Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

14 December 2016*

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 77/388/EEC — Article 17(5), third subparagraph, point (d) — Scope — Application of a deductible proportion to the value added tax charged on the acquisition of all goods and services used by a taxable person — Incidental transactions — Use of turnover as an indicator)

In Case C-378/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Commissione tributaria regionale di Roma (Regional Tax Court, Rome, Italy), made by decision of 6 May 2015, received at the Court on 16 July 2015, in the proceedings

Mercedes Benz Italia SpA

v

Agenzia delle Entrate Direzione Provinciale Roma 3,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský (Rapporteur), M. Safjan and D. Šváby, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 14 April 2016,

after considering the observations submitted on behalf of:

— Mercedes Benz Italia SpA, by P. Centore, avvocato,

— the Italian Government, by G. Palmieri, acting as Agent, and by E. De Bonis, G. De Bellis and M. Capolupo, avvocati dello Stato,

— the European Commission, by L. Lozano Palacios and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2016,

gives the following

* * Language of the case: Italian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(5) and Article 19 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), in the version in force at the material time in the main proceedings ('the Sixth Directive').

2 The request has been made in the course of proceedings between Mercedes Benz Italia Spa ('Mercedes Benz') and the Agenzia delle Entrate Direzione Provinciale Roma 3 (Revenue Authority, Provincial Office, Rome 3; the 'tax authority'), concerning value added tax (VAT) deductions made by Mercedes Benz in respect of the 2004 tax year.

Legal context

EU law

3 The 17th recital of the Sixth Directive was worded as follows:

'… Member States should be able, within certain limits and subject to certain conditions, to take or retain special measures derogating from this Directive in order to simplify the levying of tax or to avoid fraud or tax avoidance;

…'

4 Article 13B of that directive provided:

'Without prejudice to other Community provisions, Member States shall exempt …:

(d) the following transactions:

1. the granting and the negotiation of credit and the management of credit by the person granting it;

…'

5 Under Article 17(2) and (5) of that directive:

'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) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country;

…

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.'

6 Paragraphs 1 and 2 of Article 19 of the Sixth Directive, entitled 'Calculation of the deductible proportion', were worded as follows:

'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 …

— 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 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 incidental real estate and financial transactions …'

7 The Sixth Directive was repealed and replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which came into force on 1 January 2007.

Italian law

8 Article 10(1) of the Decreto del Presidente della Repubblica n. 633 — istituzione e disciplina dell'imposta sul valore aggiunto (Presidential Decree No 633 establishing and regulating value added tax) of 26 October 1972 (GURI No 292, of 11 November 1972), in the version applicable to the dispute in the main proceedings ('DPR No 633/72'), provides:

'The following shall be exempt from tax:

the supply of services relating to the granting and negotiation of credit, the management of those services and finance transactions …'

9 Article 19(5) of DPR No 633/72 provides:

'As regards taxable persons who engage both in activities which give rise to transactions in respect of which VAT is deductible and in activities which give rise to transactions which are exempt from VAT …, the right to deduct tax shall apply only to the part of the VAT in proportion to the first category of transactions, and the corresponding amount shall be determined by applying the deductible proportion under Article 19-bis.'

10 It is apparent from the documents before the Court that the method for determining the right to deduct, provided for in Article 19(5) of DPR No 633/72, applies in respect of all goods and services acquired by taxable persons carrying out transactions in respect of which VAT is deductible and VAT-exempt transactions.

11 According to Article 19-bis of DPR No 633/72:

'1. The deductible proportion referred to in Article 19(5) shall be calculated on the basis of the ratio between the amount of the transactions in respect of which VAT is deductible, carried out during the year, and the same amount increased by the exempt transactions carried out during the same year. The deductible proportion shall be rounded up or down to the next unit depending on whether the decimal point falls above or below five tenths.

2. For the purpose of calculating the deductible proportion under paragraph 1, no account shall be taken … of the exempt transactions listed in paragraphs 1 to 9 [of Article 10 of DPR No 633/72] where they do not form part of the taxable person's main activity or are incidental to his taxable transactions. However, tax relating to goods and services used exclusively to carry out the latter transactions remains non-deductible.'

12 Article 36 of DPR No 633/72 is worded as follows:

'(1) In the case of taxable persons carrying out more than one activity, the tax shall apply in aggregate and cumulatively to all activities, by reference to overall turnover, subject to the provisions of the following paragraphs.

(2) If the taxable person operates undertakings or simultaneously exercises trades or professions, the tax shall apply separately for the operation of undertakings and for the exercise of trades or professions in accordance with the applicable provisions and by reference to the turnover.

(3) Taxable persons who operate several undertakings or carry out more than one activity in the same undertaking or several trades or professions may opt for the separate application of the tax relating to some of the activities in which they engage, by indicating their choice to the tax authority in their declaration relating to the previous year or in their declaration of commencement of operations. In such a case, the deduction provided for in Article 19 shall be granted, provided that separate accounts

are maintained for that activity, but shall be excluded, by way of derogation from the provisions of the preceding paragraph, with regard to the tax on non-depreciable mixed-use goods. The option shall take effect for as long as it is not revoked and in any event for at least three years. … The provisions of this paragraph shall also apply to taxable persons … who carry out exempt activities within the meaning of Article 10(1).

(4) The tax shall in every case apply separately, in accordance with the provisions respectively applicable and by reference to the overall turnover of each of them, …

(5) In all cases where the tax is applied separately for a given activity, where the deduction provided for in Article 19 is reduced pursuant to paragraph 3 of that article or is imposed as a lump sum, that deduction shall be granted in respect of the tax on mixed-use goods and services, within the limits of the fraction which may be attributed to the exercise of the activity itself. The transfers of services to the activity subject to the reduced or lump sum deduction constitute the provision of services within the meaning of Article 3 and shall be deemed to have been made on the basis of their normal value on the date on which they are provided. …'

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

13 Mercedes Benz is responsible for the strategic direction of the marketing of the Daimler-Chrysler Group brands in Italy.

14 In its VAT return for the 2004 tax year, Mercedes Benz classified its financial activities, namely the granting of loans to its subsidiaries, as 'incidental' to its taxable activities, thereby justifying the exclusion of the interest accrued on those loans from the calculation of the denominator in the fraction used to establish the deductible proportion referred to in Article 19-bis of DPR No 633/72.

15 As a result of a tax audit carried out in 2008 and relating to the 2004 tax year, Mercedes Benz was made subject, by decision of the tax authority, to an additional assessment to VAT in the amount of EUR 1 755 882, on the ground that the interest received on those loans had been improperly excluded from the denominator of the fraction used to establish the deductible proportion, in so far as the granting of those loans was one of Mercedes Benz's main activities, since the accrued interest on those loans represented 71.64% of its total turnover.

16 Mercedes Benz brought an action against that decision before the Commissione tributaria provinciale di Roma (Provincial Tax Court, Rome, Italy), which was dismissed. Mercedes Benz subsequently lodged an appeal against that decision before the referring court, the Commissione tributaria regionale di Roma (Regional Tax Court, Rome, Italy).

17 In the dispute, Mercedes Benz has argued that it was entitled to exclude the accrued interest on the loans made from the denominator of the fraction used to establish the deductible proportion of the VAT and, in particular, it claimed that in any event the national legislature had incorrectly transposed Articles 168 and 173 to 175 of Directive 2006/112 by providing that the deductible proportion referred to in Article 19-bis of DPR No 633/72 applies without distinction to all goods and services acquired by a taxable person, irrespective of whether those goods and services are used for transactions in respect of which VAT is deductible, for transactions in respect of which VAT is not deductible, or for both types of transactions.

18 In those circumstances, the Commissione tributaria regionale di Roma (Regional Tax Court, Rome) stayed proceedings and referred the following question to the Court for a preliminary ruling:

'For the purposes of exercising the right of deduction, are national provisions (in particular Article 19(5) and Article 19-bis of [DPR No 633/72]) and the practice of the national tax authority which requires that reference be had to the composition of a trader's turnover, inter alia in order to identify so-called "incidental" transactions, but make no provision for a method of calculation that is based on both the composition and the actual destination of the acquisitions and that objectively reflects the actual share of the expenditure attributable to each of the — taxed and untaxed — activities engaged in by the taxpayer incompatible with an interpretation of Articles 168 and Articles 173 to 175 of Directive 2006/112 which is guided by the principles of proportionality, effectiveness and neutrality, as set out in EU law?'

Consideration of the question referred

Preliminary observations

19 First, although the referring court has formally referred, in its request for a preliminary ruling, to Articles 168 and 173 to 175 of Directive 2006/112, it should be pointed out that, in the tax year at issue in the main proceedings, the right of deduction of taxable persons was governed mainly by Articles 17 and 19 of the Sixth Directive.

20 Second, it is clear from the documents before the Court that, by adopting Article 19(5) and Article 19-bis of DPR No 633/72, the national legislature intended to take advantage of the method of derogation provided for in point (d) of the third subparagraph of Article 17(5) of the Sixth Directive.

21 In those circumstances, it must be held that, by its question, the referring court is asking, in essence, whether point (d) of the third subparagraph of Article 17(5) and Article 19 of the Sixth Directive must be interpreted as not precluding national rules and practice, such as those at issue in the main proceedings, which require a taxable person:

— to apply to all goods and services which he has acquired a deductible proportion based on turnover, without providing for a method of calculation which is based on the nature and actual destination of each of the goods and services acquired and which objectively reflects the part of the expenditure actually to be attributed to each of the taxed and untaxed activities; and

— to refer to the composition of his turnover in order to identify transactions which may be classified as 'incidental'.

The Court's reply

22 It must be borne in mind at the outset that, under Article 17(2) of the Sixth Directive, taxable persons have the possibility of deducting the tax on the acquisition or supply of goods or services which are intended to be used exclusively for carrying out taxable transactions.

23 In respect of the goods and services which are intended to be used for the needs both of transactions giving rise to a right of deduction and of those which do not give rise to such a right, the first subparagraph of Article 17(5) of the Sixth Directive provides that the deduction is allowable only for the part of the VAT which is proportional to the amount relating to the first type of transactions.

24 However, the third subparagraph of Article 17(5) of the Sixth Directive allows Member States to use specific methods, of a derogating character, for the calculation of the right of deduction, including that laid down in point (d) of that provision (see, to that effect, judgment of 8 November 2012, *BLC Baumarkt* , C-511/10, EU:C:2012:689, paragraph 24).

25 In accordance with point (d) of the third subparagraph of Article 17(5) of the Sixth Directive, a Member State may authorise or compel a taxable person to make the deduction in accordance with the rule laid down in the first subparagraph of Article 17(5) of that directive, in respect of all goods and services used for all transactions referred to therein.

26 In the first place, the Court must consider whether point (d) of the third subparagraph of Article 17(5) of the Sixth Directive, read in context, must be interpreted as meaning that the method of calculating the right to deduct VAT for which it provides implies the use of a deductible proportion based on turnover.

27 In that regard, it must be pointed out that, contrary to the other derogating methods of calculation set out in the third subparagraph of Article 17(5) of the Sixth Directive, that provided for in point (d) provides expressly that its application is to be applied in accordance with the rule referred to the first subparagraph of Article 17(5) of that directive.

28 As is apparent from paragraph 23 above, the rule referred to in the first subparagraph of Article 17(5) of the Sixth Directive does not specify how the part of the VAT which is proportional to the amount relating to transactions giving rise to the right to deduct is to be determined.

29 That being so, the second subparagraph of Article 17(5) of the Sixth Directive, which immediately follows the first subparagraph and begins with the words '[t]his proportion', thus referring to the deductible proportion provided for in the first subparagraph, provides that that proportion must be determined in accordance with Article 19 of that directive.

30 Article 19(1) of the Sixth Directive provides that the proportion deductible under the first subparagraph of Article 17(5) of that directive must be made up of a fraction having, as numerator, the turnover attributable to transactions in respect of which VAT is deductible and, as denominator, the turnover attributable to those transactions and to transactions in respect of which VAT is not deductible.

31 Accordingly, the reference in point (d) of the third subparagraph of Article 17(5) of the Sixth Directive to compliance with the rule referred to in the first subparagraph of that paragraph must be read as involving the use of a deductible proportion based on turnover in the implementation of that provision.

32 It follows from this that point (d) of the third subparagraph of Article 17(5) of the Sixth Directive, read in conjunction with the first and second subparagraphs of Article 17(5) and Article 19(1) of that directive, must be interpreted as meaning that the method of calculating the right to deduct VAT for which it provides implies the use of a proportion that is based on turnover.

33 In the second place, it is necessary to examine whether point (d) of the third subparagraph of Article 17(5) of the Sixth Directive precludes a Member State from requiring a taxable person to apply, to all of the goods and services acquired by it, a deductible proportion based on turnover, irrespective of the nature and actual destination of each of those goods and services.

34 First, in that regard, it is clear from the actual wording of the first subparagraph of Article 17(5) of the Sixth Directive that the calculation of a deductible proportion to determine the amount of deductible VAT is, in principle, reserved solely to goods and services used by a taxable person to carry out both economic effect, transactions which give rise to a right to deduct and those which do not (see, to that

effect, judgments of 6 September 2012, *Portugal Telecom* , C-496/11, EU:C:2012:557, paragraph 40, and of 9 June 2016, *Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft*, C-332/14, EU:C:2016:417, paragraph 25).

35 Second, under point (d) of the third subparagraph of Article 17(5) of the Sixth Directive, Member States are permitted to 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'.

36 Since the first subparagraph of Article 17(5) of the Sixth Directive, expressly referred to in point (d) of the third subparagraph of Article 17(5) of that directive, refers both to transactions in respect of which VAT is deductible and to those in respect of which it is not, the expression 'all transactions referred to therein' must be understood as referring to the two types of transactions referred to in the first subparagraph of Article 17(5) of that directive.

37 Unlike the first subparagraph of Article 17(5) of the Sixth Directive, point (d) of the third subparagraph of Article 17(5) of that directive does not use the expression 'both'.

38 In the absence of such a clarification, point (d) of the third subparagraph of Article 17(5) of the Sixth Directive must be understood as referring to all of the goods and services used by the taxable person concerned in order to carry out both transactions in respect of which VAT is deductible and those in respect of which it is not, without it being necessary that those goods and services be used for both of those types of transactions.

39 It must be recalled that, where a provision of EU law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see, inter alia, judgment of 9 March 2000, *EKW and Wein & Co* , C-437/97, EU:C:2000:110, paragraph 41).

40 To interpret point (d) of the third subparagraph of Article 17(5) of the Sixth Directive as applying only to goods and services used to carry out 'both' transactions in respect of which VAT is deductible and those in respect of which it is not would give that provision the same scope as the first subparagraph of Article 17(5) of that directive, from which that provision is, however, supposed to derogate.

41 It is true that the referring court appears to have doubts as to the compatibility of the interpretation set out in paragraph 38 above with the principles of proportionality of deductions, effectiveness of the right to deduct and VAT neutrality.

42 However, without it being necessary to examine the precise impact which those principles have on the interpretation of the third subparagraph of Article 17(5) of the Sixth Directive, it must be held that the taking into account of those principles, which govern the system of VAT but from which the legislature may validly derogate, cannot in any event justify an interpretation which would deprive that derogation, which the legislature has expressly intended, of all effectiveness.

43 The considerations set out in paragraph 38 above are, moreover, supported by one of the objectives pursued by the Sixth Directive, which is, as is clear from the 17th recital of that directive, to authorise the use of rules which are relatively simple to apply (see, to that effect, judgment of 8 March 2012, *Commission* v *Portugal*, C-524/10, EU:C:2012:129, paragraph 35).

44 In applying the calculation rule provided for in point (d) of the third subparagraph of Article 17(5) of the Sixth Directive, taxable persons are not obliged to assign the goods and services which they purchase either to transactions in respect of which VAT is deductible or to transactions in respect of which it is not, or to those two types of transactions, and consequently the national tax authorities do not have to verify whether that assignment has been correctly carried out.

45 In the third place, it is necessary to determine whether, in the light of Article 19(2) of the Sixth Directive, it is permissible for a Member State to require that taxable person also to refer to the composition of his turnover in order to identify, among the transactions carried out, those which may be classified as 'incidental'.

46 In that regard, it must be borne in mind that, pursuant to Article 19(2) of the Sixth Directive, in order to establish the proportion referred to in paragraph 1 of that article, the amount of the turnover relating to 'incidental real estate and financial transactions' must be excluded. However, the Sixth Directive does not define that latter concept.

47 However, the Court has already stated that, although the scale of the income generated by financial transactions within the scope of the Sixth Directive may be an indication that those transactions should not be regarded as incidental within the meaning of Article 19(2) of that directive, the fact that income greater than that produced by the activity stated by the undertaking concerned to be its main activity is generated by such transactions cannot, by itself, suffice to preclude their classification as 'incidental transactions' within the meaning of that provision (see, to that effect, judgment of 29 April 2004, *EDM* , C-77/01, EU:C:2004:243, paragraph 77).

48 Moreover, it is apparent from the Court's case-law that an economic activity must be classified as 'incidental', within the meaning of Article 19(2) of the Sixth Directive, if it does not constitute the direct, permanent and necessary extension of the business and if it does not entail a significant use of goods and services subject to VAT (see, to that effect, judgments of 11 July 1996, *Régie dauphinoise*, C-306/94, EU:C:1996:290, paragraph 22; of 29 April 2004, *EDM* , C-77/01, EU:C:2004:243, paragraph 76; and of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraph 31).

49 Accordingly, it must be held that the composition of the turnover of the taxable person constitutes a relevant factor in determining whether certain transactions must be regarded as 'incidental' within the meaning of the second sentence of Article 19(2) of the Sixth Directive, but account should also be taken, for that purpose, of the relationship between those transactions and the taxable activities of that taxable person and, as the case may be, of the use which they entail of the goods and services which are subject to VAT.

50 It follows from all of the foregoing considerations that point (d) of the third subparagraph of Article 17(5) and Article 19 of the Sixth Directive must be interpreted as not precluding national rules and practice, such as those at issue in the main proceedings, which require a taxable person:

— to apply to all goods and services which he has acquired a deductible proportion based on turnover, without providing for a method of calculation which is based on the nature and actual destination of each of the goods and services acquired and which objectively reflects the portion of the expenditure actually to be attributed to each of the taxed and untaxed activities; and

— to refer to the composition of his turnover in order to identify transactions which may be classified as 'incidental', in so far as the assessment carried out for that purpose also takes account of the relationship between those transactions and the taxable activities of that taxable person and, as the case may be, of the use which they entail of the goods and services which are subject to VAT.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Point (d) of the third subparagraph of Article 17(5) and Article 19 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, must be interpreted as not precluding national rules and practice, such as those at issue in the main proceedings, which require a taxable person:

— **to apply to all goods and services which he has acquired a deductible proportion based on turnover, without providing for a method of calculation which is based on the nature and actual destination of each of the goods and services acquired and which objectively reflects the portion of the expenditure actually to be attributed to each of the taxed and untaxed activities; and**

— **to refer to the composition of his turnover in order to identify transactions which may be classified as 'incidental', in so far as the assessment carried out for that purpose also takes account of the relationship between those transactions and the taxable activities of that taxable person and, as the case may be, of the use which they entail of the goods and services which are subject to value added tax.**

[Signatures]