Arrêt de la Cour
Case C-137/02

Finanzamt Offenbach am Main-Land

v

Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Reference for a preliminary ruling – Interpretation of the Sixth VAT Directive – Right of a Vorgründungsgesellschaft (civil-law partnership the object of which is to prepare the means necessary for the activities of a capital company yet to be formed) to deduct input VAT – Transfer for consideration of the totality of those means upon formation of the capital company – Transfer not subject to VAT in consequence of the exercise by the Member State concerned of the option provided for in Article 5(8) of the Sixth VAT Directive)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Civil-law partnership founded for the sole purpose of setting up a capital company – Transfer of the totality of its assets to that capital company once founded – Member State not regarding such a transfer as a supply of goods – Right to deduct

(Council Directive 77/388, Arts 5(8), 6(5) and 17(2))

A partnership established for the sole purpose of founding a capital company is entitled to deduct the input tax paid on supplies of goods and services where its only output transaction in the performance of its object was to effect by formal act the transfer for consideration of the supplies obtained to that capital company once founded and where, because the Member State concerned has exercised the options provided for in Articles 5(8) and 6(5) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, a transfer of a totality of assets is not deemed to be a supply of goods or services.

Even if that partnership does not intend to effect itself taxable operations, its sole object being to prepare the activities of the capital company, the tax which it wishes to deduct relates none the less to supplies acquired for the purpose of effecting taxable transactions, even though those transactions are only the planned transactions of the capital company.

(see paras 41, 43, operative part)

JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004(1)

(Reference for a preliminary ruling – Interpretation of the Sixth VAT Directive – Right of a Vorgründungsgesellschaft (civil-law partnership the object of which is to prepare the means necessary for the activities of a capital company yet to be formed) to deduct input VAT – Transfer

for consideration of the totality of those means upon formation of the capital company – Transfer not subject to VAT in consequence of the exercise by the Member State concerned of the option provided for in Article 5(8) of the Sixth VAT Directive)

In Case C-137/02,
REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between
Finanzamt Offenbach am Main-Land

and

Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR,
on the interpretation of Article 17(2) 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18),

THE COURT (Fifth Chamber),,

composed of: P. Jann, acting for the President of the Fifth Chamber, A. Rosas and S. von Bahr (Rapporteur), Judges,
Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,
after considering the written observations submitted on behalf of:

– Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR, by R.W. Horn and A. Kowol, Rechtsanwälte,
– the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,
– the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents, assisted by A. Böhlke, Rechtsanwalt,
after hearing the oral observations of the Finanzamt Offenbach am Main-Land, represented by J. Aue, acting as Agent, Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR, represented by R.W. Horn, the German Government, represented by M. Lumma, and the Commission, represented by K. Gross, assisted by A. Böhlke, at the hearing on 11 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 23 October 2003,

gives the following

Judgment

1 By order of 23 January 2002, received by the Court on 12 April 2002, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 17(2) 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18), (‘the Sixth Directive’).

2 That question was raised in proceedings between the Finanzamt Offenbach am Main-Land ('the Finanzamt') and Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR ('Faxworld GbR') concerning the Finanzamt's refusal to allow Faxworld GbR to deduct the value added tax ('VAT') incurred on transactions from which it benefited.
3 The question essentially concerns the right of a Vorgründungsgesellschaft, which is a civil-law partnership the object of which is to prepare the means necessary for the activities of a capital company to be formed, to deduct VAT where its sole output in performance of its object is to transfer the totality of its assets to that company once it has been formed. The question is based on the premiss that the Member State concerned has exercised the option provided for in Articles 5(8) and 6(5) of the Sixth Directive to consider that no supply of goods or services takes place upon the transfer of a totality of assets or part thereof and that the recipient is to be treated as the successor to the transferor.

Legal framework

Community legislation

4 Point 1 of Article 2 of the Sixth Directive provides that the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such are to be subject to VAT.

5 Under Article 4(1) and (2) of the Sixth Directive:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

6 As regards the supply of goods, Article 5(8) of the Sixth Directive provides:

'In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax.'

7 Article 6(5) of the Sixth Directive states that 'Article 5(8) shall apply in a like manner to the supply of services'.

8 With respect to the right to deduct, Article 17(1) and (2) of the Sixth Directive provides:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a)value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…'.

National legislation

9 The relevant provisions of the Sixth Directive have been transposed into German law by the Umsatzsteuergesetz 1993 (1993 Law on turnover tax, BGBl. 1993 I, p. 565, 'the UStG 1993'). In the version applicable to 1996, the financial year in question, Paragraph 1(1) of the UStG 1993 stated, as a general rule, that supplies effected for consideration by a trader in Germany in the course of his business are subject to turnover tax.

10 However, since the Federal Republic of Germany has exercised the option granted to the Member States in Articles 5(8) and 6(5) of the Sixth Directive, Paragraph 1(1a) of the UStG 1993 states:

‘(1a) Transactions in the context of the transfer of a business to another trader for the purposes of his undertaking are not subject to [VAT]. A transfer of a business takes place where an undertaking or separately managed business unit forming part of an undertaking is in its entirety transferred, whether for consideration or not, or brought in as a contribution to a company. The recipient trader takes the place of the transferor.’

The main proceedings and the question referred for a preliminary ruling

11 Faxworld GbR is a civil-law partnership founded on 1 October 1996 with the sole object of setting up the company Faxworld Telefonmarketing Aktiengesellschaft (‘Faxworld AG’).

12 As the national court explains, the establishment of an Aktiengesellschaft (German company limited by shares) may, as in the case before the national court, be preceded by a Vorgründungsgesellschaft. A Vorgründungsgesellschaft is based on a preliminary agreement between the founders of the company to cooperate with a view to establishing the Aktiengesellschaft. Therefore, if that company, once established, wishes to assume the assets, rights and obligations of the Vorgründungsgesellschaft, which are not transferred to it automatically, they must be transferred by way of a separate legal transaction.

13 Thus, as a Vorgründungsgesellschaft, Faxworld GbR rented office premises, acquired fixed assets and had fixtures and fittings installed in the office premises. It also sent introductory mailings and engaged in advertising for the company to be established. After Faxworld AG was established by notarial act of 28 November 1996, Faxworld GbR ceased activities and transferred to Faxworld AG all the previously acquired assets at their book value, for a price of just under DEM 90 000. Faxworld AG was thus able to take up its commercial activities in the offices rented and equipped for its purposes by Faxworld GbR, without having to take any additional measures.

14 Therefore, in performing its sole object, Faxworld GbR effected no output transactions other than the transfer of the assets it had acquired to Faxworld AG.

15 For the financial year 1996, Faxworld GbR treated that transfer as a non-taxable transfer of a business under Paragraph 1(1a) of the UStG 1993. For the same financial year, the Finanzamt refused to allow Faxworld GbR to deduct, as input tax, the VAT of just under DEM 13 000 incurred on its input transactions. In a tax notice of 5 January 1998, the Finanzamt justified that refusal by stating that Faxworld GbR was not to be regarded as a trader within the meaning of Paragraph 2 of the UStG 1993 since the only output transaction which it intended to effect was the business transfer to the company to be established, which transfer is, under Paragraph 1(1a) of the UStG 1993, not deemed to be a taxable supply.

16 However, the Finanzgericht (Finance Court) delivered a judgment granting Faxworld GbR’s application challenging the Finanzamt’s decision, on the ground that that partnership was an undertaking and, as such, was entitled to deduct the input tax. The principle of neutrality of VAT required the deduction of the input tax even though, as a *Vorgründungsgesellschaft*, Faxworld GbR never intended to use the input services procured in order to effect taxable transactions itself.

17 It is against that judgment that the Finanzamt has brought an appeal on a point of law before the Bundesfinanzhof, claiming that Faxworld GbR is not entitled to deduct because it is not a trader since at no time did it intend to provide taxable services itself and because Faxworld AG’s activities cannot be attributed to it.

18 The Bundesfinanzhof, which, for its part, is inclined to recognise Faxworld GbR’s right to deduct the input tax, takes the view, first, that the supplies to Faxworld GbR in connection with the planned establishment of the capital company are costs which, by their very nature, are part of the economic activity of the business as a whole (Case C?408/98 *Abbey National* [2001] ECR I?1361, paragraphs 35 and 36).

19 Second, the Bundesfinanzhof takes the view that, if the transfer by Faxworld GbR of all its assets to Faxworld AG, which was its only output transaction, must be regarded as a ‘transfer of a totality of assets’ within the meaning of Article 5(8) of the Sixth Directive and not as a taxable transaction for the purposes of Article 17(2) of that directive, it would seem

appropriate to link the input supplies of Faxworld GbR to the planned transactions of Faxworld AG.

20 However, observing that, according to the judgment in *Abbey National*, a taxable person may deduct only the VAT on input supplies used for the purposes of its own taxable transactions and that, therefore, account cannot be taken of the transactions of the recipient of the transfer, the Bundesfinanzhof points out that, in the case at issue in the main proceedings, the legal distinction between Faxworld GbR and Faxworld AG is merely the result of the particular features of German civil law relating to the establishment of companies. Moreover, the national court points out that the principle of fiscal neutrality underlying the system of VAT precludes economic operators carrying on the same activities from being treated differently as far as taxation is concerned, and takes the view that the particularities of German civil law relating to the establishment of companies cannot result in the loss of a right to deduct tax in the preparatory phase (Case C?216/97 *Gregg* [1999] ECR I?4947, paragraph 20).

21 In the light of those considerations, the Bundesfinanzhof decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is a partnership which has been established for the sole purpose of forming a limited company entitled to deduct input tax paid on goods and services procured by it if, after that company has been formed, that partnership effects by formal act a transfer for consideration of the procured goods and services to the subsequently founded limited company and, from the outset, did not intend to carry out any other output transactions and if, in the Member State concerned, a transfer of a totality of assets is not deemed to be a supply of goods or services (first sentence of Article 5(8) and Article 6(5) of the Sixth Directive …)?'

22 The Bundesfinanzhof states that if the Court answers that question in the negative the further question arises as to whether the company, in this case, Faxworld AG, is entitled to deduct the input tax paid on transactions for supplies to the Vorgründungsgesellschaft, in this case, Faxworld GbR, even though the company had not been founded at the time of the supplies.

The question referred for a preliminary ruling

23 By its question, the Bundesfinanzhof is asking essentially whether, under the Sixth Directive, a partnership created for the sole purpose of establishing a capital company is entitled to deduct the VAT paid by it where that partnership's only output transaction was to transfer all of its assets to the company once it had been established and where, because the Member State concerned has exercised the options provided for in Articles 5(8) and 6(5) of the Sixth Directive, such a transfer is not deemed to be a supply of goods or services.

24 As regards the right to deduct, Article 17(2) of the Sixth Directive provides that the taxable person is entitled to deduct from the tax which he is liable to pay the VAT due or paid in respect of goods or services supplied or to be supplied to him by another taxable person 'insofar as the goods and services are used for the purposes of his taxable transactions'. Thus, it is clear from the wording of that provision that, in order for a person to be entitled to deduct, he must be a 'taxable person' within the meaning of the Sixth Directive and the goods and services in question must have been used for the purposes of his taxable transactions.

The classification of Faxworld GbR as a taxable person

25 As regards the classification of Faxworld GbR as a taxable person, Article 4(1) of the Sixth Directive provides that any person who independently carries out in any place any economic activity specified in paragraph 2 of that article, whatever the purpose or results of that activity, is to be regarded as a taxable person. According to paragraph 2, the economic activities referred to in paragraph 1 comprise all activities of producers, traders and persons supplying services.

26 Only the German Government does not regard Faxworld GbR as a taxable person within the meaning of Sixth Directive, on the ground that the partnership never carried out any economic activity. In support of that argument, it submits, first, that all of Faxworld GbR's input activities were intended solely to prepare the economic activities of a different legal entity which was yet to be established, namely Faxworld AG. Second, the transfer of assets by Faxworld GbR to Faxworld AG, which was Faxworld GbR's only output activity, was not a taxable transfer of a business for the purposes of Article 5(8) of the Sixth Directive.

27 Those arguments cannot be upheld. First, Article 4 of the Sixth Directive gives VAT a very wide scope, comprising all stages of production, distribution and the provision of services (see Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 7; Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 10; and Case C?186/89 *van Tiem* [1990] ECR I?4363, paragraph 17).

28 According to settled case-law, a person who acquires goods for the purposes of an economic activity within the meaning of Article 4 does so as a taxable person (Case C?97/90 *Lennartz* [1991] ECR I?3795, paragraph 14; Joined Cases C?110/98 to C?147/98 *Gabalfrisa and Others* [2000] ECR I?1577, paragraph 47; and Case C?400/98 *Breitsohl* [2000] ECR I?4321, paragraph 34), even if the goods are not used immediately for such economic activities (see, to that effect, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 22). Contrary to what the German Government argues, the validity of those findings is in no way limited by the identity of the person whose economic activity is in question.

29 Second, the German Government's argument based on the exercise by the Federal Republic of Germany of the option provided for in Article 5(8) of the Sixth Directive, by which it intends to show that Faxworld GbR's only output transaction does not fall within the scope of Article 4 of that directive, is erroneous. In accordance with the purpose of the Sixth Directive, which is, inter alia, to found a common system of VAT upon a uniform definition of 'taxable persons', the status of taxable person must be assessed solely on the basis of the criteria set out in Article 4 of the Sixth Directive (see *van Tiem*, cited above, paragraph 25). Accordingly, the scope of Article 4 of the Sixth Directive cannot be altered by the fact that a Member State has or has not exercised the option provided for in Article 5(8) of that directive, which enables it to deem that no supply of goods takes place where the totality of assets or a part thereof is transferred (see, with respect to the exercise by a Member State of the option provided for in Article 5(3) of the Sixth Directive, *van Tiem*, paragraph 26).

30 A partnership such as Faxworld GbR must therefore be regarded as a taxable person within the meaning of the Sixth Directive.

Whether taxable transactions within the meaning of Article 17(2) of the Sixth Directive were effected

31 As stated in paragraph 24 of this judgment, Article 17(2) of the Sixth Directive provides that a taxable person may deduct the VAT incurred on goods or services used 'for the purposes of his taxable transactions'. With respect to establishing whether a taxable person has effected taxable transactions, point 1 of Article 2 of the Sixth Directive provides, as a general rule, that the supply of goods or services effected for consideration by a taxable person acting as such are subject to VAT.

32 However, where a Member State has exercised the options provided for in Articles 5(8) and 6(5) of the Sixth Directive, no supply of goods or services is deemed to take place upon the transfer of a totality of assets or part thereof.

33 Since its only output transaction was the transfer of the totality of its assets and given that the Federal Republic of Germany has exercised the options provided for in Articles 5(8) and 6(5) of the Sixth Directive, Faxworld GbR itself effected no taxable transactions within the meaning of Article 17(2) of the Sixth Directive.

34 In that regard, Faxworld GbR argues that it and Faxworld AG must be regarded as a single economic unit. Since the goods and services acquired by Faxworld GbR were to be used for the purposes of Faxworld AG's taxable transactions, Faxworld GbR is entitled to deduct the input tax. Moreover, it observes that, according to the judgment in *Breitsohl*, cited above, the right to deduct the VAT paid on supplies acquired with a view to the

realisation of a planned economic activity continues to exist even where the tax authority is aware, from the time of the first tax assessment, that the economic activity envisaged, which is to give rise to taxable transactions, will not be taken up. That ruling applies *a fortiori* where, as in the case before the national court, the economic activity was taken up.

35 According to the German Government, if, contrary to its argument, Faxworld GbR is to be regarded as a taxable person for the purposes of the Sixth Directive, it is not entitled to deduct the VAT incurred on input transactions. In its view, it follows from the judgment in *Abbey National* that, where the Member State has exercised the option provided for in Article 5(8) of the Sixth Directive, the input tax may be deducted in the event of a transfer of the entire business only if the input transactions are part of the trader's overheads. However, in the case before the national court, Faxworld GbR's sole output transaction was the transfer of its assets to Faxworld AG, which means that Faxworld GbR cannot rely on the right to deduct under Article 17 of the Sixth Directive.

36 Although it does not dispute that Faxworld GbR is to be treated as a taxable person, the Commission shares the view taken by the German Government as regards that partnership's right to deduct. Relying on the judgment in *Abbey National*, paragraph 28, which states that the right to deduct presupposes that the expenditure incurred in acquiring the output services was part of the cost components of the taxable transactions, the Commission argues that the deduction of input tax requires that taxable transactions be effected; Faxworld GbR, however, never intended to effect such transactions.

37 It should be noted, first of all, that the deduction scheme is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see *Rompelman*, paragraph 19; Case C?37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15; *Gabalfrisa*, cited above, paragraph 44; Case C?98/98 *Midland Bank* [2000] ECR I?4177, paragraph 19; and *Abbey National*, paragraph 24). Given the general nature of that right, derogations are permitted only in the cases expressly provided for in the Directive (see, to that effect, *Ghent Coal Terminal*, cited above, paragraph 16).

38 In the case giving rise to the judgment in *Abbey National*, the taxable person in question had transferred a business and wished to deduct the VAT which it had paid on the services received by it for the purpose of that transfer in circumstances in which the transfer did not constitute a taxable transaction because the Member State concerned had exercised its option under Article 5(8) of the Sixth Directive.

39 Recognising that the taxable person was, in principle, entitled to deduct the VAT, the Court found that the costs of the services in question formed part of the taxable person's overheads and that, even in the case of a transfer of a totality of assets, where the taxable person no longer effects transactions after using those services, their costs must be regarded as part of the economic activity of the business as a whole before the transfer. Otherwise, an arbitrary distinction would be drawn between, on the one hand, expenditure incurred for the purposes of a business before it is actually operated and that incurred during its operation and, on the other hand, the expenditure incurred in order to terminate its operation (see *Abbey National*, paragraph 35).

40 That interpretation made it possible to relieve the taxable person in question of the burden of the VAT paid in the course of its economic activity. Accordingly, the taxable person's additional argument that it had to be able to rely on the recipient's taxable operations in order to be entitled to deduct all the VAT incurred on those services was rejected (*Abbey National*, paragraphs 31 and 32).

41 However, in contrast to the facts of the case giving rise to the judgment in *Abbey National*, the taxable person in the case before the national court, namely Faxworld GbR, as a Vorgründungsgesellschaft, did not even intend to effect itself taxable operations, its sole object being to prepare the activities of the Aktiengesellschaft (limited company). None the less, the VAT which Faxworld GbR wishes to deduct relates to supplies acquired for the

purpose of effecting taxable transactions, even though those transactions were only the planned transactions of Faxworld AG.

42 In those precise circumstances, and in order to ensure the neutrality of taxation, it must be held that, where the Member State has exercised the options provided for in Articles 5(8) and 6(5) of the Sixth Directive, as a result of the fact that, according to those provisions, 'the recipient shall be treated as the successor to the transferor', a Vorgründungsgesellschaft, as the transferor, must be entitled to take account of the taxable transactions of the recipient, namely the Aktiengesellschaft, so as to be entitled to deduct the VAT paid on input services which have been procured for the purposes of the recipient's taxable operations.

43 Accordingly, the answer to the question referred by the Bundesfinanzhof must be that a partnership established for the sole purpose of founding a capital company is entitled to deduct the input tax paid on supplies of goods and services where its only output transaction in the performance of its object was to effect by formal act the transfer for consideration of the supplies obtained to that company once founded and where, because the Member State concerned has exercised the options provided for in Articles 5(8) and 6(5) of the Sixth Directive, a transfer of a totality of assets is not deemed to be a supply of goods or services.

Costs

44 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundesfinanzhof by order of 23 January 2002, hereby rules:

A partnership established for the sole purpose of founding a capital company is entitled to deduct the input tax paid on supplies of goods and services where its only output transaction in the performance of its object was to effect by formal act the transfer for consideration of the supplies obtained to that company once founded and where, because the Member State concerned has exercised the options provided for in Articles 5(8) and 6(5) 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, as amended by Council Directive 95/7/EC of 10 April 1995, a transfer of a totality of assets is not deemed to be a supply of goods or services.

Jann

Rosas

von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass

V. Skouris

Registrar

President

1 – Language of the case: German.