Case C-437/06

Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG

v

Finanzamt Göttingen

(Reference for a preliminary ruling from the Niedersächsisches Finanzgericht)

(Sixth VAT Directive – Taxable person simultaneously carrying out economic activities, taxable or exempt, and non-economic activities – Right to deduct input VAT – Expenditure connected with the issue of shares and atypical silent partnerships – Apportionment of input VAT according to the economic nature of the activity – Calculation of the deductible proportion)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Taxable person simultaneously carrying out economic activities and non-economic activities*

(Council Directive 77/388, Art. 2(1))

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Taxable person simultaneously carrying out economic activities and non-economic activities*

(Council Directive 77/388)

1. Where a taxpayer simultaneously carries out economic activities, taxed or exempt, and non-economic activities outside the scope of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, deduction of the value added tax relating to expenditure connected with the issue of shares and atypical silent partnerships is allowed only to the extent that that expenditure is attributable to the taxpayer's economic activity within the meaning of Article 2(1) of that directive.

(see para. 31, operative part 1)

2. The determination of the methods and criteria for apportioning input value added tax between economic and non-economic activities within the meaning of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is in the discretion of the Member States who, when exercising that discretion, must have regard to the aims and broad logic of that directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity.

The Member States have the right to apply, as necessary, an investment formula or a transaction formula or any other appropriate formula, without being required to restrict themselves to only one of those methods.

(see paras 38-39, operative part 2)

JUDGMENT OF THE COURT (Fourth Chamber)

13 March 2008 (*)

(Sixth VAT Directive – Taxable person simultaneously carrying out economic activities, taxable or exempt, and non-economic activities – Right to deduct input VAT – Expenditure connected with the issue of shares and atypical silent partnerships – Apportionment of input VAT according to the economic nature of the activity – Calculation of the deductible proportion)

In Case C?437/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Niedersächsisches Finanzgericht (Germany), made by decision of 5 October 2006, received at the Court on 24 October 2006, in the proceedings

Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG

v

Finanzamt Göttingen,

THE COURT (Fourth Chamber),

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

Advocate General: J. Mazák,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG, by R. Jouvenal, Rechtsanwalt,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Portuguese Government, by L. Fernandes and R. Laires, acting as Agents,

– the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, and by P. Harris, Barrister,

– the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(1) and 17(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 (OJ 1977 L 145, p. 1) ('the Sixth Directive').

2 The reference has been made in the course of proceedings between Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG ('Securenta') and the Finanzamt Göttingen ('the Finanzamt') concerning the scope of the right to deduct amounts of value added tax ('VAT').

Legal context

Community legislation

3 Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…'

4 Article 4 of the Sixth Directive sets out the following definitions:

'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.

…'

5 Under Article 13B of the Sixth Directive:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(d) the following transactions:

…

5. transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities …

…’

6 Article 17 of the Sixth Directive is worded as follows:

‘…

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;

(b) value added tax due or paid in respect of imported goods;

(c) value added tax due under Articles 5(7)(a) and 6(3).

3. Member States shall also grant to every taxable person the right to a deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

(a) transactions relating to the economic activities as referred to in Article 4(2) carried out in another country, which would be eligible for deduction of tax if they had occurred in the territory of the country;

…

5. As regards goods and services to be used by a taxable person both for transactions in respect of which VAT is deductible and for transactions in respect of which it is not … only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person.

However, the Member States may:

(a) authorise the taxable person to determine a proportion for each sector of his business, provided that separate accounts are kept for each sector;

(b) require the taxable person to determine a proportion for each sector of his business and to keep separate accounts for each sector;

(c) authorise or require the taxable person to make the deduction on the basis of the use made of all or part of the goods and services;

(d) authorise or require the taxable person to make the deduction in accordance with the rule laid down in the first subparagraph, in respect of all goods and services used for all transactions referred to therein;

(e) provide that, where the VAT which is not deductible by the taxable person is insignificant, it is to be treated as nil.

…’

7 In accordance with Article 19 of the Sixth Directive:

‘1. The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:

– as numerator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3);

– as denominator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which value added tax is not deductible. …

The proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next unit.

2. By way of derogation from the provisions of paragraph 1, there shall be excluded from the calculation of the deductible proportion, amounts of turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business. Amounts of turnover attributable to incidental real estate and financial transactions shall also be excluded.

3. The provisional proportion for a year shall be that calculated on the basis of the preceding year’s transactions. In the absence of any such transactions to refer to, or where they were insignificant in amount, the deductible proportion shall be estimated provisionally, under the supervision of the tax authorities, by the taxable person on the basis of his own forecasts. However, Member States may retain their current rules.

Deductions made on the basis of such provisional proportions shall be adjusted when the final proportion is fixed during the following year.’

National legislation

8 Paragraph 1(1) of the Law on Turnover Tax 1993 (Umsatzsteuergesetz 1993, BGBl. 1993 I, p. 565; ‘the UstG’) provides that certain transactions effected for consideration within the State by a trader in the course of business are to be subject to VAT.

9 In accordance with Paragraph 4(8)(e) and (f) of the UStG, transactions, including negotiation but not management or safekeeping, in securities and transactions and negotiations concerning interests in companies or other associations are exempt from taxation.

10 Paragraph 15 of the UStG provides:

‘(1) The trader may deduct the following amounts of input tax:

1. tax shown separately in invoices … for supplies of goods or services effected by other traders for the purposes of its business ...;

2. the turnover tax on imports in respect of goods imported for the purposes of its business …;

3. the tax in respect of the intra-Community acquisition of goods for the purposes of its business.

(2) There shall be no deduction of tax in respect of the supply, importation or intra-Community acquisition of goods, or in respect of supplies of services, which the trader uses for the purposes of the following transactions:

1. exempt transactions,

...

(4) If a trader uses any goods supplied, imported or acquired in the Community for the purposes of its business, or a service supplied to it, only in part for effecting transactions in respect of which the right to deduct is excluded, there shall be no deduction of the part of the input tax which is economically attributable to those transactions. The trader may make an appropriate estimate of the non-deductible amounts.

...'

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

11 Securenta's activities in the financial year in dispute – 1994 – involved acquiring, managing and selling real estate, securities, financial holdings and investments of all types. Securenta acquired the capital necessary for this by means of the issue of shares and atypical silent partnerships. While offering shares for public subscription, it admitted a multitude of silent partners. The persons thus associated provided capital which the company reinvested.

12 During 1994, Securenta carried out taxable transactions worth DEM 2 959 800. Securenta's total turnover was DEM 6 480 006. That amount included dividend earnings of DEM 226 642 and earnings of DEM 1 389 930 from the sale of securities, giving a total of DEM 1 616 572. Out of input tax totalling DEM 6 838 535, the greater part – DEM 6 161 679 – was not attributable to specific output transactions.

13 In the administrative proceedings to determine Securenta's fiscal obligations, Securenta stated that, as all the input VAT paid related to expenditure connected with the acquisition of new capital, it was deductible on the ground that the issue of shares was linked to the reinforcement of the company's capital and that transaction had benefited the company's economic activity in general.

14 The Finanzamt refused deduction of the input tax relating to expenditure connected with the issue of atypical silent partnerships (DEM 4 171 424), as well as the input tax relating to expenditure connected with Securenta's leasing transactions (DEM 676 856). According to the Finanzamt, input tax not attributable to specific output transactions remained in the amount of DEM 1 990 254. Of this the Finanzamt allowed a right of deduction in respect of the proportion calculated in accordance with a formula of approximately 45% – based on the application of a criterion linked to the size of the investments made – resulting in deductible input tax in the amount of DEM 1 567 616 and a refund for the 1994 financial year of DEM 1 123 647.

15 Securenta accordingly brought an action against that decision. By judgment of 18 October 2001, the Niedersächsisches Finanzgericht (Finance Court) dismissed the action.

16 Securenta appealed against that decision to the Bundesfinanzhof (Federal Finance Court) which, by judgment given on 18 November 2004, set aside the judgment of the Niedersächsisches Finanzgericht.

17 The Niedersächsisches Finanzgericht, hearing the case afresh, then decided to stay the

proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) If a taxable person simultaneously engages in a business activity and a private activity, is the entitlement to deduct input [VAT] determined according to the proportion of assessable and taxable transactions, on the one hand, to assessable and exempt transactions, on the other hand, or is the deduction of tax allowed only to the extent that the expenditure connected with the issue of shares and silent partnerships is to be attributed to the applicant’s economic activity within the meaning of Article 2(1) of [the Sixth] Directive …?

(2) If the deduction of input [VAT paid] is allowed only to the extent that the expenditure connected with the issue of shares and silent partnerships is to be attributed to the applicant’s economic activity, should the apportionment of the input tax between business activity and private activity be carried out according to an “investment formula” or is a “transaction formula”, applying Article 17(5) of [the Sixth] Directive … *mutatis mutandis*, also appropriate?’

The questions referred for a preliminary ruling

Observations submitted to the Court

18 Securenta submits that all the input VAT paid in respect of the expenditure connected with the acquisition of capital is deductible, since a share issue serves to increase the financial resources of a company for the benefit of its economic activity in general. In order to determine the amount covered by the right to deduct, it is necessary to define the proportion of assessable and taxable transactions, on the one hand, to assessable and exempt transactions, on the other.

19 The German Government takes the view that deduction of the input VAT paid is allowable only to the extent that the expenditure connected with the issue of shares and silent partnerships is to be attributed to a business activity. The German Government explains that, in the main proceedings, part of the capital thus acquired was allocated to areas in which no business activity was carried out, that is to say, the acquisition of financial holdings. It is therefore appropriate to apportion the input VAT paid between business activity and private activity, using a formula based on the nature of the investment.

20 The Portuguese Government submits that the input VAT paid is deductible only with regard to transactions effected in the framework of business activity and that the investment formula is the more appropriate method of apportionment.

21 The United Kingdom Government points out that the proportion of the overhead inputs that is linked to a non-economic activity is not taken into account for the purposes of calculating the deductibility of input VAT paid. As to the method of apportionment, that Government takes the view that it is not prescribed by the Sixth Directive and is a matter for the discretion of the Member States.

22 The Commission of the European Communities points out that the tax treatment of a business activity depends on the applicability of one of the factors giving rise to the right to exemption. While transactions in securities are exempt from VAT, supplies of immovable goods may, where appropriate, be taxed. In those circumstances, it is for the national court to conduct an examination of the nature of the various activities carried out by Securenta. In that regard, the Commission advocates the investment formula, which needs, however, to be sufficiently finely adjusted as to reflect economic reality.

Reply of the Court

The first question

23 By its first question, the national court seeks to ascertain how, in the case of a taxpayer who carries out both economic and non-economic activities, the right to deduct input VAT paid is to be determined.

24 In order to reply to that question, it should first be recalled that the right to deduct is an integral part of the VAT scheme which in principle may not be limited and which must be exercised immediately in respect of all the taxes charged on transactions relating to inputs (see Case C?62/93 *BP Supergas* v *Greek State* [1995] ECR I?1883, paragraph 18, and Joined Cases C?110/98 to C?147/98 *Gabalfrisa and Othersv Agencia Estatal de Administración Tributaria* [2000] ECR I?1577, paragraph 43).

25 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 (see 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?223/03 *University of Huddersfield* [2006] ECR I?1751, paragraph 47).

26 It is apparent from the information supplied by the national court that Securenta carries out three types of activity: (i) non-economic activities, which do not fall within the scope of the Sixth Directive; (ii) economic activities, which as such fall within the scope of that directive but are exempt from VAT; and (iii) taxed economic activities. The question therefore arises, in that context, whether – and, if so, to what extent – such a taxable person has the right to deduct input VAT relating to expenditure which is not attributable to specific output transactions.

27 With regard to expenditure connected with the issue of shares or atypical silent partnerships, it should be noted that, in order for the input VAT paid in respect of such a transaction to give rise to a right to deduct, the expenditure incurred in that regard must be a component of the cost of the output transactions that gave rise to the right to deduct (see Case C?408/98 *Abbey National* [2001] ECR I?1361, paragraph 28; Case C?16/00 *Cibo Participations* [2001] ECR I?6663, paragraph 31; and Case C?435/05 *Investrand* [2007] ECR I?1315, paragraph 23).

28 In those circumstances, the input VAT paid in relation to the expenditure connected with the issue of shares or atypical silent partnerships can give rise to the right to deduct only if the capital thus acquired was used in connection with the economic activities of the person concerned. The Court has held that the deductions scheme laid down by the Sixth Directive relates to all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see *Gabalfrisa and Others*, paragraph 44; Case C?98/98 *Midland Bank* [2000] ECR I?4177, paragraph 19; and *Abbey National*, paragraph 24).

29 In the main proceedings, as the national court has observed, the expenditure connected with supplies of services carried out in the context of the issue of shares and financial holdings was not solely attributable to downstream economic activities carried out by Securenta and was not therefore among the elements which, alone, go to make up the cost of the transactions relating to those activities. If, however, that had been the case, the supplies of services concerned would have had a direct and immediate link with the taxpayer’s economic activities (see *Abbey National*, paragraphs 35 and 36, and *Cibo Participations*, paragraph 33). However, it is apparent from the documents before the Court that the costs incurred by Securenta for the financial transactions at issue in the main proceedings were, at least in part, for the performance of non-economic

activities.

30 To the extent that input VAT relating to expenditure incurred by a taxpayer is connected with activities which, in view of their non-economic nature, do not fall within the scope of the Sixth Directive, it cannot give rise to a right to deduct.

31 The answer to the first question must therefore be that, where a taxpayer simultaneously carries out economic activities, taxed or exempt, and non-economic activities outside the scope of the Sixth Directive, deduction of the VAT relating to expenditure connected with the issue of shares and atypical silent partnerships is allowed only to the extent that that expenditure is attributable to the taxpayer's economic activity within the meaning of Article 2(1) of that directive.

The second question

32 By its second question, the national Court seeks to ascertain whether, on the assumption that deduction of input VAT is allowed only to the extent that the expenditure incurred by the taxpayer is attributable to economic activities, apportionment of the input tax between economic activity and non-economic activity should be carried out in accordance with an investment formula or – where Article 17(5) of the Sixth Directive applies *mutatis mutandis* – a transaction formula.

33 In order to reply to that question, it should be noted that the provisions of the Sixth Directive do not include rules relating to the methods or criteria which the Member States are required to apply when adopting provisions permitting the apportionment of input VAT paid according to whether the relevant expenditure relates to economic activities or to non-economic activities. As the Commission has noted, the rules set out in Articles 17(5) and 19 of the Sixth Directive relate to input VAT on expenditure connected exclusively with economic activities, and distinguish between economic activities which are taxed and give rise to the right to deduct and those which are exempt and do not give rise to such a right.

34 In those circumstances, and so that taxpayers can make the necessary calculations, it is for the Member States to establish methods and criteria appropriate to that aim and consistent with the principles underlying the common system of VAT.

35 In that regard, the Court has held that, where the Sixth Directive does not contain the guidance necessary for such precise calculations, the Member States are required to exercise that power, having regard to the aims and broad logic of the Directive (see, to that effect, Case C?72/05 *Wollny* [2006] ECR I?8297, paragraph 28).

36 In particular, and as the Advocate General noted in point 47 of his Opinion, the measures which the Member States are required to adopt in that regard must comply with the principle of fiscal neutrality on which the common system of VAT is based.

37 Accordingly, the Member States must exercise their discretion in such a way as to ensure that deduction is made only for that part of the VAT proportional to the amount relating to transactions giving rise to the right to deduct. They must therefore ensure that the calculation of the proportion of economic activities to non-economic activities objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity.

38 It is appropriate to add that, when exercising that discretion, the Member States have the right to apply, as necessary, an investment formula or a transaction formula or any other appropriate formula, without being required to restrict themselves to only one of those methods.

39 The answer to the second question must therefore be that the determination of the methods

and criteria for apportioning input VAT between economic and non-economic activities within the meaning of the Sixth Directive is in the discretion of the Member States who, when exercising that discretion, must have regard to the aims and broad logic of the Directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity.

Costs

40 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:

1. **Where a taxpayer simultaneously carries out economic activities, taxed or exempt, and non-economic activities outside the scope 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, deduction of the VAT relating to expenditure connected with the issue of shares and atypical silent partnerships is allowed only to the extent that that expenditure is attributable to the taxpayer's economic activity within the meaning of Article 2(1) of that directive.**

2. **The determination of the methods and criteria for apportioning input VAT between economic and non-economic activities within the meaning of the Sixth Directive is in the discretion of the Member States who, when exercising that discretion, must have regard to the aims and broad logic of that directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity.**

[Signatures]

* Language of the case: German.