

JUDGMENT OF THE COURT (Fourth Chamber)

19 November 2009*

In Case C-461/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 3 October 2008, received at the Court on 23 October 2008, in the proceedings

Don Bosco Onroerend Goed BV

v

Staatssecretaris van Financiën,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as the President of the Fourth Chamber, R. Silva de Lapuerta, G. Arestis, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: V. Trstenjak,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 September 2009,

after considering the observations submitted on behalf of:

- Don Bosco Onroerend Goed BV, by W. Ambergen, belastingadviseur,

- the Netherlands Government, by C. Wissels, M. Noort and M. de Grave, acting as Agents,

- Ireland, by D. O'Hagan, acting as Agent, and G. Clohessy SC,

- the Commission of the European Communities, by D. Triantafyllou, M. van Beek and W. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 13B(g) 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 (OJ 1977 L 145, p. 1, ‘the Sixth Directive’), in conjunction with Article 4(3)(a) of the directive.

- 2 The reference was made in the context of proceedings between Don Bosco Onroerend Goed BV (‘Don Bosco’) and the Staatssecretaris van Financiën (‘Secretary of State for Finances’) concerning an exemption from transfer duty on the acquisition of a property, an exemption linked, under Netherlands law, to whether the acquisition is subject to value added tax (‘VAT’).

Legal context

Community law

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

4 Article 4(3) of the Sixth Directive provides that:

‘Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2 and in particular one of the following:

- (a) the supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand.

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 these periods do not exceed five years and two years respectively.

“A building” shall be taken to mean any structure fixed to or in the ground;

- (b) the supply of building land.

“Building land” shall mean any unimproved or improved land defined as such by the Member States.’

- 5 Article 13 of the Sixth Directive, headed 'Exemptions within the territory of the country', provides:

'...

B. Other exemptions

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

...

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

(h) the supply of land which has not been built on other than building land as described in Article 4(3)(b).

...'

- 6 Subparagraph (b) of the first paragraph of Article 13C provides that ‘Member States may allow taxpayers a right of option for taxation in cases of ... the transactions covered in B(d),(g) and (h) above’.

National legislation

- 7 Pursuant to Article 11 of the 1968 Law on turnover tax (Wet op de omzetbelasting 1968), in the version in force in 1999 (‘Law on turnover tax’):

‘1. Subject to conditions to be laid down by public administrative regulation the following shall be exempt from tax:

- (a) the supply of immovable property and rights over such property, with the exception of:
- (1) the supply before or, at most, two years after, first occupation of buildings or parts of buildings and the land on which they stand as well as the supply of building land;
 - (2) supplies, other than the supplies described in point 1, to persons who use the immovable property for purposes that give rise to a right to deduct in part or in full tax pursuant to Article 15, provided that the transferor and the transferee have jointly submitted a request to that effect to the tax inspector, and who moreover abide by the conditions laid down by ministerial order;

...

3. For the purposes of applying Point 1 of Paragraph 1(a):

- (a) a “building” is to be taken to mean any structure fixed to or in the ground;
- (b) “first occupation” is to be taken to mean occupation of a building after it has been transformed or renovated if the transformation or the renovation has created a finished property;
- (c) “the land on which they stand” is to be taken to mean any land commonly treated as belonging to the building or as being for its use.

4. For the purposes of applying Point 1 of Paragraph 1(a), “building land” is to be taken to mean any land which has not been built on:

- (a) on which work is being or has been carried out;
- (b) which is being or has been improved with a view to exclusive use of the land;

(c) in the vicinity of which improvements are being or have been made; or

(d) for which a building permit has been granted;

with a view to constructing buildings on the land.’

8 Article 2(1) of the Law on the taxation of legal transactions (‘Wet op belastingen van rechtsverkeer’) provides that “[t]ransfer duty” is a tax levied in respect of the acquisition of immovable property located in the Netherlands or of rights over such immovable property’.

9 As provided in Article 15(1)(a) of that law, subject to conditions laid down by public administrative regulation, there is an exemption from transfer duty for the acquisition ‘by way of supply within the meaning of Point 1 of Article 11(1)(a) of the [Law on turnover tax] ... which is subject to turnover tax, unless the property is used to create revenue and the purchaser can deduct turnover tax in part or in full, in accordance with Article 15 of the [Law on turnover tax]’.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 In 1998, Stichting Leusderend (‘the vendor’) sold to Don Bosco a plot of land occupied by two dilapidated buildings previously housing a school with boarding facilities (‘the property’).

- 11 Don Bosco planned to have those two buildings completely demolished so that it might then construct new buildings on the land that had thus become available. To that end, it had been agreed that the vendor would apply for a demolition licence, conclude an agreement with a contractor for the demolition of the buildings and be charged the cost thereof. According to the agreement between the vendor and Don Bosco, Don Bosco would bear that cost through an increase in the selling price, except for the cost of removing asbestos, which would be payable by the vendor.

- 12 On 27 August 1999 the municipality of Leusden (Netherlands) granted the vendor a demolition licence, one of the conditions being that the demolition work could not begin until any asbestos in the buildings concerned had been removed.

- 13 Having submitted to the vendor a quotation for the removal of asbestos and the subsequent demolition works on 21 September 1999, the undertaking responsible for those tasks began the work on the morning of 30 September 1999.

- 14 At midday on the same date the property was transferred to Don Bosco. By that time some of the paving between the buildings had been removed, part of the side wall of one of the buildings had been taken down with the help of a hydraulic crane, and windows, frames and brickwork had in part been demolished and destroyed.

- 15 Work to remove asbestos did not begin until after the property had been transferred and it was only after that work was finished that demolition of the buildings continued. Thereafter, new office buildings were constructed on that plot of land, to the order and on behalf of Don Bosco.

16 Following the acquisition of the property, Don Bosco received an assessment of outstanding transfer duty. The objection lodged against that assessment was rejected by decision of the tax inspector.

17 Don Bosco brought an action against that decision, submitting that, in the circumstances, the supply of the property was subject to VAT and that, therefore, it was exempt from transfer duty pursuant to Article 15(1)(a) of the Law on the taxation of legal transactions.

18 The Gerechtshof te Amsterdam (Amsterdam Court of Appeal) dismissed the action as unfounded, on the ground that the supply of the property was exempt from turnover tax under Article 11(1)(a) of the Law on turnover tax.

19 Don Bosco lodged an appeal on a point of law against the judgment of the Gerechtshof te Amsterdam, claiming that the Sixth Directive and, in particular, Articles 13B(h) and 4(3)(b) of the directive, had to be interpreted as meaning that the supply of the property should be liable to VAT.

20 The referring court is unsure whether the supply of a building partly demolished with a view to the construction of a new building in its place still constitutes the supply of that old building, first occupation of which occurred in the past, or whether any supply during the demolition phase of that building or during the construction phase of the new building must be considered to be a supply of the building before its first occupation.

21 In this respect, the national court refers to the principle of VAT neutrality and points out that making the supply of a property that takes place after demolition of the old building has begun but before first occupation of the new building has occurred liable to

VAT would result in the VAT charged on that demolition, site clearance and construction qualifying for deduction, so that any supply would be 'net' of VAT until first occupation. By contrast, where the supply of land with a completely or partly demolished building is exempt, the VAT due on the demolition would form part of the price of the new building.

22 However, according to the national court, the question of VAT neutrality would be less of an issue, or even none at all, when it is the purchaser who gives the order for demolition and is charged the cost thereof, and not the vendor who supplies the property to be demolished. This would be all the more so when it is not the vendor, but the purchaser, who has drawn up the plans for the new building. In such a case, it should be held that the vendor in fact supplies the old building.

23 Taking the view that the outcome of the case in the main proceedings depends on the interpretation of the Sixth Directive, the Hoge Raad der Nederlanden has referred the following questions to the Court for a preliminary ruling:

'(1) Must Article 13B(g) of the Sixth Directive in conjunction with Article 4(3)(a) of the directive be interpreted as meaning that VAT is charged on the supply of a building which has been partly demolished with a view to the replacement of that building with a newly constructed building?

(2) Is it relevant to the answer to that question whether it is the vendor or the purchaser of the building who has given the order for demolition and is charged the cost thereof, and thus the supply is [subject to VAT] only if the vendor has given the order for demolition and is charged the cost thereof?

- (3) Is it relevant to the answer to the first question whether it is the vendor or the purchaser of the building who has drawn up the plans for the new building, and thus the supply is [subject to VAT] only if the vendor has drawn up the plans for the new building?
- (4) If the answer to the first question is in the affirmative, is [VAT] then levied on any supply occurring after the date on which the demolition work actually begins or after a later date, especially the date on which the demolition has made substantial progress?’

The questions referred for a preliminary ruling

²⁴ By its questions, which it is appropriate to consider together, the national court asks essentially whether Article 13B(g) of the Sixth Directive in conjunction with Article 4(3)(a) of that directive must be interpreted as meaning that the supply of land occupied by a building that is to be demolished in order to be replaced by a new construction, and whose demolition had already begun before that supply took place, is exempt from VAT.

²⁵ It should be noted at the outset that, according to consistent case-law, the terms used to specify an exemption such as that set out in Article 13 of the Sixth Directive are to be interpreted strictly, since that exemption constitutes an exception to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the

exemptions of their intended effect (see, to that effect, Case C-445/05 *Haderer* [2007] ECR I-4841, paragraph 18; Case C-407/07 *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing* [2008] ECR I-9615, paragraph 30; and Case C-357/07 *TNT Post UK* [2009] ECR I-3025, paragraph 31).

- 26 The exemption from VAT provided for in Article 13B(g) of the Sixth Directive requires, first of all, the supply to concern a building or parts thereof, and the land on which it stands or they stand.
- 27 In accordance with the third subparagraph of Article 4(3)(a) of the Sixth Directive, a building is to be taken to mean any structure fixed to or in the ground.
- 28 In the light of the wording of the above definition of the term 'building', the Netherlands Government submits that, in case of the supply of land occupied by a building that is to be replaced and has, for that reason, already been partly demolished, that building constitutes such a 'structure', as long as it has not been completely removed. A partly demolished building is always an old building that has already been occupied, so that its supply is exempt from VAT pursuant to Article 13B(g) of the Sixth Directive.
- 29 By contrast, the Commission of the European Communities claims in its written submissions, and Ireland essentially supported this view at the hearing, that a situation such as that described in the previous paragraph of this judgment constitutes, first and foremost, a supply of land, whilst the existing building is merely accessory to that supply. The reason is said to be that, from the start, the intention had been to demolish the building and hence to supply land with a view to constructing a new building on it.
- 30 Therefore, it must be examined whether the fact that the old building, or at least part of it, existed when the property was supplied is the decisive factor for the application of the exemption provided for in Article 13B(g) of the Sixth Directive or whether other

aspects, such as those set out in the second and third questions referred for a preliminary ruling, may or must be taken into consideration.

31 In this respect, interpretation of that provision cannot be based on the Commission's initial proposal or its amended proposal for the Sixth Directive. Those proposals embodied exhaustive rules as regards the supply of immovable property and, in particular, a common definition of building land. Moreover, the exemption from VAT was not limited to the supply of land which has not been built on. The Council of the European Union, however, did not accept either of those proposals and opted for a different approach. Notably, as regards the term 'building land', the Council finally referred to the Member States' definitions (see, to that effect, Case C-468/93 *Gemeente Emmen* [1996] ECR I-1721, paragraph 21).

32 Moreover, it is apparent from the order for reference that, in the case in the main proceedings, the vendor did not only sell and supply the plot of land on which two buildings stood when the contract was concluded. In accordance with its undertaking given to Don Bosco, the vendor also applied for a demolition licence and entered into an agreement with a company that actually carried out the demolition work on those two buildings, at its own expense. It had been agreed that the vendor would be charged the cost of that demolition, which was to be added to the selling price for the property, except for the cost of removing asbestos, which would be payable by the vendor. By contrast, it is not apparent from the order for reference that the vendor was involved in the construction of the new building.

33 Consequently, in its dealings with Don Bosco and for VAT purposes, the vendor supplied the property and also provided the services relating to the demolition of the existing buildings.

34 Accordingly, it must be decided whether, for VAT purposes, and in particular the interpretation of the provisions governing the questions referred by the national court,

the supply of the property and the demolition of the buildings are to be considered to be two distinct and independent transactions requiring separate assessment or as a single complex transaction comprising several elements (see, to that effect, Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraphs 18 and 20, and Case C-425/06 *Part Service* [2008] ECR I-897, paragraphs 48 and 49).

35 It is true that it follows from Article 2 of the Sixth Directive that every supply or transaction must normally be regarded as distinct and independent (see, to that effect, particularly *Part Service*, paragraph 50 and the case-law cited, as well as Case C-572/07 *RLRE Tellmer Property* [2009] ECR I-4983, paragraph 17).

36 In certain circumstances, however, several formally distinct transactions, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent (see, to that effect, *Part Service*, paragraph 51, and *RLRE Tellmer Property*, paragraph 18).

37 This is particularly true where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see, to that effect, Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 23; *Part Service*, paragraph 53; and *RLRE Tellmer Property*, paragraph 19).

38 According to the Court's case-law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether there were two or more distinct transactions or one single transaction (see, to that effect, in particular *Levob Verzekeringen and OV Bank*, paragraph 19, and *Aktiebolaget NN*, paragraph 21). Therefore, contrary to what Don Bosco and the Netherlands Government claim,

account must be taken of additional supplies, such as the ones described in the second and third questions referred for a preliminary ruling, by the vendor of the immovable property, in order to determine whether the transaction at issue is exempt from VAT.

39 In a situation such as that at issue in the case in the main proceedings, it must be held that, for VAT purposes, the actions undertaken by the vendor are closely linked. The demolition work and the supply of the plot of land as such actually overlapped. The economic purpose of those actions was to supply land ready for construction. In this respect, it is not possible, without undue contrivance, to take the view that Don Bosco acquired from the same person first an old building and the ground it stood on which, as it happened, was of no economic use to him, and, only subsequently, the supplies in connection with the demolition of the buildings, which alone could render the land economically useful (see, by analogy, *Aktiebolaget NN*, paragraph 25).

40 Consequently, the supply of land on which a dilapidated building still stands, which must be demolished so that a new building can be constructed in its place and demolition of which had already begun before that supply took place, and also the demolition of that building must, in circumstances such as those described by the referring court, be considered to form a single transaction for VAT purposes, having, taken as a whole, the aim of supplying not the existing building but land that had not been built on.

41 Therefore, such a transaction, viewed as a whole, does not fall within the exemption from VAT provided for by Article 13B(g) of the Sixth Directive, regardless of how far demolition of the old building had progressed at the moment the land was actually 'supplied'.

42 In those circumstances, it is for the referring court to examine whether the land at issue falls under the definition of 'building land' within the meaning of Articles 4(3)(b) and 13B(h) of the Sixth Directive.

43 In that respect, it must be recalled that, taking into account the express reference, in Article 4(3)(b) of the Sixth Directive, to the Member States' definitions of building land, it is for the Member States to define what land is to be regarded as being building land, for the purposes of the application both of Article 4(3)(b) and of Article 13B(h) of the Sixth Directive, while having regard to the objective pursued by Article 13B(h), which seeks to exempt from VAT only supplies of land which has not been built on and is not intended to support a building (see, to that effect, *Gemeente Emmen*, paragraphs 20 and 25).

44 In the light of the foregoing, the answer to the questions referred must be that Article 13B(g) of the Sixth Directive in conjunction with Article 4(3)(a) of that directive must be interpreted as meaning that the exemption from VAT provided for in Article 13B(g) does not cover the supply of land still occupied by a dilapidated building that is to be demolished and replaced by a new building and whose demolition, paid for by the vendor, had already begun before the actual supply took place. For VAT purposes, such supply and such demolition form a single transaction, given that, taken as a whole, the aim of the transactions was not to supply the existing building and the land it stands on but land that has not been built on, regardless of how far demolition of the old building had progressed at the moment the land was actually supplied.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 13B(g) 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, in conjunction with Article 4(3)(a) of the directive must be interpreted as meaning that the exemption from value added tax provided for in Article 13B(g) does not cover the supply of land still occupied by a dilapidated building that is to be demolished and replaced by a new building and whose demolition, paid for by the vendor, had already begun before the actual supply took place. For value added tax purposes, such supply and such demolition form a single transaction, given that, taken as a whole, the aim of the transactions was not to supply the existing building and the land it stands on but land that has not been built on, regardless of how far demolition of the old building had progressed at the moment the land was actually supplied.

[Signatures]