OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 15 October 2015 (1)

**Case C?128/14**

**Staatssecretaris van Financiën**

**v**

**Het Oudeland Beheer BV**

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands, Netherlands))

(Request for a preliminary ruling — Taxation — Sixth VAT Directive — Article 5(7)(a) — Taxable transactions — Application for business purposes of goods obtained in the course of business — Treatment as a supply for consideration — Taxable amount — Article 11(A)(1)(b) — Cost price — Value added tax paid and deducted — Long lease — Annual ground rent)

1. In this case, which concerns a request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) relating to the interpretation of Sixth Directive 77/388/EEC, (2) the Court is again asked to provide clarification on the determination of the taxable amount of ‘internal supplies’.

2. These are transactions whereby taxable persons apply for business purposes goods in respect of which no value added tax (VAT) has been paid, since those goods were produced by the taxable persons themselves or, more generally, were obtained ‘internally’ in the course of the business. (3) In order to avoid placing these taxable persons at a tax advantage, the Sixth Directive gave Member States the option — also included in Directive 2006/112/EC (4) — to treat internal supplies as a supply of goods for consideration, where the goods were applied to business activities exempt from VAT, and thus to make such application subject to VAT. The Court has already had several occasions to consider questions concerning the VAT system for transactions of this kind. (5)

3. The questions referred for a preliminary ruling in this case form part of a dispute between an undertaking, Het Oudeland Beheer BV (‘Oudeland’) and the Staatssecretaris van Financiën (tax authorities) regarding a notice of additional assessment in respect of VAT relating to the taxation of a complex property transaction involving the grant of a long lease over land and a building under construction on that land, completion of the building and the letting of the building.

4. The national court essentially asks whether the grant of the long lease and the costs of completing the building, on which Oudeland already paid VAT, subject to, however, a right of deduction, may be included in the taxable amount of the internal supply, comprising the letting of

the building as office premises. If the answer is in the affirmative, the national court also asks how the value of the long lease should be calculated for the purposes of such taxation.

## I – **Legal framework**

### A – *EU law*

5. Although Directive 2006/112 repealed and replaced the Sixth Directive from 1 January 2007, the latter still applies to the main proceedings, in view of the date of the relevant facts.

6. In general terms, the supply of goods effected for consideration within the territory of a country by a taxable person acting as such is subject to VAT. (6)

7. Article 5(1) of the Sixth Directive defines the supply of goods as 'the transfer of the right to dispose of tangible property as owner'. Article 5(3)(b) of that directive gives Member States the option to consider as tangible property 'rights in rem giving the holder thereof a right of user over immovable property'. Under Article 5(5), Member States may consider the handing over of certain works of construction to be supplies.

8. Article 5(7)(a) of the Sixth Directive, namely the provision concerning the taxation of internal supplies, provides that Member States may 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 [VAT] on such goods, had they been acquired from another taxable person, would not be wholly deductible'.

9. The second sentence of Article 10(2) of the Sixth Directive provides that deliveries of goods other than those referred to in Article 5(4)(b) thereof and supplies of services which give rise to successive statements of account or payments are to be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire.

10. Article 11(A)(1)(b) of the Sixth Directive concerns the calculation of the taxable amount for VAT in respect of the transactions referred to, inter alia, in Article 5(7)(a) thereof. As set out in that provision, the taxable amount in respect of such transactions is 'the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined [at] the time of supply'.

11. Under Article 17(1) of the Sixth Directive, the right to deduct arises at the time when the deductible tax becomes chargeable. Paragraph 2 thereof states that, in so far as the goods 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, the VAT due or paid in respect of goods supplied or to be supplied to him by another taxable person (Article 17(2)(a)) as well as the VAT due under Article 5(7)(a) (Article 17(2)(c)). As regards goods used by a taxable person both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible, Article 17(5) of the Sixth Directive provides that 'only such proportion of the [VAT] shall be deductible as is attributable to the former transactions'.

12. Article 20 of the Sixth Directive provides for adjustments of deductions, if necessary, 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 amount to be deducted. As regards capital goods, Article 20(2) states that adjustment is to be spread over five years. In the case of immoveable property, the adjustment period may be extended up to 20 years.

B – *Netherlands law*

13. Pursuant to Article 3(1) of the 1968 Law on turnover tax (Wet op de omzetbelasting 1968), in the version applicable in the main proceedings ('Law on VAT'), the supply of goods includes 'the supply of immovable properties by those who produced them with the exception of land which has not been built on other than building land' (subparagraph (c)) and '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' (subparagraph (h)).

14. Under Article 3(2) of the Law on VAT, the following, among others, is also treated as the supply of goods: the grant of rights over immovable property, 'save where the sum paid therefor plus turnover tax amounts to less than the economic value of those rights. The economic value shall be, at least, the cost price, including VAT, of the immovable property subject to the right, as it was upon creation by an independent third party at the time of the act.'

15. As set out in Article 8(3) of the Law on VAT, with regard to supplies such as those referred to in, in particular, Article 3(1)(h), 'the consideration shall be the amount, exclusive of turnover tax, which would have to be paid for the goods if, at the time of supply, they were to be acquired or produced in the condition in which they are at that time.'

16. As regards the taxable amount, Article 8(5)(b) of the Law on VAT provides that a public administrative regulation may determine the extent to which, in the case of property encumbered by, inter alia, a long lease, the charges pertaining thereto form part of the consideration.

17. This provision was implemented by the 1968 Decree on turnover tax (Uitvoeringsbesluit omzetbelasting 1968, 'the Decree'), Article 5(1) of which states, '[u]pon the grant, transfer, waiver or termination of a long lease right …, the value of the ground rent … forms part of the consideration, provided that this is not higher than the fair market value of the property to which the right relates'. Under Article 5(5), the value of, in particular, a ground rent is calculated in accordance with Annex A to the Decree. Annex A(b) to the Decree provides that the value of a ground rent 'which expires after a certain period is the annual amount multiplied by the number of years during which the payments must be made', whereby every euro is calculated in accordance with a percentage stipulated in that annex.

## II – **Facts in the main proceedings, national procedure and questions referred for a preliminary ruling**

18. On 8 March 2004, Oudeland, in return for an annual payment in advance ('the ground rent'), acquired a long lease over a plot of land which included a building on-site that was under construction. The term of the long lease was set at 20 years. The annual ground rent was EUR 330 000.

19. Since, in the Netherlands, the grant of a long lease is treated as the supply of immovable property for the purposes of levying VAT (7) and is thus subject to that tax, Oudeland was charged EUR 730 455 in VAT for the grant of the lease. In accordance with Annex A(b) to the Decree, this amount was calculated by applying the relevant percentage of 19% to the capitalised value (corresponding to EUR 3 844 550) of the total consideration agreed upon for the grant of the long lease, received in the form of annual ground rents. Oudeland paid this amount to the trader who granted the long lease and subsequently deducted it in its VAT return for March 2004.

20. Oudeland had the building completed after the grant of the long lease, whereupon it was delivered to Oudeland as completed office premises. The costs of completing the office premises were EUR 1 571 749. Oudeland paid EUR 298 632 in VAT and immediately deducted this amount in full. During the completion of the building, the first of the annual ground rents for the long lease fell due and was paid by Oudeland.

21. After delivery of the building, Oudeland proceeded to let it from 1 June 2004. In respect of a section of the building (corresponding to 12.5% of its area, according to information provided by the Kingdom of the Netherlands), Oudeland, together with the tenants, opted to waive the VAT exemption available for the letting of immovable property. (8) The remainder of the building, corresponding to 87.5% of its area, was let and this transaction was exempt from VAT.

22. Oudeland assumed that the letting of the building had to be treated as an internal supply, for the purposes of Article 3(1)(h) of the Law on VAT, a provision that is based on Article 5(7)(a) of the Sixth Directive. It therefore paid VAT on the letting of the section of the office premises covered by the VAT exemption, in respect of which it therefore had no right of deduction. Oudeland calculated the taxable amount by including all the costs, excluding VAT, of completing the building plus the annual ground rent already due at the time of the supply, that is, EUR 330 000.

23. However, the tax authorities did not endorse that approach and took the view that the taxable amount of the letting of the building had to be based on the costs of completing the building plus the capitalised value of the ground rents as a whole, that is, EUR 3 844 500, calculated in accordance with Annex A(b) to the Decree. Accordingly, they issued a notice of additional assessment to Oudeland for an amount equal to the difference between the taxable amount as calculated by Oudeland and the taxable amount as calculated by the tax authorities. Oudeland lodged an objection against the notice of additional assessment, which was subsequently rejected by decision of the tax authorities.

24. Oudeland brought an action against that decision before the Rechtbank te ?s-Gravenhage (Court of First Instance, The Hague), which was dismissed. Oudeland then lodged an appeal against that dismissal ruling before the Gerechtshof te ?s-Gravenhage (Court of Appeal, The Hague). The Gerechtshof te ?s-Gravenhage upheld the appeal and thus annulled the ruling of the Rechtbank te ?s-Gravenhage, the decision of the tax authorities and the additional assessment. The appeal court held that, under Article 8(3) of the Law on VAT, the taxable amount of the internal supply included the cost price of the land that Oudeland held under the long lease and that, in this connection, it was necessary to take as a basis the value that the land had for Oudeland at the time of the internal supply. That value could not be equated to the value that the land would represent at that time to an owner and had to be limited to the ground rent paid prior to completion of the building.

25. The tax authorities lodged an appeal on a point of law against that decision before the referring court.

26. The appeal pending before that court concerns the question of how the taxable amount for VAT purposes of the internal supply at issue in the main proceedings should be calculated. This case specifically concerns the question whether such amount only includes the annual ground rents relating to the grant of the long lease paid as of the date of the internal supply, or whether it includes the total value of the grant of that lease, corresponding to the capitalised value of the rents.

27. Against that background, the referring court observes that, according to the judgment in *Gemeente Vlaardingen*

, (9) in a case such as this, the taxable amount for VAT comprises the total sum of the value of the land, the value of the building on it (if any) and the costs of production, in so far as the taxable person has not yet paid any VAT on those values and costs. However, it asks whether this judgment must be interpreted as meaning that the cost price factors on which VAT has been paid should be excluded from the taxable amount, even where the taxable person has subsequently deducted the VAT paid on such factors in full, in accordance with national law.

28. Furthermore, if these cost price factors have to be included in the taxable amount, the referring court asks how that amount should be determined as regards the calculation of the value of the long lease. It also asks, in particular, how the value of the ground rents payable consecutively forms part of the taxable amount of an internal supply.

29. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 11(A)(1)(b) of the Sixth Directive be interpreted as meaning that the cost price of land or other substances or materials in respect of which the taxable person has paid VAT in respect of their acquisition, in this case through the grant of a right in rem to use immovable property, is not part of the taxable amount in respect of a supply within the meaning of Article 5(7)(a) of the Sixth Directive? Is the position different if the taxable person has deducted this VAT on the basis of national law — whether or not in conflict with the Sixth Directive in that respect — upon that acquisition?

(2) In a case such as the present one, in which land with a building under construction is acquired with the grant of a right in rem referred to in Article 5(3)(b) of the Sixth Directive, must Article 11(A)(1)(b) of the Sixth Directive be interpreted as meaning that the value of the ground rent, that is to say the value of the annual amounts to be paid for the duration or remainder of the duration of the right in rem, is part of the taxable amount of a supply within the meaning of Article 5(7)(a) of the Sixth Directive?’

## III – **Procedure before the Court of Justice**

30. The Court received the decision to refer on 18 March 2014. Oudeland, the Netherlands Government and the European Commission submitted observations and appeared at the hearing held on 16 July 2015.

## IV – **Legal analysis**

### A – *Preliminary remarks*

31. Before replying to the questions referred by the national court, it is necessary first of all to give an overview of the VAT system applying to internal supplies as well as the raison d’être and objective of this system, as they derive from the case-law of the Court.

32. It is apparent from Article 5(7)(a) of the Sixth Directive, now Article 18(a) of Directive 2006/112, that the Member States may treat the following transactions as a supply for consideration and, therefore, make them subject to VAT: ‘internal supplies’ where a taxable person applies for the purposes of his business goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible.

33. In those circumstances, under Article 11(A)(1)(b) of the Sixth Directive, now Article 74 of

Directive 2006/112, the taxable amount of such transactions is either the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply. It follows from the decision to refer that it is not disputed that, in the present case, the taxable amount is calculated on the basis of the cost price. The parties also agree that the cost price includes the price of the grant of the long lease and the price of the works to complete the building.

34. It is apparent from the case-law of the Court that Article 5(7)(a) of the Sixth Directive concerns situations in which the mechanism for deduction provided for, by way of a general rule, under the Sixth Directive and Directive 2006/112 cannot apply. Pursuant to this mechanism, 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. The provision in question concerns this latter case, namely a situation 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. (10)

35. In particular, that provision allows 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, the provision in question gives 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, and of making that application subject to VAT. (11)

36. It follows from these considerations that the aim of the provision allowing Member States to make internal supplies subject to VAT is to prevent distortion of competition by ensuring the equal treatment of taxable persons, in accordance with the principle of fiscal neutrality, which is inherent in the VAT system. (12) This provision specifically aims to eliminate 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. It seeks to ensure that a taxable person who, for the purposes of an activity exempt from VAT, applies goods obtained in the course of his business is subject to the same tax burden as competitors engaged in the same exempt activity using goods which they have acquired in their entirety from a third party. (13)

37. The questions referred for a preliminary ruling by the national court are to be answered in the light of these case-law principles.

B – *The first question referred*

38. By its first question, the national court essentially asks whether Articles 5(7)(a) and 11(A)(1)(b) of the Sixth Directive must be interpreted as meaning that the application by a taxable person, for the purposes of an economic activity exempt from VAT, of immoveable property built on land over which the taxable person has acquired a right in rem entitling him to use that land and immoveable property, property which he had a third party complete, can be subject to VAT calculated on the basis of a taxable amount comprising the value of the right in rem acquired and the costs of completing the property, where the taxable person has already paid the VAT relating to that value and those costs, VAT which he has also already deducted in full.

39. It is apparent from the decision to refer that, by this question, the Hoge Raad der

Nederlanden (Supreme Court of the Netherlands) essentially seeks clarification on the implications of the judgment in *Gemeente Vlaardingen*. (14) That judgment concerned a case similar to the present case, in which a municipality had commissioned third parties to transform sports pitches owned by it which it subsequently let, an activity exempt from VAT. In its judgment, the Court held that the two abovementioned provisions of the Sixth Directive did not prevent the application by a taxable person, for the purposes of an economic activity exempt from VAT, of land owned by it and which it had a third party transform from being subject to VAT, calculated on the basis of the sum of the value of the ground on which the pitches lay and the costs of transforming the pitches, to the extent that the taxable person has not yet paid the VAT relating to that value or to those costs. (15)

40. The question referred by the national court essentially seeks to clarify the meaning of the expression ‘has not yet paid the VAT relating to that value or to those costs’ used by the Court in that judgment and, in particular, ascertain whether the taxable amount for VAT should exclude cost price factors — in this instance, the value of the long lease and the costs of completing the building — on which the taxable person has already paid VAT, VAT which he has also already deducted in full.

41. Whilst Oudeland and the Netherlands Government agree that, if the VAT paid on the cost price factors for the internal supply has been deducted, there is no substantive double taxation or repeated taxation, with the result that these factors can be included in the taxable amount of the supply, the Commission submits, on the other hand, that Articles 5(7)(a) and 11(A)(1)(b) of the Sixth Directive do not even apply to the facts of the present case, since Oudeland had already paid the VAT relating to the supply and to the works to complete the building. According to the Commission, in order to correct Oudeland’s VAT situation, recourse would have to be had to the mechanism for the adjustment of deductions, set out in Article 20 of the Sixth Directive.

42. It is necessary, as a preliminary point, to address the question of the applicability, which the Commission disputes, of the provisions on the taxation of internal supplies in circumstances such as those of this case. In the light of Article 5(7)(a) of the Sixth Directive and the relevant case-law, the application of these provisions is subject to three cumulative conditions. (16) First, the taxable person must have obtained the goods in the course of his business, including where he has provided materials or land, for the production of immovable property by a third party. Secondly, the taxable person must have used the goods for the purposes of his business. Thirdly, the VAT on those goods would not have been wholly deductible if they had been acquired entirely from another taxable person. If these three conditions are met, the use of the goods for business purposes must be treated as a taxable supply. (17)

43. It falls to the national court to determine specifically whether, in the present case, these conditions are met. However, there is nothing in the documents before the Court which appears to contradict that conclusion and both the national court and the parties to the main dispute agree that the provision in question applies to the present case. First, the building was obtained in the course of the business, after being completed by a third party on land and using materials provided by Oudeland. (18) Secondly, by being let, the building was applied for the purposes of the business. Thirdly, 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.

44. Whilst this transaction may be subject to the provisions on the taxation of internal supplies, the case-law of the Court shows that the VAT thereon is to be levied as follows.

45. First of all, the entire amount of the input VAT paid by the taxable person in respect of the acquisition of the goods for the purposes of the subsequent application must give rise to a right to deduct that VAT, in accordance with Article 17(2) of the Sixth Directive. (19) Accordingly,

Oudeland was right to pay and subsequently to deduct the VAT on the costs associated with the grant of the long lease and the completion of the building.

46. Secondly, the application of the goods is itself subject to VAT and the amount for which the taxable person is liable as a result of that application must be calculated, in accordance with Article 11(A)(1)(b) of the Sixth Directive, on the basis of the overall value of each of those elements, it being understood that VAT must not have been previously charged on those elements. (20)

47. It is precisely at this stage that the national court?s question arises. Since Oudeland already paid VAT on the grant of the long lease and on the works to complete the building, but also deducted such VAT, can these cost price factors of the applied goods be taken into account for the purposes of calculating the taxable amount for VAT of the application of the goods forming the subject matter of the internal supply?

48. In the judgment in *Gemeente Vlaardingen*, the Court stated that the option of treating an internal supply as a supply made for consideration cannot be used in order to charge VAT on the value of the goods which the taxable person concerned has made available to the third party who completed or improved them, to the extent that the taxable person has already, in the context of an earlier tax period, *paid* VAT on that value. (21) The Court explained that such repeated taxation would be incompatible with the essential characteristic of VAT, namely that it is imposed on the added value of the goods or services concerned, since the tax payable on a transaction is calculated after the tax paid on the preceding transaction has been deducted. Furthermore, such repeated taxation would also be incompatible with the aim of the above option, which is intended to enable Member States to make subject to VAT the application of goods for the purposes of activities exempt from VAT, but in no way authorises Member States to levy VAT several times on the same element of the value of those goods. (22)

49. As submitted, in essence, by Oudeland and the Netherlands Government, it follows from this line of reasoning that the Court’s aim was to prevent concurrent taxation, namely double taxation of a substantive, not simply technical, nature. Repeated taxation does not arise if, in accordance with the essential characteristic of the VAT system, to which the Court refers, the VAT paid on the cost price factors included in the taxable amount of the internal supply has been deducted. Only where the VAT relating to such factors remains chargeable to the taxable person because he has not deducted them are the factors not to be included in the taxable amount of the internal supply.

50. This interpretation is, moreover, borne out by the case-law of the Court. In its judgment in *Gemeente ?s-Hertogenbosch*, the Court no longer used the term ‘paid’, but stated that VAT must not have been previously ‘charged’ on the elements to be included in the taxable amount. (23) In addition, more recently, in its judgment in *Property Development Company*, (24) the Court stated that ‘in no case, may the taxable amount referred to in Article 11A(1)(b) of the Sixth Directive include an element of value on which the taxable person has already paid VAT without subsequently being able to deduct it’. (25) Therefore, elements of value on which the taxable person has already paid VAT, VAT which it has deducted, can be included in the taxable amount.

51. Consequently, the fact that, in the main proceedings, the amounts relating to the VAT on the grant of the long lease and the completion of the building were paid does not prevent these cost price factors from being taken into account in the taxable amount of the supply for the purposes of Article 5(7)(a) of the Sixth Directive, in so far as the VAT on these elements has been deducted.

52. It should also be noted that, since only part of the immoveable property (87.5% of the area

of the building at issue in the main proceedings) was applied to activities exempt from VAT, the VAT deduction will be excluded only in that proportion. As regards the remainder, to the extent that the goods concerned are used for the purposes of taxable transactions, corresponding to 12.5% of the area of the building, then under Article 17(2) and (5) of the Sixth Directive Oudeland is, in principle, authorised to deduct from the tax for which it is liable the VAT paid in respect of the internal supply. (26)

53. It is also necessary to dismiss the Commission's argument by which it submits, by expressly referring to the judgment in *Gemeente Leusden and Holin Groep*, (27) that, in order to correct Oudeland's VAT situation, recourse would have to be had to the mechanism for the adjustment of deductions set out in Article 20 of the Sixth Directive, particularly paragraph 2 thereof.

54. In its judgment in *Gemeente Leusden and Holin Groep*, the Court stated that treatment as supplies made for consideration under Article 5(7)(a) of the Sixth Directive and the VAT adjustment for capital goods referred to in Article 20(2) thereof are two mechanisms with the same *economic effect*, that is to say, they oblige a taxable person to pay amounts equivalent to the deductions to which he was not entitled, however, the arrangements for payment are different. Whereas Article 5(7)(a) of the Sixth Directive entails a single payment, Article 20(2) of that directive provides for adjustments, in respect of capital goods, spread out over several years. (28)

55. However, it also follows from that judgment that, although both mechanisms have the same economic effect, they do not pursue the same aim. Indeed, only Article 5(7)(a) of the Sixth Directive relates to the application by a taxable person of goods for the purposes of his business. Accordingly, in cases in which this provision applies, only Article 5(7)(a) of the Sixth Directive may serve as a basis for requiring a taxable person to pay sums originally deducted in respect of immoveable property which was subsequently let under an exempt lease. (29)

56. In the light of all of the above considerations, I propose that the Court reply to the first question referred for a preliminary ruling as follows: Articles 5(7)(a) and 11(A)(1)(b) of the Sixth Directive must be interpreted as meaning that the application by a taxable person, for the purposes of an economic activity exempt from VAT, of immoveable property built on land over which the taxable person has acquired a right in rem entitling him to use that land and immoveable property, property which he had a third party complete, can be subject to VAT calculated on the basis of a taxable amount comprising the value of the right in rem acquired and the costs of completing the property, where the taxable person has already paid the VAT relating to that value and those costs, VAT which he has also already deducted in full.

C – *The second question referred*

57. By its second question, the national court essentially asks whether, in circumstances such as those of the present case, in which the taxable person has acquired land with a building under construction through the grant of a right in rem, Article 11(A)(1)(b) of the Sixth Directive is to be interpreted as meaning that the value of the right in rem, which has to be included in the taxable amount of a supply for the purposes of Article 5(7)(a) thereof, must correspond to the overall value of the annual ground rents — that is to say the total value of the annual amounts to be paid for the entire duration of the right in rem — or the value of the amounts outstanding for payment under the annual ground rent for the remainder of the long lease, or even the value of the annual ground rents already due.

58. The national court notes, first of all, that the Sixth Directive contains no rules on the taxable amount of the rights in rem referred to in Article 5(3)(b) thereof. It submits that it can be argued that the value of the amounts payable consecutively for the acquisition of a long lease do not form

part of the cost price of the building, because those amounts constitute the consideration for a temporary right of use and are not due from the acquirer at once upon acquisition of the right, but are instead due over a term of years.

59. However, where a Member State, such as the Netherlands, has made use of the possibility of treating a right in rem as tangible property and where, under national legislation, the grant and the transfer of such a right in rem during its term results not in tax due depending on the period of use of the immoveable property and periodic payments to be made, but tax due in one payment on the total of the amounts stipulated for the whole or remaining period (in the form of a ‘capitalised ground rent’), this could mean that, at the time of the supply under Article 3(1)(h) of the Law on VAT, the cost price must include the value of the amounts to be paid as ground rent. The national court also raises the question of the compatibility of such legislation with Article 10(2) of the Sixth Directive.

60. Oudeland asserts that future ground rents cannot be taken into account for the purposes of calculating the cost price for the taxable person, since Article 11(A)(1)(b) of the Sixth Directive expressly provides that the cost price is to be determined at the time of the internal supply. By contrast, the Netherlands Government argues that account must be taken of the capitalised value of the ground rents for the entire duration of the long lease which constitutes the value of the total consideration of the lease, as agreed by the parties when it was granted.

61. It should be recalled, first of all, that the rule laid down in Article 11(A)(1)(b) of the Sixth Directive, according to which the taxable amount of the transactions referred to, in particular, in Article 5(7)(a) thereof is to be ‘the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined [at] the time of supply’, derogates from the general rule laid down in Article 11(A)(1)(a) of the directive, according to which the taxable amount of transactions subject to VAT is to be the consideration for the supplies of goods and services forming the subject matter of such transactions. (30)

62. Furthermore, Article 11(A)(1)(b) clearly shows that it is only in the absence of a purchase price for the goods or for similar goods that the taxable amount of an application within the meaning of Article 5(7)(a) of the Sixth Directive is the ‘cost price’, determined at the time of the transaction. (31) The criterion of the cost price is therefore a criterion for determining the taxable amount which could be defined as ‘dually residual’, as it only applies if both the general criterion of consideration and the secondary criterion of the purchase price of the goods or of similar goods do not apply. (32)

63. As observed in point 33 of this Opinion, according to the referring court, since it is common ground that, in the present case, the purchase price of goods similar to the building is absent, the relevant criterion for determining the taxable amount of the application at issue is the cost price.

64. The case-law provides some guidance on how this criterion is to be applied. Thus, in order to calculate the cost price, all elements of the value which gave rise to that price must be examined in detail. (33) In addition, the calculation of the taxable amount, as set out in Article 11(A)(1)(b) of the Sixth Directive, should be based on the overall value of each of the elements that must be taken into account. (34) Furthermore, it is apparent from the wording of this provision that the cost price must be calculated at the time of the taxable transaction, namely when the goods are applied for the purposes of the exempt activity. (35)

65. As the Netherlands Government correctly points out, Article 11(A)(1)(b) of the Sixth Directive, where it is used to calculate the taxable amount of an application within the meaning of Article 5(7)(a) thereof, must be read in the light of the specific aim pursued by the latter provision, as set out in points 34 to 36 of this Opinion, namely to prevent distortion of competition by

ensuring the equal treatment of taxable persons, in accordance with the principle of fiscal neutrality.

66. It should also be borne in mind that, in the present case, pursuant to the national provision based on Article 5(3)(a) of the Sixth Directive, (36) the grant of a long lease is treated as the supply of goods.

67. It follows from all of these considerations that, in order to ensure the equal treatment of taxable persons, the calculation of the total cost price for the taxation of the application to an exempt activity of goods acquired in the course of business should seek to make the interested party, in this case Oudeland, subject to the same tax burden as a reference competitor engaged in the same exempt activity who uses goods (in this case, the land and completed building) over which he has acquired a long lease and on which he has paid VAT, VAT which he cannot, however, deduct because the activity for which the goods are used is exempt.

68. In a case such as this, the total cost price is the overall value of the price of the works to complete the building plus the overall value of the cost price of the grant of the long lease (over the land and the building under construction), calculated at the time the building is applied to the exempt activity. In my view, this second value corresponds to the (capitalised) value of the amounts outstanding for payment under the annual ground rent at the time of the application of the goods. Indeed, this value corresponds to the cost that the reference competitor would have to bear ? for the purposes of engaging in the same exempt activity ? in order to be able to grant a long lease over the goods with the same duration as the right in rem held by the interested party over the goods at the time of their application to the exempt activity.

69. The grant of a long lease — a right in rem deriving from Roman law — is characterised by the conferment on the acquirer, for a stipulated term and for consideration, of the same right to enjoy the property as that held by the owner, excluding all others from any entitlement to that right, and by the fact that the lessor takes ownership of the improvements made and structures erected by the acquirer during the term of the lease. (37) The consideration payment method may be agreed upon by the parties and may take the form of a single payment or instalments (as in the present case, by way of annual ground rents).

70. Since one of the key aspects of long leases is the fact that the temporal effect of their conferment is limited, it is therefore clear that the overall value of the grant of such leases is proportionate to their duration. Consequently, this value decreases with the passage of time.

71. Thus, if, for example, Oudeland had applied the completed building to the exempt activity, 10 years after the grant of the long lease with a term of 20 years, the reference competitor, mentioned in paragraph 67 of this Opinion, would be represented by a taxable person who, in order to engage in the exempt letting activity, would have to have acquired the long lease (on which he would pay VAT, without being able to deduct it thereafter) for a term of only 10 years. In those circumstances, there would be no justification for making the interested party, who applies goods as provided in Article 5(7)(a) of the Sixth Directive (Oudeland in this case), pay VAT on the value of all of the ground rents stipulated for the entire term of the long lease. This value would not actually correspond to the cost price of the long lease *determined at the time of the application.*

72. On the basis of these considerations, I do not think — in contrast to the Netherlands Government — that the capitalised value of the ground rents for the entire duration of the long lease corresponds to the overall value of the cost price of that lease, as determined at the time of the application of the goods. (38) That would only be the case if the application of the goods takes place at the time of the grant of the long lease.

73. Furthermore, based on the same considerations and contrary to Oudeland's arguments, I do not think that the cost price of the long lease could possibly correspond entirely to the value of the ground rents already paid. This value does not correspond to the value of the long lease determined at the time of the application of the goods. In this connection, in contrast to Oudeland's assertions, the fact that the cost price has not yet been paid in full is not relevant for the purposes of determining that price, which must be understood as the cost that the reference competitor mentioned in point 67 of this Opinion would bear.

74. Lastly, as regards the national court's concerns as to the compatibility of Netherlands legislation — which provides that the grant or transfer of a right in rem results in a single payment of VAT on the total of the amounts stipulated for the entire period — with Article 10(2) of the Sixth Directive, I note that the national court itself states that the case pending before it does not concern a situation to which that question directly relates. Consequently, I do not think it is strictly necessary for the Court to deal with this question in the context of the present case. In that connection, I merely point out that, in any event, the criterion laid down in the provision which the national court asks to be interpreted in its second question, namely Article 11(A)(1)(b) of the Sixth Directive, is the criterion of the cost price, so that the value that must be included in the taxable amount set out in that provision is the overall value of the cost price factor, irrespective of the payment arrangements agreed upon.

75. To conclude, I consider that the following reply should be given to the second question referred for a preliminary ruling: in a case such as that at issue in the main proceedings, in which the taxable person has acquired land with a building under construction through the grant of a right in rem, Article 11(A)(1)(b) of the Sixth Directive is to be interpreted as meaning that the value of this right in rem, which has to be included in the taxable amount of a supply, for the purposes of Article 5(7)(a) thereof, must correspond to the overall value of the amounts outstanding for payment under the annual ground rent at the time of the application of the goods.

## V – **Conclusion**

76. In the light of the foregoing considerations, I propose that the Court give the following replies to the questions referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands):

(1) Articles 5(7)(a) and 11(A)(1)(b) 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 must be interpreted as meaning that the application by a taxable person, for the purposes of an economic activity exempt from value added tax, of immoveable property built on land over which the taxable person has acquired a right in rem entitling him to use that land and immoveable property, property which he had a third party complete, can be subject to value added tax calculated on the basis of a taxable amount comprising the value of the right in rem acquired and the costs of completing the property, where the taxable person has already paid the value added tax relating to that value and those costs, value added tax which he has also already deducted in full.

(2) In a case such as that at issue in the main proceedings, in which the taxable person has acquired land with a building under construction through the grant of a right in rem, Article 11(A)(1)(b) of Directive 77/388 is to be interpreted as meaning that the value of this right in rem, which has to be included in the taxable amount of a supply, for the purposes of Article 5(7)(a) thereof, must correspond to the overall value of the amounts outstanding for payment under the annual ground rent at the time of the application of the goods.

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, ‘the Sixth Directive’).

3 – Transactions of this kind are known by different names, such as ‘self supplies’, ‘deemed supplies’, ‘integration supplies’ and ‘supplies for business purposes’. However, since the goods are obtained and applied internally, within the undertaking, I prefer to use the term ‘internal supplies’.

4 – Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which repealed and replaced the Sixth Directive as from 1 January 2007 (see, in particular, Article 18(a) of Directive 2006/112).

5 – See judgments in *Gemeente Leusden and Holin Groep* (C?487/01 and C?7/02, EU:C:2004:263, paragraphs 90 et seq.); *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698); *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:2188); and *Property Development Company* (C?16/14, EU:C:2015:265).

6 – See Article 2 of the Sixth Directive and Article 2(1)(a) of Directive 2006/112.

7 – See Article 3(2) of the Law on VAT (mentioned in point 14 of this Opinion). This provision is based on Article 5(3)(b) of the Sixth Directive.

8 – This was possible under Article 11(5) of the Law on VAT, which is based on Article 13(C)(a) of the Sixth Directive.

9 – C?299/11, EU:C:2012:698.

10 – Judgment in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698, paragraph 25).

11 – Ibidem (paragraph 26).

12 – Opinion of Advocate General Mazák in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:561, points 45 and 47 as well as the case-law cited).

13 – Judgment in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698, paragraphs 27 and 28).

14 – Ibidem.

15 – Ibidem (paragraph 37 and the operative part of the judgment).

16 – See, in this connection, the Opinion of Advocate General Sharpston in *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:267, points 60 to 62), to which the Court expressly referred in paragraph 32 of its judgment in *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:2188).

17 – Ibidem (point 61).

18 – This situation is comparable to that giving rise to the judgments in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698) and *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:2188).

19 – Judgment in *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:2188, paragraph 34).

20 – Judgment in *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:2188, paragraph 35), which refers to the judgment in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698, paragraphs 28 to 33).

21 – C?299/11, EU:C:2012:698, paragraph 32. Emphasis added.

22 – Ibidem.

23 – Judgment in *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:2188, paragraph 35, cited and referred to in point 46 of this Opinion).

24 – C?16/14, EU:C:2015:265.

25 – Ibidem (paragraph 42).

26 – Judgment in *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:2188, paragraph 36).

27 – C?487/01 and C?7/02, EU:C:2004:263, particularly paragraphs 90 et seq.

28 – Ibidem (paragraphs 90 and 91). Emphasis added.

29 – Ibidem (paragraph 92 and, *a contrario*, paragraph 93).

30 – See judgment in *Property Development Company* (C?16/14, EU:C:2015:265, paragraphs 33 and 34) as well as, by analogy, as regards Articles 73 and 74 of Directive 2006/112, judgment in *Marinov* (C?142/12, EU:C:2013:292, paragraph 31). The transactions referred to in Article 5(7)(a) of the Sixth Directive consist of, in particular, applications of goods acquired in the course of business to an economic activity exempt from VAT. In all cases of treatment as a supply made for consideration, the taxable person does not receive any actual consideration that can serve as a taxable amount for calculating VAT, with the result that the general rule laid down in Article 11(A)(1)(a) of the Sixth Directive cannot apply.

31 – Judgment in *Property Development Company* (C?16/14, EU:C:2015:265, paragraph 37).

32 – See, as regards the criterion of the cost price, the considerations set out in point 39 of the Opinion of Advocate General Sharpston in *Finanzamt Freistadt Rohrbach Urfahr* (C?219/12, EU:C:2013:152).

33 – Judgment in *Property Development Company* (C?16/14, EU:C:2015:265, paragraph 40 *in fine*).

34 – See, by analogy, judgments in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698, paragraph 28) and *Gemeente ?s-Hertogenbosch* (C?92/13, EU:C:2014:2188, paragraph 35).

35 – See judgment in *Gemeente Vlaardingen* (C?299/11, EU:C:2012:698, paragraph 30).

36 – That is, Article 3(2) of the Law on VAT (see point 14 of this Opinion).

37 – See judgment in '*Goed Wonen*' (C?326/99, EU:C:2001:506, paragraph 55), which concerned a usufructuary right, which is also a right in rem like a long lease. Without it being necessary, in my opinion, to consider the differences or similarities between long leases and the letting of immovable property, I merely note that a fundamental difference between these two legal situations, which might warrant different tax treatment, is that the grant of a long lease as a right in rem is comparable to, as set out in Article 5(3)(b) of the Sixth Directive, a supply for consideration,

while letting is not.

38 – As mentioned in point 67 of this Opinion, I cannot endorse the approach suggested by the Netherlands Government, according to which the reference competitor is a taxable person who engages in the same non-exempt activity and who acquired ownership of the immoveable property entirely from a third party. The acquisition value of a long lease over property is necessarily lower than the acquisition value of ownership over the same property. These two values are not, therefore, comparable.