Case C-98/07

Nordania Finans A/S and BG Factoring A/S

v

Skatteministeriet

(Reference for a preliminary ruling from the Højesteret)

(Sixth VAT Directive – Article 19(2) – Calculation of the deductible proportion – Exclusion of amounts of turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business – Notion of 'capital goods used by the taxable person for the purposes of his business' – Vehicles purchased by a leasing company to be leased and subsequently sold on termination of the respective leasing contracts)

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. 19(2))

Article 19(2) 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 the notion of 'capital goods used by the taxable person for the purposes of his business' does not include vehicles which a leasing undertaking purchases with a view to leasing them and subsequently selling them upon termination of the respective leasing contracts, as the sale of such vehicles at the end of those contracts is an integral part of the usual business activities of that undertaking.

For the party concerned, the purchase and subsequent sale of such goods means that it has to use goods and services for mixed use on an everyday basis. Since that sale is part of the normal taxable activities of the taxable person, the turnover attributable to it must be taken into account in the calculation of the deductible proportion in order for that proportion to reflect as accurately as possible the division of use, in respect of those activities, of the goods and services put to mixed use, since otherwise there would be a failure to have regard to the objective of the neutrality of the common system of value added tax. Therefore, if the sale, on termination of the leasing contracts, of the vehicles covered by those contracts is in the nature of a normal activity for the taxable person concerned, who carries out that activity by way of business and as a matter of course, it would be contrary to that objective of neutrality if that taxable person were not actually relieved of the portion of value added tax imposed on the overall costs incurred to effect that sale and thus to carry on its usual taxable business activity.

(see paras 25-26, 36, operative part)

JUDGMENT OF THE COURT (Fourth Chamber)

6 March 2008 (*)

(Sixth VAT Directive – Article 19(2) – Calculation of the deductible proportion – Exclusion of amounts of turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business – Notion of ‘capital goods used by the taxable person for the purposes of his business’ – Vehicles purchased by a leasing company to be leased and subsequently sold on termination of the respective leasing contracts)

In Case C?98/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Højesteret (Denmark), made by decision of 19 February 2007, received at the Court on 21 February 2007, in the proceedings

Nordania Finans A/S,

BG Factoring A/S

v

Skatteministeriet,

THE COURT (Fourth Chamber),

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

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2007,

after considering the observations submitted on behalf of:

– Nordania Finans A/S and BG Factoring A/S, by H.S. Hansen and T.K. Kristjánsson, advokater,

– the Danish Government, by B. Weis Fogh, acting as Agent, assisted by K. Lundgaard Hansen, advokat,

– the Commission of the European Communities, by D. Triantafyllou and S. Schønberg, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 19(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 has been made in the course of proceedings between Nordania Finans A/S ('Nordania Finans') and BG Factoring A/S ('BG Factoring'), successors in law to BG Erhvervsfinans A/S ('Erhvervsfinans'), all three of which are companies governed by Danish law, and Skatteministeriet (Ministry of Fiscal Affairs) regarding the right to partial deduction of the value added tax ('VAT') on Erhvervsfinans' overall costs.

Legal context

Community legislation

3 Under the 12th recital in the preamble to the Sixth Directive:

'… the rules governing deductions should be harmonised to the extent that they affect the actual amounts collected; … the deductible proportion should be calculated in a similar manner in all the Member States'.

4 Article 17(5) of the Sixth Directive provides:

'As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which [VAT] is deductible, and for transactions in respect of which [VAT] is not deductible, only such proportion of the [VAT] 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.

…'

5 Article 19 of the Sixth Directive, headed 'Calculation of the deductible proportion', is worded as follows:

'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 [VAT], of turnover per year attributable to transactions in respect of which [VAT] is deductible under Article 17(2) and (3),

– as denominator, the total amount, exclusive of [VAT], of turnover per year attributable to transactions included in the numerator and to transactions in respect of which [VAT] is not deductible. The Member States may also include in the denominator the amount of subsidies, other than those specified in Article 11A(1)(a).

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 transactions specified in Article 13B(d), in so far as these are incidental transactions, and to incidental real estate and financial transactions shall also be excluded. Where Member States exercise the option provided under Article 20(5) not to require adjustment in respect of capital goods, they may include disposals of capital goods in the calculation of the deductible proportion.

…'

6 Article 20 of the Sixth Directive, which sets out certain rules relating to adjustments of deductions, provides:

'1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, …

…

2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. …

…

3. In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. …

…

4. For the purposes of applying the provisions of paragraphs 2 and 3, Member States may:

– define the concept of capital goods,

…

5. If in any Member State the practical effect of applying paragraphs 2 and 3 would be insignificant, that Member State may, subject to the consultation provided for in Article 29, forego application of these paragraphs having regard to the need to avoid distortion of competition, the overall tax effect in the Member State concerned and the need for due economy of administration.

…'

National legislation

7 The VAT Law (momsloven) transposes the Sixth Directive into Danish national law. Under Article 38(1) of that Law, in the version applicable as at 18 May 1994:

'In respect of goods and services which a registered undertaking uses both for purposes giving rise to entitlement to a deduction under Article 37 and for other purposes in its business, a deduction may be made in respect of that part of the tax which is proportionate to the turnover in the part of the business which must be registered. There shall be excluded from the assessment of turnover amounts of turnover attributable to the supplies of capital goods used for the purpose of

the business. Machinery, equipment and similar business assets, the sales price of which, excluding tax under this Law, exceeds DKK 50 000 [from 1996, DKK 75 000], shall be regarded as capital goods …'

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

8 Nordania Finans and BG Factoring are two companies belonging to the same group and arose out of the restructuring of that group following the demerger, in 2001, of Erhvervsfinans.

9 In the period 1995 to 1998, Erhvervsfinans operated a business involving the financial leasing of cars, which was liable to VAT. In 1998, that business related to 4 500 vehicles. Erhvervsfinans also had a business involving the provision of financial services, which was VAT-exempt. It thus had to calculate a proportion in order to establish the amount to which the partial deductibility of VAT on its overall costs related.

10 For the purpose of that calculation, Erhvervsfinans took into consideration the turnover from the sale of the vehicles upon termination of the respective lease contracts. It took the view that those vehicles were not 'capital goods used by the taxable person for the purposes of his business' within the meaning of Article 19(2) of the Sixth Directive.

11 By decision of 17 November 1999, the Danish local tax authorities objected to that assessment, taking the view that the vehicles did constitute such goods and that the turnover from the sale of those vehicles could therefore not be taken into consideration in the calculation of that proportion.

12 Erhvervsfinans lodged an appeal against that decision before the Landsskatteret (National Tax Tribunal) which, by order of 27 April 2001, upheld its claim.

13 Skatteministeriet lodged an appeal against that order before the Østre Landsret (Eastern Regional Court), which, as it took the view that the relevant vehicles were capital goods, reversed the order of the Landsskatteret by judgment of 16 December 2003.

14 Nordania Finans and BG Factoring, which had in the meantime become the successors in law to Erhvervsfinans, lodged an appeal against that judgment before the Højesteret (Supreme Court) on 9 February 2004.

15 It was in those circumstances that the Højesteret decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the expression "capital goods used by the taxable person for the purposes of his business" contained in Article 19(2) of the Sixth Directive … to be interpreted as covering goods which a leasing undertaking purchases with a view to both leasing and resale upon termination of the respective leasing contracts?'

The question referred for a preliminary ruling

16 By its question the national court asks specifically whether Article 19(2) of the Sixth Directive is to be interpreted as meaning that the notion of 'capital goods used by the taxable person for the purposes of his business' includes vehicles which a leasing undertaking purchases with a view, as in the case in the main proceedings, to leasing them and subsequently selling them upon termination of the respective leasing contracts.

17 It should be borne in mind at the outset that, in determining the scope of a provision of Community law, its wording, context and objectives must all be taken into account (Case C-162/91 *Tenuta il Bosco* [1992] ECR I?5279, paragraph 11; Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 27; and Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 34). Furthermore, it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case C-321/02 *Harbs* [2004] ECR I-7101, paragraph 28, and Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-0000, paragraph 24).

18 In that regard, Article 19(2) of the Sixth Directive makes no express reference to the law of the Member States for the purpose of determining its meaning and scope and its terms do not, by themselves, with certainty permit the inference that it covers goods such as those at issue in the main proceedings. In those circumstances, it is important to take into account the context and objectives of that provision.

19 As regards its context, Article 19 of the Sixth Directive is part of Title XI thereof, which sets out the rules governing deduction. The right to deduct, which is laid down in Article 17(2) of that directive, and relates to the input tax on the goods and services used by the taxable person for the purposes of his taxable transactions, 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 complete neutrality of taxation of all economic activities, provided that they are themselves subject in principle to VAT (see to that effect, inter alia, Case C-435/05 *Investrand* [2007] ECR I-1315, paragraph 22 and the case-law cited).

20 Where the taxable person effects both taxable transactions, in respect of which VAT is deductible, and exempt transactions, in respect of which VAT is not deductible, Article 17(5) of the Sixth Directive provides that only such proportion of the VAT is deductible as is attributable to the taxable transactions. That proportion is to be calculated according to the detailed rules set out in Article 19 of that directive. As the Advocate General has noted at point 65 of his Opinion, those provisions are intended to enable a taxable person who acquires goods or services in order to carry on both taxable and exempt activities to deduct in full the amount of the VAT paid on the acquisition of those goods or services which is deemed to correspond to the proportion used for the purpose of the taxable activities.

21 It is against that background that, while Article 19(1) of the Sixth Directive provides that the deductible proportion is to be made up of a fraction having, as numerator, the turnover attributable to taxable transactions and, as denominator, the total turnover plus, in some circumstances, certain subsidies, Article 19(2) provides that, by way of derogation, amounts of, inter alia, turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business or attributable to incidental real estate and financial transactions are to be excluded.

22 The objective of Article 19(2) is apparent from the Explanatory Memorandum to the proposal for the Sixth Directive, which was submitted by the Commission of the European Communities to the Council of the European Communities on 29 June 1973 (see *Bulletin of the European Communities*, supplement 11/73, p. 19), according to which ‘[t]he factors mentioned in this paragraph must be excluded from the calculation of the proportion lest, being unrepresentative of the taxable person’s business activity, they should deprive the amount of any real significance. Such is the case with sales of capital items and real estate and financial transactions which are only ancillary operations, that is to say are only of secondary importance in relation to the total

turnover of the business. These factors are only excluded if they are not part of the usual business activity of the taxable person'.

23 In that regard, the Court has already held that the purpose of excluding incidental financial transactions from the denominator of the fraction used to calculate the deductible proportion in accordance with Article 19 of the Sixth Directive is to comply with the objective of complete neutrality guaranteed by the common system of VAT. If all receipts from a taxable person's financial transactions linked to a taxable activity were to be included in that denominator, even where the creation of such receipts did not entail the use of goods or services subject to VAT or, at least, entailed only their very limited use, calculation of the deduction would be distorted (Case C-306/94 *Régie dauphinoise* [1996] ECR I-3695, paragraph 21).

24 By adopting the provisions of Article 19(2) of the Sixth Directive, the Community legislature thus intended to exclude from the calculation of the proportion the turnover attributable to a sale of goods where that sale is of an unusual nature in relation to the normal activities of the taxable person concerned and does not therefore require the use of goods or services for mixed use in a way that is proportionate to the turnover which it generates. As the Advocate General stated in point 68 of his Opinion, the inclusion of that turnover in the calculation of the deductible proportion would distort the resultant figure in the sense that it would no longer reflect the division of use of goods or services for mixed use as between taxable and exempt activities respectively.

25 In those circumstances, the notion of 'capital goods used by the taxable person for the purposes of his business' within the meaning of Article 19(2) of the Sixth Directive cannot include capital goods the sale of which is, for the taxable person concerned, in the nature of a normal business activity. For the party concerned, the purchase and subsequent sale of such goods means that it has to use goods and services for mixed use on an everyday basis. Since that sale is part of the normal taxable activities of the taxable person, the turnover attributable to it must be taken into account in the calculation of the deductible proportion in order for that proportion to reflect as accurately as possible the division of use, in respect of those activities, of the goods and services put to mixed use, since otherwise there would be a failure to have regard to the objective of the neutrality of the common system of VAT.

26 Therefore, if, as in the case in the main proceedings, the sale, on termination of the leasing contracts, of the vehicles covered by those contracts is in the nature of a normal activity for the taxable person concerned, who carries out that activity by way of business and as a matter of course, it would be contrary to that objective of neutrality if that taxable person were not actually relieved of the portion of VAT imposed on the overall costs incurred to effect that sale and thus to carry on its usual taxable business activity. It follows that the turnover attributable to such a sale cannot be considered to relate to 'capital goods used by the taxable person for the purposes of his business' within the meaning of Article 19(2) of the Sixth Directive.

27 That finding cannot be called into question by the fact that, in the context of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16) ('the Second Directive'), the Court held that the definition of 'capital goods' in the third indent of the first paragraph of Article 17 of that directive covered goods used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but are written off over several years (Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraph 12).

28 In the case which gave rise to the judgment in *Verbond van Nederlandse Ondernemingen*, it was for the national court to ascertain, having regard to the Netherlands legislation in force,

whether office supplies of low value could be regarded as capital goods which could, under Article 17 of the Second Directive, be excluded from the right to deduct VAT provided for by that directive. Even if vehicles purchased by a business in order to carry on its business activities may constitute capital goods in terms of the interpretation given, in that context, of Article 17 of the Second Directive, it cannot be inferred merely from the criteria laid down by the Court in that judgment that such vehicles are to be classified as capital goods in respect of the application of Article 19(2) of the Sixth Directive.

29 To exclude generally from the calculation of the deductible proportion goods which are used for the purposes of a business activity and are indeed distinguishable by their durable nature and their value, such that the acquisition costs are not normally treated as current expenditure but are written off over several years, without taking account of the fact that the sale of those goods, at the end of the leasing contracts, is an integral part of the normal activity of the taxable person, would run directly counter to the objective of neutrality of the common system of VAT.

30 That is why the definition of the capital goods referred to in Article 19(2) of the Sixth Directive, which establishes the specific rules for the calculation of the deductible proportion, is not necessarily the same as that which was used in respect of the application of the general scheme of deduction established by the Second Directive.

31 The interpretation given by the Court in *Verbond van Nederlandse Ondernemingen* is not therefore relevant for the purpose of answering the question referred for a preliminary ruling in the present case.

32 It is also not of relevance that Article 20(4) of the Sixth Directive leaves it to the Member States to define the concept of capital goods.

33 Firstly, it is clear from the wording of that provision that the right thus given to the Member States applies only for the purposes of applying Article 20(2) and (3), which sets out the rules relating to adjustments of deductions.

34 Secondly, that right cannot be conferred on the Member States in respect of the application of the rules for the calculation of the proportion set out in Article 19(2) of the Sixth Directive without thereby failing to have regard to the intention of the Community legislature, expressed in the 12th recital in the preamble to that directive, that the proportion should be calculated in a similar manner in all the Member States.

35 In those circumstances, the rules for adjustments of deductions as established in Article 20 of the Sixth Directive and the specific rule contained in the last sentence of Article 19(2), which provides for the inclusion, in the calculation of the proportion, of disposals of the capital goods referred to, in the context of those adjustment rules, in Article 20(5) of that directive, have no bearing on the interpretation which must be given to the concept of capital goods excluded from the calculation of the proportion pursuant to the first sentence of Article 19(2) of the Sixth Directive, as that concept must be given an autonomous and uniform interpretation within the Community.

36 In view of the foregoing, the answer to the question referred must be that Article 19(2) of the Sixth Directive is to be interpreted as meaning that the notion of ‘capital goods used by the taxable person for the purposes of his business’ does not include vehicles which a leasing undertaking purchases with a view, as in the case in the main proceedings, to leasing them and subsequently selling them upon termination of the respective leasing contracts, as the sale of such vehicles at the end of those contracts is an integral part of the usual business activities of that undertaking.

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 (Fourth Chamber) hereby rules:

Article 19(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 notion of 'capital goods used by the taxable person for the purposes of his business' does not include vehicles which a leasing undertaking purchases with a view, as in the case in the main proceedings, to leasing them and subsequently selling them upon termination of the respective leasing contracts, as the sale of such vehicles at the end of those contracts is an integral part of the usual business activities of that undertaking.

[Signatures]

* Language of the case: Danish.