Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

1 March 2012 *

(VAT — Directive 2006/112/EC — Articles 9, 168, 169 and 178 — Deduction of input tax paid in respect of transactions conducted with a view to carrying out planned economic activity — Purchase of land by the partners of a partnership — Invoices drawn up prior to registration of the partnership seeking the deduction)

In Case C-280/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Poland), made by decision of 31 March 2010, received at the Court on 4 June 2010, in the proceedings

Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wąsiewicz spółka jawna

v

Dyrektor Izby Skarbowej w Poznaniu,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič, J.-J. Kasel (Rapporteur) and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 22 June 2011,

after considering the observations submitted on behalf of:

— Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wąsiewicz spółka jawna, by M. Pawlik, tax adviser,

— the Polish Government, by M. Szpunar and by K. Rokicka, A. Gawłowska and A. Kramarczyk, acting as Agents,

— the German Government, by C. Blaschke, acting as Agent,

— the Greek Government, by K. Paraskevopoulou, Z. Chatzipavlou and M. Michelogiannaki, acting as Agents,

— the French Government, by J.-S. Pilczer, acting as Agent,

* Language of the case: Polish.

— the European Commission, by D. Triantafyllou and K. Herrmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 9, 168 and 169 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The reference has been made in proceedings between (i) Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wąsiewicz spółka jawna ('Polski Trawertyn'), general partnership, and its partners Granatowicz and Wąsiewicz ('partners'), and (ii) Dyrektor Izby Skarbowej w Poznaniu (Director of the Tax Office, Poznań) concerning the deduction of input value added tax ('VAT') in respect of transactions conducted prior to registration of a partnership in the companies register.

Legal context

Directive 2006/112

3 Article 9(1) of Directive 2006/112 states:

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

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

4 Article 168 of Directive 2006/112 provides, inter alia:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…'

5 Article 169 of Directive 2006/112 provides:

'In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

(a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State;

(b) transactions which are exempt pursuant to Articles 138, 142 or 144, Articles 146 to 149, Articles 151, 152, 153 or 156, Article 157(1)(b), Articles 158 to 161 or Article 164;

(c) transactions which are exempt pursuant to points (a) to (f) of Article 135(1), where the customer is established outside the Community or where those transactions relate directly to goods to be exported out of the Community.'

6 Article 178(a) of Directive 2006/112 states:

'In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240.'

7 Under Article 213(1) of Directive 2006/112:

'Every taxable person shall state when his activity as a taxable person commences, changes or ceases.

Member States shall allow, and may require, the statement to be made by electronic means, in accordance with conditions which they lay down.'

8 Article 220 of Directive 2006/112 provides:

'Every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party:

(1) supplies of goods or services which he has made to another taxable person or to a non-taxable legal person;

(2) supplies of goods as referred to in Article 33;

(3) supplies of goods carried out in accordance with the conditions specified in Article 138;

(4) any payment on account made to him before one of the supplies of goods referred to in points (1), (2) and (3) was carried out;

(5) any payment on account made to him by another taxable person or non-taxable legal person before the provision of services was completed.'

9 Article 226 of Directive 2006/112 provides, inter alia:

'Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

(1) the date of issue;

…

(4) the customer's VAT identification number, as referred to in Article 214, under which the customer received a supply of goods or services in respect of which he is liable for payment of VAT, or received a supply of goods as referred to in Article 138;

(5) the full name and address of the taxable person and of the customer;

…’

10 Under Article 273 of Directive 2006/112:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

National legislation

11 Article 15(1) and (2) of the Law of 11 March 2004 on value added tax (Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług, Dziennik Ustaw No 54, item 535), in the version applicable at the time of the facts in the main proceedings (‘Law on VAT’), provides:

‘(1) Taxable persons are legal persons, organisational units without legal personality and natural persons pursuing an independent economic activity referred to in paragraph 2, regardless of the purpose or result of such activity.

(2) Economic activities shall comprise all activities of producers, traders and service providers, including extractors of natural resources and farmers, as well as the activity of persons exercising professions, also when the given activity was carried out once in circumstances indicating an intention to perform such activities frequently. Economic activity shall include also activities consisting in the exploitation of goods or intangible or legal assets on a continuing basis for the purpose of obtaining income therefrom.’

12 Under Article 86(1) of the Law on VAT:

‘In so far as the goods and services are used to conduct taxable transactions, a taxable person within the meaning of Article 15 shall have the right to deduct the amount of input tax from the amount of tax due, subject to Articles 114, 119(4), 120(17) and (19), and Article 124.’

13 Article 86(2) of the Law on VAT prescribes:

‘Subject to subparagraphs 3 to 7, the amount of input tax shall consist of:

(1) the total amount of tax specified in the invoices received by the taxable person:

(a) for the acquisition of goods and services,

(b) as confirmation of prepayment (advance payment, deposit, instalment), where they have given rise to a tax liability,

(c) from the commissioning party for the supply of goods forming the subject-matter of a commission contract,

…’

14 Under Article 86(10)(1) of the Law on VAT the right to deduct the amount of input tax arises when a return is drawn up for the period in which the taxable person received an invoice or customs document.

15 Article 106(1) of the Law on VAT provides:

'Taxable persons within the meaning of Article 15 shall be required to issue an invoice confirming, in particular, the sale made, the date of the sale, the unit price excluding tax, the taxable amount, the rate and amount of tax, the amount due and data on the taxable person and the acquirer, subject to paragraphs 2, 4 and 5 and Articles 119(10) and 120(16).'

16 Under Article 9(1)(1) and (2) of the Decree of the Minister for Finance of 25 May 2005 on the refund of tax to certain taxable persons, the advance refund of tax, the issue of invoices and the method for storing them, and lists of goods and services to which the exemptions from the tax on goods and services do not apply (Dziennik Ustaw No 95, item 798), applicable until 1 December 2008, an invoice confirming a sale must contain at least the first name and surname or name or abbreviated name of the seller and the acquirer and the addresses thereof and the tax identification numbers of the seller and the acquirer.

17 In Polish law, non-cash contributions made to companies governed by commercial and civil law are exempt from tax. In addition, a registered partnership does not come into being until entry in the companies register.

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

18 On 22 December 2006, a court official issued an invoice to the partners for the acquisition of an opencast stone quarry.

19 On 26 April 2007, the partners founded Polski Trawertyn. The same day, a notary issued an invoice to the partnership for drawing up a notarial act and extracts relating to its setting up.

20 The inspections carried out by the relevant authorities at Polski Trawertyn in respect of the period from June to September 2007 resulted in their finding an irregularity affecting the declared amount of input tax. It was found that in June 2007 the partnership had overstated the input tax by entering the two invoices mentioned above in its VAT return.

21 In relation to the first of the invoices, the inspection authority stated that Polski Trawertyn did not have the right to deduct the input VAT since the acquirer of the immovable property was not the company itself but the natural persons who, after the partnership was set up on 26 April 2007, contributed the property, as a contribution in kind, to the partnership. As regards the second invoice, the tax authority concluded that it also had no right to deduct the input tax indicated therein because the invoice had been issued before the date on which Polski Trawertyn was registered in the companies register. Since registration was effected on 5 June 2007, the invoice of 26 April 2007 was issued to a non-existent entity.

22 Since the Director of the Izba Skarbowa w Poznaniu (Tax Office, Poznań), after the appeal brought by Polski Trawertyn, upheld the decision of the tax authorities, the partnership brought the case before the Wojewódzki Sąd Administracyjny w Poznaniu (Regional Administrative Court, Poznań). Since that court dismissed the appeal the partnership appealed in cassation.

23 In support if its appeal the partnership argued, inter alia, that, since the acquisition of the property — an opencast quarry in the main proceedings — was effected with the intention of using it for an economic activity, and was subsequently confirmed by objective facts (the creation of an economic

entity and its registration as a taxable person), it may be reasonably concluded that the partners concerned acted as a taxable person for the purposes of Article 9 of Directive 2006/112. A taxable person has, under Articles 168 and 169 of that directive, the right to deduct immediately the input VAT paid on investment expenditure incurred for the purposes of transactions which it intends to carry out.

24 The Naczelny Sąd Administracyjny takes the view that the solution to the case before it depends on whether, in view of Articles 9, 168, 169, 178(a) and 226 of Directive 2006/112 and in the light of the facts of the case in the main proceedings, Polski Trawertyn has the right to deduct VAT on purchases effected by partners before the partnership came into being as a legal entity.

25 In those circumstances, the Naczelny Sąd Administracyjny decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is an entity, in the persons of future partners, which effects investment expenditure before formal registration of the partnership as an entity governed by commercial law or registration for purposes of value added tax, entitled, following registration of the partnership as an entity governed by commercial law and registration for purposes of value added tax, to exercise, pursuant to Article 9 and Articles 168 and 169 of … Directive 2006/112 …, the right to deduct input tax incurred in connection with investment expenditure which is used for taxable activities carried out within the framework of the partnership?

(2) Does an invoice documenting incurred investment expenditure which was issued to the partners, and not to the partnership, preclude exercise of the right to deduct input tax incurred in connection with investment expenditure as referred to in Question 1?’

Consideration of the questions referred

The first question

26 At the outset, it should be noted that, as was apparent from the arguments presented to the Court at the hearing, it is established that the partners cannot, by applying the national legislation applicable in the main proceedings, rely on a right to deduct VAT on investment expenditure which they effected before the registration and identification of Polski Trawertyn for the purposes of VAT, for and with the view to its economic activity, because the contribution of the capital goods at issue is an exempt transaction. It must therefore be held that, in a situation such as that at issue in the main proceedings, not only does that national legislation not permit that partnership to exercise the right to deduct VAT incurred on the capital goods at issue, but also prevents the partners who effected the investment expenditure from exercising that right.

27 In those circumstances, the first question must be understood as asking, in essence, whether Articles 9, 168 and 169 of Directive 2006/112 must be interpreted as precluding national legislation which permits neither partners nor their partnership to exercise the right to deduct input tax on the investment costs incurred by those partners before registration and identification of the partnership for the purposes of and with the view to its economic activity.

28 Before replying to that question, it should be noted, first, that according to the case-law of the Court, the economic activities referred to in Article 4(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 (OJ 1977 L 145, p. 1, ‘Sixth Directive’), which is in essence identical to the first subparagraph of Article 9(1) of Directive 2006/112, may consist in several consecutive transactions and that preparatory acts, such as the acquisition of business assets

and therefore the purchase of immovable property, must themselves be treated as constituting economic activity (see, inter alia, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 22, and Case C-110/94 *INZO* [1996] ECR I-857, paragraph 15).

29 The Court has also held that the principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of and with the view to commencing a business must be regarded as an economic activity and that it would be contrary to that principle if such an activity did not commence until the property was actually exploited, that is to say until it began to yield taxable income. Any other interpretation would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of immovable property and expenditure incurred during exploitation (see, inter alia, *Rompelman*, paragraph 23, and *INZO*, paragraph 16).

30 The Court concluded therefrom that anyone who carries out such investment transactions which are closely connected with and necessary for the future exploitation of immovable property must be regarded as a taxable person within the meaning of the Sixth Directive (see *Rompelman*, paragraph 23).

31 Accordingly, in a situation such as that at issue in the main proceedings, in which the partners of a partnership incurred, before registration and identification of the partnership for the purposes of VAT, investments necessary for the future exploitation of immovable property by the partnership, those partners may be considered to be taxable persons for the purposes of VAT and are therefore, in principle, entitled to exercise the right to deduct input tax.

32 Therefore, the fact that the contribution of an immovable property to a partnership by its partners is a transaction exempted from VAT and the fact that those partners do not pay VAT upon that transaction cannot have the consequence of burdening them with the cost of the VAT in the context of their economic activity without any possibility of their deducting it or of obtaining a refund (see, to that effect, *Rompelman*, paragraph 23).

33 Second, it should be noted that the Court has held that, in applying the principle of neutrality of VAT, a taxable person whose sole object is to prepare the economic activity of another taxable person and who has not effected any taxable transaction may exercise a right to deduct in relation to taxable transactions carried out by the other taxable person (see, to that effect, Case C-137/02 *Faxworld* [2004] ECR I-5547, paragraphs 41 and 42). That interpretation of the Sixth Directive concerned a situation where the VAT which the first taxable person wished to deduct related to supplies acquired by it for the purpose of carrying out taxable transactions planned by the second taxable person.

34 It is true, as the Advocate General observed at points 46 to 49 of his Opinion, that the factual and legislative context of the dispute which led to the reference for a preliminary ruling giving rise to the judgment in *Faxworld* was different to that forming the basis for the present reference for a preliminary ruling. However, the grounds underlying the Court's interpretation in that judgment remain valid in circumstances such as those which characterise the main proceedings.

35 It must therefore be held that, in so far as, under national legislation, the partners, even though they may be considered taxable persons for the purposes of VAT, are unable to rely on the taxable transactions effected by Polski Trawertyn in order to relieve the cost of the VAT on investment transactions effected for the purposes of and with the view to the activity of that partnership, the latter must, in order to ensure the neutrality of taxation, be entitled to take account of those investment transactions when deducting VAT (see, to that effect, *Faxworld*, paragraph 42).

36 That finding is not called into question by the argument that to allow, in a situation such as that at issue in the main proceedings, the partners to recoup the input tax paid or to authorise Polski Trawertyn to deduct that VAT would be likely to increase the risk of evasion or abuse of VAT.

37 According to the case-law of the Court, the status of taxable person is not achieved and the right to deduct may not be exercised until the person seeking to deduct the VAT has established that the relevant conditions are fulfilled and that his intention to commence the economic activities giving rise to taxable transactions is confirmed by objective evidence. If the tax authorities were to conclude that the right to deduct has been exercised fraudulently or abusively, they would be entitled to demand, with retrospective effect, repayment of the amounts deducted (see, inter alia, *Rompelman*, paragraph 24; *INZO*, paragraph 24; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 33).

38 In the light of those considerations, the answer to the first question is that Articles 9, 168 and 169 of Directive 2006/112 must be interpreted as precluding national legislation which permits neither partners nor their partnership to exercise the right to deduct input VAT on the investment costs incurred by those partners, before the creation and registration of the partnership, for the purposes of and with the view to its economic activity.

The second question

39 By its second question, the national court asks, in essence, whether Articles 168 and 178(a) of Directive 2006/112 must be interpreted as precluding national legislation under which, in circumstances such as those at issue in the main proceedings, input tax paid cannot be deducted by a partnership due to the fact that the invoice, drawn up before the registration and identification of the partnership for the purposes of VAT, was issued in the name of the future partners of that partnership.

40 In that regard, it should be noted that the right to deduct provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (Case C-368/09 *Pannon Gép Centrum* [2010] ECR I-7467, paragraph 37 and the case-law cited).

41 As regards the formal requirements of that right, it is apparent from Article 178(a) of Directive 2006/112 that its exercise is subject to the holding of an invoice. Article 226 of Directive 206/112 states that, without prejudice to the particular provisions of that directive, only the details set out in that article are required for VAT purposes on invoices issued pursuant to Article 220 of that directive. Under Article 226(1) and (5) of the directive, the date of issue of the invoice and the full name as well as the address of the taxable person and of the customer must thus appear on the invoice.

42 It follows that it is not open to Member States to make the exercise of the right to deduct VAT dependent on compliance with conditions relating to the content of invoices which are not expressly laid down by the provisions of Directive 2006/112. Under Article 273 of that directive, Member States may impose obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, but cannot rely on that power in order to impose additional obligations over and above those laid down by that directive (see *Pannon Gép Centrum*, paragraph 40).

43 In addition, the Court has held that the principle of VAT neutrality requires that deduction of input tax be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. Where the tax authority has the information necessary to establish that the taxable person is, as the recipient of the supplies in question, liable to VAT, it cannot impose, in relation to the taxable person's right to deduct that tax, additional conditions which may have the effect of rendering that right ineffective (see, as regards the reverse charge procedure, Case C-385/09 *Nidera Handelscompagnie* [2010] ECR I-10385, paragraph 42).

44 As regards the case in the main proceedings, it must be stated that, as is apparent from the statement of reasons relating to the first question referred for a preliminary ruling, the material conditions laid down in Article 168(a) of Directive 2006/112 appear to be satisfied so that, inter alia, Polski Trawertyn can exercise the right to deduct the VAT relating to the acquisition of the immovable property, since that transaction was indeed performed for the purposes of its taxable transactions.

45 As the inability of Polski Trawertyn to exercise its right to deduct the input tax paid arises from the fact that, at the date of issue of the invoice relating to the acquisition, that partnership was not yet registered or identified for the purposes of VAT and the invoice had, therefore, been drawn up in the name of the partners, even though, as the national court found, those who paid the input tax and those who make up Polski Trawertyn are one and the same legal entity, that inability must be considered to result from a purely formal obligation.

46 As the Advocate General stated at point 72 of his Opinion, compliance with such an obligation cannot be required where, in a situation such as that at issue in the main proceedings, that requirement would have the effect of rendering that right of deduction ineffective, and therefore call into question the neutrality of VAT.

47 According to the case-law, first, while it is true that there is an obligation on taxable persons, pursuant to Article 213 of Directive 2006/112, to state when their activity commences, changes or ceases, the Member States are in no way authorised, in the event of such a declaration not being submitted, to deprive the taxable person of that right (see *Nidera Handelscompagnie*, paragraph 48).

48 The Court has held, second, that, while it is true that an invoice has an important documentary function because it may contain verifiable data, there are circumstances in which the data may be legitimately established by means other than by an invoice and where the requirement to have an invoice in full conformity with the provisions of Directive 2006/112 would be capable of affecting the right of a taxable person to deduct (see, to that effect, Case C-90/02 *Bockemühl* [2004] ECR I-3303, paragraphs 51 and 52).

49 However, it should be noted that, as is apparent from the decision for reference, in a situation such as that at issue in the main proceedings, the data necessary to ensure a reliable and efficient collection of VAT is established.

50 Having regard to those considerations, the answer to the second question is that Articles 168 and 178(a) of Directive 2006/112 must be interpreted as precluding national legislation under which, in circumstances such as those at issue in the main proceedings, input VAT paid cannot be deducted by a partnership when the invoice, drawn up before the registration and identification of the partnership for VAT purposes, was issued in the name of the partners of that partnership.

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 (First Chamber) hereby rules:

1. **Articles 9, 168 and 169 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation which permits neither partners nor their partnership to exercise the right to deduct input VAT on investment costs incurred by those partners, before the creation and registration of the partnership, for the purposes of and with the view to its economic activity.**

2. **Articles 168 and 178(a) of Directive 2006/112 must be interpreted as precluding national legislation under which, in circumstances such as those at issue in the main proceedings, the input VAT paid cannot be deducted by a partnership when the invoice, drawn up before the registration and identification of the partnership for the purposes of value added tax, was issued in the name of the partners of that partnership.**

[Signatures]