

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 16 December 2004 (1)

Case C-536/03

António Jorge Lda

v

Fazenda Pública

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal))

(Value added tax – Deduction of input tax – Real property transactions – Goods and services used for taxable and non-taxable transactions – Deductible proportion – Services not completed and not paid for)

I – Introductory remarks

1. This request for a preliminary ruling concerns the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (2) ('the Sixth Directive') in relation to the right to deduct. The questions referred for a preliminary ruling concern, in detail, the treatment of work in progress which has not yet been put on the market or paid for.

II – Legal framework

A – Community law

2. In respect of the origin and scope of the right to deduct input tax, Article 17(5) of the Sixth Directive provides:

'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 value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax 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.

However, Member States may:

- (a) authorise the taxable person to determine a proportion for each sector of his business, provided that separate accounts are kept for each sector;
- (b) compel the taxable person to determine a proportion for each sector of his business and to keep separate accounts for each sector;
- (c) authorise or compel the taxable person to make the deduction on the basis of the use of all or part of the goods and services;
- (d) authorise or compel the taxable person to make the deduction in accordance with the rule laid down in the first subparagraph, in respect of all goods and services used for all transactions referred to therein;
- (e) provide that where the value added tax which is not deductible by the taxable person is insignificant it shall be treated as nil.'

3. Article 19 of the Sixth Directive reads as follows:

'Calculation of the deductible proportion

1. The proportion deductible under the first subparagraph of Article 17(5) shall be made up of a fraction having:

- as numerator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3),
- as denominator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which value added tax is not deductible. The Member States may also include in the denominator the amount of subsidies, other than those specified in Article 11A (1)(a).

The proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next unit.

2. By way of derogation from the provisions of paragraph 1, there shall be excluded from the calculation of the deductible proportion, amounts of turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business. Amounts of turnover attributable to transactions specified in Article 13 B(d), in so far as these are incidental transactions, and to incidental real estate and financial transactions shall also be excluded. Where Member States exercise the option provided under Article 20(5) not to require adjustment in respect of capital goods, they may include disposals of capital goods in the calculation of the deductible proportion.

3. The provisional proportion for a year shall be that calculated on the basis of the preceding year's transactions. In the absence of any such transactions to refer to, or where they were insignificant in amount, the deductible proportion shall be estimated provisionally, under supervision of the tax authorities, by the taxable person from his own forecasts. However, Member States may retain their current rules.

Deductions made on the basis of such provisional proportion shall be adjusted when the final proportion is fixed during the next year.'

B – *National law*

4. The relevant law is the Portuguese Value Added Tax Law ('CIVA'), (3) in particular Article 23, which governs the right to deduct. In respect of real property, the regime laid down therein was amended by Article 5 of a later decree¹law. (4) It is only the pleadings that show that a further legal instrument (5) also has effects on Article 23 CIVA.

5. Under Portuguese law as applied by the tax authorities there, the value of work in progress at the end of the year is also to be included in the denominator of the fraction to be used for determining the proportion.

III – **Facts, main proceedings and the questions referred for a preliminary ruling**

6. António Jorge Lda ('Jorge Lda') is an undertaking engaged in the building industry, whose objects include public and private works contracts and the purchase and sale of buildings and land. Jorge Lda is subject to VAT; it is exempt from VAT in respect of the sale of buildings but not in respect of building services.

7. According to the order for reference, in the years 1994 to 1997, Jorge Lda provided services (under public works contracts) which entitled it to deduct the VAT paid on certain purchases and transactions (construction of buildings with a view to sale) which did not qualify for that deduction. In those years, about 50% of its turnover was from contracts for the construction of buildings, on which VAT was paid at the rate of 5% and deducted at the rate of 16% or 17%. On 20% of its turnover, tax was paid at the rate of 16% or 17%. The remainder of its turnover related to transactions exempt from VAT which did not give rise to the right to deduct.

8. An inspection by the competent department established inter alia the following:

- difficulties in respect of general expenses deducted by Jorge Lda even though its purchases were intended for the exempt sector and the taxable sector;
- the purchase of real property fell within the sector which is subject to VAT (deductible), part of the amount of the depreciation of that property being distributed at the end of the financial year or allocated to a sector exempt from tax.

9. While Jorge Lda deducted the total amount of general expenses, the tax authorities demanded the additional payment of the non-deductible part plus interest for late payment.

10. Jorge Lda lodged an objection against those tax assessments.

11. The dispute essentially concerns the interpretation of the term 'transaction' within the meaning of the Sixth Directive, that is, the question whether the tax authorities were allowed also to take into account the value of the work in progress not yet sold.

12. In order to clarify those legal issues regarding the interpretation of the Sixth Directive, the Supremo Tribunal Administrativo referred the following questions to the Court of Justice for a preliminary ruling:

'1. In what sense must Article 19 of the Sixth Council Directive of 17 May 1977 (77/388/EEC) be interpreted?

2. Is Article 23(4) of the CIVA compatible with the abovementioned provision, when interpreted to the effect that, where the taxable person is an undertaking engaged in real property business,

carrying out work in two sectors of activity, one being the construction of buildings for sale (exempt from VAT) and the other public works contracts (subject to VAT), in order to calculate the deductible percentage of VAT or the proportion borne by that taxable person on the purchase of goods and services intended for both those activities, it is necessary to include in the denominator of the fraction to be calculated, in addition to the annual turnover, the value of work in progress which at the end of every year has not yet been put on the market and the value of which has not, in whole or in part, been received?

3. Or in the sense that that denominator comprises turnover only?’

IV – The questions referred for a preliminary ruling

13. In view of the content and wording of the three questions referred, it is appropriate to examine their admissibility.

14. The Court of Justice has consistently held that it may refuse to rule on a question referred for a preliminary ruling by a national court where it is obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where it does not have before it the factual or legal material necessary to give a helpful answer to the questions submitted to it. (6)

15. The first question referred for a preliminary ruling contains a request for interpretation of a provision of Community law, but it is worded in such a general way that a separate answer is not possible.

16. The second question referred, on the other hand, raises a problem which has repeatedly been pointed out by the Court of Justice. Thus the question concerns the ascertainment of the compatibility of national law, namely Article 23(4) CIVA, with a provision in a directive. Questions about the compatibility of national law with Community law are, however, not admissible subject-matter for references for preliminary rulings.

17. In addition, the order for reference contains only a brief statement of national law, in particular in respect of the wording of Article 23 CIVA.

18. It is therefore questionable whether the order for reference satisfies the requirements of the case-law of the Court of Justice according to which the national legal context must also be stated in sufficient detail to give a useful answer.

19. Moreover, in another case concerning Portuguese VAT (7) the Court of Justice declared a request for a preliminary ruling inadmissible owing to, inter alia, an insufficient statement of national law, although the national law provisions were attached in an annex. In the present case, the order for reference does not contain either the wording of the original version of the provision or that of the subsequent amendments.

20. A further criterion for the admissibility of questions referred for preliminary rulings is the requirement that the information furnished in the decisions making the references must not only enable the Court to give helpful answers but also enable the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice. The Court must ensure that the opportunity to submit observations is safeguarded, in view of the fact that, in accordance with that provision, only the decisions making the references are notified to the interested parties. (8)

21. It must however be pointed out that in the present proceedings, in spite of the importance of

the underlying legal issue, no Member State other than the one concerned has submitted observations. That indicates that the order for reference, which was notified to the other Member States, does not contain sufficient information.

22. The subject-matter of the third question referred is clearly the interpretation of Article 23 CIVA, a national law provision. In accordance with the wording of Article 234 EC, such a request is inadmissible.

23. It must now be asked whether the question referred might not be reworded in such a way that it is admissible. It would be possible to reword it to the effect that an interpretation of Article 19 of the Sixth Directive, in particular the term 'transaction', is requested.

24. In that regard, the question then of course arises whether it would be a request for a general opinion. It is settled case-law that such a request is, however, not admissible subject-matter for a request for a preliminary ruling under Article 234 EC. (9)

25. On the other hand, if the questions referred were aimed at resolving the actual dispute pending before the national court, such a request would also be inadmissible, because it is settled case-law of the Court that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the specific facts in the case is a matter for the national court. (10)

26. The Court of Justice is not therefore competent to rule on the facts of the main proceedings or to apply the Community provisions interpreted by it to national measures or facts in an actual case, since that is within the exclusive jurisdiction of the national court. The assessment of Jorge Lda's individual transactions for VAT purposes thus requires an appraisal of facts which is a matter for the national court. (11)

27. In the light of the – admittedly – strict approach taken by the Court of Justice to the conditions for the admissibility of questions referred for a preliminary ruling, it can be stated in the present case, as on the occasion of an earlier request for a preliminary ruling from the same national court, (12) that none of the questions referred is admissible.

V – Conclusion

28. In the light of all the foregoing, I propose that the Court of Justice declare the reference for a preliminary ruling inadmissible.

1 – Original language: German.

2 – OJ 1977 L 145, p. 1, since amended many times.

3 – Decree-Law No 394B/84 of 26 December 1984 (DR Series 1, No 297).

4 – Decree-Law No 241/86 of 20 August 1986 (DR Series 1, No 190).

5 – Decree-Law No 195/89 of 20 July 1989.

6 – See on this point, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19, Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 22 et seq. and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22.

7 – Order in Case C-154/01 *Caves Costa Verde*, OJ 2001 C 289, p. 8.

8 – Joined Cases 141/81, 142/81 and 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6, and orders in Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 13, and Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 24.

9 – Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 60, Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 32, Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 42, and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 32.

10 – Case 36/79 *Denkavit* [1979] ECR 3439, paragraph 12, Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, paragraph 37, Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 31, and Case C-421/01 *Traunfellner* [2003] ECR I-11941, paragraph 21 et. seq.

11 – Case C-448/01 *EVN* [2003] ECR I-14527, paragraph 59.

12 – On admissibility see also the order of 22 November 2001 in Case C-223/00 *DAFSE v Partex*, OJ 2002 C 84, p. 32.