Case C-435/05

Investrand BV

v

Staatssecretaris van Financiën

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Sixth VAT Directive – Article 17(2) – Right to deduct – Costs related to advisory services obtained in the course of arbitration proceedings to establish the amount of a claim that forms part of a company's assets, but arose before its holder became liable to VAT)

Judgment of the Court (Fourth Chamber), 8 February 2007

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax

(Council Directive 77/388, Art. 17(2))

Article 17(2) of the 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 the costs for advisory services which a taxable person obtains with a view to establishing the amount of a claim forming part of his company's assets and relating to a sale of shares prior to his becoming liable to VAT do not, in the absence of evidence establishing that the exclusive reason for those services is to be found in the economic activity, within the meaning of that directive, carried out by the taxable person, have a direct and immediate link with that activity and, consequently, do not give rise to a right to deduct the VAT charged on them.

(see para. 38, operative part)

JUDGMENT OF THE COURT (Fourth Chamber)

8 February 2007 (*)

(Sixth VAT Directive – Article 17(2) – Right to deduct – Costs related to advisory services obtained in the course of arbitration proceedings to establish the amount of a claim that forms part of a company's assets, but arose before its holder became liable to VAT)

In Case C-435/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 2 December 2005, received at the Court on the same day, in the proceedings

Investrand BV

v

Staatssecretaris van Financiën,

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, E. Juhász, R. Silva de Lapuerta, G. Arestis and T. von Danwitz, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M.-A. Gaudissart, head of unit,

having regard to the written procedure and further to the hearing on 22 November 2006,

after considering the observations submitted on behalf of:

– Investrand BV, by H. Konijnenberg, R. van der Paardt and J. Streefland, advocaten,

– the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

– the Greek Government, by S. Spyropoulos and I. Bakopoulos, acting as Agents,

– the United Kingdom Government, by T. Harris, acting as Agent,

– the Commission of the European Communities, by M. van Beek and D. Triantafyllou, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns 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) (‘the Sixth Directive’).

2 The reference was made in the course of proceedings between Investrand BV (‘Investrand’), a company established under Netherlands law, and the Staatssecretaris van Financiën (State Secretary for Finances) following the latter’s refusal to allow Investrand to deduct the value added tax (‘VAT’) paid on the cost of advisory services which it obtained in the course of arbitration proceedings to establish the amount of a claim that forms part of its assets, but arose before it became liable to VAT.

Legal context

Community legislation

3 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.

…’

4 Article 17 of the Sixth Directive, entitled ‘Origin and scope of the right to deduct’, provides in paragraphs (1) and (2):

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

…’

National legislation

5 Article 2 of the Law of 1968 on turnover tax (Wet op de omzetbelasting 1968) of 28 June 1968 (*Staatsblad* 1968, No 329; ‘the Law of 1968’) is worded as follows:

‘A trader may deduct from the tax to be paid on supplies of goods and services the tax charged on supplies of goods and services to him, acquisitions of goods effected by him within the Community and imports of goods intended for him.’

6 Article 15(1) of the Law of 1968 provides:

‘The tax referred to in Article 2 which is deductible by the trader shall be:

(a) the tax which, in the period covered by the return, other traders have charged him by means of an invoice issued in accordance with the applicable rules, in respect of supplies of goods and services which they have made to him;

…

in so far as the trader uses the goods and services for the purposes of his business.’

The facts which gave rise to the dispute in the main proceedings and the question referred for a preliminary ruling

7 Investrand was incorporated on 22 August 1986. It owned 43.57% of the shares in Cofex BV (‘Cofex’), a clothing business.

8 On 3 August 1989, Investrand sold its Cofex shares to Hi-Tec Sports plc (‘Hi-Tec Sports’). At the time of that sale, it was agreed that it would receive, in addition to a fixed sum, a further sum the amount of which would depend on the profits made by Cofex in the period from 1989 to 1992.

9 Until 1 January 1993, Investrand’s activity was that of a passive holding company, holding shares in other companies, but with no involvement in their management.

10 Prior to 1 January 1993, Investrand did not perform any services for consideration. As from that date, under an agreement made with Cofex, it carried out, for consideration, management activities for Cofex.

11 A dispute arose between Investrand and Hi-Tech Sports over the calculation of the sum payable to Investrand on the basis of Cofex’s profits relating to the 1992 financial year. That dispute gave rise, in 1996, to arbitration proceedings in the course of which the costs related to legal advisory services were invoiced to Investrand.

12 Investrand deducted the VAT paid on those costs, in the amount of NLG 8 495.50, in respect of the 1996 financial year.

13 As they took the view that Investrand was not entitled to make that deduction, the Netherlands tax authorities issued an additional assessment. Following an objection by Investrand, the authorities took a decision confirming that additional assessment.

14 Investrand appealed against that decision before the Gerechtshof te Amsterdam. That court held that Investrand was not entitled to deduct the VAT paid on the costs in question, on the ground that the advisory services had been provided in connection with an activity which it did not at that time perform as a trader and that they did not have a direct and immediate link with an activity carried out in that capacity.

15 Investrand appealed in cassation against the judgment of the Gerechtshof te Amsterdam before the Hoge Raad der Nederlanden.

16 The first ground of that appeal seeks to contest the finding of the Gerechtshof te Amsterdam that the sale of shares is not an economic activity within the meaning of the Sixth Directive. The national court is, however, of the opinion that that ground of appeal cannot be accepted as such a finding is consistent with the Court’s case-law (Case C-77/01 *EDM* [2004] ECR I-4295, and Case C-465/03 *Kretztechnik* [2005] ECR I-4357).

17 By the second ground of appeal, Investrand submits that, by linking the costs related to the advisory services which it obtained in 1996 not to the activities carried out by it, as a trader, in the course of that financial year, but to the period when the sale of shares took place, at which time it did not yet have that status, the Gerechtshof te Amsterdam incorrectly interpreted the judgment of the Court in Case C?98/98 *Midland Bank* [2000] ECR I-4177.

18 In that regard, the national court observes that, according to the settled case-law of the Court, a taxable person whose activities are subject to VAT is, under Article 17(2) of the Sixth Directive, entitled to deduct that VAT where there is a direct and immediate link between the goods and services utilised, on the one hand, and, on the other hand, the transactions to be performed by him in respect of which a right of deduction exists.

19 The national court asks whether such a link can be assumed where a taxable person obtains services with a view to establishing the amount of a claim that forms part of the assets of his business but arose in a period prior to his becoming liable to VAT.

20 According to that court, the fact that, in the present case, the costs incurred relate to a transaction carried out in a period in which Investrand did not have the status of a taxable person within the meaning of the Sixth Directive precludes there being a direct and immediate link with its business activity, and, therefore, militates in favour of refusing the right to deduct. On the other hand, the fact that the claim corresponding to the sum payable to Investrand forms part of the assets of that company and that, in order to secure those assets, it incurred costs payable out of them could lead to those costs being regarded as forming part of the applicant's general costs and, consequently, having a direct and immediate link with the activity carried out so as to warrant a right to deduct.

21 In the light of that uncertainty, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In the context of the right of deduction granted in Article 17(2) of the Sixth Directive, must it be held that there is a direct and immediate link between specific services obtained by a taxable person and taxable transactions yet to be performed by that same taxable person in a case where those services have been obtained with a view to establishing a monetary claim that forms part of his assets but which arose in a period preceding that in which he became a taxable person for VAT purposes?'

The question referred for a preliminary ruling

22 It should be noted, to begin with, that the rules governing deduction introduced by the Sixth Directive are 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 complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, inter alia, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15; and Case C?408/98 *Abbey National* [2001] ECR I?1361, paragraph 24).

23 According to settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement (see *Midland Bank*, paragraph 24; *Abbey National*, paragraph 26; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 26). The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (see *Midland Bank*, paragraph 30; *Abbey National*, paragraph 28; and Case C-16/00 *Cibo Participations* [2001] ECR I-6663, paragraph 31).

24 It is however also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (see, inter alia, *Midland Bank*, paragraphs 23 and 31, and *Kretztechnik*, paragraph 36).

25 In the case in the main proceedings, it must be pointed out, as did the national court, that, in accordance with settled case-law, the sale of shares does not in itself constitute an economic activity within the meaning of the Sixth Directive and does not therefore fall within its scope (see, inter alia, Case C-155/94 *Wellcome Trust* [1996] ECR I?3013, paragraphs 33 to 37; *EDM*, paragraphs 57 to 62; and *Kretztechnik*, paragraph 19).

26 Contrary to what Investrand has claimed, the steps taken by a taxable person, on his own behalf, to recover a claim or establish the value thereof cannot be treated as such an activity either. Such steps do not constitute the exploitation of property to produce income on a continuing basis because any resultant gain derives merely from his status as holder of the claim in question and is not the product of any economic activity within the meaning of the Sixth Directive (see, to that effect, *Kretztechnik*, paragraph 19).

27 As the Netherlands Government observed at the hearing, Investrand cannot rely in that regard on Case C-305/01 *MKG?Kraftfahrzeuge-Factoring* [2003] ECR I-6729). The case which gave rise to that judgment concerned an activity which consisted of purchasing debts, under a factoring contract, for consideration, and assuming the risk of the debtors' default, in return for a commission paid by the client thereby relieved of such a risk. Whilst the steps taken by Investrand were on its own behalf, the debt collection activity at issue in that case was carried out for third parties and in exchange for payment. It was in the light of those characteristics that the Court classified it as an economic activity within the meaning of the Sixth Directive, which could give rise to a right to deduct.

28 As neither the sale of shares nor the steps taken by Investrand in connection with the claim which it had against Hi-Tec are transactions falling within the scope of the Sixth Directive, the costs related to the advisory services at issue in the main proceedings cannot be regarded as having a direct and immediate link with a particular transaction or transactions giving rise to a right to deduct.

29 In view of the case-law cited in paragraph 24 of this judgment, it must also be ascertained whether, as Investrand maintained in relying on *Midland Bank*, the costs at issue in the main proceedings constitute general costs which have a direct and immediate link with the taxable person's economic activity as a whole, on the ground that the claim to which they relate forms part of the assets of the business which it operates.

30 The Netherlands, Greek and United Kingdom Governments and the Commission of the European Communities submit that there is no such link, given that those costs are related only to the sale of Cofex shares which took place between Investrand and Hi-Tec Sports. Those Governments add that the transaction took place, moreover, at a time when Investrand was not yet liable to VAT.

31 In that connection, it must be pointed out, as did the Netherlands Government and the Commission, that the circumstance that the claim linked to the sale of Cofex shares which took place between Investrand and Hi-Tec Sports constitutes, according to the information in the order for reference, part of the assets of the business operated by Investrand is not sufficient to establish that there is a direct and immediate link between the costs incurred by Investrand for advice concerning that claim and Investrand's economic activities.

32 No document in the case would support an assertion that, had it not carried out economic activities which were subject to VAT as from 1 January 1993, Investrand would not have obtained the advisory services at issue in the main proceedings. It thus appears that, whether or not it carried out such activities as from that date, Investrand would have obtained those services with a

view to safeguarding the financial consideration for the sale of shares to Hi-Tec Sports which took place in 1989.

33 In those circumstances, it cannot be considered that the costs relating to those services were incurred for the purposes of and with a view to Investrand's taxable activities. As the exclusive reason for those costs is not to be found in those activities, the costs have no direct and immediate link to them.

34 As the Commission observed, Investrand's position in this case is no different from that of a private shareholder who, having sold his shares, has sought legal advice and incurred expenditure relating to that advice in the course of a dispute with the purchaser concerning the claim corresponding to the price of that sale. Those circumstances do not fall within the scope of the Sixth Directive (see, to that effect, *EDM*, paragraphs 60 and 61).

35 It should also be noted that this case can be distinguished from that which gave rise to the judgment in *Kretztechnik*. The costs incurred for advice in the case which gave rise to that judgment, which were accepted by the Court, in paragraph 36 thereof, as constituting overheads which had a direct and immediate link with the taxable person's economic activity as a whole, related to a share issue intended to increase the taxable person's capital for the benefit of its economic activity.

36 While it may not be inferred from any document before the Court that, in the circumstances of this case, Investrand would not have obtained the advisory services at issue if it had not carried out an economic activity which was subject to VAT, the exclusive reason for the advisory services concerned in the case which gave rise to the judgment in *Kretztechnik* was, by contrast, to be found in the taxable person's economic activity and in the capital increase it decided on to augment its financial means for the benefit of that activity.

37 Unlike the costs for advice at issue in the case in the main proceedings, the costs for advice concerned in *Kretztechnik* therefore had a direct and immediate link with the taxable person's economic activity as a whole.

38 In the light of the foregoing, the answer to the question referred by the Hoge Raad der Nederlanden must be that Article 17(2) of the Sixth Directive is to be interpreted as meaning that the costs for advisory services which a taxable person obtains with a view to establishing the amount of a claim forming part of his company's assets and relating to a sale of shares prior to his becoming liable to VAT do not, in the absence of evidence establishing that the exclusive reason for those services is to be found in the economic activity, within the meaning of that directive, carried out by the taxable person, have a direct and immediate link with that activity and, consequently, do not give rise to a right to deduct the VAT charged on them.

Costs

39 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 (Fourth Chamber) hereby rules:

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, is to be interpreted as meaning that the costs for advisory services which a taxable person obtains with a view to establishing the amount of a claim forming part of his company's assets and relating to a sale of shares prior to his becoming liable to VAT do not, in the absence of evidence establishing that the exclusive

reason for those services is to be found in the economic activity, within the meaning of that directive, carried out by the taxable person, have a direct and immediate link with that activity and, consequently, do not give rise to a right to deduct the VAT charged on them.

[Signatures]

* Language of the case: Dutch.