OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 24 February 2005 (1)

Case C-465/03

Kretztechnik AG

v

Finanzamt Linz

1. In the present reference for a preliminary ruling, the Linz section of the Austrian Unabhängiger Finanzsenat (Independent Tax Tribunal) asks (i) whether a company which issues new shares, and becomes listed on a stock market for that purpose, is to be regarded as making a supply for consideration for VAT purposes and (ii) whether, depending on the answer to that question, VAT paid on services acquired in connection with the listing and share issue may be deductible.

Relevant Community VAT provisions

2. Under Article 2(1) of the Sixth VAT Directive, (2) transactions subject to VAT include 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' and the importation of goods.

3. A taxable person is defined in Article 4(1) as one who carries out an economic activity, whatever its purpose or result. Economic activities are, under Article 4(2), 'all activities of producers, traders and persons supplying services', together with the 'exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis'.

4. In Article 5(1), the essential definition of a supply of goods is 'the transfer of the right to dispose of tangible property as owner', and a supply of services is defined in Article 6(1) as 'any transaction which does not constitute a supply of goods'. It is further specified that supplies of services may include, inter alia, 'assignments of intangible property whether or not it is the subject of a document establishing title'.

5. However, certain types of transaction, which on the basis of those provisions would be subject to VAT, are exempted under the provisions of Article 13.

6. In particular, Article 13B(d)(5) exempts 'transactions, including negotiation, excluding

management and safekeeping, in shares, interests in companies or associations, debentures and other securities', excluding documents establishing title to goods and rights or securities relating to immovable property.

7. It is inherent in the VAT system that, in order to prevent tax being levied cumulatively on a series of transactions within the economic sphere, which would result in a variable and possibly heavy burden depending on the number of transactions in the series, a taxable person is entitled, when accounting for VAT to the fiscal authorities, to deduct the amount of tax paid on his input supplies from that which he has charged to his customers on his outputs. The essentials of that right to deduct are set out in Article 17 of the Sixth Directive.

8. Article 17(2) states: '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) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person …' The right arises, in accordance with Article 17(1), at the time when the deductible tax becomes chargeable.

9. Because the right to deduct arises only in respect of supplies used for the purpose of taxed transactions, there is no such right if they are used only for the purpose of other output transactions, such as the exempt transactions listed in Article 13, or of supplies which fall outside the scope of VAT because, for example, they are not effected for consideration or are not made by a taxable person acting as such, in the context of an economic activity within the meaning of Article 4.

10. Article 17(5) of the Sixth Directive deals with situations where goods or services are used by a taxable person both for transactions in respect of which VAT is deductible and for those in respect of which it is not. In such cases 'only such proportion of the value added tax shall be deductible as is attributable to the former transactions'.

National proceedings and reference for a preliminary ruling

11. Kretztechnik AG ('Kretztechnik') is an Austrian public limited company whose objects are the development and sale of all types of electro-medical appliances, in particular ultrasound apparatus for medical and technical purposes, and other medical appliances. Sales of its products are subject to VAT, and it is therefore entitled to deduct input tax on supplies of goods or services which it acquires for the purposes of making those sales.

12. In January 2000 Kretztechnik decided to increase its issued share capital by 25%, by issuing 2 500 000 bearer shares at an issue price of EUR 1.00 per share. For that purpose, the company was listed on the Neues Markt stock exchange in Frankfurt, Germany, from 23 March 2000. In order to obtain that listing, it had to pay for certain services, on which it was charged VAT.

13. In its VAT assessment for that year, the tax authority refused Kretztechnik's deduction of the input tax on costs involved in the company's admission to the German stock market, on the ground that the share transactions for the purposes of which those costs had been incurred were exempt from tax.

14. Kretztechnik has challenged that assessment before the Unabhängiger Finanzsenat, an independent tribunal with jurisdiction in tax and customs matters.

15. In its challenge, Kretztechnik relies on Article 17(2) of the Sixth Directive, submitting that input

tax could be deducted in so far as the services in respect of which it was charged were used ultimately for the purposes of its taxable transactions.

16. According to the case-law of the Court of Justice, Kretztechnik argues, services need not be used directly for the purposes of taxable transactions in order to give rise to deduction, and costs of the kind in issue form part of a company's economic activity taken as a whole. (3) It also submits that the judgment in *KapHag Renditefonds* (hereinafter *'KapHag'*), (4) to the effect that the admission of a partner to a partnership in exchange for a cash contribution to its assets falls outside the scope of VAT, is applicable; the present case concerns not the transfer of shares – exempted under Article 13B(d)(5) of the Sixth Directive – but their creation, and a company must be treated in the same way as a partnership in that regard.

17. The Finanzsenat takes the view that the services in respect of which the disputed input tax was charged are clearly attributable exclusively to the preparation, support and execution of the company's admission to the stock market; they cannot be attributed to its economic activity taken as a whole.

18. If the issue of shares to (future) shareholders is a supply of services falling within the scope of VAT, the Finanzsenat continues, then it is an exempt supply and input tax cannot be deducted on services acquired for the purpose of that supply.

19. If, however, by analogy with *KapHag*, the transaction is to be regarded as not falling within the definition of an economic activity in Article 4(2) of the Sixth Directive, the Finanzsenat is unsure whether a right to deduct may arise. The Court's judgment in that case did not rule on the point, but Advocate General Ruiz-Jarabo (5) took the view that there was no right to deduct.

20. The Unabhängiger Finanzsenat has therefore requested the Court to give a preliminary ruling on the following questions:

'(1) In becoming listed on a stock market and in issuing shares in that connection to new shareholders in return for the issue price, does a public limited company make a supply for consideration within the meaning of Article 2(1) of [the Sixth Directive]?

(2) If the first question is answered in the affirmative: are Article 2(1) and Article 17 of the Sixth Directive to be interpreted as meaning that all services obtained in connection with a listing on the stock market are to be attributed to an exempt supply and that for that reason there is no right to a deduction of input tax?

(3) If the first question is answered in the negative: is there a right under Article 17(1) and (2) of the Sixth Directive to deduct input tax on the ground that the services in respect of which a deduction of input tax is claimed (advertising, agent's fees, and legal and technical advice) are used for the purposes of the undertaking's taxable transactions?'

21. Written observations have been submitted by the defendant tax authority, by the Austrian, Danish, German, Italian and United Kingdom Governments and by the Commission. At the hearing, oral argument was presented by Kretztechnik, by the German and United Kingdom Governments and by the Commission.

Assessment

Admissibility of the reference

22. In its order for reference, the Unabhängiger Finanzsenat convincingly maintains that it is a court or tribunal of a MemberState competent to make a reference under Article 234 EC.

23. Moreover, since the reference was made, the Court has without demur answered questions in another case before that body (6) – in contrast to an earlier reference (7) from a Berufungssenat der Finanzlandesdirektion (Appeal Chamber of the regional finance authority), predecessor of the Unabhängiger Finanzsenat but functionally and organisationally linked to the tax authority whose decisions it reviewed.

24. There is therefore no doubt about the admissibility of the reference.

The questions raised

25. Kretztechnik wishes to deduct the input VAT paid on the cost of various services which it purchased for the purposes of gaining admission to the Frankfurt stock exchange and issuing new shares to be listed on that market. The referring court has determined that the services in question were exclusively attributable to those operations.

26. In order for VAT to be deductible, the relevant input transactions must have a direct and immediate link to taxed output transactions. (8)

27. However, the Court has considered that a taxable person's general overheads are in principle cost components of, and thus have a direct and immediate link to, the whole of that person's economic activity. Input VAT on those overheads may thus be deducted to the extent that the output supplies are taxed. (9)

28. It is common ground that the share issue is not a taxed supply.

29. If it is an exempt supply, then there can be no right to deduct the VAT paid on services directly and immediately attributable to that supply.

30. However, Kretztechnik has submitted that a share issue is not a supply by the issuing company at all, and that a different analysis must thus apply. In its view, the share issue is simply an increase in capital, with costs related to that increase forming part of the company's general overheads and thus having a link to the whole of its economic activity.

The first question

The Sixth Directive

31. The national court asks whether becoming listed on a stock market and issuing shares to new shareholders constitutes a supply for consideration within the meaning of Article 2 of the Sixth Directive. Since no goods are involved, the issue is whether there is a supply of services. And it is clear that the fact of becoming listed on a stock exchange cannot in itself be a supply, but if anything only a receipt, of services.

32. The first question is thus whether, in issuing new shares, a company makes a supply of services for consideration.

33. It is clear that transactions in shares or interests in companies or associations may constitute

supplies for consideration within the scope of VAT, since otherwise they could not be exempted under Article 13B(d)(5) and, in any event, they clearly fall within the concept of 'assignments of intangible property' in Article 6(1). Exempted transactions include the negotiation of shares, but not their mere management or safekeeping.

34. In keeping with that provision, and with the definition in Article 4(2) under which economic activities include the 'exploitation' of tangible or intangible property for the purpose of obtaining income on a continuing basis, the Court has consistently held that the mere acquisition, holding and sale of shares cannot constitute economic activities within the meaning of the Sixth Directive; by contrast, transactions carried out in the course of a business trading in securities may come within the scope of VAT. (10)

35. Thus, a transfer of existing shares may constitute a supply for consideration subject to VAT, within the meaning of Article 2(1) of the Sixth Directive, if it is effected in the context of a commercial share-dealing activity. In that case, it will be an exempt transaction, by virtue of Article 13B(d)(5). When not effected in such a context, however, it falls outside the scope of VAT.

36. However, the Court has so far considered in this context only the selling by a taxable person of shares in a separate company. Where a company issues new shares in itself, a different analysis may be called for. For example, as Kretztechnik has pointed out, where one company owns shares in another, those shares form part of the first company's assets; that company's own shares however are regarded as liabilities, towards its shareholders.

37. Whilst the Court has not before had to consider the status of issues of new shares by a limited company, it has, in *KapHag*, (11) held that the admission of a new partner in return for a cash contribution to the assets of a partnership does not constitute an economic activity within the meaning of the Sixth Directive or a supply of services for consideration to the partner.

38. The Court's relevant reasoning in *KapHag*, contained essentially in paragraphs 36 to 42 of the judgment, may be summarised as follows. (12) Although 'exploitation of tangible or intangible property' is a broad concept, it does not extend to the mere acquisition and holding of shares, because any dividend yielded by that holding is merely the result of ownership. A new partner entering into a partnership in return for a cash contribution to its assets does not therefore engage in an economic activity within the meaning of the Sixth Directive. If the taking of a share does not in itself constitute such an economic activity, the same must be true of the transfer of such shares. The admission of a new partner into a partnership does not therefore constitute a supply of services to him.

39. That reasoning was based on the Court's pre-existing case-law (13) of which it was, as the Danish Government points out, a logical extension. It has recently been confirmed in *Banque Bruxelles Lambert*. (14)

40. Kretztechnik, the Danish and Italian Governments and the Commission all consider, essentially, that the decision in *KapHag* is transposable to the situation of a limited company issuing new shares in order to increase its capital.

41. There are obvious parallels between the two situations.

42. However, the defendant tax authority and the Austrian, German and United Kingdom Governments consider that the two situations must be distinguished and that the share issue constitutes a supply for consideration within the scope of VAT (but exempt under Article 13B(d)(5)).

43. The defendant tax authority and the Austrian Government consider that an essential difference lies in the respective natures of a partnership and a limited company. Unlike a company, for example, a partnership may lack legal personality.

44. I do not agree that the differences in legal characteristics are relevant here. As the United Kingdom Government pointed out at the hearing, those characteristics vary considerably between Member States. However, both a holding in a partnership and a share in a limited company involve part-ownership of the entity concerned – to the extent that the entity is recognised as such in the legal system by which it is governed – and thus, indirectly, of its assets. The issue of new shares in exchange for cash which will increase a company's capital is closely comparable in economic terms to the admission of a new partner in exchange for a cash contribution to a partnership's assets.

45. Furthermore, the tax authority argues, the admission of a new partner involves the conclusion of a contract between the existing and new partners, whereas the issue of new shares does not involve the existing shareholders as such.

46. However, as the Court pointed out in *KapHag*, (15) if the admission of a new partner does not constitute a supply for consideration, it is irrelevant whether it is to be regarded as an act of the partnership or of the existing partners.

47. Nor do I consider relevant the fact, pointed out in particular by the Austrian and United Kingdom Governments, that a company issuing new shares on a stock market does not know – unlike a partnership admitting a new partner – to whom the shares will be sold, and that some or all of the purchasers may be dealers acting as taxable persons in the context of an economic activity.

48. It is clear that the classification of a transaction for VAT purposes can be determined only by the capacity in which the supplier is acting, not by that in which the customer is acting. If that were not so, an end supply to a private consumer would not be a taxable transaction, in complete contradiction with the nature of VAT as a 'general tax on consumption … applied up to and including the retail trade stage'. (16)

49. The capacity in which the customer acts is relevant only to his subsequent right to deduct whatever VAT may be charged on the transaction. (17) Whether VAT is charged or not depends on whether the supplier is a 'taxable person acting as such' and, if so, on whether the transaction is taxed or exempt.

50. But the argument is in any event based on an assumption that a share issue is capable of constituting a supply to the new shareholder.

51. The significant finding in *KapHag*, however, is that there is no supply to the new partner, either by the existing partners or by the partnership, and the significant question in the present case is whether the share issue is to be regarded as a supply by the company at all. In that regard, I find the analysis proposed by the Italian Government and to a large extent by the Commission, but most cogently by Kretztechnik, extremely convincing.

52. Although Article 6(1) of the Sixth Directive defines a supply of services as any transaction which does not constitute a supply of goods, that definition clearly cannot be taken to its literal extreme. It might be more reasonable to interpret it as intended to define a service as anything supplied which is not a good.

53. VAT is a tax on turnover and on consumption. (18) Only supplies which form part of a taxable person's turnover and are stages in a chain normally ending in consumption by a final customer can be subject to the tax.

54. It is not possible to regard a share issue as forming part of a company's turnover. Nor is it a service consumed by the new shareholder, who is not a customer but a part-owner of the company.

55. Furthermore, it is important to remember that a transaction between two parties has two aspects: it is on the one hand a supply and on the other an acquisition. (19) However, only the supply, not the acquisition, can be a transaction – taxed or exempt – falling within the scope of VAT. Self-evidently, a person does not make a supply when he acquires goods or services.

56. In a share issue, what is the supply and what is the acquisition?

57. Ownership of a share in a limited company involves (residual and contingent) ownership of a fraction of the company's assets, normally entitling the shareholder to a proportion of distributed profits, and of residual value if the company is wound up.

58. Where a shareholder sells a share, that is clearly a supply of services, in the form of an assignment of existing intangible property, within the meaning of Article 6(1) of the Sixth Directive. The purchaser does not make an investment in the company in the sense of a contribution of capital but rather acquires certain rights relating to capital which has already been contributed. That is the type of transaction with which the Court's previous case-law on the VAT treatment of share transactions has been concerned.

59. When a company issues new shares, however, it is not selling any existing intangible property or any right over a fraction of its existing assets. It is increasing its assets by acquiring capital, and acknowledging the new shareholders' rights as residual owners of a previously non-existent fraction of the increased assets which they have contributed in the form of capital.

60. Such a step defies categorisation as a supply of services by the company. From its point of view, there is an acquisition of capital, not a supply, and thus no transaction capable of being taxed or exempted from VAT. From the shareholder's point of view, it is an investment, an employment of capital, and not an acquisition. (20)

The Capital Duty Directive

61. If the issue of new shares by a limited company is not a supply subject to VAT, it may none the less be subject to another form of tax, harmonised at Community level by the Capital Duty Directive. (21)

62. And it is true, as the Italian Government points out, that Article 12(1)(f) of that directive envisages that Member States may charge VAT on transactions listed in Articles 10 and 11, which include share issues.

63. None the less, nothing in the Capital Duty Directive can have the effect of subjecting to VAT any transaction which is not within the scope of the latter tax under the terms of the VAT directives. Article 12(1)(f) can therefore refer only to such other transactions covered by Articles 10 and 11 as may be subject to VAT under the Sixth Directive – such as commercial trading in shares.

64. Furthermore, a comparison between the Capital Duty Directive and the VAT directives suggests that capital transactions do not come within the scope of VAT at all, whether they are regarded as inputs or as outputs.

65. The first two recitals in the preamble to the First VAT Directive (22) read:

'Whereas the main objective of the Treaty is to establish, within the framework of an economic union, a common market within which there is healthy competition and whose characteristics are similar to those of a domestic market;

Whereas the attainment of this objective presupposes the prior application in Member States of legislation concerning turnover taxes such as will not distort conditions of competition or hinder the free movement of goods and services within the common market'.

66. The first recital in the preamble to the Capital Duty Directive, on the other hand, reads:

'Whereas the objective of the Treaty is to create an economic union whose characteristics are similar to those of a domestic market and whereas one of the essential conditions for achieving this is the promotion of the free movement of capital'.

67. Those passages would support the view that the two (sets of) directives – and the two levies – concern two different categories of transaction. Both aim to secure a level playing-field within the internal market, but VAT concerns the free movement of goods and services whereas capital duty concerns the free movement of capital. Just as capital duty cannot be levied on supplies of goods or services, so it may be presumed that VAT – a tax on turnover and consumption – cannot apply to the raising of capital.

Conclusion on the first question

68. It may thus be concluded that an issue of new shares by a company is not a supply by the company at all and/or that it is a transaction of a type with which VAT is not concerned. In either event, the various submissions regarding its classification on the assumption that it is a supply within the scope of VAT are not relevant.

69. The answer to the national court's first question must therefore be no, and its second question consequently does not call for an answer.

The third question

70. If the share issue cannot be regarded as a supply by Kretztechnik, capable of taxation or exemption within the VAT system, then it is necessary to view in that light the referring court's finding that the costs of the disputed services are attributable exclusively to the admission to the stock market for the purpose of the issue.

71. Determination of the right to deduct governed by Article 17 of the Sixth Directive is based on an attribution of input costs to output transactions.

72. Any link which those costs may have with other events, such as other inputs, transactions purely internal to the taxable person's business, or events, other than supplies, entirely outside the scope of VAT, is simply irrelevant in that regard.

73. For example, if a trader uses the services of a broker or valuator when acquiring a commodity, the cost of those services may be said to be directly, immediately and exclusively linked to the acquisition. That does not however determine whether the VAT on the services is deductible. The right to deduct must be determined by the output transactions for the purposes of which the services are used. The transactions in question will usually be the onward supply of the commodity or of the goods or services for which it is used or in which it is incorporated. The right to deduct will depend on whether that supply is taxed or not.

74. Thus, if the transaction with which the input is most closely linked is one which falls entirely outside the scope of VAT because it is in any event not a supply of goods or services, it is irrelevant for the purpose of determining deductibility. What matters is the link, if any, with such output supplies, and whether they are taxed or exempt. (23)

75. The question to be asked in Kretztechnik's case is therefore whether the capital raised by the share issue was used for the purposes of one or more taxed output transactions.

76. It seems likely that the use of the capital – and the services connected with the raising of that capital – cannot be linked to any specific output transactions, but must rather be attributed to the company's economic activity as a whole. There can be no reasonable doubt that a commercial company which raises capital does so for the purposes of its economic activity.

77. It appears to be common ground that Kretztechnik makes only taxed output supplies, so that it raised the capital in its capacity as a taxable person acting as such. In that case, VAT on inputs attributable as overheads to its whole economic activity will be wholly deductible, in accordance with the case-law summarised in point 27 above. If however it were also to make other supplies, only a proportion would be deductible, determined in accordance with Article 17(5) of the Sixth Directive.

Conclusion

78. I am therefore of the opinion that the Court should give the following answers to the questions referred by the Unabhängiger Finanzsenat:

(1) In becoming listed on a stock market and in issuing shares in that connection to new shareholders in return for the issue price, a public limited company does not make a supply for consideration within the meaning of Article 2(1) 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;

(2) Input tax on services acquired for the purposes of such a share issue may be deducted to the extent that the company charges VAT on its output transactions, in accordance with Article 17(1), (2) and (5) of the Sixth Directive.

1 – Original language: English.

2– 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; hereinafter 'the Sixth Directive').

3– Case C-15/81 *Gaston Schul Douane Expediteur* [1982] ECR 1409 and Case C-408/98 *Abbey National* [2001] ECR I-1361.

4– Case C-442/01 [2003] ECR I-6851.

5– Point 50 of the Opinion.

6– Case C-278/02 *Herbert Handlbauer* [2004] ECR I-0000; see paragraph 23 of the judgment and points 24 to 37 of the Opinion of Advocate General Tizzano.

7– Case C-516/99 *Walter Schmid* [2002] ECR I-4573

8– See Case C-16/00 *Cibo Participations* [2001] ECR I-6663, paragraph 26, and the case-law cited there.

9– See Case C-4/94 *BLP Group* [1995] ECR I-983, in particular at paragraph 25, and *Abbey National*, cited in footnote 3, in particular at paragraphs 35, 36 and 40.

10– See, most recently, Case C-8/03 *Banque Bruxelles Lambert* [2004] ECR I-0000, paragraphs 36 to 41, and the case-law cited there.

11– Cited in footnote 4.

12– See also points 24 to 36 of Advocate General Ruiz-Jarabo's Opinion

13– The Court cited in particular Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111, paragraph 12, Case C-80/95 *Harnas & Helm* [1997] ECR I-745, paragraphs 13 to 15, and Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 33

14– Cited in footnote 10

15– At paragraph 42

16– See Article 2 of the First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

17– See Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 8

18– See the titles of all the VAT directives, and Article 2 of the First Directive, cited in footnote 16

19– In the case of a barter transaction, there are of course two supplies and two acquisitions

20– See also points 32 and 33 of Advocate General Ruiz-Jarabo’s Opinion in *KapHag*

21– Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969(II), p. 412).

22– Cited in footnote 16

23– See also my Opinion in *Abbey National*, cited in footnote 3, in particular at points 35 and 46