OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 10 April 2014 (1)

Case C?92/13

Gemeente ’s-Hertogenbosch

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

(VAT — Taxable transactions — Supply effected for consideration — First occupation by a municipal authority of premises built for it on land belonging to it — Activities engaged in as a public authority and as a taxable person)

1. A local government authority (which, pursuant to Article 4(5) of the Sixth VAT Directive, (2) is not to be considered a taxable person in respect of activities or transactions in which it engages as a public authority) ordered the construction of an office building on land belonging to it. It was charged VAT on the construction work. The building is used mainly for its activities as a public authority, but also for both taxable and exempt economic activities. For reasons apparently connected with the introduction of a national VAT compensation fund which can relieve it of the burden of its input tax, the local authority wishes its first occupation of the building to be treated as a taxable supply to itself (a ‘self-supply’). The tax authority disagrees. The Hoge Raad der Nederlanden (Netherlands Supreme Court) wishes to know whether such treatment as a taxable self-supply is consistent with the Sixth Directive.

Legislative background

The Sixth Directive

2. Under Article 2(1) of the Sixth Directive, ‘the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’ is to be subject to VAT.

3. Article 4(1) and (2) of that directive define a taxable person as any person who independently carries out in any place any economic activity, whatever its purpose or results. Such activities include all those of producers, traders and persons supplying services, and the ‘exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis’.

4. Under Article 4(5), States, regional and local government authorities and other bodies governed by public law are normally not to be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions. However, they are to be considered taxable persons in respect of such activities or transactions where treatment

as non-taxable persons would lead to significant distortions of competition. They are also to be considered taxable persons when they engage in any of the activities (which are all of a commercial or economic nature) listed in Annex D to the Sixth Directive.

5. Article 5(1) defines a supply of goods as 'the transfer of the right to dispose of tangible property as owner'. Under Article 5(5), Member States may consider the handing over of certain works of construction to be such supplies. Under Article 5(6), the 'application by a taxable person of goods forming part of his business assets for his private use … or more generally their application for purposes other than those of his business' is also to be treated as a supply for consideration if input VAT was wholly or partly deductible.

6. Article 5(7)(a) provides that Member States may also treat as supplies made for consideration '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 value added tax on such goods, had they been acquired from another taxable person, would not be wholly deductible'.

7. Article 6(1) defines a supply of services as 'any transaction which does not constitute a supply of goods within the meaning of Article 5'. Under Article 6(2)(a), that includes 'the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible'. Article 6(3) allows Member States in some circumstances to 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 supplied by another taxable person would not be wholly deductible.

8. The (fictitious) transactions covered by Articles 5(6) and (7) and 6(2) and (3) are sometimes referred to as 'self-supplies'.

9. Pursuant to Article 11A(1)(b) and (c), the taxable amount is to be, 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 as the time of supply and, in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services.

10. Under Article 17(1), the right to deduct arises at the time when the deductible tax becomes chargeable. Article 17(2) specifies that, in so far as the goods and services are used for the purposes of his taxable transactions, the taxable person is entitled to deduct from the tax which he is liable to pay, inter alia, VAT due or paid in respect of goods or services supplied or to be supplied to him by another taxable person (Article 17(2)(a)) and VAT due under Articles 5(7)(a) and 6(3) (Article 17(2)(c)).

11. As regards goods and services to be used by a taxable person both for transactions in respect of which VAT is deductible and for transactions in respect of which it is not deductible, Article 17(5) provides that 'only such proportion of the value added tax shall be deductible as is attributable to the former transactions' (detailed rules being set out in Article 19). That proportion is to be determined for all the transactions carried out by the taxable person. Article 20 provides for deductions to be adjusted where appropriate, in particular where the deduction was higher or lower than that to which the taxable person was entitled or where some change occurs in the factors used to determine the deductible amount. In the case of capital goods, adjustment is to be spread over five years. For immovable property, the period may be extended up to 20 years.

Case-law on self-supplies pursuant to Article 5(7)(a) of the Sixth Directive

12. In *Gemeente Vlaardingen*, (3) where a municipal authority had engaged an outside contractor to convert sports pitches belonging to it (the 'materials provided') from grass to artificial cover, the Court stated, inter alia:

'25 Article 5(7)(a) of the Sixth Directive concerned situations in which the mechanism for deduction provided for, by way of a general rule, under the Sixth Directive could not apply. In so far as goods are used for the purposes of an economic activity which is subject to output tax, it is necessary to deduct the input tax on those goods in order to avoid double taxation. On the other hand, where goods acquired by a taxable person are used for the purposes of transactions which are exempt, no input tax can be deducted (see, inter alia, Case C?184/04 *Uudenkaupungin kaupunki* [2006] ECR I?3039, paragraph 24; Case C?515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie* [2009] ECR I?839, paragraph 28; and Case C?118/11 *Eon Aset Menidjmunt* [2012] ECR, paragraph 44). … [O]ne of the situations concerned by Article 5(7)(a) of the Sixth Directive was that in which no deduction can be made, from the output VAT charged, of an amount paid by way of input VAT, since the output economic activity was exempt from VAT.

26 In particular, … Article 5(7)(a) of the Sixth Directive allowed Member States to develop their tax law in such a way that businesses which, owing to the fact that they are engaged in an activity which is exempt from VAT, cannot deduct the VAT that they have paid on acquiring their business goods are not placed at a disadvantage as compared with competitors engaged in the same activity who use goods which they have obtained without paying VAT, by producing the goods themselves or, more generally, by obtaining them "in the course of [their] business". In order to make those competitors subject to the same tax burden as businesses which have acquired their goods from a third party, Article 5(7)(a) of the Sixth Directive gave Member States the option of treating the application, for the purposes of the exempt activities of the business, of goods obtained in the course of business as a supply of goods made for consideration within the meaning of Article 2(1) and Article 5(1) of the Sixth Directive, and of making that application subject to VAT.

27 In order for it to be possible for that option … to be used in a way which truly eliminates all inequalities, in relation to VAT, between taxable persons who have acquired their goods from another taxable person and those who have acquired them in the course of their business, the terms "goods produced, constructed, extracted, processed, … in the course of such business" must be construed … as covering not only goods entirely produced, constructed, extracted or processed by the business concerned itself, but also goods constructed, extracted or processed by a third party with materials provided by that business.'

13. The Court ruled that, under Articles 5(7)(a) and 11A(1)(b) of the Sixth Directive, read together, 'the application by a taxable person, for the purposes of an economic activity exempt from VAT, of sports pitches which he owns and which he has had transformed by a third person can be subject to VAT calculated on the basis of the aggregate arrived at by adding to the transformation costs the value of the ground on which the pitches lie, to the extent that the taxable person has not yet paid the VAT relating to that value or to those costs, and provided that the pitches at issue are not covered by the exemption provided for in Article 13B(h) of the Sixth Directive' (which is for 'the supply of land which has not been built on other than building land').

14. Earlier, at paragraph 33 of *Uudenkaupungin kaupunki*, (4) the Court had stated, in relation to activities of a local authority *not* excluded from the scope of VAT pursuant to Article 4(5) of the Sixth Directive, that 'Articles 5(6) and 6(2) apply only where the goods concerned are put to private use, not where the goods are put to another use in non-taxable activity'.

Case-law on allocation of mixed-use property

15. The Court's consistent case-law on the allocation of mixed-use property as between business and private assets is summarised most recently in *Van Laarhoven*: (5)

'25 … where capital goods are used both for business and for private purposes, the taxable person has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes (see Case C?434/03 *Charles and Charles-Tijmens* [2005] ECR I?7037, paragraph 23 and case-law cited, and Case C?72/05 *Wollny* [2006] ECR I?8297, paragraph 21).

26 Should the taxable person choose to treat capital goods used for both business and private purposes as business goods, the input VAT on the acquisition of those goods is, in principle, immediately deductible in full (see *Charles and Charles-Tijmens*, paragraph 24, and *Wollny*, paragraph 22). [(6)]

27 However, in such a case, the right to immediately and fully deduct VAT paid at the time of the acquisition leads to the corresponding obligation to pay VAT on private use of the business assets (see *Charles and Charles-Tijmens*, paragraph 30, and *Wollny*, paragraph 24). To that end, Article 6(2)(a) of the Sixth Directive treats use for private purposes in the same way as the supply of services for consideration, so that the taxable person must, in accordance with Article 11A(1)(c) of the same directive, pay VAT on expenses relating to that use (see Case C?269/00 *Seeling* [2003] ECR I?4101, paragraphs 42 and 43).'

16. The advantage to the taxable person of proceeding in that manner was explained as follows at point 74 of the Opinion of Advocate General Jacobs in *Charles and Charles-Tijmens*:

'… even though his private consumption is subject to VAT, as is that of any other private consumer, the taxable person may in some cases derive certain tax advantages from the application of Articles 5(6) and 6(2) because, inter alia:

– deduction is immediate, whereas taxation is deferred and staggered over the period of private use, providing a possible cash-flow benefit;

– VAT is charged on the cost of goods or services used, which is likely to be lower than the price at which they could have been acquired as a private individual from another trader;

– in the case of capital goods, including immovable property, the cost to the taxable person of providing the "service" of use of the goods or property (and thus the output tax) may be particularly low in relation to the cost of acquisition (and thus to the deductible input tax), so that private use will in effect bear a reduced tax burden — a benefit likely to increase with the proportion of private use'.

17. However, in *Vereniging Noordelijke Land- en Tuinbouw Organisatie* ('*VNLTO*'), (7) the Court considered, in substance, that the principles governing the option to allocate capital goods as between business and private assets (that is to say, between assets used as a taxable person and those used as a private individual) could not be transposed to a situation in which a taxable person carries out both economic activities which fall within and non-economic activities which fall outside the scope of VAT. Consequently, Articles 6(2)(a) and 17(2) of the Sixth Directive were not applicable to the use of goods and services allocated to the business for the purpose of

transactions other than the taxable transactions of the taxable person, as the VAT due in respect of the acquisition of those goods and services, and relating to such transactions, was not deductible.

18. Unlike the situation in *Charles and Charles-Tijmens*, which concerned 'immovable property allocated to the assets of the business before being attributed, in part, to private use, by definition completely different from the business of the taxable person', the situation in *VNLTO* related to 'transactions other than VNLTO's taxable transactions, consisting in safeguarding the general interests of its members, and not capable of being considered, in this case, to be non-business transactions, given that they constitute the main corporate purpose of that association'. (8)

Netherlands law

19. Under Article 3(1) of the Wet op de Omzetbelasting (Law on Turnover Tax; text as applicable in 2002) supplies of goods comprise, inter alia:

'(c) the supply of items of immovable property by the person who completed them, with the exception of land which has not been built on other than building land …

…

(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; land which has not been built on other than building land … is excluded from the application of this subsection'. (9)

20. Article 11(1)(a)(1) of the same law provides that, on the one hand, supplies of immovable property and transfers of rights to which such property is subject, with the exception of supplies of buildings or parts of buildings together with the land on which they are built, effected no later than two years after their first occupation and, on the other hand, supplies of building land, are to be exempted from VAT.

21. Under Article 3(1)(a) of the Uitvoeringsbeschikking Omzetbelasting (Turnover tax implementing order; text as applicable in 2002), public authorities are to be regarded as taxable persons in respect of supplies of immovable property. (10)

22. The Wet op het BTW-compensatiefonds (Law on the VAT compensation fund) came into force on 1 January 2003. Article 2 sets up a VAT compensation fund within the Finance Ministry. Under Article 3, bodies governed by public law are entitled to a contribution from that fund to finance turnover tax charged to them in respect of goods and services used for purposes other than business purposes. Article 13(1)(a) excludes supplies made before the entry into force of the law from the entitlement to a contribution.

Facts, procedure and question referred

23. The Gemeente 's-Hertogenbosch (Municipality of 's-Hertogenbosch; 'the Gemeente') is a local government authority and, as such, pursuant to Article 4(5) of the Sixth Directive, is not to be considered a taxable person in respect of activities or transactions in which it engages as a public authority. However, it also engages in certain economic activities and transactions, both taxable and exempt.

24. In principle, therefore, it is entitled to deduct input tax on goods and services acquired for the purposes of its taxable economic activities, but not on those acquired for the purposes either of

its activities as public authority or of its exempt economic activities.

25. In 2000, the Gemeente ordered the construction of an office building on land belonging to it. (11) Its VAT return for July 2002 (before the introduction of the VAT compensation fund) showed input tax of EUR 287 999 in respect of the construction work. It first occupied the building on 1 April 2003 (after the introduction of the fund).

26. The Gemeente's use of the building was split as follows: 94% for activities as a public authority (outside the scope of VAT and therefore not giving rise to deduction of input tax), 5% for taxable economic activities (subject to VAT and giving rise to deduction of input tax) and 1% for exempt economic activities (subject to VAT and not giving rise to deduction of input tax). (12)

27. It appears from the Gemeente's observations that it originally chose, in accordance with the Court's case-law on the allocation of mixed-use property, (13) to allocate the building to its business assets, with a view to qualifying for full deduction of input VAT during construction. However, it later concluded from the *VNLTO* judgment (14) that such allocation was not possible in its case, and no longer pursued that approach.

28. The Gemeente still wishes to deduct the whole of the EUR 287 999 input tax on the supplies acquired in 2002 but now on the basis, essentially, that its first occupation of the building in 2003 constituted a taxable supply to itself, in accordance with Article 3(1)(h) of the Wet op de Omzetbelasting and Article 5(7)(a) of the Sixth Directive; consequently, it argues, the 2002 input supplies were acquired for the purposes of a taxable output supply and gave rise to an immediate right of deduction in full.

29. The tax authority disagrees with that analysis. It considers that only 6% of the input tax charged in 2002, corresponding to the proportion of the Gemeente's activities which fall within the scope of VAT, may be deducted.

30. The Hoge Raad, hearing the dispute on appeal, envisages four possible interpretations of the Sixth Directive, (15) but is uncertain which of them might be correct. It therefore asks the Court:

'Should Article 5(7)(a) of the Sixth Directive be interpreted as meaning that supplies are made for consideration in a situation in which a municipality takes first occupation of a building which it has had built on its own land and which it is to use at the rate of 94% for its activities as a public authority and at the rate of 6% for its activities as a taxable person, including 1% for exempt activities to which no right of deduction applies?'

The various viewpoints

31. In addition to the Hoge Raad's own analysis, as set out in the order for reference, written observations have been submitted by the Gemeente, by the Greek and Netherlands Governments, and by the Commission, all of whom made oral submissions at the hearing on 22 January 2014.

32. In essence, two broad lines of approach are suggested to the Court.

33. The first (which I shall call 'the self-supply approach', and which encompasses three of the Hoge Raad's possible approaches) assumes that the situation in the main proceedings falls within the scope of Article 5(7)(a) of the Sixth Directive. That assumption is shared by the Greek and Netherlands Governments, and also forms the basis of the views currently advanced by the Gemeente.

34. The second approach (which I shall call 'the allocation approach') assumes that in 2002 the

Gemeente allocated the building between its business and private assets, thus determining the subsequent VAT position, and that Article 5(7)(a) does not apply. That approach is strongly favoured by the Commission and seems to have been the one originally taken by the Gemeente. It may not, however, be entirely independent of the self-supply approach; in some circumstances it might be possible to combine the two (see point 39 below).

35. Under the *self-supply approach*, the Gemeente is to be regarded as having 'produced' the building itself (because it contributed the land and the original façade of the final building, acquiring the remaining goods and services from outside) in 2002, and as then having 'supplied' it to itself on first occupation in 2003, as contemplated in Article 5(7)(a) of the Sixth Directive.

36. In the Hoge Raad's first variant of that approach, 6% of the VAT charged on the 2002 supplies should be deductible, representing the extent to which the building was ultimately used for business purposes. The self-supply in 2003 should then be ignored for the purposes of imposition and deduction of VAT because it concerned only the same (negligible) proportion of the use of the building for business purposes. That variant is not favoured in any of the observations submitted to the Court.

37. In the second of the Hoge Raad's three variants, the VAT on the 2002 supplies should be fully deductible by virtue of their use for a taxable output, namely the 2003 self-supply, on which VAT should also be fully chargeable. Then, 5% of the VAT on the self-supply (corresponding to the 5% taxable economic activity) should be deductible and 95% (corresponding to the 94% activity as a public authority plus the 1% exempt economic activity) non-deductible. That corresponds to the position which the Gemeente now adopts. The Commission also accepts it as a possible analysis, but does not favour it. However, in the Commission's view, if this variant of the self-supply approach is found to be correct, it should be combined with the allocation approach by treating the Gemeente's subsequent use of the building for the purposes of its activities as a public authority as use for purposes other than those of the Gemeente's 'business' for the purposes of the Sixth Directive and thus as a taxable supply of services for consideration in accordance with Article 6(2)(a) thereof.

38. In the Hoge Raad's third variant, the self-supply in 2003 should be regarded as a taxable supply only to the extent of the proportion of use of the building for business purposes, namely 6%; consequently, only the same proportion of the input tax on the 2002 supplies should be deductible. That variant corresponds, broadly, to the views of the Greek and Netherlands Governments.

39. Under the *allocation approach*, the Gemeente is to be regarded as having acquired the 2002 supplies from outside and as having allocated them (and the building incorporating them) to its business assets, allowing full deduction of the input VAT. Having then used the building to the extent of 94% for purposes in respect of which it acted as a non-taxable person and thus as a final consumer, the Gemeente should charge itself non-deductible VAT on the cost of making the building available for those purposes, pursuant to Article 6(2)(a) of the Sixth Directive. In respect of the remaining 6% of the original deduction, there should be apportionment between the 1% of use for exempt business transactions and the 5% of use for taxable transactions. The Commission considers in the alternative that this approach should be applied following the 2003 self-supply in accordance with Article 5(7)(a), if such a supply is found to have taken place (see point 37 above).

40. The allocation approach is not envisaged as such by the Hoge Raad, which none the less considers it possible that Article 5(7)(a) of the Sixth Directive cannot apply at all because there is no provision for any deduction mechanism for public authorities which is linked to that article; if that were so, the way would of course be open for the allocation approach. That approach is, however, the Commission's favoured analysis and corresponds, apparently, to the Gemeente's

original principal argument. The difficulty — underlined in particular by the Netherlands Government but acknowledged also by the Gemeente — is whether, following the judgment in *VNLTO*, it is possible to apply the Court's case-law on allocation between business and private assets in circumstances such as those of the main proceedings. The Commission considers that there is no such difficulty. (16)

Assessment

Significance of the VAT compensation fund

41. It seems from the observations in this case that the Gemeente's reasons for advocating the analysis which it now puts forward are linked to the introduction of the VAT compensation fund on 1 January 2003. A non-deductible VAT burden incurred in 2003 was eligible for compensation from that fund, whereas that was not the case for a similar burden incurred in 2002. It therefore seems that it would be in the Gemeente's interest that the VAT charged on the 2002 supplies were fully deductible and that the non-deductible VAT were charged only in 2003.

42. From the information in the case-file, however, it was initially not clear to what extent the existence of the VAT compensation fund might be relevant to the analysis of the question referred. It appeared possible that compensation from that fund would amount to the equivalent of deduction, thus distorting the operation of the common VAT system.

43. That doubt was largely dispelled at the hearing. As I now understand matters, central government funding for local government in the Netherlands is provided essentially through the Gemeentefonds ('municipality fund'), on which local authorities are entitled to draw in order to defray their expenditure, subject to limits determined by certain criteria, including their size and population. Until the end of 2002, municipalities received flat-rate contributions from that fund in respect of all their expenditure, including VAT where applicable. The VAT compensation fund was separated from the municipality fund in 2003 — with the result that VAT is now treated separately from VAT-exclusive expenditure — in order to ensure that all VAT on supplies acquired for the purposes of activities as a public authority, and thus falling entirely outside the scope of VAT, and only such VAT, would qualify for compensation. That system, as was made clear at the hearing by the Netherlands Government and endorsed by the Commission, is not a fiscal but a budgetary measure, designed simply to ensure appropriate funding for local government expenditure and to eliminate cost distortions as between in-house and outsourced services.

44. If that understanding is correct, it seems to me that no obvious distortion of the VAT system would be likely to arise as between a situation in which the Gemeente was able to treat the 2002 supplies as inputs for a taxable self-supply in 2003 and one in which it was not. In the former case, the VAT due on those inputs would be deductible in 2002 and so would not be taken into account for the purposes of compensation from the municipality fund in that year, whereas the VAT due on the self-supply would qualify for compensation from the VAT compensation fund in 2003. In the latter case, the VAT-inclusive cost would be taken into account when calculating compensation from the municipality fund in 2002, and there would be no VAT due in 2003.

45. In those circumstances, I shall not consider any further the relevance of the VAT compensation fund and I suggest that the Court need not do so either. However, if the national court were to find that recourse to the VAT compensation fund might have a distorting effect on the VAT system, it would have to take that effect into account and, if need be, refer a further question to the Court on any issue in that regard.

The ultimate outcome

46. The Gemeente was charged input VAT in 2002 on supplies which it acquired for the ultimate purpose of using an office building to the extent of 94% for activities as a public authority (outside the scope of VAT and therefore not giving rise to deduction of input tax), 5% for taxable activities (subject to VAT and giving rise to deduction of input tax) and 1% for exempt activities (subject to VAT and not giving rise to deduction of input tax).

47. Ultimately, therefore, any outcome which is consistent with the system of the Sixth Directive must be one in which a right to deduct arises in respect of the 5% of the building's use for taxable output purposes but not in respect of the remainder. (17)

48. The Hoge Raad and all those who have submitted observations to the Court appear to agree on that ultimate outcome.

49. The difficulty lies in determining how correctly to achieve it on the basis of the various provisions of the Sixth Directive and the Court's case-law interpreting them, a matter on which the same agreement does not exist.

Relevance of the VNLTO *judgment*

50. The first question must be, in my view, whether the allocation approach is precluded by the Court's judgment in *VNLTO*. (18) If so, that approach need not be considered further. If not, it will still be necessary to determine whether the self-supply approach can apply and, if it can, to examine the extent to which the two approaches might be consistent with each other.

51. Reading *VNLTO*, I find it difficult to disagree with the Gemeente and the Netherlands Government that the Court was effectively ruling that, where a taxable person's business includes both transactions (whether taxable or exempt) falling within the scope of VAT and transactions falling outside that scope, the option and mechanism set out in the case-law on allocation of mixed-use capital goods are not available. Although the reasoning in the judgment might have been fuller and clearer, it seems to follow the rather more complete analysis provided by Advocate General Mengozzi at points 20 to 57 of his Opinion in that case. And I can fully agree that the phrase 'private use … or … [use for] purposes other than those of [the] business' in Article 6(2)(a) of the Sixth Directive does not obviously cover use for purposes which are those of the business but which fall outside the scope of VAT.

52. *VNLTO* concerned an association of agricultural undertakings, funded by membership subscriptions, which promoted the interests of the agricultural sector in parts of the Netherlands. That activity, being financed generally from subscriptions rather than from specific fees, was not effected for consideration, and thus fell outside the scope of VAT. However, VNLTO also provided, to its members and to third parties, individual services for which it issued invoices and which constituted supplies for consideration within the scope of VAT. The issue addressed by the Court was whether Article 6(2)(a) of the Sixth Directive could be applied to the use, for the purpose of transactions falling outside the scope of VAT, of goods and services acquired by VNLTO and allocated to its business. The answer was no. The transactions in question were not capable of being considered to be non-business transactions, 'given that they constitute the main corporate purpose of that association'. (19)

53. The present case concerns a local authority which is not to be considered a taxable person in respect of activities or transactions in which it engages as a public authority, and which thus fall outside the scope of VAT. Those activities appear to constitute its 'main corporate purpose'. In addition, it provides services which are both taxable and exempt but which fall within the scope of VAT and in respect of which it is to be considered a taxable person.

54. It seems to me that the same principle should apply in both cases.

55. I am not dissuaded from that view by the Commission's arguments that *VNLTO* concerned services, whereas the present case concerns capital goods; that in *VNLTO* the relevant activities or transactions fell outside the scope of VAT because there was no specific consideration, whereas in the present case it is because the Gemeente is not to be considered a taxable person; and that in *Uudenkaupungin kaupunki* (20) the Court accepted that the option of allocating mixed-use capital goods to business assets was available to public authorities.

56. First, the Court's reasoning and ruling in *VNLTO* clearly referred to 'goods and services', and I can find no suggestion that 'goods' was intended to mean only 'goods other than capital goods', while Advocate General Mengozzi's analysis reached the clear view (21) that Article 6(2)(a) of the Sixth Directive was not applicable in the circumstances of that case, even where capital goods were concerned. Second, I do not consider that the reason for which activities or transactions fall outside the scope of VAT can be relevant to determining whether they constitute 'purposes other than those of [the] business'; what matters, according to *VNLTO*, is whether they fall within the 'main corporate purpose' of the entity concerned. Finally, I find no indication in *Uudenkaupungin kaupunki* that the Court there endorsed the view that the option of allocating mixed-use capital goods to business assets was available to public authorities. Paragraph 34 of that judgment, cited by the Commission, is couched in general terms and addresses a general objection made by the Finnish Government, whereas at paragraph 33, the Court clearly stated that 'Articles 5(6) and 6(2) apply only where the goods concerned are put to private use, not where the goods are put to another use in non-taxable activity'.

57. I am therefore of the view that, in the circumstances of the present case, the Gemeente was not entitled to exercise the option of allocating the office building to its activity as a taxable person, and of then treating its use for activities as a public authority as a taxable supply of services for consideration.

Article 5(7)(a) of the Sixth Directive

58. It is next necessary to consider whether Article 5(7)(a) of the Sixth Directive applies and, if so, with what effect.

59. That provision offers Member States an option. However, I agree with the Netherlands Government that, once a Member State has taken up that option — as is the case with the Netherlands — the VAT treatment in question must be applied in every situation which meets the criteria laid down in that provision, in accordance with the manner in which they have been incorporated in national law. Conversely, of course, it may not be applied in circumstances which do not meet those criteria.

60. Reading Article 3(1)(h) of the Wet op de Omzetbelasting in the light of Article 5(7)(a) of the Sixth Directive and the relevant case-law, I find that, where a taxable person both (i) produces goods in the course of his business (or provides materials, including land, for goods produced to order) and (ii) uses the goods produced for the purposes of his business, and where (iii) the VAT on those goods would not have been wholly deductible if they had been acquired entirely from

another taxable person, then their use for the purposes of the business must be treated as a taxable supply.

61. Those three conditions are cumulative: if they are all met, the use for business purposes must be treated as a taxable supply; if they are not, it may not.

62. It seems to me that, prima facie, those conditions are met in the case of the Gemeente. The office building was constructed to order, using (inter alia) land and a façade provided by the Gemeente — a situation comparable to that in *Gemeente Vlaardingen*. I consider also that it must be regarded as having been constructed in the course of the Gemeente's business and used for the purposes of that business; the meaning of 'business' in Article 5(7) of the Sixth Directive must be the same as in Article 6(2), in a parallel self-supply context. And, because the building was used also for purposes other than taxable transactions, the input VAT would not have been wholly deductible if it had been acquired entirely from another taxable person.

63. The question then arises whether that prima facie analysis is invalidated because only 6% of the use of the building was for the purposes of the Gemeente's business as a taxable person.

64. In my view, it is not. Article 5(7)(a) of the Sixth Directive was concerned with eliminating distortions of competition arising from the fact that, where input tax is not wholly deductible, those who produce their own inputs would enjoy an advantage over those who have to acquire the same inputs from outside unless both sets of inputs were taxed in the same way. That concern is not dependent on specific values. The extent of the advantage is thus not a determining factor. In any event, it could not be evaluated in terms of a proportion: the advantage represented by 6% of a large sum of VAT may be greater than that afforded by 94% of a smaller sum.

65. Consequently, it seems to me that the Gemeente's taking possession of the office building (regardless of when, exactly, that event took place), following its construction using elements provided by the Gemeente, must be treated as a taxable self-supply, as contemplated in Article 5(7)(a) of the Sixth Directive.

66. It is, however, essential to bear in mind that such treatment has no role to play where supplies are simply acquired in their entirety from another taxable person and then put to a particular use, whatever that use may be. Within the common VAT system, no conceivable purpose can be served by treating one and the same supply first as an acquisition (with full taxation and full deduction of input tax) and subsequently as a self-supply (with full taxation and, as the case may be, no or partial deduction), rather than as a single supply with full taxation and, as the case may be, no or partial deduction. Thus, if the tax treatment in issue in the main proceedings were to involve only the supplies of goods and services provided by the Gemeente's outside contractor(s), independently of the elements of the final building provided by the Gemeente itself, there would be no scope for the application of Article 5(7)(a) of the Sixth Directive. (22)

67. Such treatment is appropriate (and compulsory) only if and to the extent that all the conditions in Article 5(7)(a) of the Sixth Directive are fully met. It cannot, therefore, apply exclusively to the supplies of goods and services provided by the Gemeente's outside contractor or contractors. The self-supply must concern the whole delivery, necessarily including the land and the existing façade. If that were not so, there would be no contribution from the Gemeente and the whole transaction would fall to be treated under the normal rules. Consequently, the amount of VAT for which the Gemeente is to be regarded as liable in respect of the self-supply must be calculated on the basis of the total purchase price (failing which, the cost price at the time of supply) of each and every element of the land and building, in accordance with Article 11A(1)(b) of the Sixth Directive — provided that VAT has not already been levied on those elements. (23)

68. On the assumption that Article 5(7)(a) of the Sixth Directive can and must be applied to the supply of the building as a whole, I would agree with the Gemeente that it is in effect the Hoge Raad's second proposed variant of that approach (see point 37 above) which should prevail, a view which is also accepted, though not favoured, by the Commission.

69. Article 5(7)(a) of the Sixth Directive refers to 'application by a taxable person for the purposes of his business' of, essentially, goods produced in-house. Where that is the case, such application may be (and, in a Member State which has exercised the option, must be) treated as a supply made for consideration within the meaning of Article 2(1) of the same directive, and thus as subject to VAT. The provision does not contemplate either the application of such goods for purposes which are partly those of the taxable person's business and partly outside the scope of the VAT system or the treatment of such application as a supply made partly for consideration and partly not for consideration. Indeed, the purposes for which a supply is used are not in principle relevant to the question whether the supply is taxable or not (although they are relevant to the question whether a right to deduct the VAT charged on the supply may arise).

70. Thus, where there is a self-supply of the kind provided for in Article 5(7)(a), that supply is necessarily a taxable transaction in its entirety, unless it falls wholly or partly within an exemption from VAT.

71. There is no indication in the present case of any exemption which might apply to the self-supply of the office building.

72. That being so, it must be treated as a fully taxable output transaction made by the Gemeente. As a result, any and all input VAT on supplies acquired by the Gemeente for the purpose of that taxable output transaction must be eligible for deduction pursuant to Article 17(2) of the Sixth Directive.

73. However, in respect of the self-supply itself, the Gemeente will be liable for VAT on the whole value of the transaction. Then, pursuant to Article 17(2) and (5) of the Sixth Directive, to the extent that the building is used for the Gemeente's taxable transactions (5% in the present case), it may deduct that input tax from the output tax for which it must account to the tax authority. For the remaining 95%, in respect of use for other transactions, no deduction is possible.

74. To sum up, the interpretation which I propose would produce the following result in the present case. The Gemeente's first occupation of its building in 2003 is to be treated as a supply made for consideration and the taxable amount must be calculated, in accordance with Article 11A(1)(b) of the same directive, for the whole value of the supply, including that of the land, provided that VAT has not already been levied on the latter. The Gemeente may deduct the input VAT on all supplies which it acquired for that purpose, including where applicable that of the land, when accounting for the VAT for which it is liable on that supply treated as being made for

consideration. When it uses the building for further supplies in the course of its activity, it may deduct from the output tax on those supplies, pursuant to Article 17(2) and (5) of the Sixth Directive, only that proportion of the VAT for which it is liable on the supply treated as being made for consideration pursuant to Article 5(7)(a) which corresponds to the use of the building for taxable transactions, namely, in the circumstances of the main proceedings, 5%.

Conclusion

75. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the question raised by the Hoge Raad to the following effect:

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 applying to a situation in which a municipality takes first occupation of a building which it has had built on its own land and which it is to use at the rate of 94% for its activities as a public authority and at the rate of 6% for its activities as a taxable person, including 1% for exempt activities to which no right of deduction applies.

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; ‘the Sixth Directive’). The Sixth Directive was in force at the material time in the main proceedings, but has since been replaced, without material change, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – Case C?299/11 [2012] ECR.

4 – Cited in paragraph 25 of *Gemeente Vlaardingen*, in point 12 above.

5 – Case C?594/10 [2012] ECR. See also Case C?460/07 *Puffer* [2009] ECR I?3251, paragraph 39 et seq.

6 – That position was changed by Article 168a(1) of Directive 2006/112, introduced with effect from 1 January 2011 by Council Directive 2009/162/EU of 22 December 2009 amending various provisions of Directive 2006/112 (OJ 2010 L 10, p. 14), under which, in particular: ‘In the case of immovable property forming part of the business assets of a taxable person and used both for purposes of the taxable person’s business and for his private use or that of his staff, or, more generally, for purposes other than those of his business, VAT on expenditure related to this property shall be deductible … only up to the proportion of the property’s use for purposes of the taxable person’s business.’ Under Article 168a(2), Member States may apply the same rule to other goods. *Ratione temporis*, however, the new legislation has no effect on the case in the main proceedings.

7 – Cited in paragraph 25 of *Gemeente Vlaardingen* (point 12 above), paragraphs 26 to 40. See also Case C?437/06 *Securenta* [2008] ECR I?1597, paragraphs 26 to 31.

8 – Paragraph 39 of the judgment.

9 – Article 3(1)(h) is based on Article 5(7)(a) of the Sixth Directive.

10 – Pursuant to Article 4(5), second subparagraph, of the Sixth Directive.

11 – According to the Gemeente, this involved demolition of an existing building apart from its façade, followed by new construction behind the façade.

12 – The split was apparently agreed upon between the Gemeente and the tax authority.

13 – See point 15 above.

14 – See point 17 above.

15 – See points 35 to 38 below.

16 – See point 55 et seq. below.

17 – See also *Securenta*, cited in footnote 7, paragraph 37.

18 – See points 17 and 18 above.

19 – *VNLTO*, cited in paragraph 25 of *Gemeente Vlaardingen* (point 12 above), paragraph 39.

20 – Cited in paragraph 25 of *Gemeente Vlaardingen*, in point 12 above.

21 – Point 57 of the Opinion.

22 – See also footnote 10 to Advocate General Mazák's Opinion in *Gemeente Vlaardingen*, cited in footnote 3 above, and, a contrario, paragraph 27 of the judgment in that case.

23 – See *Gemeente Vlaardingen*, cited in footnote 3 above, paragraph 30 et seq.