JUDGMENT OF THE COURT (Sixth Chamber)

13 March 2014 (*)

(Taxation — Value added tax — Origin and scope of the right of deduction — Dissolution of a partnership by a partner — Acquisition of a portion of the client base of that partnership — Contribution in kind to another partnership — Payment of input tax — Whether deduction possible)

In Case C?204/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 20 February 2013, received at the Court on 18 April 2013, in the proceedings

Finanzamt Saarlouis

v

Heinz Malburg,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, President of the Chamber, S. Rodin and F. Biltgen (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Malburg, by K. Koch, Rechtsanwalt,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the European Commission, by C. Soulay and A. Cordewener, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1) and (2) and Article 17(2)(a) 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 request has been made in proceedings between the Finanzamt Saarlouis (the Saarlouis tax authority; ‘the Finanzamt’) and Mr Malburg concerning the right to deduct input value added tax

(‘VAT’) paid by a partner on the transfer to him of part of the client base at the time of the division of assets of a partnership of tax advisors.

Legal context

EU law

3 Article 2(1) of the Sixth Directive provides:

‘The following shall be subject to [VAT]:

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 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.

…’

5 Article 17(2)(a) 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) [VAT] 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.’

German law

6 According to the first sentence of point 1 of Paragraph 1(1) of the Law on Turnover Tax (Umsatzsteuergesetz 2003, BGB1. 2003 I, p. 2645, ‘the UStG 1994’), supplies of various goods and services which a trader makes for consideration within the territory of the country in the course of his business are subject to VAT.

7 Pursuant to the first sentence of Paragraph 2(1) of the UStG, a trader is any person who independently carries out an industrial, commercial, craft or professional activity. In accordance with the second sentence of Paragraph 2(1) of the UStG, the undertaking comprises the whole of a trader’s industrial, commercial, craft or professional activity. Pursuant to the third sentence of that provision, ‘industrial, commercial, craft or professional activity’ means any sustained activity carried out for the purpose of obtaining income, even where there is no intention to make a profit or an association carries out its activities only in relation to its members.

8 The first sentence, point 1, of Paragraph 15(1) of the UStG provides that a trader may deduct the tax due under that law in respect of supplies of goods and services provided for the purposes of his business by another trader. However, in accordance with the first sentence, point 1, of Paragraph 15(2) of the UStG, it is not possible to deduct input tax in respect of supplies of goods and services which a trader uses for exempt transactions.

The dispute in the main proceedings and the question referred

9 Up to 31 December 1994, Mr Malburg held a 60% share in the German partnership Malburg & Partner ('the old partnership'), while the other two partners each held 20% shares. The old partnership was dissolved on 31 December 1994, with a portion of the client base being transferred to each of the partners. With effect from 1 January 1995, the two other partners each operated separately as independent tax advisors.

10 On 31 December 1994 Mr Malburg founded a new partnership in which he held a 95% share ('the new partnership'). According to the findings of fact made by the court of first instance, which bind the referring court, Mr Malburg made available the client base, which he had acquired following the dissolution of the old partnership, free of charge to the new partnership for use in its business.

11 By judgment of 24 September 2003, the court of first instance found that the old partnership had been dissolved on 31 December 1994 by division of its assets. The Finanzamt then assessed the old company as liable for payment of VAT for 1994 based on the transfer of the client base. The VAT assessment for 1994 acquired binding force and the tax due was paid.

12 The old partnership, represented by Mr Malburg, issued an invoice dated 16 August 2004 and addressed to him in the amount of EUR 1 548 968.53 for the 'division of assets on 31 December 1994' including a separate itemisation for VAT.

13 In his VAT return for August 2004, Mr Malburg deducted VAT of EUR 232 345.28 which had been invoiced to him in respect of the acquisition of the client base. The Finanzamt refused that VAT deduction.

14 Mr Malburg lodged a complaint against that decision of the Finanzamt and submitted an annual VAT return for 2004 in which, in addition to the input VAT paid for the acquisition of the client base at issue, he declared turnover of EUR 44 990 resulting from his activities as managing director of the new partnership. The Finanzamt rejected that complaint on the ground that Mr Malburg had not used the client base at issue in his own business. According to the Finanzamt, the economic asset which that client base constitutes had been used by the new partnership, an undertaking to be distinguished from Mr Malburg. Mr Malburg was therefore not entitled to any right to deduct input VAT.

15 Mr Malburg brought the case before the Finanzgericht des Saarlandes, which upheld his action.

16 In support of its appeal on a point of law, the Finanzamt claims that the decision of the Finanzgericht des Saarlandes is unlawful and that the principles established by the Court in Case C?280/10 *Polski Trawertyn* [2012] ECR do not apply to a situation such as that at issue in the main proceedings since it concerns the deduction of input VAT paid by a founding partner and not the deduction of input VAT paid by a partnership.

17 The Eleventh Chamber of the Bundesfinanzhof, before whom the case was heard, indicates

that it is inclined to support the argument that Mr Malburg is entitled to deduct input VAT paid on the acquisition of the client base.

18 First, in accordance with the provisions of the Sixth Directive, as interpreted by the Court, a trader may deduct input VAT, in so far as he purchases services for his business or in so far as they are used or will be used for the purposes of his taxed transactions (see, inter alia, Case C?137/02 *Faxworld* [2004] ECR I?5547, paragraph 24; Case C?63/04 *Centralan Property* [2005] ECR I?11087, paragraph 52; Case C?257/11 *Gran Via Moine?ti* [2012] ECR, paragraph 23; and Case C?285/11 *Bonik* [2012] ECR, paragraph 29).

19 In that regard, the referring court states that it is apparent from the Court's case-law that preparatory acts must be treated as constituting economic activity (see, inter alia, *Polski Trawertyn* , paragraph 28, and *Gran Via Moine?ti*, paragraph 26 and the case-law cited), and that the principle that VAT should be neutral requires that the first investment expenditure incurred for the purposes of and with the view to commencing a business be regarded as an economic activity.

20 In the present case, the referring court, without analysing whether Mr Malburg can be categorised as a trader on the basis of his position as managing director of the new partnership, an activity which, according to his VAT return, he carried out in the year in dispute, 2004, considers that, by his acquisition of the client base which he subsequently transferred free of charge to the new partnership for it to use in its business, Mr Malburg carried out an economic activity on behalf of the new partnership by carrying out preparatory acts.

21 Next, according to the referring court, the client base was also transferred to Mr Malburg in his capacity as a recipient of services. This follows from the fact that he acquired the client base in his own name and on his own behalf by way of a division of assets and only subsequently made it available free of charge to the new partnership for use by it.

22 The referring court states finally that, in the present case, the condition set out in the first sentence, point 1, of Paragraph 15(1) of the UStG is satisfied since VAT was due under that law on the input transaction. The Finanzamt decided that the old partnership was subject to VAT for 1994 in respect of the transfer of the client base to Mr Malburg and that tax was paid.

23 That argument cannot, in the opinion of the referring court, be called into question by the fact that Mr Malburg, as a partner in the new partnership, made the acquired client base available to the new partnership free of charge for its use and, to that extent, there was therefore no taxable output transaction and that the direct link necessary between an input transaction and taxable output transaction was, in principle, absent. In *Polski Trawertyn* the Court held, according to the referring court, that the provisions governing the common system of VAT must be interpreted as precluding national legislation which permits neither partners nor their partnership to exercise the right to deduct input VAT paid on investment costs incurred by those partners, before the creation and registration of that partnership, for the purposes of and with a view to commencement of its economic activity. That judgment is applicable, by analogy, to the present case.

24 However, the referring court observes that the Fifth Chamber of the Bundesfinanzhof disagrees with that interpretation and considers that the reasoning of the Court in *Polski Trawertyn* cannot be applied to the present case. Thus, in particular, in its view, the transaction in dispute does not constitute ‘an investment transaction’ such as that at issue in the case which gave rise to the judgment in *Polski Trawertyn*. According to that Chamber, the present case involves not the acquisition of capital goods by the new partnership but merely the provision of such goods for use by that partnership. In addition it points out that the ‘output transaction’ carried out by Mr Malburg involves not a taxable transaction, as was the case in *Polski Trawertyn*, but rather a transaction which is in itself non-taxable.

25 In that regard, the referring court considers that doubts remain as regards the exact interpretation of the provisions of the Sixth Directive.

26 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Having regard to the principle of tax neutrality, must Article 4(1) and (2) and Article 17(2)(a) of [the Sixth Directive] be interpreted as meaning that a partner in a partnership of tax advisors who acquires from the partnership a portion of its client base for the sole purpose of transferring it directly thereafter and free of charge to a newly founded partnership of tax advisors, in which he is the principal partner, for it to use such client base in its business, may be entitled to deduct the input tax paid on the acquisition of the client base?’

Consideration of the question referred for a preliminary ruling

27 By its question the referring court asks, in essence, whether Article 4(1)(2) and Article 17(2)(a) of the Sixth Directive must, having regard to the principle of VAT neutrality, be interpreted as meaning that a partner in a partnership of tax advisors who acquires from that partnership a portion of its client base for the sole purpose of making it available directly and free of charge to a newly founded partnership of tax advisors, in which he is the principal partner, so that that partnership can use that client base in its business, without that client base however becoming part of the capital assets of the newly founded partnership, may be entitled to deduct the input VAT paid on the acquisition of the client base at issue.

28 As is apparent from paragraphs 23 and 24 of the present judgment, the referring court seeks more specifically to ascertain whether the reasoning underlying the interpretation given by the Court in *Polski Trawertyn*, concerning the recovery of input VAT in respect of transactions carried out for the purpose of future economic activity to be carried out by a partnership, the future partners of which have paid the input tax, applies by analogy to a situation such as that at issue in the main proceedings.

29 At the outset, it must be noted that it is apparent from paragraph 26 of *Polski Trawertyn* and from point 63 of the Advocate General's Opinion on the case which gave rise to that judgment, that the facts which gave rise to that case were unique to it. Thus, the partners of a future company could not, under the applicable national legislation, rely on a right to deduct VAT on investment expenditure which they had incurred, in their personal capacity before the registration and identification of that company for the purposes of VAT, for the purposes of and with the view to commencement of its economic activity, because the contribution of the capital goods at issue was an exempt transaction. The Court, in the light of the facts so described, held that, in a situation such as that at issue in the main proceedings of that case, not only did that national legislation not permit that partnership to exercise the right to deduct VAT paid on the capital goods at issue, but it also prevented the partners who incurred the investment expenditure from exercising that right.

30 In *Polski Trawertyn* the Court thus ruled that Articles 9, 168 and 169 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) must be interpreted as precluding national legislation which permits neither the partners nor their partnership to exercise a right to deduct input VAT paid on the investment costs incurred by those partners, before the creation and registration of the partnership, for the purposes of and with a view to the commencement of its economic activity.

31 It is in the light of the foregoing that it becomes necessary to determine whether the factors which characterised the situation at issue in *Polski Trawertyn* are applicable, by analogy, to a situation such as that at issue in the main proceedings.

32 In order to answer the question referred, it must, first, be borne in the mind that according to Article 4(1) and (2) of the Sixth Directive, economic activities and, more specifically, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis are subject to taxation and give rise, as the case may be, to deduction from output VAT, laid down in Article 17(2)(a) of that directive.

33 It should further be borne in mind that, pursuant to Article 17(2)(a) of the Sixth Directive, where a taxable person uses the goods and services for the purposes of his taxable transactions, he is entitled to deduct, from the tax which he is liable to pay, the VAT 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.

34 As the Court has previously held, 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 a taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement (see Case C?104/02 *Becker* [2013] ECR, paragraph 19 and the case-law cited).

35 It is clear that, in the case which gave rise to *Polski Trawertyn*, the output transaction which the two future partners effected, namely the contribution of immovable property to the partnership in the form of investment expenditure for the purposes of the economic activity of that partnership, certainly fell within the scope of VAT, but constituted a transaction exempt from that tax. On the other hand, in the case in the main proceedings, the output transaction does not fall within the scope of VAT, since the provision of the client base for use by the new partnership free of charge cannot be considered to constitute an 'economic activity' within the meaning of the Sixth Directive.

36 That provision of the client base for the use of the new partnership is 'free of charge' and therefore does not fall within the scope of Article 2(1) of the Sixth Directive, which refers only to supplies of goods and services provided for consideration, nor within the scope of Article 4(1) and

(2) of the Sixth Directive, which refers to the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

37 Consequently, in the present case, there is also not a direct and immediate link between a particular input transaction and an output transaction giving rise to entitlement to deduct, in accordance with Article 17(2)(a) of the Sixth Directive.

38 The Court has 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 one or more output 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 (Case C?98/98 *Midland Bank* [2000] ECR I?4177, paragraph 31; Case C?465/03 *Kretztechnik* [2005] ECR I?4357, paragraph 36; and *Becker*, paragraph 20). That may be the case, inter alia, if it is established that the taxable person himself acquired the client base at issue in the course of his activity as a managing director of a newly formed partnership and the costs resulting from that acquisition had to be considered as forming part of the general costs relating to his activity as managing director.

39 However, as is apparent from paragraph 20 of the present judgment, the referring court has itself excluded that possibility from its reasoning, so that there is no need for the Court to make a ruling in that respect.

40 Second, it must be noted that the referring court seeks to ascertain whether, having regard to the principle of fiscal neutrality, *Polski Trawertyn* is not applicable by analogy to the present case.

41 In that regard, it must be borne in mind that the Court has repeatedly held that the principle of fiscal neutrality manifests itself through the deduction system which 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 therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way (see, inter alia, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19, and Case C?32/03 *Fini H* [2005] ECR I?1599, paragraph 25 and the case-law cited).

42 The principle of fiscal neutrality does not apply therefore to a situation such as that at issue in the main proceedings, where, as is apparent from paragraphs 35 and 36 of this judgment, the provision of the client base for the use of a partnership free of charge is not a transaction falling within the scope of VAT.

43 Moreover, as the Court has already held, the principle of fiscal neutrality is not a rule of primary law but a principle of interpretation, to be applied concurrently with the principle on which it is a limitation (Case C?44/11 *Deutsche Bank* [2012] ECR, paragraph 45). It does not therefore allow the scope of the deduction from output VAT to be extended in the face of an unambiguous provision of the Sixth Directive. As regards the case which gave rise to *Polski Trawertyn*, it was clear that the application of the national legislation at issue did not allow either the future partners of the partnership to be created or that partnership to rely successfully on the principle of neutrality.

44 Third, it is important to note that the facts of the dispute in *Polski Trawertyn* are also different in other respects from the situation at issue in the main proceedings. Thus, in this case, the new partnership had already been created when Mr Malburg acquired the client base and, unlike the situation at issue in *Polski Trawertyn*, there was no contribution of capital goods, in this case, the

client base, to the capital assets of that partnership. Finally, it is not the newly formed partnership which has requested the right to deduct input VAT paid by a partner in the course of acts preparatory to the partnership's activity.

45 Therefore, the reasoning underlying the interpretation adopted by the Court in *Polski Trawertyn* cannot be applied to a situation such as that at issue in the main proceedings.

46 That conclusion is supported by the fact that, as the German Government notes, the provision of the client base for use free of charge cannot be treated in the same way as other courses of action legally possible under national law, which under that law would have permitted an entitlement to deduct but which, of his own volition, Mr Malburg did not choose. Contrary to the national legislation at the origin of the dispute which gave rise to *Polski Trawertyn*, which did not allow the applicant for a deduction to benefit from the application of the principle of fiscal neutrality, it therefore appears, though it is for the referring court to determine, that the national legislation at issue in the main proceedings does not preclude, in principle, the implementation of the principle of fiscal neutrality in a situation such as that at issue in the main proceedings, which is characterised by the fact that the applicant could have made use of other options.

47 In the light of all the foregoing, the answer to the question referred is that Article 4(1)(2) and Article 17(2)(a) of the Sixth Directive must, having regard to the principle of VAT neutrality, be interpreted as meaning that a partner in a partnership of tax advisors who acquires from that partnership a portion of its client base for the sole purpose of making that client base available directly and free of charge to a newly founded partnership of tax advisors, in which he is the principal partner, so that that partnership can use that client base in its business, without that client base however becoming part of the capital assets of the newly founded partnership, is not entitled to deduct input VAT paid on the acquisition of the client base concerned.

Costs

48 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 (Sixth Chamber) hereby rules:

Article 4(1) and (2) and Article 17(2)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995 must, having regard to the principle of value added tax neutrality, be interpreted as meaning that a partner in a partnership of tax advisors who acquires from that partnership a portion of its client base for the sole purpose of making that client base available directly and free of charge to a newly founded partnership of tax advisors, in which he is the principal partner, so that that partnership can use that client base in its business, without that client base however becoming part of the capital assets of the newly founded partnership, is not entitled to deduct input value added tax paid on the acquisition of the client base concerned.

[Signatures]

* Language of the case: German.