Case C-243/23 [Drebers] [1]

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

18 April 2023

Referring court:

Hof van Beroep te Gent (Belgium)

Date of the decision to refer:

28 June 2022

Appellant:

Belgian State / Federale Overheidsdienst Financiën

Respondent:

L BV

Subject matter of the main proceedings

The dispute in the main proceedings concerns the question whether L BV is entitled to deduct VAT in respect of certain renovation works carried out on a building used partly for professional purposes.

Subject matter and legal basis of the request

This application, based on Article 267 TFEU, concerns the question whether Articles 187 and 189 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') preclude legislation such as that at issue in the main proceedings (namely Article 48(2) and Article 49 of the Wetboek BTW (the VAT Code, Belgium; 'the WBTW') in conjunction with Article 9 Koninklijk Besluit (the Royal Decree; 'the KB') No 3), according to which the extended 15-year adjustment period in the case of the renovation of

[1] This is a fictitious name which does not correspond to the real name of any party to the proceedings.

an existing building is applied only if, after the works, there is a 'new building' within the meaning of Article 12 of the VAT Directive, whereas the useful economic life of a substantially renovated building – which, however, does not qualify as a 'new building' on the basis of administrative criteria under national law – is identical to the useful economic life of a new building, which is significantly longer than the period of five years referred to in Article 187 of the VAT Directive, and whether the aforementioned Article 187 has direct effect.

Questions referred for a preliminary ruling

Do Articles 187 and 189 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax preclude legislation such as that at issue in the main proceedings (namely Article 48(2) and Article 49 WBTW, read in conjunction with Article 9 KB No 3 of 10 December 1969, relating to the deduction facility for the application of value added tax), according to which the extended adjustment period (of 15 years) in the case of the renovation of an existing building is applied only if, after completion of the works, on the basis of the criteria under national law, there is a 'new building' within the meaning of Article 12 of the aforementioned Directive, whereas the useful economic life of a substantially renovated building (which, however, on the basis of the administrative criteria under national law does not qualify as a 'new building' within the meaning of the aforementioned Article 12) is identical to the useful economic life of a new building, which is considerably longer than the period of five years referred to in the aforementioned Article 187, which is shown, inter alia, by the fact that the works carried out are depreciated over a period of 33 years, which is also the period over which new buildings are depreciated?

Does Article 187 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax have direct effect, so that a taxable person who has carried out works on a building without those works leading to the renovated building being classified as a 'new building' within the meaning of Article 12 of that directive on the basis of criteria under national law, but where those works have a useful economic life which is identical to that of such new buildings to which a 15-year adjustment period does apply, may rely on the application of the 15-year adjustment period?

Provisions of European Union law relied on

Articles 12, 187 and 189 of the VAT Directive/Article 4(3) TEU

Provisions of national law relied on

Article 1(9)(1)(1), Article 48(2) and Article 49 WBTW/Article 9 KB No 3

Succinct presentation of the facts and procedure in the main proceedings

1 L BV is a company in which the legal profession is exercised. For several years it has owned a property used partly privately and partly for its economic activity.

2 From 2007 to 2015, substantial construction work was carried out on this immovable property: in the first phase, which lasted until July 2010, works were carried out on the three rear sections (the middle part of the building, the glass annexe and the lift shaft) and on the main building itself. In the second phase, the works in progress on the three rear sections were continued and several works needed to be redone; in the third phase, work on the main building was completed. After the works, the market value of the building was estimated at EUR 2 750 000, based on the assumption that 40% was for private occupation and 60% for professional use.

3 In January 2014, the VAT exemption for the economic activity of the profession of lawyer was lifted, so that L BV has since been registered as a party subject to VAT.

4 After August 2015, the Algemene Administratie van de Bijzondere Belastinginspectie (General Administration of the Special Tax Inspectorate, Belgium) carried out an unannounced tax inspection at the registered office of L BV for the period from 1 January 2014 to 30 September 2015. Following that inspection, the Federale Overheidsdienst Financiën (the Federal Public Service for Finance, Belgium; 'the FPS Finance') took the view that L BV had committed several breaches of VAT legislation during that period.

In the final report of the FPS Finance of 21 September 2017, EUR 163 756.24 of VAT was considered to be due, and the FPS Finance accused L BV of, inter alia, the wrong application of the adjustment period. L BV had taken into account a 15-year adjustment period for the costs of the abovementioned construction works, whereas the FPS Finance took the view that the works in question did not constitute constructing a building, so that the adjustment period was limited to five years.

5 In October 2017, a writ of execution was issued to L BV for, inter alia, EUR 163 756.24 for VAT and tax fines of EUR 16 375.63 on account of the unlawful deduction of VAT.

6 L BV brought an action against that decision before the rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Court of First Instance, East Flanders, Ghent Division, Belgium) in October 2018. By the judgment of 10 March 2020, that court declared the action admissible and partially well founded.

7 In June 2020, the FPS Finance brought an appeal against that judgment before the referring court. The FPS Finance claims, inter alia, that Article 9(1)(1) KB No 3 is applicable and that the adjustment period should therefore be five years for the VAT charged on the business assets and that the amounts claimed should be

awarded. L BV, which lodged a cross-appeal, contends in particular that the appeal brought by the FPS Finance should be dismissed as unfounded.

The essential arguments of the parties in the main proceedings

8 The FPS Finance did not accept the 15-year adjustment period because the construction works would not have resulted in the 'construction of a building', but only in the improvement and renovation of the existing building. The legal and regulatory provisions therefore do not allow the 15-year adjustment period to be applied to the concrete facts.

9 L BV disputes that there are reasons why an adjustment period of only five years should be applied. In its view, the Belgian legislation is incompatible with the VAT Directive; the underlying idea is that VAT adjustment may be subject to a longer period in the case of immovable property which is generally used and depreciated over a longer period and which has a (considerably) longer economic life.

Succinct presentation of the reasoning in the request for a preliminary ruling

10 In accordance with the first and second subparagraphs of Article 187(1) of the VAT Directive, the adjustment period for capital goods is, in principle, five years. However, on the basis of the third subparagraph of Article 187(1), Member States may extend the adjustment period to a maximum of 20 years for 'immovable property acquired as capital goods'. Article 189 of the VAT Directive allows Member States, inter alia, to define the concept of 'capital goods' and to determine the amount of VAT to be taken into consideration for the adjustment. That article also states that Member States are to 'adopt any measures needed to ensure that adjustment does not give rise to any unjustified advantage', which means that the VAT Directive grants Member States a certain degree of discretion.

L BV submits, with good reason, that that discretion is not absolute and that Member States may not exceed the limits of their discretion, which means they must respect the terms used in the VAT Directive.

11 In accordance with Article 4(3) TEU, Member States must take all measures necessary to ensure compliance with the obligations under EU law and refrain from any measures that could jeopardise the attainment of the European Union's objectives.

12 Furthermore, Member States must exercise their power bearing in mind the objectives of the VAT Directive as well as the principle of fiscal neutrality inherent in the Community VAT regime. It is necessary to uphold L BV's argument where it refers to the principle of neutrality as a specific expression of the principle of equality, under which similar goods or services, which are thus in

competition with each other, must be treated equally for VAT purposes and a taxable person may rely on the VAT Directive in order to challenge national legislation that is incompatible with that directive and its underlying principles.

13 The Belgian legislature has laid down the rules on adjustments relating to property and other business assets in, inter alia, Article 1(9)(1)(1), Article 48(2) and Article 49 WBTW and KB No 3.

In a judgment dated 30 April 2021, the Hof van Cassatie (the Court of Cassation, Belgium) inferred from those provisions that transactions the object or effect of which is to convert or improve a building or part thereof are subject to an adjustment period of five years, whereas transactions concerning or contributing to the construction of a building or part thereof are subject to the 15-year adjustment period.

Similarly, in response to a parliamentary question of May 2017, the Minister of Finance confirmed that, at the time of the conversion or improvement of a building, the adjustment period is, in principle, five years, unless the works carried out are of such significance that a new building is in fact created.

Thus, under Belgian law, where an existing building is renovated, the 15-year adjustment period is applied to VAT on those works if, after the works have been carried out, there is a 'new building' for VAT purposes.

14 L BV submits, with good reason, that, under the Belgian legislation, the extended 15-year adjustment period does not apply to significant works carried out on buildings where, as a result of the work carried out, they have an economic life which is the same as that of newly constructed buildings – which is apparent in particular from the depreciation period of those works, which is identical to that of newly constructed buildings, despite the nature and importance of the works carried out for the durability of the building as economic inputs – those buildings do not qualify as 'new buildings' for VAT purposes.

15 L BV takes the view that Article 9 KB No 3, by transposing the concept of 'immovable property acquired as capital goods' used in the VAT Directive in such a strict manner into national law (by applying the 15-year adjustment period only to works resulting in a building that can be sold with the application of VAT, without applying the same period to works which have resulted in a building with an economic life equivalent to that of a new building, on the sole ground that, according to the FPS Finance, the renovated building could not be sold with VAT), infringes the VAT Directive and that the King has not exercised the powers conferred by Article 48(2) WBTW in a manner consistent with the Directive.

16 L BV submits, in the first place, that Articles 187 or 189 of the VAT Directive make no reference whatsoever to 'new buildings' and/or to Article 12 of the VAT Directive, which interprets what must be regarded, for the purposes of VAT legislation, as a 'new building' that can be transferred with the application of VAT.

17 On the other hand, according to L BV, the concept of 'capital goods' unquestionably refers to goods which are used over a long period of time and are generally depreciated. In its view, 'immovable property acquired as capital goods' should be understood to mean immovable property which has an economic life (significantly) longer than the standard five-year adjustment period, which is demonstrated, inter alia, by the fact that they are depreciated over a much longer period.

In order for works on immovable property to be regarded as immovable capital goods within the meaning of the VAT Directive, L BV contends that it is the useful economic life of the building, on account of the works or renovations carried out on it, rather than the time of its first occupation that matters. It takes the view that this is logical because the adjustment period is intended to verify and correct the deduction relating to the manufacture or creation of a means of production.

18 L BV refers to the principle of fiscal neutrality, which requires, in its view, that all immovable property acquired as capital goods with the same or a comparable useful economic life should benefit from the same VAT treatment, which means that they must be subject to one and the same VAT adjustment period. It submits that, where buildings, as in the present case, undergo substantial renovations and therefore have a useful economic life equivalent to that of new buildings, which is demonstrated by the fact that the works are depreciated over a period of 33 years, they are comparable to new buildings, as a means of production created as a result of the works, and should benefit from the same VAT treatment.

19 The referring court submits that, since L BV is asking it to interpret the directive differently from what is permitted under Belgian law and there is reasonable doubt as to the conformity of Belgian law with Community law, it is appropriate to submit questions for a preliminary ruling on this matter to the Court of Justice.