Arrêt de la Cour
Case C-32/03

I/S Fini H

v

Skatteministeriet

(Reference for a preliminary ruling from the Højesteret)

(Sixth VAT Directive – Status of taxable person – Right to deduct – Winding up – Direct and immediate link – Transactions forming part of the economic activity as a whole)

Opinion of Advocate General Jacobs delivered on 28 October 2004

Judgment of the Court (Third Chamber), 3 March 2005

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Economic activities within the meaning of Article 4 of the Sixth Directive – Taxable person – Meaning – Person having ceased an economic activity but continuing to pay rent and charges relating to premises previously used for that activity owing to the impossibility of surrendering the lease – Included – Benefit of a right to a deduction – Conditions

(Council Directive 77/388, Art. 4 (1) to (3))

Article 4(1) to (3) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is to be interpreted as meaning that a person who has ceased an economic activity but who, because the lease contains a non-termination clause, continues to pay the rent and the charges on the premises used for that activity, is to be regarded as a taxable person within the meaning of that article and is entitled to deduct the value added tax on the amounts thus paid, provided that there is a direct and immediate link between the payments made and the economic activity and that the absence of any fraudulent or abusive intent has been established.

Transactions such as the payments which a person continues to make during the period over which their business was wound up must be regarded as forming part of the economic activity within the meaning of Article 4 of the Sixth Directive. Moreover, there is a direct and immediate link between the obligation to continue to pay the rent and other charges after the economic activity has ceased and the carrying on of that activity, since the lease was entered into in order to have the premises available which were necessary for carrying on that activity, which was actually carried on there. The duration of the obligation to pay the rent and the charges on those premises has, in that respect, no bearing, provided that that period of time is strictly necessary to complete the winding-up of the business.

(see paras. 24, 26, 28-29, 35, operative part)

JUDGMENT OF THE COURT (Third Chamber)
3 March 2005(1)

(Sixth VAT Directive – Status of taxable person – Right to deduct – Winding up – Direct and immediate link – Transactions forming part of the economic activity as a whole)

In Case C-32/03,REFERENCE for a preliminary ruling under Article 234 EC from the Højesteret (Denmark), made by decision of 22 January 2003, received at the Court on 28 January 2003, in the proceedings
I/S Fini H

v

Skatteministeriet

THE COURT (Third Chamber),,

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J.-P. Puissochet, J. Malenovský and U. Lõhmus (Rapporteur), Judges,
Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar
having regard to the written procedure and further to the hearing on 15 September 2004,after considering the observations submitted on behalf of:
– I/S Fini H, by S. Halling-Overgaard and M. Krarup, advokaterne,
– the Skatteministeriet, by P. Biering, acting as Agent,
– the Danish Government, by J. Molde and P. Biering, acting as Agents,
– the Commission of the European Communities, by E. Traversa and T. Fich, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(1) to (3) 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 The reference was made in the course of proceedings between the limited partnership I/S Fini H (‘Fini H’) and the Skatteministeriet (Ministry of Taxation). The Skatteministeriet demands that the partnership repay the negative value added tax (‘VAT’) paid to it during the period from 1 October

1993 to 31 March 1998. Moreover, it refuses to pay Fini H negative VAT in respect of the period from 1 April to 30 September 1998.

Legal framework

Community legislation

3 According to the fourth recital in its preamble, the purpose of the Sixth Directive is, inter alia, to ensure that the common system of turnover taxes is non-discriminatory.

4 Article 4 of the Sixth Directive provides:

'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.

3. Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2 …

…'

5 Article 17(2) of the Sixth Directive is worded as follows:

'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 in respect of goods or services supplied or to be supplied to him by another taxable person;

…'

National legislation

6 Article 3 of the momsloven (law on VAT), as published in Consolidating Regulation No 804 of 16 August 2000, ('the VAT law') is worded as follows:

'Taxable person shall mean any natural or legal person who independently carries on an economic activity.'

7 The right to deduct VAT on expenses linked to an independent economic activity is provided for in Article 37 of the VAT law.

The main case and the questions referred for a preliminary ruling

8 Fini H is a limited partnership which was created in 1989 with the object of running a restaurant. In order to carry on that activity, it leased premises from 20 May 1988. The lease, which was concluded for a term of 10 years, could be terminated only with effect from 30 September 1998.

9 Fini H closed its restaurant at the end of 1993 and the premises subsequently remained unused. It sought to terminate the lease but the landlord refused to consent, and relied on the absence in the lease of a clause providing for early termination. Moreover, Fini H failed to find a replacement tenant to take over the lease, which came to an end only on its contractual date of expiry.

10 During the period from the end of 1993 to 30 September 1998, Fini H remained registered in the VAT register even though it no longer carried on its restaurant business. It thus continued to deduct input tax paid by it on the costs incurred in relation to the lease in question, namely the rent and the heating, electricity and telephone charges. Once the restaurant was closed and there was no longer any output tax to declare, this resulted in net payments to Fini H.

11 In September 1998, the told-og skatteregionen (regional tax authority 'the authority') demanded repayment of the sums paid to Fini H as negative VAT between October 1993 and March 1998. It also decided that the amounts of VAT yet to be paid in respect of the period from 1 April to 30 September 1998 would not be reimbursed. The authority argued that Fini H had not carried on any activity subject to VAT since the third quarter of 1993.

12 That position was upheld by the Landsskatteretten (Supreme Administrative Tax Authority). It took the view that, following the cessation of its restaurant business, Fini H had not carried on an economic activity within the meaning of Article 3 of the VAT law. The lease could not, by itself, establish liability for VAT under that article. The Landsskatteretten added that the fact that the premises were, for a certain period, used for economic purposes in the form of a restaurant did not appear to justify a requirement that Fini H be regarded as a taxable person for VAT purposes under Article 3 once that activity had ceased.

13 Fini H then brought an action against that decision of the Landsskatteretten before the Vestre Landsret (Denmark), which dismissed it by judgment of 29 August 2001. The Vestre Landsret held that entitlement to deduct input tax requires that the taxable expenditure relate to an independent economic activity within the meaning of Article 3 of the VAT law. It ruled that the expenditure on rent and charges incurred after Fini H had ceased its restaurant business, which were not attributable to normal winding-up operations, could not be regarded as operational expenditure linked to an independent economic activity within the meaning of Article 3 of the VAT law.

14 Fini H lodged an appeal against that judgment of the Vestre Landsret before the Højesteret.

15 It was against that background that the Højesteret decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1.Can a person be regarded as independently carrying on an economic activity within the meaning of Article 4(1) to (3) of the Sixth VAT Directive in a situation in which the person concerned originally entered into a lease agreement as part of an independent economic activity but has now ceased that actual activity, even though the lease continues to exist for a particular period as a result of a non-termination clause, and in which, after the actual activity ceases, no transactions subject to VAT are conducted by application of the lease for the purpose of obtaining income therefrom on a continuing basis?

2.Does the question whether or not the person concerned actively seeks, during the remaining part of the period of non-terminability, either to utilise the commercial lease to conduct transactions subject to VAT for the purpose of obtaining income therefrom on a continuing basis or to dispose thereof have any bearing on the answer to Question 1 and does the length of the period of non-terminability or the remaining part thereof likewise have any bearing?'

The questions referred for a preliminary ruling

The first question

16 By its first question, the national court is asking, essentially, whether Article 4(1) to (3) of the Sixth Directive must be interpreted as meaning that a person who has ceased his commercial activity but continues to pay the rent and charges on the premises used for that activity because the lease contains a non-termination clause is to be regarded as a taxable person and, therefore, as entitled to deduct VAT on the inputs thus paid.

17 Fini H submits that it derives its right to deduct from the fact that the lease was concluded for the purpose of starting or carrying on an economic activity. If it were not recognised as being entitled to deduct VAT, it would have to pay VAT on goods and supplies acquired for business purposes.

18 According to the Danish Government and the Commission of the European Communities, where a taxable person no longer exercises an economic activity, the right to deduct ceases to apply to him from the date on which he ceased that activity or after a reasonable period of brief duration calculated from that date. A taxable person cannot enjoy a right to deduct indefinitely on account of the fact that, in the past, he exercised an economic activity.

19 The Court observes, first of all, that Article 4(1) of the Sixth Directive defines 'taxable person' by reference to the term 'economic activity'. It is the existence of such an activity which establishes the status of 'taxable person' to whom the Sixth Directive gives the right

to deduct.

20 Article 4(2) states that 'economic activities' are to be understood as comprising, in particular, all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The expression 'all activities' used in that provision suggests that the economic activity concerned may consist of several consecutive transactions.

21 The case-law also makes clear that an economic activity within the meaning of the Sixth Directive need not consist of a single act but may consist of a series of consecutive acts (see, in particular, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 22).

22 Accordingly, preparatory acts must be regarded as economic activities within the meaning of the Sixth Directive. Any person performing such preparatory acts is consequently regarded as a taxable person within the meaning of Article 4 of that directive and is entitled to deduct (*Rompelman*, paragraph 23, and Case C?110/94 *INZO* [1996] ECR I?857, paragraph 18). Entitlement to deduct is retained, even if it is subsequently decided, in view of the results of a profitability study, not to move to the operational phase but to put the company into liquidation, with the result that the economic activity envisaged does not give rise to taxed transactions (*INZO*, paragraph 20).

23 With respect to the transfer of a totality of assets, the Court has held that, where the taxable person no longer effects transactions after using services provided for that purpose, the costs of those services must be regarded as part of the economic activity of his business as a whole before the transfer and that he must be recognised as being entitled to deduct. Any other interpretation would amount to drawing an arbitrary distinction 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 Case C?408/98 *Abbey National* [2001] ECR I?1361, paragraph 35, and Case C?137/02 *Faxworld* [2004] ECR I?0000, paragraph 39).

24 Those same considerations dictate that transactions such as the payments which Fini H continued to have to make during the period over which its restaurant business was wound up must be regarded as forming part of the economic activity within the meaning of Article 4 of the Sixth Directive.

25 Such an interpretation is justified by the deduction system, with regard to which the Court has repeatedly held that it is intended 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 complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, to that effect, *Rompelman*, paragraph 19; Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 44; and Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraph 19; and *Abbey National*, paragraph 24).

26 However, a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement (*Midland Bank*, paragraph 24).

27 In the main case, Fini H's obligation, owing to a non-termination clause in the lease, to continue paying business rent and charges on a property which it had leased for the purpose of carrying on a restaurant business until the normal expiry of the lease could, in principle, be regarded as being directly and immediately linked to the restaurant business.

28 Since Fini H entered into the lease in order to have the premises necessary for carrying on its restaurant business and given that the premises were actually used for that business, it must be conceded that the partnership's obligation to continue paying the rent and other charges after it had ceased that business was a direct consequence of the carrying on of that business.

29 Accordingly, the duration of the obligation to pay the rent and the charges on those premises has no bearing on the existence of an economic activity within the meaning of Article 4(1) of the Sixth Directive, provided that that period of time is strictly necessary to complete the winding-up of the business.

30 It follows that, in respect of the rent and charges on the premises previously used for carrying on the restaurant business which were paid during the period for which the restaurant was not operated, that is to say, from October 1993 to September 1998, the taxable person must be entitled to deduct the VAT in the same way as during the period from the commencement of his restaurant business to the date on which it came to an end because, for the entire term of the lease, the premises were directly and immediately linked to his economic activity.

31 The right to deduct VAT on account of the winding-up of the business must therefore be recognised in so far as its application does not give rise to fraud or abuse.

32 In that regard, the Court has already held that Community law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C?367/96 *Kefalas and Others* [1998] ECR I?2843, paragraph 20, and Case C?373/97 *Diamantis* [2000] ECR I?1705, paragraph 33). That would be the case, for example, if Fini H, whilst relying on the right to deduct VAT in respect of the payment of rent and charges relating to the period after the cessation of the restaurant business, continued to use the premises previously used as a restaurant as premises for purely private purposes.

33 If the tax authorities were to conclude that the right to deduct has been exercised fraudulently or abusively, they would be entitled to demand, with retrospective effect, repayment of the amounts deducted (see, inter alia, *Rompelman*, paragraph 24; *INZO*, paragraph 24; and *Gabalfrisa*, paragraph 46).

34 It is, in any event, a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends.

35 The answer to the first question must therefore be that Article 4(1) to (3) of the Sixth Directive is to be interpreted as meaning that a person who has ceased an economic activity but who, because the lease contains a non-termination clause, continues to pay the rent and charges on the premises used for that activity is to be regarded as a taxable person within the meaning of that article and is entitled to deduct the VAT on the amounts thus paid, provided that there is a direct and immediate link between the payments made and the economic activity and that the absence of any fraudulent or abusive intent has been established.

The second question

36 In light of the answer given to the first question, the second question is irrelevant and there is no need to answer it.

Costs

37 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 (Third Chamber) rules as follows:

Article 4(1) to (3) of the 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, is to be interpreted as meaning that a person who has ceased an economic activity but who, because the lease contains a non-termination clause, continues to pay the rent and charges on the premises used for that activity is to be regarded as a taxable person within the meaning of that article and is entitled to deduct the VAT on the amounts thus paid, provided that there is a direct and immediate link between the payments made and the commercial activity and that the absence of any fraudulent or abusive intent has been established.

[Signatures]
1 – Language of the case: Danish.