Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

8 November 2018 (*)

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Proposed sale of shares in a sub-subsidiary — Expenditure associated with the provision of services acquired for the purposes of that sale — Sale not carried out — Request for a deduction of input tax — Scope of VAT)

In Case C?502/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vestre Landsret (High Court of Western Denmark), made by decision of 15 August 2017, received at the Court on 18 August 2017, in the proceedings

C&D Foods Acquisition ApS

v

Skatteministeriet,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot, President of the First Chamber, acting as President of the Sixth Chamber, A. Arabadjiev and C.G. Fernlund (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– C&D Foods Acquisition ApS, by T. Frøbert and K. Bastian, advokater,

– the Danish Government, by J. Nymann-Lindegren, acting as Agent, and by D. Auken, advokat,

– the European Commission, by R. Lyal and N. Gossement, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 C&D Foods Acquisition ApS ('C&D Foods') and the Skatteministeriet (Ministry of Taxation, Denmark) concerning the latter's refusal to grant to that company the deduction of input value added tax (VAT) relating to consultancy services which that company used in the context of a proposed sale, which was not completed, of shares in a sub-subsidiary to which C&D Foods provided management and IT services.

Legal context

EU law

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

'The following 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 Article 9(1) of that directive is worded as follows:

'"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 Under Article 168 of Directive 2006/112:

'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;

...'

Danish law

6 At the time of the facts of the case in the main proceedings, the relevant provisions of the Momsloven (Law on VAT) were set out in Consolidation Law No 966 of 14 October 2005, as amended ('the Law on VAT').

7 Pursuant to Paragraph 3(1) of the Law on VAT:

‘A taxable person is any natural or legal person exercising an independent economic activity.’

8 Paragraph 4(1) of that law provides:

‘“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.’

9 Paragraph 13(1).11 of the Law on VAT is worded as follows:

‘The following goods and services shall be exempt from VAT:

11. The following financial activities:

...

(e) transactions, including negotiation but excluding management and safekeeping, relating to securities, excluding securities holdings and other securities conferring certain rights, in particular the right of use, to real property, as well as equities and shares the ownership of which confers, in fact or in law, property rights or rights of use of immovable property or of a share of immovable property.’

10 Paragraph 37(1) of that law provides:

‘Undertakings registered pursuant to Paragraphs 47, 49, 51 or 51a may, when calculating the input tax (see Paragraph 56(3)), deduct the tax provided for by the present Law for purchases and other transactions carried out by the undertaking, relating to goods and services used exclusively for the purposes of the undertaking’s non-tax-exempt supplies on the basis of Paragraph 13, in particular supplies carried out abroad, subject, however, to Paragraph 6.’

11 The referring court states that, following SKAT (Danish Tax Authority) practice, a parent holding company which is involved in the management of a subsidiary cannot deduct the VAT levied on consultancy fees incurred during the sale of securities representing the capital of that subsidiary, even in the case of the disposal of the entirety of those securities, since such a sale is tax-exempt pursuant to Paragraph 13(1).11(e) of the Law on VAT.

12 In the case where the previous acquisition and ownership of the shares in the subsidiary constituted an economic activity, SKAT takes the view that the disposal by the holding company of the shares owned in the subsidiary constitutes a VAT-exempt transaction. Consequently, the input tax levied on the fees associated with that sale is not deductible.

13 A right to deduct VAT levied on consultancy fees incurred in the context of the sale of shares in a subsidiary may, however, be granted if those fees are liable to be regarded as forming part of the general costs of the taxable person’s economic activity. For that purpose, the costs incurred are required to be capable of being considered as components of the cost of the transactions carried out in the context of the economic activity of that taxable person. By contrast, if those costs can be incorporated into the price of the shares transferred, no right to deduct VAT may be granted. According to SKAT, the right to a deduction depends on a specific assessment as to whether the costs incurred are liable to be incorporated into the price of the shares transferred or are exclusively part of the components of the cost of the transactions inherent to the taxable person’s economic activity as a whole.

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

14 C&D Foods, a company established under Danish law, is part of the Arovit international group ('the Arovit group'). It was the parent company of Arovit Holding A/S, also a Danish company, which owned Arovit Petfood, which, in turn, owned the other companies in the group.

15 Prior to 1 March 2007, the main activity of C&D Foods was to act as the parent company of Arovit Holding. On that date, C&D Foods entered into a management agreement with its sub-subsidiary Arovit Petfood, relating to the supply of management and IT services. By virtue of that agreement, C&D Foods invoiced Arovit Petfood monthly for its services, on the basis of the amount of its fees plus a 'mark-up' of 10%, to which amount VAT was added.

16 On 13 August 2008, Kaupthing Bank, an Icelandic credit institution, assumed ownership of the Arovit group for the sum of EUR 1, on account of the failure on the part of the former owner of that group to repay a loan which had been granted to it. Since Kaupthing Bank intended to sell all of the shares owned in Arovit Petfood, so as no longer to be the group's creditor, it entered, over the period from December 2008 to March 2009, into a number of consultancy agreements, on behalf of C&D Foods, in the context of that proposed sale ('the disputed services').

17 Having paid fees associated with that proposed sale, C&D Foods deducted the corresponding VAT over the course of 2009. The sale process was brought to an end during the autumn or towards the end of 2009, as no potential buyer had been found.

18 By decision of 26 January 2012, SKAT refused the VAT deduction associated with the expenditure related to the disputed services. That decision was upheld by the Landsskatteretten (Danish Supreme Tax Authority) on the ground, inter alia, that that expenditure did not exhibit the necessary connection to C&D Foods' VAT-taxable transactions.

19 C&D Foods brought proceedings before the Retten i Esbjerg (Esbjerg District Court, Denmark), which referred the matter to the Vestre Landsret (High Court of Western Denmark) in view, according to the former court, of the questions of principle raised.

20 The Vestre Landsret (High Court of Western Denmark) is unsure as to whether a holding company is entitled to deduct the VAT levied on fees associated with a sale, envisaged but not completed, of shares in a sub-subsidiary to which that holding company supplies management and IT services.

21 It was in those circumstances that the Vestre Landsret (High Court of Western Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 168 of Directive 2006/112 be interpreted as meaning that a holding company, in circumstances such as those in the main proceedings, is entitled to a full deduction of VAT on input services related to due diligence investigations before an envisaged, but not completed, sale of shares in a subsidiary to which the holding company supplies management and IT services that are subject to VAT?

(2) Is the answer to the above question affected by the fact that the price for the VAT-taxable management and IT services, which the holding company supplies for the purposes of its economic activity, is a fixed amount corresponding to the holding company's expenditure on employees' salaries, with the addition of a "mark-up" of 10%?

(3) Irrespective of the answer to the foregoing questions, can a right of deduction exist if the

consultancy costs at issue in the main proceedings are regarded as general costs, and if so, on what conditions?'

Consideration of the questions referred

22 It should be noted, first of all, that, according to the referring court, the questions referred for a preliminary ruling relate only to the right to deduct the VAT relating to the expenditure associated with the disputed services in circumstances such as those at issue in the main proceedings, and not to the question as to who properly bore that expenditure.

23 In that connection, it must be recalled, as the Advocate General notes in point 16 of her Opinion, that, in accordance with Article 168 of Directive 2006/112, the right to deduct input tax presupposes that the taxable person is the recipient of the supplies or services at issue.

24 In the case in the main proceedings, it is apparent from the information before the Court that Kaupthing Bank sought, on behalf of C&D Foods, consultancy services in order to prepare for the disposal of its shares in Arovit Petfood. The proceeds of that proposed sale were intended to allow Kaupthing Bank to cease to be a creditor of the Arovit group.

25 Inasmuch as it is apparent from the order for reference that C&D Foods was the recipient of at least some of the disputed services and that, furthermore, the referring court has explained why it deemed it necessary to seek an answer to the questions referred for a preliminary ruling, it appears that those questions are not hypothetical.

26 Secondly, in order to answer the questions referred, it is necessary to establish beforehand whether a share disposal transaction, such as that at issue in the main proceedings, constitutes an economic activity coming within the scope of Directive 2006/112.

27 Accordingly, it is necessary to take the view that, by those questions, which it is appropriate to examine together, the referring court is asking, in essence, whether Articles 2, 9 and 168 of Directive 2006/112 must be interpreted as meaning that a share disposal transaction, envisaged but not completed, such as that at issue in the main proceedings, comes within the scope of Directive 2006/112 and, if that is the case, for a determination as to whether those provisions grant the right to a company to deduct the input VAT related to expenditure incurred in the context of a transaction for the disposal of shares in a sub-subsidiary to which that company provides VAT-taxable management services, when it is envisaged that the proceeds of that sale will be allocated to the repayment of a debt due and, where applicable, the extent of that deduction.

28 As a preliminary point, it must be stated that Directive 2006/112, which entered into force on 1 January 2007, repealed 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), without introducing any substantive amendments vis-à-vis that directive. Since the relevant provisions of Directive 2006/112 are identical in their substantive scope to those of Sixth Directive 77/388, the case-law of the Court relating to that latter directive is also applicable to Directive 2006/112.

29 It follows from Article 2(1) of Directive 2006/112, which defines the scope of VAT, that, within the territory of a Member State, activities of an economic nature alone are subject to that tax. Pursuant to Article 9 of that directive, a taxable person is understood to mean any person who independently carries out in any place any economic activity, whatever the purpose or result of that activity. Furthermore, it is clear from Article 9 that the concept of economic activity encompasses any activity of producers, traders or persons supplying services and, more particularly, the exploitation of tangible or intangible property for the purposes of obtaining income

therefrom on a continuing basis (see, to that effect, judgment of 29 October 2009, *SKF*, C?29/08, EU:C:2009:665, paragraph 27).

30 It follows from the Court's case-law that a company which has as its sole purpose the acquisition of holdings in other companies, without it becoming directly or indirectly involved in the management of those companies, is neither a taxable person, within the meaning of Article 9 of Directive 2006/112, nor a person entitled to deduct VAT, within the meaning of Article 168 of that directive. The mere acquisition and ownership of shares do not, in themselves, constitute an economic activity for the purposes of Directive 2006/112, conferring on the holder the status of a taxable person, since those transactions do not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis, as the sole return on those transactions is a possible profit on the sale of those shares (see, to that effect, judgments of 29 October 2009, *SKF*, C?29/08, EU:C:2009:665, paragraph 28 and the case-law cited, and of 17 October 2018, *Ryanair*, C?249/17, EU:C:2018:834, paragraph 16).

31 In that connection, the Court has stated that only payments which are the consideration for a transaction or an economic activity come within the scope of VAT and that such is not the case with regard to payments which arise simply from ownership of the asset, as in the case of dividends or other yields from a shareholding (judgment of 29 October 2009, *SKF*, C?29/08, EU:C:2009:665, paragraph 29 and the case-law cited).

32 However, the position is otherwise where a financial holding in another company is accompanied by direct or indirect involvement in the management of the company in which the holding has been acquired, without prejudice to the rights held by the holding company as shareholder or associate, in so far as involvement of that kind entails carrying out transactions which are subject to VAT by virtue of Article 2 of Directive 2006/112, such as the supply of administrative, accounting and information-technology services (see, to that effect, judgment of 29 October 2009, *SKF*, C?29/08, EU:C:2009:665, paragraph 30 and the case-law cited).

33 It is, furthermore, clear from the Court's case-law that transactions relating to shares or holdings in a company are subject to VAT when they are carried out as part of a commercial share-dealing activity or in order to secure a direct or indirect involvement in the management of the companies in which the holding has been acquired, or where they constitute the direct, permanent and necessary extension of the taxable activity (judgment of 29 October 2009, *SKF*, C?29/08, EU:C:2009:665, paragraph 31 and the case-law cited).

34 So far as concerns the question of whether the expenditure associated with a share transfer transaction comes within the scope of VAT, it should be recalled that, in its judgment of 29 October 2009, *SKF* (C?29/08, EU:C:2009:665), the Court was called upon to examine that question concerning expenditure incurred by a parent company in the context of a transaction for the sale of shares in a subsidiary and a controlled company to which the former company, as the parent company, supplied services subject to VAT.

35 The Court noted, in paragraph 33 of the judgment of 29 October 2009, *SKF* (C?29/08, EU:C:2009:665), that, in such a context, a disposal, carried out in order to enable the parent company to restructure a group of companies, could be regarded as a transaction that consisted in obtaining income on a continuing basis from activities which went beyond the compass of the simple sale of shares. Accordingly, the Court found that that transaction had a direct link with the organisation of the activity carried out by the group and accordingly constituted the direct, permanent and necessary extension of the taxable activity of the taxable person and consequently came within the scope of VAT.

36 The Court has, furthermore, held that it is in the light of their objective content that it is

necessary to determine whether there is a direct and immediate link between the supply of goods or services utilised and a taxable output transaction or, exceptionally, a taxable input transaction (judgment of 21 February 2013, *Becker*, C?104/12, EU:C:2013:99, paragraph 24 and the case-law cited).

37 In that context, the Court stated that the exclusive reason for the transaction at issue should also be taken into account, since that reason must be regarded as a criterion for determining the objective content. Where it is clear that a transaction has not been performed for the purposes of the taxable activities of a taxable person, that transaction cannot be regarded as having a direct and immediate link with those activities within the meaning of the Court's case-law, even if that transaction would, in the light of its objective content, be subject to VAT (judgment of 21 February 2013, *Becker*, C?104/12, EU:C:2013:99, paragraph 29).

38 It follows that, in order for a share disposal transaction to be able to come within the scope of VAT, the direct and exclusive reason for that transaction must, in principle, be the taxable economic activity of the parent company in question, or that transaction must constitute the direct, permanent and necessary extension of that activity. That is the case where that transaction is carried out with a view to allocating the proceeds of that sale directly to the taxable economic activity of the parent company in question or to the economic activity carried out by the group of which it is the parent company.

39 In the present case, it is apparent from the file before the Court that the objective of the disposal of shares at issue in the main proceedings was to use the proceeds of that sale to settle the debts owed to Kaupthing Bank, the new proprietor of the Arovit group. As stated in the preceding paragraph of this judgment, such a sale cannot be deemed to be either a transaction for which the direct and exclusive reason is the taxable economic activity of C&D Foods, or a transaction constituting the direct, permanent and necessary extension of the taxable economic activity of that company. In those circumstances, that sale does not constitute a transaction consisting in obtaining income on a continuing basis from activities which go beyond the compass of the simple sale of shares and, accordingly, it does not come within the scope of VAT. It follows that the VAT relating to the disputed services is not deductible.

40 That finding cannot be called into question by the mere fact that any disposal of shares in Arovit Petfood would have resulted, for the latter company, in the cessation of the management and IT services provided to it by C&D Foods. It is apparent from the file before the Court that Kaupthing Bank had, in any event, intended to sell its shares in Arovit Petfood. It thus appears that the expenditure associated with the disputed services would have been incurred nonetheless, even if C&D Foods had not provided any management and IT services to Arovit Petfood. Thus, the direct and exclusive reason for any cessation of the supply of services at issue in the main proceedings cannot be found in the economic activity of C&D Foods.

41 Lastly, it should also be clarified that that finding also cannot be called into question by the fact that the intended sale was not completed. In that context, the important point is the fact that, had that sale been completed, the expenditure incurred in relation to the disputed services would not, in any event, have come within the scope of VAT and, therefore, could not have given rise to a right to deduct.

42 In the light of all of the foregoing considerations, the answer to the questions referred for a preliminary ruling is that Articles 2, 9 and 168 of Directive 2006/112 must be interpreted as meaning that a share disposal transaction, envisaged but not carried out, such as that at issue in the main proceedings, for which the direct and exclusive reason does not lie in the taxable economic activity of the company concerned, or which does not constitute the direct, permanent and necessary extension of that economic activity, does not come within the scope of VAT.

Costs

43 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 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a share disposal transaction, envisaged but not carried out, such as that at issue in the main proceedings, for which the direct and exclusive reason does not lie in the taxable economic activity of the company concerned, or which does not constitute the direct, permanent and necessary extension of that economic activity, does not come within the scope of value added tax.

[Signatures]

* Language of the case: Danish.