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OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 4 July 2017 (1)

Case C?308/16

Kozuba Premium Selection sp. z o.o.

v

Dyrektor Izby Skarbowej w Warszawie

(Request for a preliminary rulingfrom the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling — Taxation — Common system of value added tax — Exemption for the supply of a building or parts thereof, and of the land on which it stands — Directive 2006/112/EC — Article 135(1)(j) — Article 12(1)(a) and (2) — Concept of ‘first occupation’ — Concept of ‘conversion’)

1.

The Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) has referred for a preliminary ruling a question on the interpretation of Directive 2006/112/EC, (2) in so far as it affects the value added tax (VAT) which is charged on the supply of a building, or parts thereof, and of the land on which it stands. (3)

2.

Under Article 135(1)(j) of Directive 2006/112, the supply of such immovable property ‘other than the supply referred to in point (a) of Article 12(1)’ is to be exempt from VAT. In principle, therefore, the ‘supply, before first occupation,’ of a building is subject to, not exempt from, VAT, since that is the situation provided for by the latter of the two provisions cited. Conversely, VAT will not be payable in the case of subsequent supplies of the same building.

3.

However, whether a supply is subject to or exempt from VAT, as described above, may differ, because, under Article 12(2) of Directive 2006/112, Member States are able both to (i) ‘lay down the detailed rules for applying the criterion referred to in paragraph 1(a) to conversions of buildings’ and to (ii) ‘apply criteria other than that of first occupation’ in certain cases.

4.

The referring court wishes to know, in summary, whether the Polish legislation which transposed into national law that part of Directive 2006/112 (in so far as it refers both to the concept of ‘first occupation’ and to that of ‘conversion of buildings’) complies with that directive.

I. Legal context

A. European Union law

Directive 2006/112

5.

Article 2(1) provides that:

‘The following transactions shall be subject to VAT:

(a)

the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

...’

6.

Under Article 9(1):

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

7.

Under Article 12:

‘1. Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions:

(a)

the supply, before first occupation, of a building or parts of a building and of the land on which the building stands;

(b)

the supply of building land.

2. For the purposes of paragraph 1(a), “building” shall mean any structure fixed to or in the ground.

Member States may lay down the detailed rules for applying the criterion referred to in paragraph 1(a) to conversions of buildings and may determine what is meant by “the land on which a building stands”.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply, or the period elapsing between the date of first occupation and the date of subsequent supply, provided that those periods do not exceed five years and two years respectively.

...’

8.

Article 14 provides that:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

...’

9.

Article 135(1) reads:

‘1. Member States shall exempt the following transactions:

…

(j)

the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1);

...’

B. Polish law

Ustawa o podatku od towarów i us?ug (Law on the tax on goods and services) (4)

10.

Point 14 of Article 2 provides the following definition:

‘“First occupation” shall mean release for use of buildings, civil engineering works or parts thereof, in performance of taxable activities, to the first customer or user, following their:

(a)

erection or

(b)

upgrade, if the expenditure incurred for the upgrade, as defined in the regulations on income tax, constituted at least 30% of the initial value.’

11.

Article 43(1) reads as follows:

‘The following shall be exempt from tax:

…

10)

the supply of buildings, civil engineering works or parts thereof, except where:

(a)

the supply is made within the framework of the first occupation or prior to the first occupation,

(b)

the period between the first occupation and the supply of the building, civil engineering works or parts thereof was shorter than two years;

...’

II. Facts of the dispute and the question referred

12.

Kozuba Premium Selection sp. z o.o. (‘Kozuba’) (5) is a company which, on 17 September 2005, decided to increase its share capital. On the same day, one of the shareholders contributed to the company a residential building (a summer house) built in 1992.

13.

In 2006, the building was modernised and adapted to the requirements of the economic activity carried on by Kozuba, as a ‘show home’. The cost of remodelling was equivalent to 55% of the initial value of the building. (6)

14.

On 31 July 2007, the building was entered into Kozuba’s register of fixed assets (‘show home’), where it remained until 15 January 2009. On 15 January 2009, it was removed from the register of fixed assets, since it was sold to a third party.

15.

According to Kozuba, the sale of the immovable property following its refurbishment was a chargeable event for VAT. However, as it was a used building, that sale was tax-exempt, so Kozuba did not declare it in the VAT self-assessment.

16.

On 12 April 2013, the Dyrektor Urz?du Kontroli Skarbowej (Director of the Tax Inspection Authority, Poland) issued to Kozuba a VAT assessment for the first quarter of 2009, in which the taxable amount was increased by the amount from the sale of the building.

17.

According to the tax authority, in summary: (a) under point 10 of Article 43(1) of the Law on VAT, tax exemption applies only where the transfer of buildings occurs after the ‘first occupation’; and (b) under point 14 of Article 2 of the Law on VAT, ‘first occupation’ occurs only following an activity subject to tax. Therefore, although the building was intended for the company’s own activities on 31 July 2007, ‘first occupation’ had not occurred on that date, since it had not been put into service in performance of taxable activities. On that basis, ‘first occupation’ occurred on the date the building was sold, that is on 15 January 2009.

18.

On 17 May 2013, Kozuba lodged an objection against the previous notice, which was upheld on 30 July 2013 by the Dyrektor Izby Skarbowej w Warszawie (Director of the Tax Chamber, Warsaw, Poland).

19.

Kozuba brought an action against that decision before the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) which dismissed the action on the merits by judgment of 22 May 2014. (7)

20.

The company then brought an appeal before the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), a court which expresses its doubts as to whether the requirement of ‘first occupation’, as provided for in Article 2(14) of the Law on VAT, must be accompanied by a taxable activity or whether, on the contrary, ‘first occupation’ corresponds to the actual occupation of the building, irrespective of whether such a taxable activity has preceded it. In the first case, there is a possible incompatibility between the national legislation and Article 135(1)(j) of Directive 2006/112, since entitlement to the exemption would be unduly restricted.

21.

This is based on the fact that, Article 135(1)(j) of Directive 2006/112, cited above, which refers to Article 12(1)(a) thereof, associates the exemption with the concept of ‘first occupation’, but does not define that concept.

22.

According to point 14 of Article 2 of the Law on VAT, there is no ‘first occupation’ where construction or renovation of the buildings is carried out by a taxable person for his own purposes, and it is the developer which uses those buildings. Where the supply of the building is not made by virtue of a taxable activity, the exemption is not applicable as provided for in point 10 of Article 43(1) of the Law on VAT. This may be the case, for example, where the immovable property is sold ten years after its de facto occupation. The result is that the tax (that is, the exclusion from exemption) is applicable not only to ‘new’ buildings, but also to ‘old’ buildings, if the latter have been constructed or refurbished by the taxable person himself for his own use.

23.

Moreover, the referring court is uncertain as to the compatibility with Directive 2006/112 of point 14 of Article 2(b) of the Law on VAT, which provides that, where buildings are converted, first occupation occurs if the expenditure incurred for the renovation constitutes at least 30% of the building's initial value.

24.

The referring court notes that, under the Law on VAT, a VAT assessment may be made (without an exemption) each time that work of that nature is carried out and the refurbished building is transferred. That court considers that Polish law does not specify from what date and over what time frame the amount of the expenditure (at least 30% of the initial value) must be calculated in order for a 'first occupation' to be deemed to have occurred.

25.

Consequently, the Naczelny S?d Administracyjny (Supreme Administrative Court) refers the following question to the Court for a preliminary ruling:

'Must Article 135(1)(j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) be interpreted as precluding a national provision (point 10 of Article 43(1) of the Ustawa o podatku od towarów i us?ug [Law on the tax on goods and services] of 11 March 2004 [Dz. U. No 54, item 535, as amended; "the Law on VAT"]) under which the supply of buildings, civil engineering works or parts thereof is exempt from VAT save where:

(a)

the supply is made within the framework of the first occupation or prior to the first occupation,

(b)

the period between the first occupation and the supply of the building, civil engineering works or parts thereof was shorter than 2 years;

in so far as point 14 of Article 2 of the Law on VAT defines first occupation as release for use of buildings, civil engineering works or parts thereof, in performance of taxable activities, to the first customer or user, following their:

(a)

erection or

(b)

upgrade, if the expenditure incurred for the upgrade, as defined in the regulations on income tax, constituted at least 30% of the initial value?'

III. Procedure before the Court of Justice

26.

The request for a preliminary ruling was lodged at the Court Registry on 30 May 2016.

27.

The Polish Government and the European Commission submitted written observations. It has not been considered necessary to hold an oral hearing.

IV. Summary of the observations of the parties

28.

As far as the Polish Government is concerned, Article 135(1)(j) of Directive 2006/112 does not define the concept of ‘first occupation’ or refer to the definitions adopted in the laws of the Member States. It is, therefore, an independent concept of EU law which must be given a uniform interpretation in order to avoid divergences in the application of the VAT system from one State to another. (8)

29.

The provision must be interpreted in the light of its context and of the scheme and the objectives of Directive 2006/112, having particular regard to the underlying purpose of the exemption. Although, according to the Court, exemptions must be interpreted strictly, (9) as they constitute a derogation from the general rule of liability to tax, that rule of interpretation must not render the exemption ineffective.

30.

According to the Polish Government, the construction or substantial refurbishment of a building creates added value which must be taxed at the exact time a transaction subject to VAT is carried out. (10) In its opinion, that added value must be taxed at the time of its sale to a buyer, irrespective of the period during which the person who constructed or converted the building has used it for himself.

31.

The Polish Government states that, where there has been no supply (taxable activity) of a building, whether newly constructed or refurbished, it is deemed to be a ‘new building’ under Directive 2006/112. To equate ‘first occupation’ with mere de facto occupation would undermine the nature of the principles underlying that directive and would open the way to fraud through abuse of the exemption.

32.

As regards the possibility for Member States to apply criteria other than that of ‘first occupation’, the Polish Government focuses on the two situations provided for in Article 12(2) of Directive 2006/112. If a State applies the criterion of the ‘period elapsing between the date of first occupation and the date of subsequent supply’, then both the initial supply in the context of ‘first occupation’ and any subsequent supply within a two-year period would be subject to VAT. Otherwise, the initial supply in the context of a ‘first occupation’ would be exempt and the subsequent supply, having taken place within two years of that ‘first occupation’, would not be exempt.

33.

As regards the possibility that ‘first occupation’ may take place after the refurbishment of immovable property, the Polish Government points out that this contingency is recognised by the Court. (11) The Polish Government submits that the national provisions do not exceed the limits of the discretion conferred by Article 12(2) of Directive 2006/112, since the level of expenditure set by the Polish legislature entails substantial added value as a result of the conversion.

34.

According to the Commission, although exemptions must be interpreted strictly, such an interpretation cannot render the actual exemption ineffective. In this case, the national law could result in ‘old’ buildings being subject to VAT, which runs counter to the objective and logic of Article 135(1)(j) of Directive 2006/112.

35.

In the absence of a definition of ‘first occupation’ in Directive 2006/112, the Commission considers that it should be construed in its normal sense, in that it means, quite simply, the use of the building. Therefore, there is no requirement for that use to be preceded by a taxable transaction. That requirement, introduced by Polish law, gives rise to a restriction which is incompatible with Article 135(1)(j) read in conjunction with Article 12 of Directive 2006/112.

36.

As regards conversions of immovable property, the Commission points out that the second subparagraph of Article 12(2) of Directive 2006/112 permits Member States to determine the meaning of ‘first occupation’ in relation to those transactions, as confirmed by the Court in the judgment in Gemeente 's-Hertogenbosch. (12)

37.

The Commission takes the view that the requirement that, in order for a ‘conversion’ to be deemed to have taken place, the expenditure incurred must equate to at least 30% of the initial value of the building is, precisely, one interpretation of that criterion. The reconstruction process must be of such a scale that the result of that reconstruction is equivalent to a new building and, therefore, the concept of ‘first occupation’ must be applied not only to the initial construction, but also to each subsequent ‘conversion’ of the immovable property.

38.

Nevertheless, the Commission is not convinced that the definition of ‘conversion’ in Polish law is compatible with Directive 2006/112. In the Commission’s opinion, converting a building involves carrying out major alterations and not mere renovation or maintenance works, which the legislation appears to include within that concept.

V. Assessment

39.

Under Article 135(1)(j) of Directive 2006/112, the supply of a building or parts thereof, and of the land on which it stands, (13)‘other than the supply referred to in point (a) of Article 12(1)’ is to be exempt from VAT. As the latter provision refers to the ‘supply, before first occupation,’ subsequent

transfers of the same building are to be exempt from VAT.

40.

There are two matters in relation to which the referring court has expressed doubts. It has doubts, first, in relation to the definition of ‘first occupation’ in Polish law, which unjustifiably limits the effectiveness of the exemption. Since the Law on VAT associates that concept with ‘the performance of taxable activities’, a new building could be used (occupied) by its owner or its developer without that giving rise to a taxable activity. Consequently, if the developer were to transfer the building years later, the exemption would not be applicable and the sale would be subject to VAT despite the fact that the building is no longer new.

41.

Secondly, the referring court asks whether the Law on VAT complies with Article 12 of Directive 2006/112, given the terms in which the Law on VAT defines the transfer of buildings (according to which the exemption does not apply to subsequent supplies of some of those buildings).

A. The concept of ‘first occupation’

42.

Under Article 14(1) of Directive 2006/112, ‘supply of goods’ is to mean ‘the transfer of the right to dispose of tangible property as owner’. According to the case-law of the Court, ‘the concept of “supply of goods” in Article 5(1) of the Sixth Directive [(14)] does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner’. (15)

43.

According to Directive 2006/112, those who perform economic activities have the status of taxable persons for VAT purposes (Article 9(1)) if they meet the general criteria of performing those activities professionally and on a regular basis. However, those criteria are broader in relation to immovable property transactions, since the directive allows Member States also to regard as a taxable person anyone who carries out those transactions on an occasional basis, in accordance with Article 12(1)(a).

44.

Therefore, a person who develops property on a regular basis is a taxable person under Article 9(1) of Directive 2006/112. A person who develops property on an occasional basis is a taxable person under Article 12(1)(a) of the same directive provided that the Member State has used that power to extend the scope ratione personae of that directive. If that is not the case, then the supply by a person who develops property on an occasional basis would not be subject to VAT.

45.

The exemption provided for in Article 135(1)(j) of Directive 2006/112 refers to the factual situation set out in Article 12(1)(a) of that directive. As a result, in accordance with that reference, the supply of buildings, with the exception of the supply referred to in Article 12(1)(a) of the directive, is exempt. That exception applies whether or not the Member State has exercised the option to make persons who develop property on an occasional basis subject to the tax.

46.

Article 135(1)(j) and Article 12(1)(a) must be applied in a coordinated manner having regard to the purpose of the transaction. That is to say, it is necessary to consider whether the supply of the building was made before or after first occupation of the building. Therefore, even if the State has not extended the status of taxable person to persons who develop property on an occasional basis, once the supply has occurred, followed by the first occupation by a taxable person within the meaning of Article 9(1) of the directive, subsequent supplies will generally be exempt from VAT.

47.

The basis of the exemption is, in essence, the fact that the buildings which are transferred are not new. (16) No tax liability is incurred in second and subsequent supplies of buildings (as the buildings are no longer ‘new’, but ‘used’), which is consistent with the VAT system. The Court confirmed this in its judgment of 4 October 2001 in Goed Wonen, when it asserted that ‘sales of new buildings following their first supply to a final consumer’ should not be taxed and that that supply ‘marks the end of the production process’. (17)

48.

The rationale behind VAT is to tax economic activities which create added value. For immovable property, added value is inherent in the construction of a new building, the first supply of which gives rise to liability for VAT precisely because it marks ‘the end of the production process’.

49.

Repeated taxation of that same building, on the same basis, each time that it is sold subsequently would not be justified. (18) In the proposal for a Sixth Directive, it is noted in the Commission’s preparatory work that ‘to resolve difficulties in distinguishing between new buildings and old, the notion of first occupation has been used to determine the moment at which the building leaves the production process and becomes a subject of consumption, that is to say when the building begins to be used by its owner or a tenant’. (19)

50.

Article 12(2) of Directive 2006/112 confirms that the fact that a building is new is the essential characteristic determining liability to VAT, since it allows the Member States to lay down the detailed rules for applying the criterion referred to in paragraph 1(a) (supply before first occupation) to conversions of buildings. In this way, the directive allows for the taxation not only of the supply of‘new’ buildings, but also the supply of ‘used or old’ buildings, but only where the latter have undergone a conversion such that they can, in fact, be treated as new buildings. From this perspective, the activity of converting a building fulfils the same economic function (that is adding value) that the original construction fulfilled at the relevant time.

51.

The problem posed by the Law on VAT, which is also the cause of the referring court’s concern, is that it associates the concept of first occupation with the performance of a taxable activity. The Law thus excludes occupations which do not involve any of the transactions typically subject to VAT.

52.

In accordance with that national legislation, when a building is used by the owner or the developer for his own purposes for an established period of time, as in this case, the subsequent sale of the building is not exempt, since that use does not fulfil the necessary requirements to be classed as ‘first occupation’. Does that criterion limit the scope of the exemption as established in the in the common system of VAT?

53.

Directive 2006/112 does not specify what is meant by ‘first occupation’. I share the view of the Polish Government and the Commission that it is an autonomous concept of EU law, which must be given a uniform interpretation. Nonetheless, that concept should not be interpreted in an abstract manner, but by reference to the particular terms used in the dispute forming the subject matter of the request for a preliminary ruling.

54.

However, at least two interpretations of that concept can be rejected. The first of those interpretations is concerned with the mere physical fact of the occupation of buildings without a legal basis (unlawful occupations). The second interpretation is that that concept covers occupations which are merely fictional, or carried out fraudulently, with the sole aim of taking advantage of the exemption, but without any real underlying transaction. Neither of those interpretations could, in my view, be legally effective for the purpose of exempting from VAT any supply of a building made after those (unlawful or supposed) occupations have occurred.

55.

Leaving aside those two extreme scenarios, if Articles 2 and 43 of the Law on VAT are interpreted in the manner described by the referring court (namely, that for ‘first occupation’ to occur, an activity which is subject to VAT must necessarily be performed), I think that the scope of the exemption provided for in Article 135(1)(j) of Directive 2006/112 is restricted excessively.

56.

There are cases where first occupation occurs without any taxable activities taking place (either before or after that occupation). One example of such a case is occupation which occurs as a result of the letting of the building as a residence, (20) which is, in principle, a VAT-exempt transaction. (21)

57.

In the situation which gave rise to the request for a preliminary ruling, the property developer occupied (that is to say, used) the building for his own commercial purposes for more than two years and, subsequently, transferred it to a third party. The Polish tax authorities do not classify that use, for own purposes, as first occupation simply because no taxable activity took place.

58.

That premiss (that use for own purposes is not an activity subject to VAT) is, to say the least, debatable, if it is considered in the light of the points made by the Court in the judgment of 10 September 2014 in Gemeente ’s-Hertogenbosch (22) regarding the scope of Article 5(7)(a) of the Sixth Directive in relation immovable property transactions. That provision (and its equivalent in Directive 2006/112) (23) allows Member States to treat as supplies made for consideration, which are subject to VAT, the application by a taxable person for the purposes of his business of certain

goods, under certain conditions.

59.

In that judgment, the Court stated that ‘where a municipality takes first occupation of a building which it has had built on its own land and … which it intends to use … for its business activities …, that situation must be regarded as coming within the scope of Article 5(7)(a) of the Sixth Directive, in so far as the Member State concerned has exercised the option provided for in that provision’. (24)

60.

The above circumstance notwithstanding, it is true that not all first occupations need be preceded by a supply of the building, within the meaning of Directive 2006/112 (that is to say, by the transfer of the right to dispose of property to a third party), nor do they have to occur as a result of a taxable activity, if that latter concept covers non-exempt transactions.

61.

In particular, the actual occupation of the building by the developer for his own purposes and for more than two years (as in this case) is to be treated as a first supply, whether or not it is considered to be a taxable activity, (25) so that, if the building is subsequently sold, its transfer will be exempt from VAT.

62.

It is true that exemptions, since they constitute an exception to the general rule that transactions constituting chargeable events for VAT purposes must be taxed, are to be interpreted strictly, but on condition that such an interpretation does not render them ineffective. (26)

63.

In this case, since the Polish legislature chose to establish the exemption on the basis of the models proposed by Article 12(2) of Directive 2006/112, it had to remain within the limits laid down in that provision. It could opt simply to apply the criterion of first occupation, in the sense already referred to, or to accept, as an alternative criterion, ‘the period elapsing between the date of first occupation and the date of subsequent supply, provided that [that period does] not exceed … two years’ (third subparagraph of that provision). Point 10 of Article 43[(1)] of the Law on VAT provides for both possibilities.

64.

I would reiterate that in both cases, the phrase ‘first occupation’ is self-standing, and is not dependent on a taxable activity having taken place previously. The use of a building (whether newly constructed or converted, as examined below) by its owner, without interruption, for at least two years, is treated as a first supply, and the subsequent sale of the building is exempt from VAT.

B. Conversions of buildings

65.

The third subparagraph of Article 12(2) of Directive 2006/112 provides that Member States may lay down the detailed rules for applying the criterion referred to in paragraph 1(a) to ‘conversions of buildings’.

66.

Therefore, it is possible for a developer (whether working on a professional or an occasional basis) to be a taxable person for VAT purposes not only in relation to newly constructed buildings, but also in relation to old buildings which are converted. Article 12(2) of Directive 2006/112 sets out the two sets of detailed rules. The first subparagraph of Article 12(2) refers to the meaning of building as being ‘any structure fixed to or in the ground’ and the following subparagraph refers to ‘conversions of buildings and … “the land on which a building stands”’.

67.

It could be understood, almost intuitively, that reference to the conversion of immovable property in this context, instead of the conversion of buildings, was made with the intention of covering both buildings and the land on which they stand. However, the wording used in the provision indicates that that notion should be dismissed immediately since, as well as referring to immovable property, it refers to the ‘land on which a building stands’, so, without the land, all that is left is that which is built on that land. That is, in point of fact, buildings.

68.

The term ‘building’, according to the judgment of 16 January 2003 in Maierhofer, (27) covers structures fixed to or in the ground (including if they are constructed from prefabricated components in such a way that they cannot be either easily dismantled or easily moved). According to the Court, there is no reason to treat that term differently depending on whether what is concerned is a supply under Article 4(3)(a) of the Sixth Directive (now Article 12(1)(a) of Directive 2006/112), which refers to buildings, and to the exempt transaction provided for in Article 13(B)(b) (now Article 135(1)(l)), which refers to immovable property. (28)

69.

Since there is no doubt that the building sold in this case was immovable property and that it had been restructured at a cost which amounted to 55% of the initial value, the only question which must be addressed is whether the concept of conversion in the Law on VAT complies with Directive 2006/112.

70.

Difficulties arise because Directive 2006/112 does not explain what is meant by ‘conversion’. The judgment of the Court of 12 July 2012 in J. J. Komen en Zonen Beheer Heerhugowaard may shed some light on this. (29) Although the circumstances of that case differ from those in this case, the concept of ‘conversion’ is associated with the virtually complete or major renovation of old buildings. (30)

71.

As submitted above, in order for the supply of immovable property to be subject to VAT, there must be an economic activity which adds value, by means of construction works.

72.

For new buildings, the starting point is the land, which will need to be developed so that the (future) building meets habitability and functional-use requirements. The building must then be erected on the developed land. Obviously, the transition from undeveloped land to habitable building involves substantially modifying what physically exists and, to that same extent, adding value.

73.

Nonetheless, Directive 2006/112 adopts a broad approach and accepts that that construction process, by virtue of which the value was added, may continue to have an effect on buildings which have already been used. In particular, Article 12(2) of Directive 2006/112 allows Member States to specify the detailed rules for applying the ‘criterion referred to in paragraph 1(a)’ (supply of new buildings) to conversions of buildings.

74.

Member States may, therefore, treat conversions as first supplies of buildings. In the absence of a definition of ‘conversion’ in Directive 2006/112, it is for Member States to specify when and in what circumstances a conversion takes place. In my opinion, the only limitation inherent in the second subparagraph of Article 12(2) of Directive 2006/112 is that transactions which are unrelated to the actual concept of construction of a building cannot be regarded as conversion activities.

75.

According to the Law on VAT, a building is regarded as having undergone a conversion if the expenditure incurred for its improvement is at least 30% of the initial value of the building. In principle, I think that that rule, which the State is empowered to adopt, does not go beyond the inherent limitations referred to above. Where the cost of refurbishment works reaches that level (almost a third of the initial cost of the building), those works can be classed as substantial, and therefore the investment in the building represented by those works is also substantial. The works carried out in converting the building add value to it, which is a logical precondition for the (future) assessment of VAT when the building is subsequently sold.

76.

In each case, it is for the national tax authorities (or the court which reviews their decisions) to assess whether the cost of the works was incurred as a result of carrying out actual renovation, refurbishment, improvement or similar works to the building (in other words, a genuine conversion) and not just maintenance and conservation or purely embellishment work. (31)

77.

On that point, the referring court points out that the Law on VAT does not establish when and over what timeframe the provision permitting the taxation of subsequent supplies of the same building, following each conversion costing more than 30% of the initial value, is to take effect.

78.

However, I do not think that that silence prevents the national law from complying with the second subparagraph of Article 12(2) of Directive 2006/112. There is nothing to prevent a building, during its economic life, from undergoing substantial conversions which add to its original value and are

tantamount to (re)building it, at least in part. Sales of the building occurring after those subsequent improvements may be taxed, as described above, provided that each conversion fulfils the necessary requirements to be treated, to a significant extent, as a new construction of the building.

79.

In any event, quantitative considerations are almost superfluous in this case, given that the cost of the works carried out to adapt the residential building owned by Kozuba was 55% of the initial value of the building, which reveals the scale of the works undertaken. (32) Moreover, if, on account of the purpose (33) of the works, they could, from a qualitative point of view, be classed as conversion works, as outlined above, it could hardly be denied that those works constituted, in reality, the (re)building of the residence, which would make it permissible to charge VAT on its subsequent transfer.

VI. Conclusion

80.

In the light of the foregoing, I propose that the question referred by the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) be answered as follows:

Article 135(1)(j) in conjunction with Article 12(1)(a) and (2) of Council Directive 2006/112/EC on the common system of value added tax must be interpreted as:

(1)

precluding the ‘first occupation’ of buildings, civil engineering works or parts thereof necessarily being linked to the performance of taxable activities for the purposes of VAT;

(2)

not preventing a Member State from considering, for the purposes of VAT-exemption, that a building has undergone a conversion where the cost of the improvement is at least 30% of the initial value of the building, provided that the improvements are of a substantial nature and affect structural elements.

(1) Original language: Spanish.

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

(3) As the original dispute relates exclusively to a building, and not to its parts or the land on which it stands, I shall refer henceforth only to the VAT treatment applicable to buildings.

(4) Ustawa o podatku od towarów i us?ug (Law on the tax on goods and services) of 11 March 2004 (Dz. U. No 54, item 535, as amended; ‘the Law on VAT’).

(5) Kozuba is the name that was given to the undertaking Poltrex in 2009. Although some of the events took place before the undertaking was renamed, I shall refer to it as Kozuba.

(6) According to the order for reference (paragraph 3), the remodelling consisted of replacing the roofs, repainting the walls, replacing the doors and windows, laying new floors, and building a staircase to the first floor and a fireplace in the living room.

(7) However, the court annulled that decision on purely formal grounds.

(8) It cites the judgment of 17 January 2013, BG? Leasing (C?224/11, EU:C:2013:15, paragraph 56).

(9) Judgment of 18 November 2004, Temco Europe (C?284/03, EU:C:2004:730, paragraph 18).

(10) It refers to the Opinion of Advocate General Jacobs in Blasi (C?346/95, EU:C:1997:432, point 15), to indicate that, unlike the transfer of an old building, the transfer of a newly constructed building marks the end of a production process subject to VAT.

(11) Judgment of 12 July 2012, J.J. Komen en Zonen Beheer Heerhugowaard (C?326/11, EU:C:2012:461, paragraph 36).

(12) Judgment of 10 September 2014, Gemeente 's-Hertogenbosch (C?92/13, EU:C:2014:2188, paragraph 36).

(13) For the sake of simplicity, from this point onwards I shall refer only to the supply of a building, given that the dispute relates exclusively to such a supply.

(14) 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). Its wording is identical to that of Article 14(1) of Directive 2006/112.

(15) Judgment of 22 October 2015, PPUH Stehcemp (C?277/14, EU:C:2015:719, paragraph 44), citing judgments of 8 February 1990, Shipping and Forwarding Enterprise Safe (C?320/88, EU:C:1990:61, paragraph 7), and of 21 November 2013, Dixons Retail (C?494/12, EU:C:2013:758, paragraph 20).

(16) The judgment of 12 July 2012, J. J. Komen en Zonen Beheer Heerhugowaard (C?326/11, EU:C:2012:461, paragraph 21), is significant in that it states that ‘the … exemption … applies to supplies of old buildings’.

(17) C?326/99, EU:C:2001:506, paragraph 52.

(18) See the Opinion of Advocate General Jacobs in Blasi (C?346/95, EU:C:1997:432, point 15), which is also cited by the referring court.

(19) Proposal for a Sixth Directive (COM(73) 950 final) submitted to the Council on 20 June 1973 (Bulletin of the European Communities, Supplement 11/73, p. 9).

(20) See, inter alia, judgment of 4 October 2001, Goed Wonen (C?326/99, EU:C:2001:506, paragraph 52). It has been acknowledged in the case-law of the Court that the concept of the letting of immovable property covers not only the letting of land but also the letting of buildings or parts thereof (judgments of 12 February 1998, Blasi, C?346/95, EU:C:1998:51; of 9 October 2001, Cantor Fitzgerald International, C?108/99, EU:C:2001:526; of 9 October 2001, Mirror Group, C?409/98, EU:C:2001:524), and of 15 December 1993, Lubbock Fine, C?63/92, EU:C:1993:929).

(21) Though this may not be the case in all States. In the judgment of 3 February 2000, Amengual Far (C?12/98, EU:C:2000:62, paragraph 10), the Court stated that ‘as is clear from … Article 13B(b) of the Sixth Directive and from the context of that article, … the second subparagraph of that provision allows Member States to provide for further exclusions to the scope

of the exemption laid down for the letting of immovable property (see, to this effect, the judgment in Case C?63/92Lubbock Fine, [EU:C:1993:929], paragraph 13)’.

(22) C?92/13, EU:C:2014:2188.

(23) Article 18(a) of Directive 2006/112.

(24) Judgment of 10 September 2014, Gemeente 's-Hertogenbosch (C?92/13, EU:C:2014:2188, paragraph 33).

(25) In accordance with the judgment of 10 September 2014, Gemeente 's-Hertogenbosch (C?92/13, EU:C:2014:2188).

(26) Judgments of 17 January 2013, BG? Leasing (C?224/11, EU:C:2013:15, paragraph 56), and of 21 February 2013, Žamberk (C?18/12, EU:C:2013:95, paragraph 19).

(27) Case C?315/00, EU:C:2003:23, paragraphs 25 and 26.

(28) Ibid., paragraph 34.

(29) Case C?326/11, EU:C:2012:461.

(30) That case related to a commercial building undergoing work, partial demolition of which had already begun, but which, at the time of the supply, was still partly in use in that the shopping mall was still accessible to the public and at least one shop was open. Another similar case is that which gave rise to the judgment of 19 November 2009, Don Bosco Onroerend Goed (C?461/08, EU:C:2009:722), regarding some buildings which were supplied for the purpose of being demolished and rebuilt (in fact, demolition began on the day of the supply). In that judgment, the Court held that the building did not warrant consideration and that, in reality, what was supplied was land that had not been built on.

(31) Substantial alterations may include, for example, alterations achieved through works affecting the building’s foundations, structure, roof coverings and elements relating to its stability or resistance, among other similar alterations, as well as alterations relating thereto.

(32) Paragraph 15 of the order for reference.

(33) See footnote 31.