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Opinion of Mr Advocate General Jacobs delivered on 27 February 1992. - Pieter de Jong v Staatssecretaris van Financiën. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - VAT assessment - Sixth VAT Directive. - Case C-20/91.

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Opinion of the Advocate-General

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My Lords,

1. The Netherlands Hoge Raad seeks a ruling on the interpretation of the Sixth VAT Directive (Council Directive 77/388/EEC, OJ 1977 L 145, p. 1), in particular the provisions on the application of business goods for private use in Articles 5(6) and 11A(1)(b). The central issue in the case is whether a builder who acquires land for private use and builds a dwelling on it in the course of his business must account for a charge, in respect of that private use, based on the value of both the land and the building, even where he deducted VAT only on the acquisition of the goods and services used for the purpose of building the dwelling and not on the acquisition of the land.

The facts and the questions put by the national court

2. The facts of the case are as follows. On 15 August 1978 Mr de Jong, who is a building contractor, purchased a plot of land with an existing building. He did not pay VAT on the land. He was subsequently granted permission to build two dwellings on it. On 30 July 1979 he sold approximately half of the land to a third party, Mr Dolfing. He did not charge VAT on the sale. Mr de Jong then demolished the existing building and constructed two dwellings on the entire plot, one for Mr Dolfing and one for himself. The dwellings were completed in 1980 and 1981 respectively. Since Mr de Jong had deducted VAT on the acquisition of the goods and services used in the construction of the dwellings, he recorded on his VAT return by way of liability to tax ("output tax") an amount equal to the tax deducted ("input tax") on the goods and services used for the construction of the dwelling put to private use. However, the VAT Inspector considered that, for the purposes of the Netherlands provisions on the taxation of the private use of business assets (Article 3(1)(g) of the Netherlands Turnover Tax Law 1968), Mr de Jong was to be deemed to have made to himself a single supply of goods consisting of both the land and the dwelling; accordingly the Inspector sought to include the value of the land in the basis of assessment. Mr de Jong' s appeal is based on the ground that, since he acquired the land in his private capacity, it never formed part of his business assets and hence was not transferred from business to private use for the purposes of the Netherlands provisions.

3. Following an unsuccessful appeal to the Gerechtshof, Mr de Jong appealed further to the Hoge Raad. The latter concluded that the Netherlands provisions were intended to produce the same result as the relevant provisions of the Sixth Directive and referred the following questions to the Court for a preliminary ruling:

"(1) Is Article 5(6) of the Sixth Directive to be interpreted as meaning that a taxable person (a building contractor) who acquires land solely for his private use and subsequently erects on that land in the pursuit of his business a building (a dwelling) and finally puts the building together with the land on which it stands and possibly the surrounding land to his private use has applied goods forming part of his business assets for his private use within the meaning of the directive not only as regards the building, but as regards the building together with the land on which it stands and possibly the surrounding land?

(2) Is the condition laid down in Article 5(6) of the Sixth Directive regarding the assimilation of the application of goods forming part of business assets for private use to a supply that the value added tax on the goods in question or the component parts thereof has been wholly or partly deductible to be understood as meaning that where goods forming part of business assets have been applied for private use in the form of immovable property, consisting of a building and the land on which it stands and possibly the surrounding land, if there is no deductibility as regards the land there is no supply of goods either as regards the immovable property as a whole or as regards a part thereof, that is, the building?

(3) If the answer to the second question is that the whole immovable property constitutes a supply of goods as provided for in Article 5(6) of the Sixth Directive, is Article 11A(1)(b) of the directive to be interpreted as meaning that the taxable amount laid down therein must be based on the cost price of the whole immovable property, that is to say including the cost price of the land, or is the amount limited to the part of the cost price with regard to which value added tax is deductible?"

The Community provisions

4. The provisions of the Sixth Directive concerning supplies of goods and services for private use are contained in Articles 5(6) and 6(2), in conjunction with Article 11A(1)(b) and (c).

Article 5(6) provides that:

"The application by a taxable person of goods forming part of his business assets for his private use ..., where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration ..."

Article 6(2) treats as a supply of services for consideration:

"(a) the use of goods forming part of the assets of a business for the private use of the taxable person ... where the value added tax on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use ..."

Article 11A(1)(b) provides that the taxable amount for supplies referred to in Article 5(6) 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".

Article 11A(1)(c) provides similarly that for supplies referred to in Article 6(2) the taxable amount is "the full cost to the taxable person of providing the services".

5. Under those provisions, therefore, a taxable person who puts to private use goods forming part of his business assets is deemed to make a supply of goods or services for a consideration equal

to the purchase or cost price of the goods or cost of the services. The provisions are designed to prevent business goods put to private use by taxable persons from escaping taxation because of the rules in Article 17 of the directive allowing taxable persons to deduct the VAT incurred on the acquisition of such goods (that is to say, to recover such VAT by setting it off against the VAT for which they are liable on their supplies). Article 5(6) creates a deemed supply of goods, Article 6(2)(a) a deemed supply of services. Article 5(6) therefore seems to envisage the outright transfer of goods out of the business, whereas Article 6(2)(a) concerns the private use of goods which continue to form part of the business. The two provisions otherwise seem largely identical in both wording and effect.

6. Article 5(1) of the directive defines a supply of goods as the transfer of the right to dispose of "tangible property" as owner. As tangible property, land therefore falls to be classified as "goods" for the purposes of Article 5 and may be the subject of a deemed supply under Article 5(6).

The first question

7. By its first question the Hoge Raad is in effect asking whether a taxable person (a builder) who buys land solely for private use but, in the course of his business, constructs a building on the land for his own occupation applies land forming part of his business assets for private use for the purposes of Article 5(6).

8. In my view it is clear that Article 5(6) does not apply in such circumstances because the land is privately held and does not form part of the taxable person' s business assets for the purposes of that provision. That view is consistent with other provisions of the directive and with the Court' s decision in Case C-97/90 Lennartz v Finanzamt Muenchen III (see in particular paragraphs 8 to 12 of the judgment and paragraphs 23 and 24 of my Opinion in that case). Where a taxable person acquires goods wholly for private use he acts in his private capacity rather than as a taxable person for the purposes of the Sixth Directive. Consequently, the various provisions of the directive concerning the acquisition of business goods do not apply. In particular the provision conferring upon taxable persons the right to deduct VAT on purchases in Article 17(2) and also the administrative and accounting rules in Articles 18 and 22 of the directive are inapplicable to the acquisition of such goods. Since in such circumstances the goods do not enter the taxable person' s business, he clearly cannot be deemed to supply them for the purposes of Article 5(6).

9. The Commission and the German Government both share that view. However, in its written observations the Netherlands Government argued that the construction of a dwelling on land made available to the business for that purpose created for VAT purposes a new immovable property consisting of the building and the land attached to it. The new unit resulted from the taxable person' s economic activity. It therefore concluded that the first question should receive an affirmative reply, that is to say that in the circumstances described by the national court the taxable person applied both the land and the building for private use. At the hearing the Netherlands Government modified its position somewhat. It acknowledged that the first question as formulated by the national court assumed that the land was used for private purposes, but added that it was unclear whether this had been established as a matter of fact in the national proceedings (see paragraph 16 below).

10. The Hoge Raad' s first question expressly posits that the land is acquired solely for private use, and no guidance is sought on that question. It seems to me ° and on this point I agree with the Commission ° that the fact that a builder acting as a taxable person constructs a dwelling for private use on his privately held land does not convert the land into a business asset. Regardless of whether interests in land and buildings are divisible under the applicable national law relating to immovable property, it is in my view necessary for the purposes of Article 5(6) to distinguish between taxation of the land held by a taxable person in his private capacity and taxation of any building constructed on that land in the course of his business. The contrary view would go beyond what is necessary to achieve the aim of the provision, that aim being to prevent private

consumption by taxable persons from escaping tax. If Mr de Jong instructed a third party to construct a building on his land, there would be no question of the third party making a supply of land as well as the building. VAT would be chargeable solely on the price paid for the building. Imposition of a private-use charge in respect of the land in the circumstances of the present case would therefore result in a greater tax burden than if Mr de Jong acted as a normal consumer.

11. The untenability of the view advanced by the Netherlands Government in its written observations can be illustrated by the example of a garage proprietor who has his privately owned car repaired in the course of his business. In such a case the car does not become part of his business assets. The garage proprietor might be treated as supplying a service to himself under Article 6(2)(b) of the directive or as using business assets (i.e. the garage and its equipment but not the car) for private purposes under Article 6(2)(a) and as supplying to himself, under Article 5(6), any spare parts that he happens to take from his business assets in the course of the repair. But it would be absurd to suggest that he supplies the car to himself. He simply performs services on, and adds goods to, his private property in the course of his business.

12. In the present case it is questionable whether it is correct to regard the taxable person as making a supply of goods consisting of the completed building. The construction of a dwelling by a builder on a customer' s land might equally be analysed as a supply of services consisting of the performance of building work on the customer' s land or a mixed supply of work, use of equipment and materials. The construction by a taxable person of a building for his own occupation on privately held land would by analogy fall to be taxed under Article 6(2) as well as Article 5(6). On that analysis the question of a single, indivisible supply of immovable property comprising the land and the completed building would not arise.

13. That issue does not, however, need to be resolved for the purposes of this case. In my view the first question must in any event receive a negative reply, that is to say that in the circumstances described the taxable person does not apply land forming part of his business assets for private use for the purposes of Article 5(6).

The second question

14. By its second question the Hoge Raad asks in substance whether, where business assets consisting of land and a building are applied for private use, the requirement in Article 5(6) that VAT on the goods or the component parts thereof should have been wholly or partly deductible means that, where no VAT was deductible on the land, there is a supply neither in respect of the immovable property as a whole nor in respect of the building.

15. In the operative part of its decision the Hoge Raad does not expressly state that the second question is put only in the event of an affirmative reply to the first question. It is none the less clear that that is the case. The second question clearly follows from the first as a matter of logic, since it expressly postulates that land forming part of business assets is applied for private use ° which is the very point on which a ruling is sought by the first question ° and goes on to raise a separate question concerning the effect of the deductibility condition in Article 5(6). That the second question is dependent on an affirmative answer to the first question is, moreover, confirmed by a reading of the body of the order for reference (in particular paragraphs 4.3 to 4.7), where the Hoge Raad prefaces its discussion of the issues raised by the second and third questions with the words "If the answer to that first question is 'yes' " (paragraph 4.3). Since in my view the first question should be answered in the negative, it is unnecessary to consider the second question.

16. I take this view notwithstanding the approach apparently suggested by the Netherlands Government at the hearing. Although accepting that the first question should receive a negative reply, the Netherlands Government seemed to suggest that, given the uncertainty surrounding the facts of the case, the Court should reply to the second question and in so doing consider the possibility that the land was acquired privately but was subsequently "given a business intention". I

do not consider this to be necessary. A reading of the order for reference shows that the second question was not prompted by any factual uncertainty; rather, it was put on the hypothesis that, as a matter of law, a builder converts privately held land into a business asset by constructing a building on it for his private use, a view which I have already rejected (see paragraphs 10 to 12 above). Moreover, it may be noted that the second question raises rather broader issues concerning the purpose and effect of the provisions on the taxation of private use, including some that are more directly relevant to another case currently pending before the Court, namely Case C-193/91 Mohsche.

Third question

17. By its third question the national court asks whether, if there is a supply of the immovable property as a whole, the taxable amount for the purposes of Article 11A(1)(b) is the cost price of the property as a whole or just that part of the cost price in respect of which VAT was deductible. Since I consider that in the circumstances described there is no supply of the land, this question does not arise.

Conclusion

18. In conclusion, therefore, I am of the opinion that the Court should give the following reply to the first question put by the Hoge Raad:

Article 5(6) of the Sixth Directive must be interpreted as meaning that, where a taxable person (a building contractor) acquires land solely for his private use and, in the course of his business, erects a building on that land which he puts to private use, only the building and not the land is to be treated as applied for private use for the purposes of that provision.

(*) Original language: English.