JUDGMENT OF THE COURT (First Chamber)

26 May 2005 *

In Case C-465/03,

REFERENCE for a preliminary ruling under Article 234 EC, by the l'Unabhängiger Finanzsenat, Außenstelle Linz (Austria), by decision of 20 October 2003, received at the Court on 5 November 2003, in the proceedings

Kretztechnik AG

v

Finanzamt Linz,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

* Language of the case: German.

Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 December 2004,

after considering the observations submitted on behalf of:

— Kretztechnik AG, by P. Farmer, Barrister, assisted by J. Kajus and Professor B. Terra,

— Finanzamt Linz, by W. Ritirc, acting as Agent,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Danish Government, by J. Molde, acting as Agent,

— the German Government, by F. Huschens, M. Lumma and A. Tiemann, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, Avvocato dello Stato,

— the United Kingdom Government, by M. Bethell, acting as Agent, and M. Hall, Barrister,

— the Commission of the European Communities, by D. Triantafyllou and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2005,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2 and 17 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 (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18, hereinafter 'the Sixth Directive').

2 The questions were raised in proceedings between Kretztechnik AG ('Kretztechnik') and the Finanzamt Linz (Linz District Tax Office) concerning the latter's refusal to allow that company to deduct value added tax ('VAT') paid by it on supplies relating to the issue of shares for the purposes of its admission to the Frankfurt Stock Exchange (Germany).

Legal background

The Community legislation

3 The second paragraph of Article 2 of 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, Series I, 1967, p. 14), provides that '[o]n each transaction, [VAT], calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of [VAT] borne directly by the various cost components.'

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

5 Article 4(1) and (2) of the Sixth Directive are worded as follows:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

6 Under Article 5(1) of the Sixth Directive, 'the transfer of the right to dispose of tangible property as owner' is regarded as a supply of goods.

7 The first subparagraph of Article 6(1) of that directive states that 'any transaction which does not constitute a supply of goods' is a supply of services.

8 Article 13B(d)(5) of the Sixth Directive provides that the Member States are to exempt from VAT 'transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities'.

9 Article 17(1) and (2) of the Sixth Directive provide:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

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 in respect of goods or services supplied or to be supplied to him by another taxable person;

...'

10 Article 17(5) of the Sixth Directive concerns the deductibility of VAT in those cases where goods or services are used by a taxable person both for transactions giving rise to the right to deduction of VAT and for those not giving rise to that right. In such cases, the first subparagraph of that provision states that 'only such proportion of the [VAT] shall be deductible as is attributable to the former transactions'.

National law

11 The Sixth Directive was transposed into Austrian domestic law by the 1994 Law on Turnover Tax (Umsatzsteuergesetz 1994, BGBl. 663/1994), in the version published in 1999 (BGBl. I, 106/1999).

The main proceedings and the questions referred to the Court of Justice

12 Kretztechnik is a company limited by shares established in Austria whose objects are the development and distribution of medical equipment. By resolution of its general meeting of shareholders of 18 January 2000, its capital was increased from EUR 10 million to EUR 12.5 million. With a view to raising the capital needed for that increase, it applied for admission to the Frankfurt Stock Exchange.

13 Kretztechnik was listed on that stock exchange in March 2000. Its capital was increased by the issue of bearer shares.

14 The tax assessment of 5 July 2002 drawn up by the Finanzamt Linz for 2000 did not allow deduction of the input VAT paid by Kretztechnik on the supplies linked with its admission to the stock exchange. Since the issuing of shares is regarded in Austria as being exempt from VAT on the basis of a provision of national law analogous to Article 13B(d)(5) of the Sixth Directive, that company cannot, according to the Finanzamt, avail itself of any right to deduct input VAT.

15 Kretztechnik challenged that tax assessment before the Unabhängiger Finanzsenat, Außenstelle Linz (Independent Tax Tribunal, Linz), which decided to stay its proceedings and seek a preliminary ruling from the Court of Justice 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?'

The questions submitted to the Court

The first question

16 Kretztechnik, the Danish and Italian Governments and the Commission of the European Communities consider that a company does not effect a supply for consideration within the meaning of Article 2(1) of the Sixth Directive when it issues new shares in connection with its admission to a stock exchange. In that regard, they point out that Kretztechnik is entering the stock market in order to finance its business activities as provided for in its statutes and not as part of a commercial activity of dealing in securities.

17 In contrast, the Finanzamt Linz and the Austrian, German and United Kingdom Governments maintain that, even though the mere acquisition and holding of shares in a company is not to be regarded as an economic activity (see Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111; Case C-80/95 *Harnas & Helm* [1997] ECR I-745, and Case C-442/01 *KapHag* [2003] ECR I-6851), the issue of shares by a taxable person in order to increase its capital with a view to carrying on its economic activity constitutes a taxable transaction within the meaning of Article 2(1) of the Sixth Directive. That interpretation is, in their view, borne out by Article 13B(d)(5) of that directive, which presupposes the existence of a transaction that is, in principle, taxable.

18 In that connection, it must be borne in mind that it is clear from Article 2(1) of the Sixth Directive, which defines the scope of VAT, that, within a Member State, only

activities of an economic nature are subject to VAT. Economic activities are defined in Article 4(2) of the Sixth Directive as encompassing all activities of producers, traders and persons supplying services, in particular the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis (*KapHag*, paragraph 36).

19 It is settled case-law that the mere acquisition and holding of shares is not to be regarded as an economic activity within the meaning of the Sixth Directive. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property and is not the product of any economic activity within the meaning of that directive (see *Harnas & Helm*, paragraph 15; *KapHag*, paragraph 38, and Case C-8/03 *Banque Bruxelles Lambert (BBL)* [2004] ECR I-1015, paragraph 38). If, therefore, the acquisition of financial holdings in other undertakings does not in itself constitute an economic activity within the meaning of that directive, the same must be true of activities consisting in the sale of such holdings (see Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 33; *KapHag*, paragraph 40, and *BBL*, paragraph 38).

20 On the other hand, transactions that consist in obtaining income on a continuing basis from activities which go beyond the compass of the simple acquisition and sale of securities, such as transactions carried out in the course of a business trading in securities, do fall within the scope of the Sixth Directive but are exempted from VAT under Article 13B(d)(5) of that directive (see Case C-77/01 *EDM* [2004] ECR I-4295, paragraph 59, and *BBL*, paragraph 41).

21 As regards the question whether the issue of shares by a company may be regarded as an economic activity within the scope of Article 2(1) of the Sixth Directive, it is important to note, first, that the nature of such a transaction does not differ according to whether it is carried out by a company in connection with its admission to a stock exchange or by a company not quoted on a stock exchange.

22 Second, it must be borne in mind that, under Article 5(1) of the Sixth Directive, a supply of goods involves the transfer of the right to dispose of tangible property as owner. The issue of new shares — which are securities representing intangible property — cannot therefore be regarded as a supply of goods for consideration within the meaning of Article 2(1) of that directive.

23 The taxability of a share issue therefore depends on whether that transaction constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive.

24 In that connection the Court has already held that a partnership which admits a partner in consideration of payment of a contribution in cash does not effect to that partner a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive (*KapHag*, paragraph 43).

25 The same conclusion must be drawn regarding the issue of shares for the purpose of raising capital.

26 As the Advocate General rightly observes in points 59 and 60 of his Opinion, a company that issues new shares is increasing its assets by acquiring additional capital, whilst granting the new shareholders a right of ownership of part of the capital thus increased. From the issuing company's point of view, the aim is to raise capital and not to provide services. As far as the shareholder is concerned, payment of the sums necessary for the increase of capital is not a payment of consideration but an investment or an employment of capital.

27 It follows that a share issue does not constitute a supply of goods or of services for consideration within the meaning of Article 2(1) of the Sixth Directive. Therefore, such a transaction, whether or not carried out in connection with admission of the company concerned to a stock exchange, does not fall within the scope of that directive.

28 The answer to the first question must therefore be that a new share issue does not constitute a transaction falling within the scope of Article 2(1) of the Sixth Directive.

The second question

29 In view of the answer given to the first question, it is unnecessary to answer the second.

The third question

30 By its third question, the national court seeks essentially to ascertain whether Article 17(1) and (2) of the Sixth Directive confer a right to deduction of input VAT paid on supplies linked with a share issue.

31 The Finanzamt Linz and the Austrian, Danish, German and Italian Governments maintain that, since a share issue associated with admission to a stock exchange does not constitute a taxable transaction within the meaning of Article 2(1) of the Sixth Directive, there is no right to deduct the VAT levied on the supplies acquired for consideration for the purposes of that share issue. In contrast to the position in Case C-408/98 *Abbey National* [2001] ECR I-1361, in the present case the inputs, which are subject to VAT, do not form an integral part of Kretztechnik's overall economic activity as a component of the price of the products that it markets. The expenses associated with those supplies are linked only to the admission of the company to a stock exchange and have no connection with its general business on which tax is paid.

32 Conversely, Kretztechnik, the United Kingdom Government and the Commission consider that, even if the inputs subject to VAT were connected not with specific taxable transactions but with expenses relating to the share issue, they could form part of the overheads of the company and constitute components of the price of the products marketed by it. In those circumstances, Kretztechnik has a right to deduct the input VAT on expenditure incurred in obtaining the supplies linked to the admission of that company to a stock exchange (see Case C-4/94 *BLP Group* [1995] ECR I-983, paragraph 25; Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraph 31, and *Abbey National*, paragraphs 34 to 36).

33 In that connection, it must be borne in mind that, according to settled case-law, the right of deduction provided for in Articles 17 to 20 of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. It must be exercised immediately in respect of all the taxes charged on transactions relating to inputs (see, in particular, Case C-62/93 *BP Soupergaz* [1995] ECR I-1883, paragraph 18, and Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 43).

34 The deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, to that effect, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15; *Gabalfrisa and Others*, paragraph 44; *Midland Bank*, paragraph 19, and *Abbey National*, paragraph 24).

35 It is clear from the last-mentioned condition that, for VAT to be deductible, the input transactions must have a direct and immediate link with the output transactions giving rise to a right of deduction. Thus, the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (see *Midland Bank*, paragraph 30, and *Abbey National*, paragraph 28, and also Case C-16/00 *Cibo Participations* [2001] ECR I-6663, paragraph 31).

36 In this case, in view of the fact that, first, a share issue is an operation not falling within the scope of the Sixth Directive and, second, that operation was carried out

by Kretztechnik in order to increase its capital for the benefit of its economic activity in general, it must be considered that the costs of the supplies acquired by that company in connection with the operation concerned form part of its overheads and are therefore, as such, component parts of the price of its products. Those supplies have a direct and immediate link with the whole economic activity of the taxable person (see *BLP Group*, paragraph 25; *Midland Bank*, paragraph 31; *Abbey National*, paragraphs 35 and 36, and *Cibo Participations*, paragraph 33).

37 It follows that, under Article 17(1) and (2) of the Sixth Directive, Kretztechnik is entitled to deduct all the VAT charged on the expenses incurred by that company for the various supplies which it acquired in the context of the share issue carried out by it, provided, however, that all the transactions carried out by that company in the context of its economic activity constitute taxed transactions. A taxable person who effects both transactions in respect of which VAT is deductible and transactions in respect of which it is not may, under the first subparagraph of Article 17(5) of the Sixth Directive, deduct only that proportion of the VAT which is attributable to the former transactions (*Abbey National*, paragraph 37, and *Cibo Participations*, paragraph 34).

38 The answer to the third question must therefore be that Article 17(1) and (2) of the Sixth Directive confer the right to deduct in its entirety the VAT charged on the expenses incurred by a taxable person for the various supplies acquired by him in connection with a share issue, provided that all the transactions undertaken by the taxable person in the context of his economic activity constitute taxed transactions.

Costs

39 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. The costs incurred in submitting observations to the Court, other than those of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **A new share issue does not constitute a transaction falling within the scope of Article 2(1) 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, as amended by Council Directive 95/7/EC of 10 April 1995.**

2. **Article 17(1) and (2) of Sixth Directive 77/388, as amended by Directive 95/7, confer the right to deduct in its entirety the VAT charged on the expenses incurred by a taxable person for the various supplies acquired by him in connection with a share issue, provided that all the transactions undertaken by the taxable person in the context of his economic activity constitute taxed transactions.**

[Signatures]