Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

1 October 2020 (*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Sixth Directive 77/388/EEC – Article 17(2)(a) – Right to deduct input tax – Services also having benefited third parties – Existence of a direct and immediate link with the taxable person's economic activity – Existence of a direct and immediate link with one or more output transactions)

In Case C?405/19,

REQUEST for a preliminary ruling pursuant to Article 267 TFEU from the Hof van Cassatie (Court of Cassation, Belgium), made by decision of 26 April 2019, received at the Court on 24 May 2019, in the proceedings

Vos Aannemingen BVBA

v

Belgische Staat,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský (Rapporteur) and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Vos Aannemingen BVBA, by H. Geinger and F. Vanbiervliet, advocaten,

– the Belgian Government, by J.-C. Halleux and C. Pochet, 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 17 of the 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 Vos Aannemingen BVBA and the Belgische Staat (Belgian State) concerning the deductibility of value added tax (VAT) charged on the acquisition of estate agency, advertising and administrative services.

Legal context

EU law

3 Article 17(2) and (5) of the Sixth Directive, in the version amended by Article 28f of that Directive, provides:

‘2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

a) [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;

…

5. 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.

…’

Belgian law

4 Article 45(1) of the Wetboek van de belasting over de toegevoegde waarde (Value Added Tax Code), in the version applicable to the facts in the main proceedings, provides:

‘A taxable person may deduct from the tax which he is liable to pay the tax which has been charged on goods and services supplied to him, on goods he has imported and on his intra-Community acquisitions of goods, in so far as he uses them to carry out:

1. taxable transactions;

…’

5 Article 1(2) of the Koninklijk Besluit nr. 3, met betrekking tot de aftrekregeling voor de toepassing van de belasting over de toegevoegde waarde (Royal Decree No. 3 of 10 December 1969 on deductions for the application of value added tax) (*Belgisch Staatsblad*, 12 December 1969, p.12006), in the version applicable to the facts in the main proceedings, states:

‘Under no circumstances shall taxes charged on goods and services which a taxable person intends for private use or for purposes other than those falling within his economic activity be deductible.

Where a good or service is intended to be partially used for such purposes, the deduction shall not be allowed in so far as it is so used. The extent thereof shall be determined by the taxable person under the supervision of the authorities.'

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

6 Vos Aannemingen's economic activity is the construction and sale of apartment buildings. Those buildings being erected on land belonging to third parties, the undivided shares in land corresponding to the apartments sold by Vos Aannemingen are sold by the land-owners themselves.

7 Vos Aannemingen covers advertising and administrative costs as well as estate agents' commission and then deducts the associated VAT in full.

8 Following a tax inspection, the competent Belgian authority held that, for the period from 1 January 1999 to 30 September 2001, Vos Aannemingen could deduct the input VAT paid only in so far as it related just to the sale of the buildings it had constructed. That authority had thus limited the scope of the right enjoyed by that company to deduct VAT by applying to the amount of input VAT paid a fraction in which the price of the building is the numerator and the price of the building plus the price of the land is the denominator.

9 Consequently, Vos Aannemingen was served with an order to pay a sum of EUR 92 313.99 in respect of VAT, with interest and penalties thereon.

10 After proceeding, subject to reservation of all rights, to pay the sums demanded by the tax authority, Vos Aannemingen lodged an objection to the payment order and sought reimbursement of those sums.

11 By judgment of 21 March 2016, the rechtbank van eerste aanleg Oost-Vlaanderen (East Flanders Court of First Instance, Belgium) upheld Vos Aannemingen's claim.

12 That court considered that, in view of the fact that the sale of the building and of the land constitutes a single supply, the advertising costs, the administrative costs and the estate agents' commission paid by Vos Aannemingen could be regarded in their entirety as relating to the general overheads of its sole economic activity, namely the construction and sale of apartments. Furthermore, that court considered that the fact that the landowners concerned were apt to benefit from the advertising services and the services supplied by estate agents receiving commission had to be regarded as ancillary to Vos Aannemingen's purposes.

13 The tax authority then brought an appeal against that decision before the hof van beroep te Gent (Court of Appeal, Ghent, Belgium) which, by judgment of 28 November 2017, that court upheld.

14 The appeal court noted, first of all, that it was not in dispute that the VAT of which the deduction had been rejected, in part, by the tax authority, related as much to the sale of land belonging to third parties as it did to that of the buildings constructed by Vos Aannemingen.

15 It then held that, while a link did exist between the sale of the buildings and that of the land, that link was not direct and immediate within the meaning of the judgment of 8 February 2007, *Investrand* (C?435/05, EU:C:2007:87).

16 In that regard, the appeal court considered that, in the case in the main proceedings, it was legally possible to sell the land and the buildings separately and that it was open to Vos

Aannemingen to re-invoice to the landowner part of the advertising costs, administrative costs and estate agents' commission.

17 Furthermore, the appeal court took the view that it could not be argued that the landowners at issue in the main proceedings derived only a 'benefit', within the meaning of the judgment of 18 July 2013, *AES-3C Maritza East 1* (C?124/12, EU:C:2013:488), from Vos Aannemingen covering the costs and the commission. It pointed out that those costs and that commission, in so far as they were incurred in relation to the sale of the land should, in principle, have been borne by those landowners.

18 Lastly, the Court of Appeal considered that nor did the costs and commission in question fall into the category of the general overheads borne by Vos Aannemingen.

19 Vos Aannemingen appealed in cassation against that judgment before the Hof van Cassatie (Court of Cassation, Belgium). Vos Aannemingen claims, inter alia, that when an input transaction is objectively carried out for the performance of certain taxable output activities or for all of them, the taxable person can deduct in full the input tax paid, even if a third party also benefits from that transaction and if that third party would normally have had to bear part of the expenditure, as long as the personal benefit to the third party is ancillary to the taxable person's business purposes.

20 Taking the view that the case-law of the Court did not allow it to determine with certainty whether, in a situation such as that at issue in the main proceedings, the input VAT paid could be deducted in full, the Hof van Cassatie (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 17 of the [Sixth Directive] to be interpreted as meaning that the fact that expenditure also benefits a third party – as is the case where, in connection with the sale of apartments, a property developer pays advertising costs, administrative costs and estate agents' commission, which also benefit the landowners – does not preclude the value added tax (VAT) charged on those costs from being fully deductible, provided that it is established that there is a direct and immediate link between the expenditure and the economic activity of the taxable person and that the advantage to the third party is ancillary to the taxable person's business purposes?

(2) Does that principle apply also where the costs in question are not general overheads but costs attributable to specific output transactions which may or may not be subject to VAT, such as in this case the sale, on the one hand, of apartments and, on the other, of land?

(3) Does the fact that the taxable person is able/entitled to pass on part of the expenditure to the third party whom the expenditure benefits, but does not do so, have any impact on the question of the deductibility of the VAT on those costs?'

The questions referred for a preliminary ruling

The first question

21 By its first question, the referring court asks, in essence, whether Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that the fact that expenditure incurred by a taxable person, a property developer, in respect of advertising costs, administrative costs and estate agents' commission, in connection with the sale of apartments, also benefits a third party, precludes that taxable person deducting in full the input VAT paid on that expenditure where, firstly, there is a direct and immediate link between that expenditure and the economic activity of the taxable person and, secondly, the benefit to the third party is ancillary to the taxable person's business purposes.

22 Article 17(2)(a) of the Sixth Directive authorises taxable persons to deduct from the tax they are 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 them by another taxable person, in so far as those goods or those services are used for the purposes of their taxable transactions.

23 According to settled case-law of the Court, the right to deduct stipulated in that provision constitutes a fundamental principle of the common system of VAT established by EU law, so that that right is an integral part of the VAT scheme and in principle may not be limited (see, to that effect, judgments of 14 June 2017, *Compass Contract Services*, C?38/16, EU:C:2017:454, paragraph 33 and of 18 October 2018 and *Volkswagen Financial Services* (UK), C?153/17, EU:C:2018:845, paragraph 39).

24 The deduction system established by the Sixth Directive is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his or her economic activities. The common system of VAT thus ensures the absolute neutrality of taxation of all economic activities, whatever their purposes or results, provided that those activities are themselves subject, in principle, to VAT (judgment of 3 July 2019, *The Chancellor, Masters and Scholars of the University of Cambridge*, C?316/18, EU:C:2019:559, paragraph 22 and the case-law cited).

25 For the taxable person to be recognised as having a right to deduct input VAT and in order to determine the scope of such entitlement, the existence of a direct and immediate link between a particular input transaction and one or more output transactions giving rise to a right to deduct, is, in principle, necessary. 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 (judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 28, and of 24 January 2019, *Morgan Stanley & Co International*, C?165/17, EU:C:2019:58, paragraph 30 and the case-law cited).

26 However, a taxable person also 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 that taxable person's general overheads and are, as such, components of the price of the goods or services which he or she supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 29 and the case-law cited).

27 In this case, the referring court, which starts from the premiss that there is a direct and immediate link between the expenditure at issue in the main proceedings and the whole of the taxable person's economic activity, is seeking to determine whether the fact that a third party also benefits from that expenditure precludes that taxable person being able to deduct in full the input VAT paid in relation to that expenditure.

28 In that regard, once the existence of a direct and immediate link has been established between the services supplied to the taxable person and that taxable person's economic activity, the fact that a third party also benefits from those services cannot justify the right to deduct corresponding to those services being denied to the taxable person (see, to that effect, judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 35), provided, however, that the benefit the third party derives from that supply of services is ancillary to the taxable person's purposes (see, to that effect, judgment of 18 July 2013, *AES-3C Maritza East 1*, C?124/12, EU:C:2013:488, paragraph 33 and the case-law cited).

29 It would in fact be contrary to the principle of neutrality of VAT, alluded to in paragraph 24 of this judgment, to make a taxable person bear VAT on expenditure incurred for the purposes of his taxable transactions on the sole ground that a third party derives an ancillary benefit (see, to that effect, judgment of 18 July 2013, *AES-3C Maritza East 1*, C?124/12, EU:C:2013:488, paragraph 36).

30 Furthermore, it is important to point out that, in order to qualify as ancillary, the benefit to the third party must flow from a supply of services made in the taxable person's own interest (see, to that effect, judgment of 18 July 2013, *AES-3C Maritza East 1*, C?124/12, EU:C:2013:488, paragraph 33 and the case-law cited).

31 In the case where, as in the present case, it appears that expenditure corresponding to advertising costs, administrative costs and estate agents' commission has been incurred in the taxable person's interest, the benefit that third parties have also derived from that expenditure can be classed as ancillary, in the light of the case-law cited in the previous paragraph of the present case.

32 It follows that the situation, such as that at issue in the main proceedings, where, in the context of the sale of land he or she owns, a third party also derives a benefit from services supplied to the taxable person, cannot have the effect of limiting the scope of the taxable person's right to deduct VAT.

33 Having regard to the foregoing considerations, the answer to the first question is that Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that the fact that expenditure incurred by a taxable person, a property developer, in respect of advertising costs, administrative costs and estate agents' commission, in connection with the sale of apartments, also benefits a third party, does not preclude that taxable person deducting in full the input VAT paid on that expenditure where, firstly, there is a direct and immediate link between that expenditure and the taxable person's economic activity and, secondly, the benefit to the third party is ancillary to the taxable person's business purposes.

The second question

34 By its second question, the referring court asks, in essence, whether Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that the fact that the expenditure incurred by the taxable person also benefits a third party precludes that taxable person deducting in full the input VAT paid in relation to that expenditure, in the case where that expenditure does not relate to the taxable person's general overheads but constitutes costs attributable to particular output transactions.

35 As a preliminary point, it is worth recalling that the taxable person has a right to deduct not only when the costs of the services at issue are part of general overheads linked to the whole of the taxable person's economic activity but also, and above all, when there is a direct and

immediate link between an input transaction and one or more output transactions giving rise to the right to deduct (see, to that effect, judgments of 29 October 2009, *AB SKF*, C?29/08, EU:C:2009:665, paragraph 60, and of 30 May 2013, *X*, C?651/11, EU:C:2013:346, paragraph 55).

36 In the wording of its second question, the referring court focuses specifically on the hypothesis that costs relating to the input services supplied do not form part of general overheads but are attributable to particular output transactions, some of which are carried out by the taxable person and others by a third party.

37 In that regard, as noted in paragraph 22 of the present judgment, it results from Article 17(2)(a) of the Sixth Directive that taxable persons are only authorised to deduct from tax for which they are liable the VAT due or paid within the territory of the country for services supplied to them by another taxable person in so far as those services are used for the purposes of their taxable transactions.

38 Consequently, no right can arise from the part of the expenditure that is linked not to transactions carried out by the taxable person but to transactions carried out by a third party, such as, as in the case at issue in the main proceedings, the sale of land.

39 In the present case, if it turned out that part of the services in respect of which the expenditure at issue in the main proceedings was incurred had been used not for the purposes of the taxable person’s construction operations and building sales but for the purposes of sales of land by third parties, the existence of a direct and immediate link between those services and that company’s taxable transactions would be partially broken, so that that company would not be entitled to proceed to deduct the VAT charged on that part of the expenditure (see, by analogy, judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 39).

40 For the purposes of determining the scope of the taxable person’s right to deduct, it is for the referring court to determine the extent to which the services concerned were actually supplied in order to allow the taxable person to carry out his taxable transactions (see, to that effect, judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 34). It is only to that extent that the input VAT paid will be regarded as chargeable on the services supplied to the taxable person, as required by Article 17(2)(a) of the Sixth Directive.

41 To that end, the basis must be the objective content of the services acquired by the taxable person and all of the circumstances in which the transactions concerned occurred (see, to that effect, judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 31, and of 17 October 2018, *Ryanair*, C?249/17, EU:C:2018:834, paragraph 28).

42 In circumstances such as those in dispute in the main proceedings, of particular relevance are contracts for the provision of services as well as the economic and commercial realities, consideration of which constitutes, in accordance with settled case-law, a fundamental criterion for the application of the common system of VAT (see, to that effect, judgment of 18 June 2020, *KrakVet Marek Batko*, C?276/18, EU:C:2020:485, paragraph 61).

43 Having regard to the foregoing considerations, the answer to the second question is that Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that the fact that the expenditure incurred by the taxable person also benefits a third party does not preclude that taxable person deducting in full the input VAT paid in relation to that expenditure, in the case where that expenditure does not relate to the taxable person’s general overheads but constitutes

costs attributable to particular output transactions, in so far as those costs maintain a direct and immediate link with the taxable person's taxable transactions, which is for the referring court to assess with regard to all of the circumstances in which those transactions occurred.

The third question

44 By its third question, the referring court asks, in essence, whether Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that the fact that it is possible for the taxable person to pass on, to the third party who benefits from it, part of the expenditure he or she has incurred, has an impact on that taxable person's right to deduct the VAT relating to those costs.

45 As follows from the answer to the second question, in particular from paragraph 43 of the present case, the fact that one part of the expenditure incurred by the taxable person was incurred not for the purposes of his or her own taxable transactions but for those of a transaction carried out by a third party would be of a nature to break partially the direct and immediate link that must exist between the acquisition of input services and the output transaction, thus preventing the taxable person from proceeding to deduct in full the associated VAT.

46 The fact that it is possible for the taxable person to pass on, to the third party, a part of the expenditure he has incurred in respect of those services, certainly gives some support to the conclusion that that part of the expenditure relates not to the output transaction carried out by the taxable person but to the transaction carried out by the third party.

47 However, that element is not, in isolation, sufficient for the purposes of determining the scope of the taxable person's right to deduct VAT, in so far as, according to the case-law cited in paragraph 41 of the present judgment, it is necessary, when applying the direct link test, to consider all the circumstances in which the transactions concerned occurred, an assessment which it is for the referring court to carry out.

48 Consequently, the answer to the third question is that Article 17(2)(a) of the Sixth Directive must be interpreted as meaning that, in the case where a third party benefits from expenditure incurred by the taxable person, the fact that it is possible for the taxable person to pass on to the third party a part of the expenditure so incurred constitutes one of the elements, along with all of the other circumstances in which the transactions concerned occurred, which the referring court must consider for the purposes of determining the scope of the taxable person's right to deduct VAT.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

1. **Article 17(2)(a) of the 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 be interpreted as meaning that the fact that expenditure incurred by a taxable person, a property developer, in respect of advertising costs, administrative costs and estate agents' commission, in connection with the sale of apartments, also benefits a third party, does not preclude that taxable person deducting in full the input value added tax paid on that expenditure where, firstly, there is a direct and immediate link between that expenditure and the taxable person's economic activity and, secondly, the benefit to the third party is ancillary to the taxable person's business**

purposes.

2. **Article 17(2)(a) of the Sixth Directive 77/388, as amended by Directive 95/7, must be interpreted as meaning that the fact that the expenditure incurred by the taxable person also benefits a third party does not preclude that taxable person deducting in full the input value added tax paid in relation to that expenditure, in the case where that expenditure does not relate to the taxable person's general overheads but constitutes costs attributable to particular output transactions, in so far as those costs maintain a direct and immediate link with the taxable person's taxable transactions, which is for the referring court to assess with regard to all of the circumstances in which those transactions occurred.**

3. **Article 17(2)(a) of the Sixth Directive 77/388, as amended by Directive 95/7, must be interpreted as meaning that, in the case where a third party benefits from expenditure incurred by the taxable person, the fact that it is possible for the taxable person to pass on to the third party a part of the expenditure so incurred constitutes one of the elements, along with all of the other circumstances in which the transactions concerned occurred, which the referring court must consider for the purposes of determining the scope of the taxable person's right to deduct value added tax.**

[Signatures]

* Language of the case: Dutch.