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Case C-239/22

Reference for a preliminary ruling

Date of referral:

5 April 2022

Referring court:

Cour de cassation (Belgium)

Date of the referring court's decision:

28 March 2022

Applicants:

État belge

Promo 54

Respondents:

Promo 54

État belge

***Cour de cassation de Belgique* [Belgian Court of Cassation] Judgment**

No [...]

***ÉTAT BELGE* (STATE OF BELGIUM), represented** by the Minister for Finance [...]

Appellant in cassation proceedings]

[...], [*omissis*: contact details of the applicant's representative] v

EN

***PROMO 54*,** formerly *Groupe Henova*, a public limited company based in Herve [...],

defendant in cassation proceedings

[...] [*omissis*: contact details of the defendant's

representative] No [...].

PROMO 54, formerly *Groupe Henova*, a public limited company located in Herve, [...],

the applicant in the cassation proceedings,

[...] [*omissis*: contact details of the applicant's

representative] v

***ÉTAT BELGE* [STATE OF BELGIUM], represented** by the Minister for Finance, [...]

defendant in cassation proceedings

[...]. [*omissis*: contact details of the defendant's representative]

I. Proceedings before the Court of Justice

The appeals are against the judgment of *the Cour d'appel de Liège* of 4 June 2019.

[..]

[ ] [*omissis*: elements of national proceedings]

II. Facts of the case and background to the proceedings

[...] the facts of the case can be summarised as follows:

Groupe Henova, currently known as *Promo 54,* has developed a real estate project in partnership with *Immo 2020* to convert a former college into apartments and offices.

As a result of these activities, a cooperation agreement was concluded between *Groupe Henova* and *Immo 2020*, first on 6 June 2008, under which *Immo 2020*, the owner of the land and the old building, entrusted *Groupe Henova with the* responsibility for the preparation and investigation of the real estate files, as well as for the supervision of the construction site, the coordination of the various companies, the negotiation of commercial contracts, the takeover of all sub-contractors and the real estate

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sale of the property, followed by the deed of renunciation of the right of accession of *Immo 2020* in favour of *Groupe Henova of 18* February 2009.

For each of the purchasers, the same pattern was followed as described below for the spouses [...]: on 20 December 2008, the spouses [...] signed a hope purchase for EUR 297 105,68. On 20 February 2009, a private contract was concluded between *Immo 2020* and the spouses [...] for the conversion of a former school building with land and, on the same day, the spouses [...] and *Groupe Henova*, under which the latter undertook to carry out renovation works for an amount of EUR 259 533,52 including value added tax, namely EUR 231 738,50 for the improvements to the apartment, excluding value added tax (VAT) at 6 %, and EUR 11 480,01 for the construction of the garage, excluding VAT at 21 %; from 2009 to 2009 Between March and May 2010 and on 8 July 2009, an authentic deed of sale was signed between the spouses [...] and, on the one hand, *Immo 2020* for the plot and the old building and, on the other hand, *Groupe Henova* for the apartment and garage, for a total price of EUR 276 615,89, of which EUR 231 738,50 was for the apartment.

The État belge takes the view that the transaction is artificially split up in order to obtain an abusive tax advantage and that it is not the sale of a plot of land with a house frame followed by renovation, to which a reduced rate of 6 % applies, but a single transaction for the supply of new flats, to which VAT applies at the rate of 21 %.

The judgment under appeal upholds the finding of *the État belge* [...].

III. Grounds for the cassation appeal

In support of [the first] appeal [...], [...] the applicant relies on one plea in law.

In support of the [second] appeal [...] the applicant relies on four pleas in law, the first of which is worded as follows:

Legal provisions infringed:

– *Articles 2, 9(1), 14 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,*
Articles 12 and 135(1)(j);

– *"Article 1(9) of the 'Code de la taxe sur la valeur ajoutée' and Article 44(3)(1) of the Belgian Value Added Tax Code*
point a).

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Grounds and decisions criticised

The judgment upholds [the tax administration's decision] [...] *on the following grounds: [...] 'As regards the value added tax treatment of converted buildings.*

[..]

[...] [*omissis*: the text of the legal provisions infringed, summarised below under "Complaints" and "Court ruling"].

According to [the applicant], only new buildings, that is to say, buildings which have not yet been used, can be supplied subject to value added tax and the Belgian court cannot extend the concept of 'new building' to a building which has been substantially renovated.

In support, it puts forward the following arguments:

- *The administrative interpretation of Circular No 16/1973 and Decision No 19.497 is unconstitutional, as these provisions are considered mandatory;*
- *EU law does not allow a Member State to transpose a directive by a simple circular and thus make it binding on its citizens;*
- *The development of the case-law of the Court of Justice leads to the conclusion that the concept of 'new building after renovation' is available only to Member States which have transposed Article 12(2) of Directive 2006/112/EC (VAT Directive), which Belgium has not done.*

Such reasoning is unacceptable.

If only new buildings are taxed, i.e. buildings handed over no later than 31 December of the second year following that in which they are first occupied or used, as referred to in Article 44(3) of the Value Added Tax Code
The [applicant's] initial submission in paragraph 1(a) is incorrect because the concept of 'new building' to which it refers is too restrictive.

Of course, neither Circular No 16/1973 of 28 June 1973 nor Administrative Decision No E.T. 19.497 of 20 February and 29 April (included in point 152/2 of the VAT Manual) does not have the force of law ([ ] [national doctrine]), is a position of the administration which the taxable person may challenge and is in no way binding on the courts or the ordinary courts, and Belgium has not transposed the second subparagraph of Article 12(2) of Directive 2006/112/EC, which is not directly applicable.

However, Article 44(3) of the VAT Code itself
The concept of 'new' buildings in paragraph 1(a) implies that an old building can be 'transformed' into a new building and can be occupied for the first time if it is sufficiently substantial

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has been recast and there is no need to transpose Directive 2006/112/EC in this respect
Article 12(2).

Accordingly, according to the settled case-law of the Court of Justice in the field of VAT, the terms used to designate exemptions must be interpreted narrowly, since they are derogations from the general principle that VAT is charged on each supply of goods made for consideration by a taxable person (see the judgment of the Court in Case C-461/08 Don Bosco Onroerend Goed, paragraph 25, and the case-law cited therein, 19.11.2009). Conversely, the scope of the exemptions from VAT is wide.

So a building that has reached the end of its period of newness can become new again if it is substantially renovated.

As the Cour [d'appel] has already pointed out, in the light of the above principles, it cannot be considered that an existing building may have undergone works involving substantial alterations, up to and including alterations to its very essence, and yet remain the same, so that it must be assumed that, despite those works, it can never be occupied or used for the first time ([...] [*omissis:* case-law and State doctrine]*).*

Indeed, determining the "new" nature of property inevitably involves the exercise of a certain degree of discretion, and to decide otherwise would be to abuse the concept.

It does not follow from this discretion that the principle of legality of taxation enshrined in Article 170 of the Constitution would be infringed, since this must be assessed in the light of the general nature of the law and the variety of situations in which it applies.

In order to ensure equal treatment of taxpayers and legal certainty, the administration has established criteria which are contained in documents with the meaning of a circular.

Paragraph 152/2 of the VAT Manual contains the following clarification:

"152/2. Old buildings rebuilt.

According to Article 44(3)(1) of the Code, new buildings are not only newly constructed buildings, but also old buildings which have been modified in such a way that they acquire the characteristics of a new building.

Three possible cases can be considered in this context.

Case 1. The works carried out on the old building have radically altered its essential elements, namely its nature, structure (load-bearing walls, columns, boards, staircases or lifts, etc.) and, where appropriate, its purpose (see the 1973

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28 June Circular No 16/1973, paragraph 10(3)).

In such a case, it is clearly a new building, irrespective of the cost of the work carried out to implement the changes compared to the value of the building before the changes.

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The second case. The works carried out in the old building did not change the essential elements of the building, as in the first case, but were intended either to preserve the property or to improve its amenities, as in the case of the installation of central heating, the installation of a bathroom, the renovation of the roof and others.

In this case, the essential elements of the building have not been altered. Therefore, the resale of that building, part of the building and the land adjoining it, or the creation, transfer or transfer back of rights in rem other than ownership of that building, part of the building and the land adjoining it after the completion of the works, cannot in principle give rise to VAT, even if the cadastral income of the property would have increased and the cost of the works carried out would be very high compared with the value of the property before the works were carried out.

Case 3. Given that, where the works carried out result in substantial alterations to the building, it is in most cases difficult to assess whether substantial elements have been radically altered within the meaning of the first case, the building may nevertheless be considered to be new if the cost of the works carried out by the owner or on his behalf by third parties, excluding VAT, is at least 60% of the market value of the building in which the works are carried out, excluding the land, at the time the works are completed.

[..]

[...] [*omissis*: clarification of the works and their value]

However, in the first and third cases above, the transaction relating to the converted building must, in order to be taxable:

a) that the alterations would have changed the cadastral income attributable to the building before the works were carried out;

b) that the proposed transaction takes place within the time limit set out in Article 44(3)(1) of the Code;

c) taxpayer's VAT payabledemonstrates importance of the work done by the [tax] administration. [..].

[...] [*omissis*: clarification of evidence]"

As regards the "new" nature of the buildings sold by [the applicant] in

the context of VAT, it should be noted in this case that:

- *former schools are converted into apartments and offices for professional use, which vary considerably in terms of occupancy, functionality, equipment and amenities;*

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- *the amount of work carried out is considerable* [...] [*omissis*: description of the work carried out]

- *The [applicant's] contracts [state] that:*

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- *the notarial deeds specify that "the sale refers to immovable property that has not yet been put into first use - occupation";*

- *the specification applicable to apartments B4 and B7 states that "the purchaser is informed that the new building is new";*

- *a section on works related to the [building] structure, i.e. earthworks, excavations and foundations, as well as load-bearing structures, slabs and slabs are included in the specifications;*

- *invoices sent to buyers include foundations and roofing elements.*

It follows from all these elements that new buildings have been constructed which can be used for the first time and are not covered by the Value Added Tax Code The exemption provided for in Article 44(3)(1)(a) in respect of the supply of immovable property in substance.

The documents submitted by [the applicant] in support of its claim are not convincing.
[...] [*omissis*: assessment of the evidence submitted]".

Complaints

1.In accordancewith Articles 2, 9(1) and 9(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax Article 14 transfers of tangible property are generally subject to value added tax, without distinction between movable and immovable property.

Article 135(1)(j) of the abovementioned Directive provides for the following exception: 'Member States shall exempt [...] the supply of a building or part of a building and the land under it, except in the cases referred to in Article 12(1)(a)'.

The exemption of supplies of "buildings" from value added tax is therefore an exception to the general rule.

This exemption does not apply to "buildings referred to in Article 12(1)(a)", i.e. supplies of so-called "new buildings", which are still subject to value added tax as long as they meet the conditions laid down in the Directive.

[...] [*omissis*: the relevant provisions of Directive 2006/112, which the referring court has summarised under the heading 'Court's ruling'].

A grammatical interpretation of the Directive leads to the conclusion that a building loses the characteristics of a new building as soon as it is first occupied or used.

2.The Directivealso applies to the taxation of converted buildings.

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Article 12(2) of the Directive also confirms that it is the value added which is the determining factor for the VAT treatment of the supply of a building, as it empowers Member States to lay down detailed rules on the
the application of the criterion referred to in paragraph 1(a), namely the 'first use' criterion, in the case of the conversion of buildings. The Directive thus paves the way for the taxation of converted buildings if the conversion adds value to the building in question, in the same way as the original construction of the building.

Thus, one rule applies to the alteration of a building and the other to the new construction of a building. As a result, Member States no longer have the possibility to decide whether a building is new or not, except for clarifications on how to apply the rebuilding criterion.

It follows that, if a Member State does not make use of the possibility of laying down such detailed rules, the supply of converted immovable property is not subject to VAT if the first subparagraph of Article 12(2) of the Directive has not been transposed into Belgian national law.

3. In principle, the same rules are contained in the Value Added Tax Code.

The Code thus applies in principle to corporeal things, without distinguishing between movable and immovable property.

Article 44(3)(1) of the Value Added Tax Code
paragraph (a) exempts from VAT the supply of immovable property, except
the supply of the buildings referred to in Article 1(9) and the land attached thereto, provided that they are handed over no later than 31 December of the second year following the year in which the building is first used.

Article 44 of the VAT Code therefore does not apply to the case of a converted building, although, under the first subparagraph of Article 12(2) of the Directive, Member States have the option of transposing it into national law.

The Belgian legislator has not chosen this option and therefore the concept of "new building" cannot be applied to converted buildings where transposition has not taken place.

4. [The judgment under appeal *takes the view that the criterion of first use or occupation laid down in Article 44(3)(1)(a) of the Value Added Tax Code may be interpreted as meaning that 'a building in respect of which the period of novelty has expired may subsequently become such again if it is substantially renovated' and that it is not necessary 'to transpose Article 12(2) of Directive 2006/112/EC' in that regard.*

However, the Directive does not provide for this possibility for Member States, except and only on condition that they specify how the retrofitting criterion is to be applied.

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5. It follows that the judgment infringes Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
Articles 2, 9(1), 14, 12 and 135(1)

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(j), Article 1(9) of the Value Added Tax Code and
Article 44(3)(1)(a), in so far as it upholds [...] [*omissis*: the decision of the tax administration] on *the ground that a tangible object referred to in Article 1(9) of the Value Added Tax Code may be returned to its new state after treatment, even though the defendant has not transposed into national law the option provided for in Article 12(2) of Council Directive 2006/112/EC of 28 November 2006, which allows it to apply VAT to the transfer of converted immovable property.*

IV. Court ruling

The appeals are against the same judgment; they must be joined.

On [second] appeal [...]**:**

On the first basis:

Article 2 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax provides that VAT is to be charged on supplies of goods for consideration made within the territory of a Member State by a taxable person acting in his capacity as such.

Under Article 135(1)(j) of the Directive, Member States shall exempt the supply of buildings or parts of buildings and the land adjoining them, other than those referred to in
Article 12(1)(a).

Article 12(1)(a) shall apply to the supply of a building or part of a building and the land adjoining it before its first use.

The second subparagraph of Article 12(2) provides that Member States may lay down detailed rules on the application of the criterion referred to in paragraph 1(a) to the conversion of buildings and on the concept of land attached to them, and the third subparagraph provides that Member States may apply criteria other than the first use criterion, such as the period from the date of completion to the date of first delivery or the period from the date of first use to the date of next delivery, provided that these periods do not exceed five and two years respectively.

In accordance with Article 44(3) of the Value Added Tax Code
The supply of immovable property referred to in Article 1(1)(a) shall be exempt in substance; however, the supply of buildings, parts of buildings and land adjoining them referred to in the first subparagraph of Article 1(9) shall be exempt if such supply is made not later than 31 December of the second year following that in which the property in question is first occupied or used for the purposes of that Article.

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According to Article 1(9) of this Code, a building or part of a building is any structure built into and adjoining the land on which it is authorised to be built, and which is delivered by the same person at the same time as the building and the adjoining land.

The judgment states that 'neither Circular No 16/1973 of 28 June 1973 nor Administrative Decisions No E.T. 19.497 of 20 February and 29 April 1976, contained in point 152/2 of the VAT Manual on 'Conversion of old buildings' [...], have the force of law' and that 'Belgium has not transposed the second subparagraph of Article 12(2) of Directive 2006/112/EC, which is not directly applicable'.

It states that 'according to [the applicant], only new buildings, i.e. buildings which have not yet been occupied, can be subject to VAT' and that the concept of 'new building after renovation' is available only to Member States which have transposed Article 12(2) of Directive 2006/112/EC [...], which has not been done in Belgium'.

It is submitted that 'such reasoning is not acceptable', since 'it follows from the very concept of 'new' buildings referred to in Article 44(3)(1)(a) of the Value Added Tax Code that an old building may become new again' and may be occupied for the first time if it has been sufficiently substantially altered, and in that connection there is no need to transpose Article 12(2) of Directive 2006/112/EC so that 'a building which has passed the period of newness may become new again if it has been substantially renovated'.

Since a question has been referred as to the interpretation of Article 12(1) and (2) and Article 135(1)(j) of the abovementioned Directive, the Court of Justice of the European Union must give a preliminary ruling, which is contained in the operative part of this judgment.

On the following grounds

True,

consolidated the appeals [...] [*omissis*: references to appeals];

stay the proceedings until the Court of Justice of the European Union has given a preliminary ruling on the question:

Are Article 12(1) and (2) and Article 135 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
Is Article 12(1)(j) to be interpreted as meaning that, where a Member State has not defined the procedure for applying the criterion of first use to the conversion of buildings, the supply following the conversion of a building which, before the conversion, was first used, within the meaning of Article 12(1)(a) or the third subparagraph of Article 12(2) of the Directive, is still exempt from value added tax?

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[...] [*omissis*: procedural issues]

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