JUDGMENT OF THE COURT (Fifth Chamber)
29 February 1996 *

In Case C-110/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Rechtbank van Eerste Aanleg, Bruges (Belgium) for a preliminary ruling in the proceedings pending before that court between

Intercommunale voor Zeewaterontzilting (Inzo), in liquidation,

and

Belgian State,

on the interpretation of Article 4(1) and (2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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),

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet, J. C. Moitinho de Almeida, C. Gulmann (Rapporteur) and L. Sevón, Judges,

* Language of the case: Dutch.

Advocate General: C. O. Lenz,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Intercommunale voor Zeewaterontzilting, in liquidation, by Marc van Grimbergen and Xavier Leurquin, of the Brussels Bar,

— the Belgian Government, by Bernard van de Walle de Ghelcke, of the Brussels Bar,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, and Bernd Kloke, Regierungsrat in the same Ministry, acting as Agents,

— the Commission of the European Communities, by Berend Jan Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Intercommunale voor Zeewaterontzilting, the Belgian Government, the German Government and the Commission at the hearing on 5 October 1995,

after hearing the Opinion of the Advocate General at the sitting on 23 November 1995,

gives the following

Judgment

1 By judgment of 5 April 1994, received at the Court on 8 April 1994, the Rechtbank van Eerste Aanleg (Court of First Instance), Bruges, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 4(1) and (2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

2 That question was raised in proceedings in which Intercommunale voor Zeewaterontzilting, a public limited company in liquidation (hereinafter 'Inzo'), appealed against a demand issued to it by the Belgian administration for repayment of the VAT which Inzo had recovered by exercising its right to deduct.

3 Article 4(1) and (2) of the Sixth Directives provide 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 the 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 as an economic activity.'

4 Article 17(2) of the Sixth Directive provides that:

'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;

...'.

5 Article 18(4) provides that 'Where for a given tax period the amount of authorized deductions exceeds the amounts of tax due, the Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine'.

6 Article 22(1) of the directive provides that: 'Every taxable person shall state when his activity as a taxable person commences, changes or ceases'.

7 Inzo was founded in 1974 by, among others, the provinces of East and West Flanders and a number of municipalities. Its objects were defined as developing and exploiting processes for the treatment of sea water and brackish water and turning them into drinking water with a view to its distribution.

8 To that end, Inzo acquired certain capital goods and commissioned a study on the profitability of a project for the construction of a desalination plant. It paid VAT in respect of those activities, in particular on the study. That tax was subsequently repaid to it by the tax authority pursuant to Article 76 of the Belgian VAT Code.

9 The study of the project identified numerous profitability problems and some investors withdrew, whereupon in 1988 the project was abandoned and Inzo was put into liquidation. Consequently, it never commenced the activity envisaged.

10 In 1983, the tax authority found in the course of a tax inspection that Inzo had not carried out any taxable transaction. It therefore claimed repayment of the VAT recovered by Inzo between 1978 and 1982, that is to say BFR 4 913 001, plus a fine of BFR 736 500 and default interest.

11 Inzo contested that claim before the Rechtbank van Eerste Aanleg, Bruges. Referring in particular to the judgment of the Court in Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655, Inzo claimed that it had indicated by unequivocal acts that it intended regularly to carry out taxable transactions. It referred in this connection to its articles of association and the fact that it had recruited staff, established an organization to enable its objects to be attained and obtained certain loans.

12 In the proceedings before the Rechtbank the tax authority essentially argued in response that Inzo was not a 'taxable person' within the meaning of Articles 4 and 17 of the Sixth Directive. It contended that commissioning of the study could not be described as an act unequivocally indicating Inzo's intention subsequently to move to a commercial phase, because its articles of association allowed it to confine itself merely to performing that study and its members had reserved the right to decide not to proceed after the study had been carried out.

13 In those circumstances, the Rechtbank decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the activity of a company established with a specific object ("seeking and researching, establishing, exploiting and promoting all processes for the treatment of sea water and brackish water, and obtaining and selling water"), an activity which in this case extended only to commissioning and paying for a wide-ranging profitability study dealing with the process to be developed, which demonstrated the non-profitable nature of the project and which immediately resulted in the liquidation of the company, to be regarded as an economic activity within the meaning of Article 4(1) and (2) of the Sixth Council Directive of 17 May 1977?'

14 The national court's question asks essentially whether Article 4 of the directive must be interpreted as meaning that:

— where the tax authority has accepted that a company which has declared its intention to commence an economic activity giving rise to taxable transactions has the status of a taxable person for the purposes of VAT, the commissioning of a profitability study for the activity envisaged may be regarded as an economic activity within the meaning of that article, even if the purpose of that study is to investigate the degree of profitability of the activity envisaged, and that

— the status of 'taxable person' may be withdrawn from that company retroactively, where, in view of the results of that study, it has been decided not to move to the operational phase but to put the company into liquidation, so that the envisaged economic activity did not give rise to any taxable transactions.

15 In *Rompelman* the Court held, at paragraph 22, that the economic activities referred to Article 4(1) 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.

16 Also in *Rompelman*, the Court held, at paragraph 23, 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 of Article 4 of the directive would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it in accordance with Article 17 and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of immovable property and expenditure incurred during exploitation.

17 It follows from *Rompelman* that even the first investment expenditure incurred for the purposes of a business may be regarded as an economic activity within the meaning of Article 4 of the directive and that, in that context, the tax authority must take into account the declared intention of the business.

18 Where the tax authority has accepted that a company which has declared its intention to begin an economic activity giving rise to taxable transactions has the status of a taxable person for the purposes of VAT, the carrying out of a study into

the technical and economic aspects of the activity envisaged may therefore be regarded as an economic activity within the meaning of Article 4 of the directive, even if the purpose of that study is to investigate the degree of profitability of the activity envisaged.

19 It follows that, in the same circumstances, VAT paid in respect of such a profitability study may in principle be deducted in accordance with Article 17 of the directive.

20 Contrary to the submissions of the Belgian and German Governments, entitlement to that reduction is retained, even if it was subsequently decided, in view of the results of that study, not to move to the operational phase but to put the company into liquidation, with the result that the economic activity envisaged did not give rise to taxed transactions.

21 As the Commission has observed, it is contrary to the principle of legal certainty for the rights and obligations of taxable persons to depend on facts, circumstances or events which occurred after the tax authority made a finding in respect of those rights and obligations. It follows that, as from the time when the tax authority accepted, on the basis of information provided by a business, that it should be accorded the status of a taxable person, that status cannot, in principle, subsequently be withdrawn retroactively on account of the fact that certain events have or have not occurred.

22 Any other interpretation of the directive would, moreover, be contrary to the principle that VAT should be neutral as regards the tax burden on a business. It would be liable to create, as regards the tax treatment of the same investment activities, unjustified differences between businesses already carrying out taxable transactions and other businesses seeking by investment to commence activities which will in future be a source of taxable transactions. Likewise, arbitrary differences would be established between the latter businesses, in that final acceptance of the deductions would depend on whether or not the investment resulted in taxable transactions.

23 Finally, as the Court held in *Rompelman*, at paragraph 24, it is for the person applying to deduct VAT to show that the conditions for deduction are met and Article 4 does not preclude the tax authority from requiring objective evidence in support of the declared intention to commence economic activities which will give rise to taxable transactions.

24 In that context, as the Commission has stated, a taxable person acquires that status definitively only if the person concerned made the declaration of intention to begin the envisaged economic activities in good faith. In cases of fraud or abuse, in which, for example, the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations.

25 Accordingly, it should be stated in reply to the question from the national court that Article 4 of the Sixth Directive must be interpreted as meaning that:

— where the tax authority has accepted that a company which has declared an intention to commence an economic activity giving rise to taxable transactions has the status of a taxable person for the purposes of VAT, the commissioning of a profitability study in respect of the envisaged activity may be regarded as an economic activity within the meaning of that article, even if the purpose of that study is to investigate to what degree the activity envisaged is profitable, and that

— except in cases of fraud or abuse, the status of taxable person for the purposes of VAT may not be withdrawn from that company retroactively where, in view of the results of that study, it has been decided not to move to the operational phase, but to put the company into liquidation, with the result that the economic activity envisaged has not given rise to taxable transactions.

Costs

26 The costs incurred by the German Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the question referred to it by the Rechtbank van Eerste Aanleg, Bruges, by judgment of 5 April 1994, hereby rules:

Article 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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 meaning that:

— where the tax authority has accepted that a company which has declared an intention to commence an economic activity giving rise to taxable transactions has the status of a taxable person for the purposes of VAT, the commissioning of a profitability study in respect of the envisaged activity may be regarded as an economic activity within the meaning of that article, even if the purpose of that study is to investigate to what degree the activity envisaged is profitable, and that

— **except in cases of fraud or abuse, the status of taxable person for the purpose of VAT may not be withdrawn from that company retroactively where, in view of the results of that study, it has been decided not to move to the operational phase, but to put the company into liquidation with the result that the economic activity envisaged has not given rise to taxable transactions.**

Edward Puissochet Moitinho de Almeida

Gulmann Sevón

Delivered in open court in Luxembourg on 29 February 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber