

H&I 2023/87

État belge and Promo 54. VAT exemption. Conversion of a former school into apartments and offices. First occupation before the conversion. Court of Justice

CJ 09-03-2023, C-239/22 (Uitspraak), m.nt. Marie Lamensch (État belge en Promo 54)

Instantie	Court of Justice of the European Union
Datum	9 maart 2023
Zaaknummer	C-239/22
Noot	Marie Lamensch
Roepnaam	État belge en Promo 54
JCDI	JCDI:ADS693077:1
Vakgebied(en)	Europees belastingrecht / Belastingen EU Omzetbelasting / Vrijstelling
Brondocumenten	Uitspraak, Court of Justice of the European Union, 09-03-2023
Wetgang	Council directive 2006/112/EC Article 135 paragraph 1-j, Council directive 2006/112/EC Article 12 paragraphs 1 and 2

Essentie

Judgment of the Court of Justice in the case État belge and Promo 54. Article 135(1)(j) of Council Directive 2006/112/EC, read in conjunction with Article 12(1) and (2) thereof, must be interpreted as meaning that the exemption provided for by that first provision for the supply of a building or a part of a building, and of the land on which the building stands, other than those which are supplied before their first occupation, also applies to the supply of a building which was first occupied before its conversion, even if the Member State concerned has not laid down, in national law, the detailed rules for applying the criterion of first occupation to conversions of buildings, as the second of those provisions authorised it to do.

Samenvatting

Facts and question raised

The supply of immovable property is in principle VAT exempt, except when it occurs before 'first occupation' (Article 135(1)(j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the 'VAT Directive'), read in combination with Article 12(1) of the VAT Directive). This provision obviously targets newly constructed buildings, but also so-called 'converted' ones. Member States may lay down the detailed rules for applying the criteria of 'first occupation' to converted buildings (Article 12(2), second sentence, of the VAT Directive). Member States may also adjust the criteria of first occupation, for example, by setting a deadline starting with the date of first occupation (Article 12(2), third sentence, of the VAT Directive).

Contrary to other Member States, Belgium had never laid down in its VAT legislation the criteria that must be

used to determine when a renovated building can be considered as 'converted' for VAT purposes. These criteria are only to be found in the administrative doctrine (the so-called 'VAT Commentary'). The argument that, in the absence of a clear legislative provision, it should be concluded that the supply of a renovated building could never be subject to VAT in Belgium, irrespective of the extent of the renovation, had already been raised before the Belgian Supreme Court, but did not receive an answer so far.

The question in the case at hand which was referred to the Court of Justice of the European Union ('CJ') is as follows:

Must Article 12(1) and (2) and Article 135(1)(j) of Directive 2006/112/EC be interpreted as meaning that, where the Member State has not defined the detailed rules for the application of the criterion of first occupation to converted immovable property, the supply, after conversion, of a building in respect of which, before conversion, there had been first occupation within the meaning of Article 12(1)(a) or the third subparagraph of Article 12(2) of the VAT Directive remains exempt from value added tax?

CJ judgment (CJ 9 March 2023, C-239/22 Belgische Staat en Promo 54, ECLI:EU:C:2023:181)

The CJ first recalled that the *ratio legis* of the exemption foreseen under Article 135(1)(j) of the VAT Directive is the relative lack of added value generated by the sale of an old building (paragraph 21). It then confirmed that when an old building has undergone a conversion, this generates added value, therefore fulfilling the criterion of 'first occupation' referred to in Article 12(1)(a) of the VAT Directive, with the consequence that the supply of converted buildings before their first occupation must also be subject to taxation (paragraph 23).

The CJ then decided, importantly, that even though the Member States are entitled to lay down the detailed rules applying the criterion of 'first occupation' to converted buildings, their margin of manoeuvre is not unlimited, given that the concept of conversion has already been interpreted by the EU Court as follows: 'the building concerned must have been subject to substantial modifications intended to modify the use or alter considerably the conditions of its occupation' (paragraphs 24 and 25, with reference to CJ 16 November 2017, C-308/16 *Kozuba Premium Selection*, EU:C:2017:869, paragraphs 45 and 52).

Member States, however, may decide how to implement this concept into national law by imposing, for example, a quantitative criterion, according to which the costs of such a conversion must amount to a certain percentage of the initial value of the building concerned to lead to liability for VAT (paragraph 36 and CJ's judgment in *Kozuba Premium Selection*, C-308/16, paragraph 48).

The CJ then noted that, in the case at stake, Belgium did not adopt binding provisions but that, in their administrative practice, old buildings, which have undergone conversions such as to acquire the characteristics of a new building, are treated in the same way as new buildings. The CJ stressed that, in accordance with its settled case law, when transposing a directive, it is particularly important, for the sake of legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (paragraph 28, with reference to CJ 7 June 2007, C-178/05 *Commission v Greece*, EU:C:2007:317, paragraph 33 and the case law cited). It, however, decided that if a Member State has not adopted detailed binding rules for applying the criterion of first occupation to conversions of buildings, this cannot result in a situation where conversions of buildings could simply not be subject to VAT. The reason is that, otherwise, this would mean that a Member State could, by refraining from laying down detailed implementation rules, actually have an impact on whether the supply of an immovable property should be subject to VAT, whereas it is the added value in this case and the definitions arising from the CJ's case law which determines the liability to tax (paragraphs 29 and 30).

This means that the absence of a binding definition and of detailed rules for applying the criterion of first occupation to conversions of buildings does not have a direct effect on the exemption of those converted buildings, in a situation where an interpretation of national law in accordance with the text of the VAT Directive and the related case law of the Court leads, on the contrary, to the refusal of the exemption.

Accordingly, the CJ decided that the exemption provided under Article 135(1)(j) of the VAT Directive, read in

conjunction with Article 12(1) and (2) thereof, must be interpreted as also applying to the supply of a building which was first occupied before its conversion, even if the Member State concerned has not laid down, in national law, the detailed rules for applying the criterion of first occupation to conversions of buildings.

Uitspraak

JUDGMENT OF THE COURT (Eighth Chamber)

9 March 2023^[1]

(Reference for a preliminary ruling - Common system of value added tax (VAT) - Directive 2006/112/EC - Article 12(1) and (2) - Supply, before first occupation, of a building or parts of a building and of the land on which the building stands - No provisions in national law providing for detailed rules for applying the criterion relating to first occupation - Article 135(1)(j) - Exemptions - Supply, after conversion, of a building which was the subject of a first occupation before the conversion - National administrative legal commentary treating buildings which have undergone substantial conversions in the same way as new buildings)

In Case C-239/22, ECLI:EU:C:2023:181

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, Belgium), made by decision of 28 March 2022, received at the Court on 5 April 2022, in the proceedings

État belge,

Promo 54 SA

v

Promo 54 SA,

État belge,

THE COURT (Eighth Chamber),

composed of M. Safjan (Rapporteur), President of the Chamber, N. Piçarra and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Promo 54 SA, by P. Wouters, advocaat,
- the Belgian Government, by P. Cottin, J.-C. Halleux and C. Pochet, acting as Agents,
- the European Commission, by A. Armenia, C. Ehrbar and V. Uher, acting as Agents,

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

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Article 12(1) and (2) and of 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; 'the VAT Directive').

2

The request has been made in proceedings between Promo 54 SA, active in the development of real estate projects, and the État belge (Belgian State) concerning the amount of value added tax (VAT) payable by that company in respect of the conversion of a former school into apartments and offices.

Legal context

European Union law

3

Article 2(1) of the VAT Directive provides:

'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; ...'

4

Article 9(1) of that directive provides:

"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.'

5

Article 12(1) and (2) of that directive provides:

- '
 - 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.'

6

Article 135(1) of that directive states:

‘ Member States shall exempt the following transactions:

1.

...

- (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);

...’

Belgian law

7

Article 1(9) of the VAT Code provides:

‘For the purposes of this Code, the following definitions shall apply:

1. building or parts of a building means any structure fixed to or in the ground;
2. land on which it stands means land for which a building permit has been granted which is transferred by the same person and at the same time as the building and on which the building stands.

Subparagraph 1(2) shall not apply to Article 44(3)(2)(d).’

8

Article 44(3) of the VAT Code, relating to exemptions, provides:

‘The following shall also be exempt from the tax:

1. The following operations:

- (a) Supplies of immovable property;

However, this does not include supplies of buildings, parts of buildings and the land on which the buildings stand referred to in Article 1(9), where they are transferred no later than 31 December of the second year following the year in which the property referred to in Article 1(9)(1) was first occupied or used by:

- a taxable person as referred to in Article 12(2) who has constructed, had constructed or acquired with VAT the goods referred to in Article 1(9)(1);
- a taxable person as referred to in Article 8(1);
- any other taxable person, where he or she has expressed, in the form and manner determined by the King, an intention to carry out such a transfer subject to the tax.

...’

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

9

On 6 June 2008, Promo 54 and another company, Immo 2020, concluded a cooperation agreement under which Immo 2020, the owner of the land on which a former school was established, in this case a college, entrusted Promo 54 with the task of taking responsibility for supervising the conversion of that college into

apartments and offices, as well as the sale of that immovable property. By document of 18 February 2009, Immo 2020 also waived the right to the vesting of constructions on the land in favour of Promo 54.

10

The sale of those future apartments formed part of a legal arrangement consisting of two separate contracts drawn up with the purchasers. First, the purchasers concluded a contract with Immo 2020 for the sale of a part of the former school building being converted as well as a part of the land on which it was built. Secondly, on the same day, Promo 54 concluded a works contract with the purchasers for the renovation works.

11

The Belgian tax authorities considered that the transaction was artificially split in order to obtain a wrongful tax advantage. That transaction is, in fact, a single supply of new apartments subject to VAT at the rate of 21%, instead of a sale of a former building and the land on which it is constructed, followed by a renovation of that building, subject to the reduced rate of 6%.

12

Promo 54 challenged that reclassification before the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), which nevertheless dismissed its action.

13

Hearing the case on appeal, the cour d'appel de Liège (Court of Appeal, Liège, Belgium) took the view that determining the 'new' nature of a property necessarily entailed the exercise of some discretion on the part of the tax authorities and that implementation of the option given to the Member States by the second subparagraph of Article 12(2) of the VAT Directive was not necessary to treat old buildings which had undergone sufficiently significant conversions as 'new' buildings referred to in Article 44(3)(1)(a) of the VAT Code. In the present case, according to that court, new buildings, capable of being the subject of first occupation, were constructed, so that they could not benefit from the exemption provided for in favour of the supply of immovable property by type referred to in Article 44(3)(1)(a) of the VAT Code.

14

The Belgian State and Promo 54 both appealed on a point of law against the judgment of the cour d'appel de Liège (Court of Appeal, Liège).

15

According to Promo 54, only new buildings, namely those that have not yet been occupied, are able to be subject to VAT. Promo 54 therefore submits that, from its first occupation or use, any building ceases to be new, given that the Belgian State has not made use of the possibility of laying down detailed rules applying the criterion of 'first occupation', provided for in Article 12(1)(a) of the VAT Directive, to conversions of buildings. In the absence of such implementation, the competent authorities could not extend the concept of 'first occupation' to a renovated building which had already been occupied before it was converted.

16

In those circumstances, the Cour de cassation (Court of Cassation, Belgium) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 12(1) and (2) and Article 135(1)(j) of Directive 2006/112 be interpreted as meaning that, where

the Member State has not defined the detailed rules applying the criterion of first occupation to converted immovable property, the supply, after conversion, of a building in respect of which, before conversion, there had been first occupation within the meaning of Article 12(1)(a) or [the third subparagraph of] Article 12(2) of [Directive 2006/112] remains exempt from [VAT]?’

Consideration of the question referred

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By its question, the referring court asks, in essence, whether Article 135(1)(j) of the VAT Directive, read in conjunction with Article 12(1) and (2) thereof, must be interpreted as meaning that the exemption provided for by that first provision for the supply of a building or parts of a building and of the land on which the building stands, other than those buildings which are supplied before their first occupation, also applies to the supply of a building first occupied before its conversion, even if the Member State concerned has not laid down, in national law, the detailed rules applying the criterion of first occupation to conversions of buildings, as the second of those provisions authorised it to do.

18

In that regard, it should be recalled that, under Article 12(1)(a) of the VAT Directive, Member States may regard as a taxable person anyone who carries out, on an occasional basis, the supply, before first occupation, of a building or parts of a building and of the land on which the building stands.

19

Article 135(1)(j) of the VAT Directive provides for an exemption from VAT in favour of the supply of buildings, other than those referred to in Article 12(1)(a) thereof, that is to say apart from those whose supply is carried out before their ‘first occupation’ (see, to that effect, judgment of 4 September 2019, KPC Herning, C-71/18, EU:C:2019:660, paragraph 55).

20

Those provisions, in practice, make a distinction between old buildings, the sale of which is not, in principle, subject to VAT, and new buildings, the sale of which is subject to VAT, whether carried out in the context of an economic activity carried out on a permanent or occasional basis (see, to that effect, judgment of 4 September 2019, KPC Herning, C-71/18, EU:C:2019:660, paragraph 56 and the case-law cited). Consequently, the supply, by a taxable person, of a building before its ‘first occupation’ is subject to taxation, whereas the supply of a building following its ‘first occupation’ to a final consumer is exempt.

21

The ratio legis of those provisions is the relative lack of added value generated by the sale of an old building. Indeed, the sale of a building following its first supply to a final consumer, which marks the end of the production process, does not generate any significant added value and must therefore, as a rule, be exempt (judgment of 4 September 2019, KPC Herning, C-71/18, EU:C:2019:660, paragraph 57 and the case-law cited).

22

Although the VAT Directive introduces the concept of ‘first occupation’ in Article 12(1)(a) without defining it, the preparatory documents for the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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), which remain relevant for the purposes of the VAT Directive, make clear that the criterion of the 'first occupation' of a building must be understood as corresponding to the first use of the immovable property by its owner or tenant.

23

In so far as the supply of an old building that has undergone a conversion generates, like the supply of a new building before its first occupation, added value, it fulfils the criterion of 'first occupation' referred to in Article 12(1)(a) of the VAT Directive and gives rise to a transaction subject to taxation.

24

Although the Member States are therefore entitled, under the second subparagraph of Article 12(2) of the VAT Directive, to lay down the detailed rules applying the criterion of 'first occupation' to conversions of buildings, that provision cannot, however, be interpreted as meaning that the Member States are thus authorised to alter the concept of 'first occupation' in their national laws, without harming the effectiveness of the exemption provided for in Article 135(1)(j) of that directive (see, to that effect, judgment of 16 November 2017, Kozuba Premium Selection, C-308/16, EU:C:2017:869, paragraph 45).

25

The Court has thereby defined the scope of the concept of 'conversion of a building' by finding that the building concerned must have been subject to substantial modifications intended to modify the use or alter considerably the conditions of its occupation (see, to that effect, judgment of 16 November 2017, Kozuba Premium Selection, C-308/16, EU:C:2017:869, paragraph 52).

26

Subject to observing the scope of that concept, Member States may implement the option provided for in the second subparagraph of Article 12(2) of the VAT Directive by imposing, for example, a quantitative criterion, according to which the costs of such a conversion must amount to a certain percentage of the initial value of the building concerned to lead to liability for VAT (see, to that effect, judgment of 16 November 2017, Kozuba Premium Selection, C-308/16, EU:C:2017:869, paragraph 48).

27

Whilst, in the present case, the Belgian legislature did not exercise that power by adopting such binding provisions, the Belgian authorities, in their administrative practice relating to Article 44(3)(1) of the VAT Code, treated old buildings, which have undergone conversions such as to acquire the characteristics of a new building, in the same way as new buildings.

28

It is true that, according to settled case-law of the Court, when transposing a directive, it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (judgment of 7 June 2007, Commission v Greece, C-178/05, EU:C:2007:317, paragraph 33 and the case-law cited).

29

It cannot, however, be maintained that, in so far as the Member State concerned has not made use of the

option to lay down detailed rules for applying the criterion of first occupation to conversions of buildings, given by the second subparagraph of Article 12(2) of the VAT Directive, by means of binding provisions of national law, some conversions of buildings cannot be subject to VAT, in accordance with Article 135(1)(j) of that directive, read in conjunction with Article 12(1)(a) thereof and the case-law of the Court, by means of an interpretation of the 'first occupation' concept provided for by the provisions of national law.

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That would be tantamount to a Member State using the power to lay down the detailed rules for applying the criterion of first occupation to conversions of buildings amounting to liability to VAT for a building, whereas that in fact follows from the fundamental principle that it is the added value and the definitions arising from the case-law of the Court which determines the liability to tax. In that regard, it should be noted that, in the present case, the 'substantial' nature of the modifications, within the meaning of the case-law cited in paragraph 25 of the present judgment, does not appear to be in doubt, which it is for the referring court to confirm.

31

In the light of the foregoing, the absence of a binding definition, in national law, of detailed rules for applying the criterion of first occupation to conversions of buildings, does not have a direct effect on the exemption of those converted buildings, even though an interpretation of national law in accordance with Article 135(1)(j) of the VAT Directive, read in conjunction with Article 12(1)(a) thereof, and the related case-law of the Court leads, on the contrary, to the refusal of the exemption demanded.

32

The answer to the question referred is therefore that Article 135(1)(j) of the VAT Directive, read in conjunction with Article 12(1) and (2) thereof, must be interpreted as meaning that the exemption provided for by that first provision for the supply of a building or a part of a building, and of the land on which the building stands, other than those which are supplied before their first occupation, also applies to the supply of a building which was first occupied before its conversion, even if the Member State concerned has not laid down, in national law, the detailed rules for applying the criterion of first occupation to conversions of buildings, as the second of those provisions authorised it to do.

Costs

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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 (Eighth Chamber) hereby rules:

Article 135(1)(j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 12(1) and (2) thereof, must be interpreted as meaning that the exemption provided for by that first provision for the supply of a building or a part of a building, and of the land on which the building stands, other than those which are supplied before their first occupation, also applies to the supply of a building which was first occupied before its conversion, even if the Member State concerned has not laid down, in national law, the detailed rules for applying the criterion of first occupation to conversions of buildings, as the second of those provisions authorised it to do.

[Signatures]

Auteur: Marie Lamensch

With this judgment, the Court of Justice of the European Union ('CJ') makes clear that the supply of converted buildings, which by reason of their thorough renovation have acquired the characteristics of a new building, should be subject to tax, whether the Member States have or have not implemented detailed binding implementing rules. This ruling makes perfect sense because, otherwise, Member States having a discretionary power to adopt implementation criteria could, by not adopting any, *de facto* ensure that a supply that should be taxed according to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the 'VAT Directive') is in fact not being taxed.

This, however, does not mean that Belgium should not adopt clear binding rules in its VAT legislation concerning the concept of 'converted' buildings. The CJ indeed also makes clear that legal certainty requires that taxpayers should have the benefit of a clear and precise legal framework enabling them to ascertain the full extent of their rights.

Currently, according to the Belgian administrative guidance, the concept of 'converted buildings' covers those which have undergone a 'radical change' in their essential elements, namely in their nature, their structure (load-bearing walls, floors, stairwells or elevators, etcetera) and, if necessary, their destination (qualitative criteria). In such cases, the cost of the work is not relevant. The concept of converted buildings *may* also cover situations where renovation work has entailed 'a significant modification'. In this case, the Belgian tax authorities' administrative commentary states that the building *may* be considered as 'new' for VAT purposes if the cost (excluding VAT) of the work carried out reaches at least 60% of the market value of the building to which the work is carried out, excluding land, at the time of completion of the work (this quantitative criterion is thus different than in *Kozuba* (CJ 16 November 2017, C-308/16 *Kozuba Premium Selection*, ECLI:EU:C:2017:869), where the cost of the works was compared to the value of the building before its renovation).

One could argue that the Belgian administrative guidance and the case law of the national courts are sufficiently consistent to provide legal certainty. One could, however, also argue that the guidance - drafted in the 1970s - is sometimes hard to ascertain. Regarding the qualitative criteria, the question of what 'a radical change' is can indeed be subject to discussion. Reducing this discussion to the question of whether load-bearing walls have been moved seems like an oversimplification, but this is sometimes what taxable persons are confronted with. Even the quantitative criteria may prove delicate for the taxable persons who need legal certainty regarding the VAT treatment of the supply before the renovation works start. Who can indeed predict with certainty what the value of the building will be after the renovation (which may take ten years)?

Finally, one could also argue that the current quantitative criteria do not align with the VAT Directive. Indeed, the latter opens what is considered by the tax administration as a mere option for the taxable person. A taxable person could thus decide whether or not the supply is subject to VAT or registration duties, which means that the VAT treatment, in this case, would depend on the choice of the taxable person.

For all these reasons, and despite the CJ's judgment in the case at hand, adopting suitable criteria in the Belgian VAT legislation to appropriately implement the concept of 'converted' buildings would still be most welcome.

Footnotes

[1] Language of the case: French.