ORDER OF THE COURT (Sixth Chamber)

12 January 2017 (*)

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Value added tax — Directive 2006/112/EC — Articles 2, 9, 26, 167, 168 and 173 — Deduction of input tax — Taxable person simultaneously carrying out economic and non-economic activities — Holding company supplying services to its subsidiaries free of charge)

In Case C?28/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Supreme Court, Hungary), made by decision of 7 January 2016, received at the Court on 18 January 2016, in the proceedings

MVM Magyar Villamos M?vek Zrt.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, J.-C. Bonichot and C.G. Fernlund (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– MVM Magyar Villamos M?vek Zrt., by Sz. Vámosi-Nagy and P. Vaszari, ügyvédek,

– the Hungarian Government, by M. Bóra, G. Koós and M.Z. Fehér, acting as Agents,

– the United Kingdom Government, by J. Kraehling, acting as Agent, assisted by H.L. McCarthy, Solicitor,

– the European Commission, by V. Bottka and L. Lozano Palacios, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 The present request for a preliminary ruling concerns the interpretation of Articles 2, 9, 26, 167, 168 and 173 of Council Directive 2006/112/EC of 28 November 2006 on the common system

of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in the context of proceedings between MVM Magyar Villamos M?vek Zrt. and Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Directorate of the national Tax and Customs Authorities, Hungary; ‘the tax authorities’) concerning the right of MVM to deduct input value added tax (VAT) paid in relation to services procured in the interest of its subsidiaries.

Legal context

EU law

3 Article 2(1) of Directive 2006/112 provides:

‘The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…’

4 Under Article 9(1) of that directive:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

5 Article 26(1) of Directive 2006/112 provides:

‘Each of the following transactions shall be treated as a supply of services for consideration:

…

(b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.’

6 Under Article 167 of that directive:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

7 Article 168 of Directive 2006/112 provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…’

8 Pursuant to Article 173(1) of that directive:

‘In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.

…’

Hungarian law

9 Paragraphs 2, 6, 14, 119, 120 and 123 of the az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on VAT) respectively transpose Articles 2, 9, 26, 167, 168 and 173 of Directive 2006/112 into Hungarian law. The wording of those provisions of national law is substantially identical to the wording of the articles of Directive 2006/112 which they transpose.

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

10 MVM is a State-owned commercial company active in the energy sector. It leases power plants and fibre optic networks as well as being the owner of a number of companies which mainly generate or sell electricity.

11 By entering into a ‘contract of control’, within the meaning of Hungarian law, with its subsidiaries, MVM established a recognised corporate group under Hungarian law (‘the group’). However, the establishment of such a group did not have the effect of creating a separate legal person or of depriving the members of the group of their own autonomous legal personality. In addition, those members did not accede to a group tax scheme for VAT purposes.

12 The dispute in the main proceedings concerns the decision taken by the tax authorities following an inspection of MVM’s tax returns in relation to VAT for the 2008, 2009 and 2010 fiscal years.

13 During that period, MVM was responsible for the strategic management of the group. For that purpose, it procured legal, business-management and public-relations services for the benefit of (i) itself, since those services were provided in relation to its leasing of power plants and fibre optic networks, subject, as such, to VAT; (ii) the entire group; and (iii) each of the members of the group. MVM deducted the VAT relating to all of those services. However, even when those services were in the interest of the entire group or related directly to the taxed activities of the other members of the group, MVM did not, save for a few exceptions, charge its subsidiaries for those services. Nor did MVM impose a general charge on the group for its strategic management, with the result that it carried out that activity free of charge.

14 The tax authorities took the view that, under the Law CXXVII of 2007 on VAT, the VAT relating to the legal, business-management and public-relations services could be deducted only to the extent to which MVM had used those services in order to effect supplies of goods or services. Thus, the tax authorities refused MVM the right to deduct the VAT relating to those services where the services had been carried out in the interest of the other members of the group or where the services concerned business-management services related mainly to the acquisition of shareholdings (‘the services at issue’). In those circumstances, the tax authorities considered MVM to be the ultimate beneficiary of those services.

15 MVM brought an action against the decision of the tax authorities in which it claimed that the services at issue constituted general expenses relating to its taxable activity since it was a taxable

person for the purpose of VAT and did not carry out any activities which were exempt from tax. In the context of that action, MVM also claimed that the fact that it did not charge its subsidiaries did not affect its right to deduct VAT.

16 The court of first instance dismissed that action on the ground that the services at issue had not been used in the pursuit of a taxable activity for the purpose of VAT and that there was no right to deduct input VAT paid for such services.

17 MVM brought an appeal on a point of law before the referring court, the Kúria (Supreme Court, Hungary).

18 The referring court notes that, during the period at issue in the proceedings before it, MVM operated as a passive holding company as regards billing in so far as, in principle, its subsidiaries paid it only dividends, but as an active holding company in relation to its centralised management of the activities of the group.

19 However, the Kúria notes that, from an economic point of view, the charging by a holding company of its subsidiaries for services, in a purely national group of companies, is merely a technical matter. Furthermore, that court takes the view that MVM does not perform any acts free of charge since, in return for the services which it provides, ostensibly without remuneration, to its subsidiaries, it obtains higher dividends.

20 It was in those circumstances that the Kúria (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. May a holding company which plays an active role in the management of certain affairs of its subsidiaries, or of the group of companies as a whole, but which does not pass on to its subsidiaries the cost of the services carried out in relation to its active holding activity or the corresponding VAT be regarded as a taxable person for the purpose of VAT in respect of those services?

2. If the first question is answered in the affirmative, may the active holding company exercise the right to deduct the VAT corresponding to the services used by it which are directly related to the taxed economic activity of some of its subsidiaries, and if so in what way?

3. If the first question is answered in the affirmative, may the active holding company exercise the right to deduct the VAT corresponding to the services used which are in the interest of the group of companies as a whole, and if so in what way?

4. Do the answers to be given to the above questions differ if the active holding company bills its subsidiaries in respect of the abovementioned services as intermediary services, and if so to what extent?’

Consideration of the questions referred

21 Under Article 99 of the Rules of Procedure of the Court, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

22 That article must be applied in the present case.

23 By its four questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 2, 9, 26, 167, 168 and 173 of Directive 2006/112 must be interpreted as meaning that the involvement of a holding company, such as that at issue in the main proceedings, in the management of its subsidiaries, where it has charged those subsidiaries neither for the cost of the services procured in the interest of the group of companies as a whole or in the interest of certain of its subsidiaries, nor for the corresponding VAT, may be regarded as an ‘economic activity’, within the meaning of that directive, which gives rise to the right to deduct the input VAT paid for such services.

24 As a preliminary point, it must be recalled that, although Directive 2006/112 gives a very wide scope to VAT, only activities of an economic nature are covered by that tax (see, to that effect, judgment of 29 October 2009, *Commission* v *Finland*, C?246/08, EU:C:2009:671, paragraph 34 and the case-law cited). It follows from Article 2 of that directive that, among the services supplied within the territory of a Member State, only services supplied for consideration by a taxable person acting as such are subject to VAT.

25 In that regard, the Court has previously held that an activity is, as a general rule, categorised as ‘economic’ where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (judgment of 29 October 2009, *Commission* v *Finland*, C?246/08, EU:C:2009:671, paragraph 37 and the case-law cited).

26 It should also be noted that, as the Court has consistently held, the right to deduct VAT provided for in Article 167 et seq. of Directive 2006/112 is a fundamental principle of the common system of VAT and in principle may not be limited. That right to deduct is exercisable immediately in respect of all the taxes charged on input transactions (see, to that effect, judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690, paragraphs 37 and 38 and the case-law cited).

27 The deduction system is intended to relieve entirely the trader of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690, paragraph 39 and the case-law cited).

28 As regards the material conditions to be met for a right to deduct VAT to arise, it is apparent from Article 168(a) of Directive 2006/112 that the goods and services relied on to give entitlement to that right must be used by the taxable person for the purposes of his own taxed transactions, and that, as inputs, those goods or services must be supplied by another taxable person (judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690, paragraph 40 and the case-law cited).

29 In this regard, it must be recalled that, in order for VAT to be deductible, the input transactions must have a direct and immediate link with the output transactions giving rise to a right of deduction. Thus, 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 (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C?108/14 and C?109/14, EU:C:2015:496, paragraph 23 and the case-law cited).

30 More specifically, as regards the right of a holding company to deduct, the Court has previously held that a holding company which has as its sole purpose the acquisition of shares in

other undertakings and which does not involve itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not have either the status of taxable person, within the meaning of Article 9 of Directive 2006/112, or the right to deduct tax under Article 167 of that directive (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C?108/14 and C?109/14, EU:C:2015:496, paragraph 18 and the case-law cited).

31 The mere acquisition and holding of shares in a company are not to be regarded as economic activities, within the meaning of Directive 2006/112, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C?108/14 and C?109/14, EU:C:2015:496, paragraph 19 and the case-law cited).

32 The position will be otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company in its capacity as shareholder (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C?108/14 and C?109/14, EU:C:2015:496, paragraph 20 and the case-law cited).

33 In that respect, it follows from settled case-law of the Court that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity within the meaning of Article 9(1) of Directive 2006/112 where it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply by a holding company to its subsidiaries of administrative, financial, commercial and technical services (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C?108/14 and C?109/14, EU:C:2015:496, paragraph 21 and the case-law cited).

34 Thus, the mere involvement of a holding company in the management of its subsidiaries, without carrying out transactions subject to VAT under Article 2 of Directive 2006/112, cannot be regarded as an ‘economic activity’ within the meaning of Article 9(1) of that directive (see, to that effect, order of 12 July 2001, *Welthgrove*, C?102/00, EU:C:2001:416, paragraphs 16 and 17). Accordingly, such management does not come within the scope of Directive 2006/112.

35 In the present case, it is apparent from the order for reference that, during the period at issue in the main proceedings, MVM normally received no remuneration from its subsidiaries in exchange for its centralised management of the activities of the group. Thus, in the light of the foregoing considerations, it must be held that the involvement of MVM in the management of its subsidiaries cannot be regarded as an ‘economic activity’, within the meaning of Article 9(1) of Directive 2006/112, such as to come within the scope of that directive.

36 The Court has previously held that, to the extent to which input VAT relating to expenditure incurred by a taxpayer is connected with activities which, in view of their non-economic nature, do not come within the scope of Directive 2006/112, it cannot give rise to a right to deduct (judgments of 13 March 2008, *Securenta*, C?437/06, EU:C:2008:166, paragraph 30, and of 29 October 2009, *SKF*, C?29/08, EU:C:2009:665, paragraph 59).

37 It follows that MVM does not have the right to deduct the VAT paid for the services at issue to the extent to which those services relate to transactions falling outside the scope of Directive 2006/112.

38 That finding is not called into question by the fact that MVM engaged in other activities, such as the leasing of power plants and fibre optic networks, since the services at issue do not appear

to have a direct and immediate link with any taxable economic activity, within the meaning of the case-law cited in paragraph 29 above, although this is a matter for the referring court to determine.

39 In this regard, it must be noted that, as the Court held in paragraph 24 of the judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496), 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 overheads 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.

40 In the present case, it is common ground that, during the period at issue in the main proceedings, MVM engaged in a taxable economic activity, namely the leasing of power plants and fibre optic networks. However, it appears difficult to imagine that the services at issue, namely services procured in the interest of other members of the group and business-management services relating mainly to the acquisition of shareholdings, may have a direct and immediate link with that leasing activity, considered overall, although this is a matter for the referring court to determine.

41 Furthermore, MVM claims in its observations lodged before the Court that it has, since 1 January 2015, been generating a profit margin on the transactions relating to its strategic management of the companies belonging to the group.

42 In that regard, suffice it to note that, even if that management were to be regarded as being an economic activity as from that date, the expenses declared between 2008 and 2010 in relation to the procurement of the services at issue could not be regarded as components of the price of the new taxable transactions and therefore could not give rise to a right to deduct VAT.

43 Before the Court, MVM has also claimed that the services at issue served the interests of the group and that, since its subsidiaries engaged in activities conferring a right to deduct, those services have a link to the economic activities of the entire group.

44 However, in the present case, it should be pointed out that the VAT relating to the services at issue cannot be deducted as a result of the choice made by MVM not to charge the members of the group for its management services.

45 In that regard, suffice it to note that, on the one hand, traders are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their activities (see, to that effect, judgment of 12 September 2013, *Le Crédit Lyonnais*, C?388/11, EU:C:2013:541, paragraph 46) and, on the other hand, the principle of fiscal neutrality does not mean that a taxable person with a choice between two transactions may choose one of them and avail himself of the effects of the other (judgment of 9 October 2001, *Cantor Fitzgerald International*, C?108/99, EU:C:2001:526, paragraph 33).

46 Lastly, if the referring court were to find, following the assessment described in paragraphs 38 and 40 of the present order, that certain of the services at issue relate to both economic and non-economic activities of MVM, it should be borne in mind that the provisions of Directive 2006/112 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 (judgment of 13 March 2008, *Securenta*, C?437/06, EU:C:2008:166, paragraph 33).

47 In those circumstances, and in order that taxpayers can make the necessary calculations, it is for the Member States to establish methods and criteria appropriate to that objective and consistent with the principles underlying the common system of VAT. In particular, the Member States must exercise their discretion in such a way as to ensure that deduction is made only for that portion of the VAT that is proportional to the amount relating to the 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 portion of the input expenditure actually to be attributed, respectively, to those two types of activity (judgment of 13 March 2008, *Securenta* , C?437/06, EU:C:2008:166, paragraphs 34 and 37).

48 In the light of the foregoing considerations, the answer to the questions referred is that Articles 2, 9, 26, 167, 168 and 173 of Directive 2006/112 must be interpreted as meaning that, in so far as the involvement of a holding company, such as that at issue in the main proceedings, in the management of its subsidiaries, where it has charged those subsidiaries neither for the cost of the services procured in the interest of the group of companies as a whole or in the interest of certain of its subsidiaries, nor for the corresponding VAT, does not constitute an ‘economic activity’, within the meaning of that directive, such a holding company does not have the right to deduct input VAT paid in respect of those services in so far as those services relate to transactions falling outside the scope of that directive.

Costs

49 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:

Articles 2, 9, 26, 167, 168 and 173 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in so far as the involvement of a holding company, such as that at issue in the main proceedings, in the management of its subsidiaries, where it has charged those subsidiaries neither for the cost of the services procured in the interest of the group of companies as a whole or in the interest of certain of its subsidiaries, nor for the corresponding VAT, does not constitute an ‘economic activity’, within the meaning of that directive, such a holding company does not have the right to deduct input VAT paid in respect of those services in so far as those services relate to transactions falling outside the scope of that directive.

[Signatures]

** Language of the case: Hungarian.