the Law does not clearly reflect its objective. (8) The Commission goes even further, openly stating that it does not understand the meaning of the provision.

30. If one reads the wording of Article 12a of the Law, the words 'the tax deducted … [(9)] in connection with that supply by the supplier' relate to the supply by taxable person 1 (the vendor) to taxable person 2 (the supplier).

31. Consequently, under the wording of the Law itself the 'notice of additional assessment issued to the person to whom the supply was effected' necessarily refers to taxable person 2.

32. It follows that the supply at issue cannot as a matter of principle be that made by taxable person 2 to taxable person 3 because, on that supply, taxable person 2 has nothing to deduct.

33. The wording of Article 12a of the Law must therefore be interpreted very widely — as it is by the Netherlands Government (10) — so that taxable person 3 becomes liable to the tax.

34. According to the national court, (11) the wording of Article 12a of the Law could leave sufficient latitude so that, in accordance with the objective of that provision, the words 'the tax deducted …, in connection with that supply by the supplier' relate to an amount of VAT deducted previously by the taxable person who made the subsequent supply, an amount which must be adjusted because, viewed *ex post facto*, that supply was in fact VAT exempt, owing to the fact that it subsequently transpired that the condition imposed by the Law (12) was not observed. It is therefore in this case the supply from taxable person 2 to taxable person 3 which, because the vendor and the purchaser opted for a supply subject to VAT, resulted in the undertaking making the supply benefiting from too large a VAT deduction (albeit because that undertaking had, with its own supplier, opted for VAT liability on a previous supply).

35. It is plainly for the referring court, which has sole competence to interpret domestic law, to construe Article 12a of the Law (taking account of the matters set out by the Court in this case).

36. I shall in any event proceed on the assumption that Article 12a of the Law permits of the interpretation made by the Netherlands tax authorities and shall examine the question put by the referring court on that basis.

B – *Summary of the arguments of the parties*

37. Pactor Vastgoed argues that the Sixth Directive does not, in a case such as that in the main proceedings, permit the Member States, with or without the Council's permission, to designate a person other than the supplier (taxable person 2) as liable for the adjusted VAT. In its view, Article 12a of the Law is in this respect contrary to the Sixth Directive.

38. The Netherlands Government, on the other hand, takes the view that the provisions of the Sixth Directive do not preclude the Member States, in a context such as that at issue in the main proceedings, from collecting adjusted VAT from the purchaser of an immovable property.

39. Ireland and the Finnish Government essentially put forward the same argument as the Netherlands Government. They consider in particular that it follows from Article 20 of the Sixth Directive, and from the context and scheme of that directive, that the Member States have a margin of discretion enabling them to determine the conditions under which a person other than the taxable person who initially effected that deduction may be required to accept an adjustment of that deduction. According to Ireland, a contrary interpretation would be incompatible with the system of VAT established by the Sixth Directive and with the principles of legal certainty and fiscal neutrality. Furthermore, it would entail the consequence of rendering the mechanism for recovering tax revenue less effective.

40. Finally, like Pactor Vastgoed, the Commission puts forward an argument which runs counter to that put forward by the Netherlands Government and Ireland, essentially considering that the reply to the question referred for a preliminary ruling should be in the negative.

C – *Assessment*

1. Preliminary Observations

41. By its question, the referring court is essentially asking whether the Sixth Directive must be interpreted as permitting a deduction made on the supply of an immovable property by a first taxable person to a second taxable person to be adjusted by recovering that deduction from a third taxable person (Pactor Vastgoed in the main proceedings), who was not the person who made the deduction previously.

42. The Kingdom of the Netherlands made use of the possibility under Article 13C(b) of the Sixth Directive, which enables Member States to allow their taxable persons a right to opt for the taxation of certain transactions which, under the general rule contained in Article 13B(g) of that directive, are VAT exempt. (13) Those transactions include the supply of buildings or parts thereof and of the land on which they stand other than supply before first occupation.

43. It must be observed that the final paragraph of Article 13C of the Sixth Directive adds that 'Member States may restrict the scope of this right of option and shall fix the details of its use'.

44. As from 31 March 1995 at 6pm, the Netherlands legislature limited the possibility of opting for taxed supplies to supplies of immovable properties to persons using such properties for purposes which carry a total or near total right of deduction. (14)

45. As the referring court states, it may be that, whilst the undertaking concerned (the person making the supply and the person to whom the supply is made) may have initially proceeded on the basis that the property would be used for a specific purpose, in respect of which the option to tax the supply is permitted, the undertaking to which the immovable property is supplied subsequently uses it for a purpose in respect of which it is not possible to opt for taxation of the

supply. The legal rules are based on the principle that, in that situation, the supply ought to have been VAT exempt and consequently the VAT previously deducted by the supplier must be adjusted.

46. As regards those situations, Article 12a of the Law provides: 'If improper use is made of the exception laid down in Article 11(1)(a)(2), because the person to whom the supply is effected does not use the immovable property for purposes that give rise to a right to deduct tax in full or virtually in full pursuant to Article 15, the tax deducted pursuant to Article 15 in connection with that supply by the supplier shall be the subject of a notice of additional assessment issued to *the person to whom the supply was effected*' (emphasis added).

2. Article 12a of the Law and the Sixth Directive

47. It must be noted that the Sixth Directive contains no express guidance concerning the person liable for VAT in the context of adjustment of a deduction.

48. Nor does Directive 2006/112/EC, (15) which has since repealed and replaced the Sixth Directive, provide any such guidance.

49. None the less, as the Court has held on various occasions, 'the deduction system established by the directive is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. Thus, the common system of VAT seeks to ensure complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT'. (16)

50. Accordingly, 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. (17)

51. Moreover, the Court has already observed that '[t]he adjustment provided for in those articles of the Directive is an integral part of the VAT deduction scheme established by that Directive. It should be noted in that regard that the rules laid down by the Directive in respect of adjustment are intended to enhance the precision of deductions so as to ensure the neutrality of VAT, with the result that transactions effected at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies subject to VAT. By those rules, the Directive thus aims to establish a close and direct relationship between the right to deduct input VAT and the use of the goods and services concerned for taxable output transactions'. (18)

52. As the reply to that question was important for the analysis of the case, and was not unambiguously apparent from the order for reference, the Court asked the Netherlands Government and the Commission whether the deduction to be adjusted in the case in the main proceedings was the deduction made by taxable person 2 (the supplier) following the purchase from taxable person 1 (the vendor).

53. From the replies provided by each of those parties, it is clear that it is in fact taxable person 3 (Pactor Vastgoed) who would be liable for the VAT deducted by another taxable person upstream in the sales chain on the occasion of a transaction to which taxable person 3 is entirely extraneous.

54. As I stated at points 33 and 34 of this Opinion, that interpretation might be consistent both with Article 12a of the Law, and with the description of the facts provided by the referring court.

55. It is stated in the order for reference that '[t]he Inspector calculated the amount of the notice

of additional assessment on the basis of the amount of the [VAT] for which the supplier had earlier enjoyed a deduction when acquiring the immovable property; since that amount concerned an exempt supply by the supplier, it had to be adjusted on the basis of Article 15(6) of the [Law] in conjunction with Articles 13 and 13a of the order ("the adjusted VAT")'.

56. Moreover the Netherlands Government seems to confirm my interpretation above. (19)

57. In those circumstances, I (like the Commission) believe that in a situation such as this, either no adjustment is necessary or any adjustment is totally attributable to taxable person 2. Inasmuch as Pactor Vastgoed is totally extraneous to the first property transaction under which taxable person 2 acquired the immovable property at issue in the main proceedings, the fact that, at the time of the subsequent transaction involving the same asset — in this case the transaction entered into by taxable person 2 and taxable person 3 (Pactor Vastgoed) — Pactor Vastgoed does not satisfy the conditions for opting for taxation of that second transaction cannot have VAT consequences for the first transaction

58. It remains to be seen whether the Sixth Directive allows a provision of domestic law such as Article 12a of the Law to alter that reply in any of its essentials.

(a) The principal argument of the Netherlands Government

59. According to the Netherlands Government, it is clear from a combined reading of the introductory sentence to Article 13B: ('under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse'), Article 13C, last sentence ('Member States may restrict the scope of this right of option and shall fix the details of its use'), Article 20(1) ('according to the procedures laid down by the Member States), Article 20(4) ('adopt any suitable measures with a view to ensuring that adjustment does not involve any unjustified advantage') and Article 21(1)(a) ('[t]he Member States may also provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax') of the Sixth Directive that the Member States enjoy a sufficient margin of discretion to adopt a rule concerning the adjustment of deductions such as that at issue in the main proceedings. (20)

(i) Article 20 of the Sixth Directive

60. In that regard, first of all I cannot share one of the alternative arguments mentioned by the referring court to the effect that, because the Sixth Directive does not include any express provision concerning the person liable for the adjusted VAT, it is entirely for the Member States to determine the person from whom the adjusted VAT is to be collected.

61. On the contrary, not only does the Sixth Directive not expressly permit — which Article 12a of the Law does — collection of the VAT due from another taxable person as a result of the adjustment, but, furthermore, it is to be inferred from the combined provisions of Article 17(2), Article 22(4), second subparagraph, and Article 20 of the Sixth Directive that, in circumstances entailing adjustment of a deduction from which a taxable person has benefited, such adjustment must as a matter of principle be made by that person.

62. Moreover, the Proposal for the Sixth Directive (21) expressly provided that the person who had made the deduction was to pay the adjustment. The introduction to Article 20 of the proposal entitled 'Adjustment of deductions' provides: '[l]'assujetti procède à la régularisation de la déduction initialement opérée ...', which is confirmed by the English version of the proposal which reads as follows: '[t]he taxable person shall adjust the initial deduction ...'.

63. The wording itself of Article 20 as adopted suggests the same position, in stating that ‘[t]he initial deduction shall be adjusted … where that deduction was higher or lower than that to which the taxable person was entitled’. It is to be expected that in principle the mistake be corrected by the person who made it.

64. Finally, the possibility for the Member States to determine from whom the adjusted VAT may be collected goes far beyond the concept of ‘procedures’ in Article 20(1) of the Sixth Directive. (22) I shall return to this at points 70 and 71 of this Opinion.

(ii) Article 21 of the Sixth Directive

65. In the same way that VAT is payable by the taxable person carrying out a taxable transaction, and the right to deduct VAT is exercised by the taxable person who uses the goods concerned for the purposes of his taxable transactions, it is apparent from Article 21 of the Sixth Directive that recovery of an adjusted tax must in principle be effected from the taxable person who initially made the deduction of the tax, in this case the supplier (or taxable person 2).

66. Article 21, entitled ‘Persons liable to pay tax to the authorities’, exhaustively sets out the situations in which a person other than the taxable person making the supply may be liable for the tax.

67. Article 21(1)(a) of the Sixth Directive enshrines the principle whereby the taxable person liable for the VAT on a taxable transaction is the person carrying out that transaction. In this case, that would then be taxable person 2 (the supplier).

68. On the other hand, the remainder of that Article 21 contains an exhaustive list of the situations and circumstances in which the person liable is a person other than the taxable person carrying out the transaction. The situation in the case at issue in the main proceedings corresponds to none of those cases or circumstances.

69. The only latitude left to the Member States is to provide that a person other than the taxable person is jointly and severally required to pay the tax. However, Article 12a of the Law does not impose a joint and several obligation but a fiscal obligation which is totally self-standing and is imposed on the buyer.

(iii) The concept of ‘details’ and ‘procedures’ in Articles 13 and 20 of the Sixth Directive

70. I (like the Commission) am of the opinion that the Sixth Directive, and particularly Articles 13C and 20(1), does not authorise the Member States to collect an adjusted amount of VAT relating to a first transaction between a first taxable person and a second taxable person from a third taxable person having no connection with that transaction. Such a provision would go beyond the latitude left to Member States.

71. Designation of the person liable is not merely a ‘detail’ of the exercise of the right of option or of adjustment thereof, but goes to the very heart of the VAT system, which is why the provisions providing for the reverse charge procedure by the buyer must either be found in the Sixth Directive (now the VAT Directive (23)) — such as for example Articles 194 to 199 of the VAT Directive — or be the subject of derogating provisions based on Article 27 of the Sixth Directive (now Article 395 of the VAT Directive). I shall come back to this at point 103 of this Opinion.

(b) Other arguments raised by the parties

(i) First argument

72. Ireland maintains that the main proceedings present an example of why a Member State must be able to impose an adjustment on a person other than the taxable person who applied the deduction. In its view, it is appropriate and proportionate that the person who both decides on and has knowledge of the taxable activities for which the immovable property should have been and was in fact used, should be the person who bears the liability for adjustment of deductions. Such adjustment is necessary because there has been an infringement of tax law by the purchaser and not by the original supplier. If the purchaser's incorrect declarations were the breach of the law at issue, adjustments are justified for the same reason retroactive repayment has been. (24)

73. Even on the supposition that this system, so justified, could be put in place without recourse to Article 27 of the Sixth Directive (in my opinion it cannot), I cannot share Ireland's reasoning.

74. On the one hand, as Pactor Vastgoed rightly points out, if a person other than the one making the deduction is rendered liable for the VAT payable as a result of the adjustment, that other person (in this case the purchaser) does not normally have the information needed to determine the amount of the adjustment (such as the amount that the vendor deducted on acquisition of the investment property, the duration of the adjustment period still to run and any other costs in respect of which the vendor has made a VAT deduction). That other person is not, as a rule, in a position to verify whether any notice of additional assessment is correct, and cannot therefore challenge the amount of the adjustment.

75. In this case, taxable person 2 sold with knowledge of the risk, and the purchaser could have been acting in good faith or have acted without fault or negligence if, for example, he had to change the purpose to which the asset was put after the purchase for economic reasons. If he had known that he would allocate the asset to non-taxable uses, he would undoubtedly not have opted for taxation of the transaction.

76. In similar manner, the Netherlands Government observes that national tax legislation required that the purchaser (taxable person 3) have expressly and previously declared that he will satisfy the 90% criterion. Failing that express declaration, the option provided for in Article 11 of the Law cannot be exercised. Such a declaration would thus imply a conscious choice on the part of the purchaser. He would accordingly be deemed to be aware of the VAT implications if the property in question were used in a VAT-exempt manner notwithstanding his express declaration. He should therefore be deemed to be aware of the fact that as a purchaser he will become liable for any adjustment of VAT.

77. I note that, whilst it is true that the purchaser (taxable person 3) undertook to use the immovable property for taxable transactions, taxable person 2 also gave that undertaking when he acquired the property from taxable person 1. He therefore knew that, by selling the property on to taxable person 3, he might find himself in a situation of non-compliance with the undertaking that he had given with regard to taxable person 1.

78. When the Netherlands Government (25) refers to a 'conscious decision by the purchaser', that applies as much to taxable person 2 as to Pactor Vastgoed.

79. I would, moreover, point out that the objective of the VAT system is not to punish a defaulter but to ensure VAT neutrality.

80. However, under the Netherlands Government's argument, it is not inconceivable that Pactor

Vastgoed might pay VAT on an exempt transaction. It paid the VAT to taxable person 2, VAT which it deducted, with the two transactions offsetting one another at that point, but it will have to pay taxable person 2's deduction. Conversely, taxable person 2 will retain a deduction, which the Netherlands Government considers ought to be adjusted.

81. In any event, as the Commission rightly pointed out, the only circumstances justifying an adjustment of the VAT deducted by taxable person 2 (the supplier) are either that the supplier himself, as the purchaser in the initial property transaction (that is to say taxable person 1), does not subsequently meet the conditions for opting for taxation of the transaction, or that the supplier sells the immovable property at issue to Pactor Vastgoed during the adjustment period (26) and, before the end of that period, the asset is no longer allocated to taxable transactions. In either case, an adjustment of a deduction made by the supplier in relation to that transaction cannot in any event be imposed on taxable person 3 (Pactor Vastgoed), because that person cannot be held liable for the VAT deducted by other taxable persons in the context of a transaction to which it is *totally extraneous*.

(ii) Second argument

82. According to the Netherlands Government, Article 12a of the Law seeks to operate as a bar to unjustified advantages which could benefit the purchaser. In its view, the purchaser could, notwithstanding his declaration that he will use the immovable property in connection with taxable services, use the asset without hindrance for VAT-exempt services yet acquire the asset without VAT being included in the price and thus without bearing the VAT. Accordingly, not only would the vendor suffer damage up to the amount of the adjusted VAT, but also the VAT system would quite simply be jeopardised by the possibility of that option. The exemption under Article 13B(1)(g) and (h) of the Sixth Directive would thus be circumvented.

83. Suffice it to note in that regard that for the purchaser the deduction is set off against the VAT paid. I therefore fail to see how taxable person 3 would have obtained an 'unjustified advantage'.

84. Moreover the 'injustice' for the supplier, who may be subject to an adjustment even though he trusted the purchaser's (taxable person 3's) assurances that the property would be allocated to taxable transactions, stems from the requirement under the Netherlands legislation that the purchaser must allocate the immovable property to transactions which are taxable for VAT purposes.

85. According to the Commission, that condition, which requires that the purchaser of an immovable property use it for purposes for which there is a right of deduction in order for a property transaction to be taxable, is superfluous, since a taxable person would have no interest in opting for taxation if he does not use the property concerned for such purposes.

86. It is true that the Court has already held that, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, they must not go further than is necessary for that purpose. (27)

87. None the less, the Commission observes that the removal of that requirement would not affect the Netherlands Exchequer. It would suffice for the taxable person making the supply (taxable person 2) to opt for taxation, leaving potential buyers to choose not to enter into the transaction if taxation does not suit them, which would probably be the case if they carry on business not conferring entitlement to deduction because they would then have to bear the final burden of the VAT on the sale of the immovable property. In practice it may be supposed that, under Netherlands legislation as it currently stands, taxable persons whose business does not

confer entitlement to deduct prefer to buy an old property either from other taxable persons exempt from VAT or from individuals also free of VAT.

88. I would add that if the taxable person 3 alters the use to which the property is put (for economic reasons, for example) after the purchase, he will not be able to deduct the tax that he paid to taxable person 2 and the interests of the Netherlands Exchequer will be maintained. Taxable person 2 could maintain his deduction but taxable person 3 could no longer deduct the VAT that he has paid by way of the reverse charge procedure, following the derogation obtained by the Kingdom of the Netherlands which has become applicable *erga omnes*.

89. That being the case, there is nothing to preclude Netherlands legislation from maintaining the condition relating to the allocation of the property by the purchaser to taxable activities for the purposes of exercising the right to opt for taxation of the property. I believe that it is for the Member States to determine the detailed arrangements governing the exercise of the right of option. However, the national legislature is required to draw all the consequences of its choice, and cannot impose obligations on the purchaser going beyond what is permitted by Union legislation on VAT.

(iii) Third argument

90. The Netherlands Government considers that taxable person 2 did not ‘wrongly’ deduct the VAT, because at the time of its deduction the initial deduction of VAT was applied correctly.

91. Suffice to observe here that taxable person 2 sold the property in disregard of the conditions laid down when purchasing it from taxable person 1, namely that the property would be used only for taxable transactions. That is moreover what gave rise to the adjustment of the VAT deducted.

(iv) Fourth argument

92. The Netherlands Government states in its reply to the written questions put by the Court that a situation in which the VAT is collected from another taxable person also occurs when Article 5(8) of the Sixth Directive is applied. That provision covers the situation in which an undertaking is transferred to a taxable person. In that case, the taxable person succeeds the assignor. Also in that situation, an adjusted amount of VAT cannot be imposed on a person other than the taxable person who benefitted from the deduction, which, in the view of the Netherlands Government, justifies its approach.

93. It is sufficient to note in this connection that, although that Article 5(8) expressly enables the adjusted VAT to be collected from a taxable person other than the person who deducted the VAT, nothing of that kind is provided for expressly in Articles 20 and 21 of the Sixth Directive. It follows that that argument cannot call into question the analysis advanced in this Opinion.

(v) Fifth argument

94. Finally, Ireland cites paragraphs 90 and 91 of the judgment in *Halifax and Others*, (28) which state that ‘[the Sixth Directive] merely defines, in Article 20, the conditions which must be complied with in order that deduction of input taxes may be adjusted at the level of the person to whom goods or services have been provided … It is therefore, as a rule, for the Member States to lay down the conditions under which the tax authorities may recover VAT after the event, while remaining within the limits imposed by [Union] law’.

95. I do not believe that the judgment in *Halifax and Others* calls into question the analysis in

this Opinion.

96. It is sufficient to point out in that connection that paragraph 90 of the judgment relied on by Ireland is confined to one single transaction.

3. Article 12a of the Law and Decision 88/498

97. The referring court states that the option of collecting the VAT payable from another taxable person following adjustment might be founded on authorisation given under Article 27 of the Sixth Directive. However, it adds that when the insertion of Article 12a of the Law was envisaged, no derogation within the meaning of Article 27 of the Sixth Directive had been applied for or obtained by the Kingdom of the Netherlands.

98. That said, the Commission considers that the derogation subsequently obtained by the Kingdom of the Netherlands in the form of Decision 88/498 was in force at the material time.

99. I am none the less minded to take the view that that derogation cannot, in circumstances such as those in the main proceedings, warrant taxable person 3 being charged to tax.

100. Conversely, and that was its only purpose, it resulted in the VAT being required to be paid by the person who is going to deduct it, that is to say taxable person 2 for the first transaction, and taxable person 3 for the second transaction, which, moreover, appears to have occurred.

101. Further, would not there be a certain contradiction in taking the view (29) that the adjusted VAT is permitted to be transferred to the purchaser on the basis solely of the Sixth Directive, yet to have sought a derogation under Article 27 of that directive in order to authorise the procedure provided for in Article 12a of the Law?

102. However, the Netherlands Government argues that a rule such as Article 12a of the Law is in any event an extension of the authorisation set out in Decision 88/498, adopted under Article 27 of the Sixth Directive.

103. That argument cannot be accepted. Moreover, I (like the Commission) believe that, in so far as it was necessary to have recourse to a derogation under Article 27 of the Sixth Directive to authorise the Kingdom of the Netherlands to impose liability for the VAT on the purchaser in relation to a property transaction in which it has participated, recourse to the same procedure is all the more necessary in the case of a measure such as that at issue in the main proceedings, which seeks not only to change the person liable for the tax, but moreover designates a taxable person extraneous to the transaction concerned for that purpose.

104. In conclusion, I am of the opinion that the Sixth Directive does not, in the event that the VAT initially deducted in accordance with Article 20 of the Sixth Directive is adjusted in such a way that the amount of the deduction must be reimbursed in full or in part, allow that amount to be charged to a person other than the taxable person who previously applied the deduction, particularly the person to whom a property has been supplied by the taxable person and who is extraneous to the transaction concerned.

IV – **Conclusion**

105. In the light of all the foregoing considerations, I propose that the Court should reply to the question referred for a preliminary ruling by the Hoge Raad der Nederlanden as follows:

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, which was applicable at the time of the facts in the main proceedings does not, in the event that the value added tax initially deducted in accordance with Article 20 of that directive is adjusted in such a way that the amount of the deduction must be reimbursed in full or in part, allow that amount to be charged to a person other than the taxable person who previously applied the deduction, particularly the person to whom a property has been supplied by the taxable person and who is extraneous to the transaction concerned.

1 – Original language: French.

2 – Council Directive 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), in the version in force at the material time ('the Sixth Directive').

3 – Decision authorising the Kingdom of the Netherlands to apply a measure derogating from Article 21(1)(a) of the Sixth Council Directive (77/388/EEC) on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 1988 L 269, p. 54).

4 – Decision 88/498 was repealed with effect from 1 January 2008 by 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).

5 – Wet op de omzetbelasting 1968, of 28 June 1968 (*Staasblad* 1968, No 329), replacing the then turnover tax with another tax based on the system of VAT.

6 – See Article 6(4) of the Implementing Decree on turnover tax of 1968 (Uitvoeringsbeschikking omzetbelasting 1968; 'the Decree').

7 – Pursuant to the combined provisions of Article 15(6) of the Law and Articles 13 and 13a of the Decree ('the adjusted VAT').

8 – It seems that legal literature, too, is divided on Article 12a of the Law, as noted by the Advocate General in the main proceedings. See, for example, van den Elsen, *Beëindiging BTW-verhuurconstructies*, BTW-bulletin 1995, Nos 2 and 3; Mobach, O.L., *Omzetbelasting-Fiscaal commentaar*, Kluwer, 2003, p. 447 et seq.; van Hilten, M.E., and van Kesteren, H.W.M., *Omzetbelasting* (*Fed fiscale studieserie*, Deventer: Fed 2007, No 6, pp. 270 and 271; Ettema, C.M., and Others, *Wegwijs in de BTW*, the Hague, 2008, p. 377; Vetter, J.J., and Others, *Invordering van belastingen — Fed. fiscale studieserie* No 2, Deventer: Kluwer, 2005, pp. 77 and 78; Vervaet, F.L.J., and van Lynden, A.J.H., *Het wetsvoorstel ter bestrijding van BTW-constructies* , No 11, BtwBrief, 1995; Bijl, D.B., *Onroerend goed; omzetbelasting en overdrachtsbelasting*, Kluwer, 1998, p. 66; Nieuwenhuizen, W.A.P., *Een huuroverenkomst*, BTW-bulletin, 1999, Fascicule 7/8, No 67; Beelen, S.T.M., and Others *Cursus belastingrecht (omzetbelasting)*, Note 2.4.1.A.f and 2.4.1.F; Oostenrijk, A.J., and Van Dijk, L.A., *Onroerend goed en reparatiewetgeving Vermeend, Nieuw regime voor de heffing van BTW en overdrachtsbelasting* (Arthur Andersen 1996), p. 47; van den Elsen, E.H., *Onroerende zaken: BTW-constructies en economische eigendom*, Vermande 1995, p. 12; and *Wet omzetbelasting 1968, Fiscale Encyclopedie De Vakstudie, Article 12a*, Suppl. 587, April 2010.

9 – Pursuant to Article 15 of the Law.

10 – See the end of paragraph 47 of its written observations.

11 – See point 3.3.4 of the order for reference.

12 – Namely that the immovable property be completely or almost completely used for purposes for which there is a right of deduction.

13 – See Article 11(1), introductory sentence, and subparagraph (a), introductory sentence, and point 2 of the Law.

14 – The Law of 18 December 1995 (Stb. 1995, No 659), amending the Law (on VAT of 1968), the Law on taxes on legal acts and certain other tax laws in the context of the combatting of legal devices relating to immovable property, also known as the 'Law on the combatting of legal devices concerning immovable properties'.

15 – Council Directive 2006/112/EEC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

16 – See, in particular, Case C?153/11 *Klub* [2012] ECR, paragraph 35 and the case-law cited.

17 – See judgments in Cases C?184/04 *Uudenkaupungin kaupunki* [2006] ECR I?3039, paragraph 24, and *Klub*, cited above, paragraph 28.

18 – See judgment in Case C?234/11 *TETS Haskovo* [2012] ECR, paragraphs 30 to 31, which refers to the judgment in Case C?63/04 *Centralan Property* [2005] ECR I?11087, paragraph 57. See also judgments in *Uudenkaupungin kaupunki,* cited above, paragraph 26, and Case C?257/11 *Gran Via Moine?ti* [2012] ECR, paragraph 38 and the case-law cited.

19 – See, inter alia, paragraphs 34 and 47 of the observations of the Netherlands Government.

20 – That is to say, a rule designating the purchaser of an immovable property (taxable person 3) as the person liable for the adjustment of a deduction even where that deduction was initially made by the supplier of that property (taxable person 2) in the context of the previous property transaction relating to the property with another taxable person (taxable person 1).

21 – Commission Proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment (COM(73) 950 final).

22 – It provides: 'The initial deduction shall be adjusted according to the procedures laid down by the Member States.'

23 – See footnote 15 of this Opinion.

24 – Ireland refers to Case C?37/95 *Ghent Coal Terminal* [1998] ECR I?1, paragraph 21, which refers to the judgment in Case C?110/94 *INZO* [1996] ECR I?857.

25 – At paragraph 13 of its reply to the written questions put by the Court.

26 – With regard to the second case, where taxable person 2 sells the property to taxable person 3, he knows perfectly well for how long he used the property for taxable activities and that the VAT may need adjustment.

27 – See, in particular, judgments in Cases C?384/04 *Federation of Technological Industries and Others* [2006] ECR I?4191, paragraph 30; C?271/06 *Netto Supermarkt* [2008] ECR I?771, paragraph 20; and C?499/10 *Vlaamse Oliemaatschappij* [2011] ECR I?14191, paragraph 22.

28 – Case C?255/02 [2006] ECR I?1609, paragraphs 90 and 91. See also order of 3 March 2004 in Case C?395/02 *Transport Service* [2004] ECR I?1991, paragraphs 27 and 28.

29 – At paragraph 21 of the reply of that Government to the written questions of the Court.