JUDGMENT OF THE COURT (Sixth Chamber)

26 June 2003 *

In Case C-442/01,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

KapHag Renditefonds 35 Spreecenter Berlin-Hellersdorf 3. Tranche GbR

and

Finanzamt Charlottenburg,

on the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, F. Macken, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— KapHag Renditefonds 35 Spreecenter Berlin-Hellersdorf 3. Tranche GbR, by D. Ulrich, Rechtsanwalt,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents, with A. Böhlke, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, represented by W.-D. Plessing, acting as Agent, and of the Commission, represented by K. Gross, with A. Böhlke, at the hearing on 15 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2003,

gives the following

Judgment

1 By order of 27 September 2001, received at the Court on 16 November 2001, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

2 Those questions were raised in proceedings between KapHag Renditefonds 35 Spreecenter Berlin-Hellersdorf 3. Tranche GbR ('KapHag') and the Finanzamt Charlottenburg, a tax authority, concerning the applicability of value added tax ('VAT') where a partnership admits a partner in consideration for a contribution in cash.

Legal background

Community legislation

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

4 Article 4(1) and (2) of the Sixth Directive provides:

'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.'

5 Article 13B(d)(5) of the Sixth Directive provides as follows:

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

...

(d) the following transactions:

...

5. transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities....'

6 Article 17(2) and (5) of the Sixth Directive reads as follows:

'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;

...

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.'

7 Article 19(1) and (2) of the Sixth Directive provides:

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

— as numerator, the total amount, exclusive of value added tax, of turnover per year attributable to transactions in respect of which value added tax is deductible under Article 17(2) and (3),

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

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

2. By way of derogation from the provisions of paragraph 1, there shall be excluded from the calculation of the deductible proportion, amounts of turnover attributable to the supplies of capital goods used by the taxable person for the purposes of his business. Amounts of turnover attributable to transactions specified in Article 13B(d), in so far as these are incidental transactions, and to incidental real estate and financial transactions shall also be excluded....'

National legislation

8 Paragraph 1(1) of the Umsatzsteuergesetz (Law on turnover tax, BGBl. 1991 I, p. 351, 'the UStG') provides:

'1. The following transactions are subject to turnover tax:

(1) Supplies of goods or services effected for consideration by a business within the territory of the country in the course of its business....'

9 Paragraph 4 of the UStG provides:

'Among the transactions referred to in Paragraph 1(1), number 1, the following are exempted:

...

8. ...

(f) transactions, including the negotiation of transactions, in interests in companies and other associations,

....'

10 Paragraph 15 of the UStG provides:

'...

2. There is no deduction of tax in respect of supplies of goods and the import of goods, and in respect of supplies of services, which the business uses for effecting the following transactions:

(1) exempt transactions;

...

4. If a business uses any goods supplied or imported for the purposes of his business, or a service supplied to him, only in part for effecting transactions which exclude the right to deduct, then there shall not be deducted such part of the input tax as is to be attributed economically to transactions which result in the exclusion of the right to deduct. The business is entitled to make a fair estimate of the non-deductible parts.

....'

Main proceedings and questions referred to the Court

11 KapHag is a partnership ('Gesellschaft bürgerlichen Rechts') governed by German civil law; its partners are LOGOS Grundstücks-Treuhand GmbH ('LOGOS 1'), LOGOS Zweite Grundstücks-Treuhand GmbH ('LOGOS 2') and Dr Moegelin, Dr Tiemann and Dr Mehnert.

12 KapHag's object was to acquire a development right ('Erbbaurecht') in respect of a plot of land in Berlin (Germany), to erect thereon buildings forming part of a shopping centre, to exploit those buildings by leasing or managing them and to maintain them. This development right was acquired by LOGOS 1 and LOGOS 2, within KapHag. On 2 August 1991, Dr Moegelin and Dr Tiemann became partners in KapHag.

13 KapHag was intended to take the form of a closed property fund. Partners could be admitted up to a total amount of DEM 38 402 000, plus 5% premium. The general contractual terms ('general terms') agreed on 1 October 1991 referred to KapHag's partnership agreement and to other agreements concluded or to be concluded by it.

14 On 12 November 1991, Dr Mehnert announced his intention to join KapHag and to contribute a total amount of DEM 38 402 000. On 13 November 1991, the partners in KapHag decided to delete a part of the general terms and agreed on a definitive version of KapHag's partnership agreement and on other parts of the general terms.

15 By a fee note of 19 December 1991, Dr Severin, a lawyer, invoiced the plaintiff for DEM 75 000, plus VAT of DEM 10 5000, for providing legal advice and drafting the partnership agreement. The legal advice related to the fund concept and the formation of the partnership.

16 In its 1991 VAT return, KapHag deducted the abovementioned VAT payment as input tax.

17 Following an audit, the Finanzamt Charlottenburg, by decision of 17 February 1998, disallowed that deduction; it relied on paragraphs 4(8)(f) and 15(2) of the UStG.

18 KapHag lodged an objection and then an appeal, both of which were rejected.

19 KapHag then appealed to the Bundesfinanzhof on a point of law.

20 The Bundesfinanzhof took the view that when a partnership admits a partner in consideration of a contribution in cash or in kind, it makes a supply of services

effected for consideration within the meaning of Article 2(1) of the Sixth Directive which is exempt under Article 13B(d)(5) of that directive. However, it considers that that concept is questionable, since a partner is admitted not on the basis of a bilateral contract between the new partner and the partnership but on the basis of a partnership agreement concluded between partners, so that, from the viewpoint of civil law, the new partner might be regarded as obtaining his share in the partnership not from the partnership but from the other partners. It is for that reason, in particular, that legal commentators conclude that there is no supply for consideration by the partnership in such a situation.

21 On the assumption that there is a supply by the partnership and that this supply must be exempt in accordance with Article 13B(d)(5) of the Sixth Directive, the question arises as to whether it constitutes a transaction in respect of which Articles 17 and 19 of the Sixth Directive provide for deduction of input tax. That would not be so if the issue of shares in the partnership constituted an incidental transaction within the meaning of the second sentence of Article 19(2) of the Sixth Directive. The Bundesfinanzhof inclines to the view that there was such an incidental transaction in the present case, but points out that it would be contrary to the common market, with free movement of capital, if the raising of a partnership's own capital by the issue of partnership shares were to have different fiscal consequences in the various Member States.

22 Taking the view that the outcome of the main proceedings called for an interpretation of the Sixth Directive, the Bundesfinanzhof decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

'1. Where a partnership admits a partner on payment of a capital contribution in cash, does it effect a supply to him for consideration within the meaning of Article 2(1) of Directive 77/388/EEC?

2. If so, is it an incidental transaction for the purposes of the second sentence of Article 19(2) of Directive 77/388/EEC, and is the taxable person entitled to rely on that provision, according to which such incidental transactions do not exclude deduction of input tax?'

First question

Observations submitted to the Court

23 KapHag maintains that a partnership is not in a position to hold its own shares, still less to transfer or grant them. In partnerships, only the partners hold shares. Accordingly, only the partners are able to issue shares to a new partner. The entry of a new partner into an existing partnership is effected under a contract concluded not between the incoming partner and the partnership but between the new partner and the other partners. It follows that the grant of shares to a new partner in a partnership does not constitute a supply of services by the partnership.

24 Nor can the prospects of profit represented by a share form the subject-matter of a supply of services by the partnership. According to the Court's case-law, the obtaining of income in the form of a share in the profits does not constitute consideration for the acquisition of a share.

25 Nor is the new partner's contribution effected for consideration. That contribution is not regarded as the acquisition 'for consideration' of a share in the partnership but is conceived as performance of the general obligation to favour the object of the partnership, which follows solely from that acquisition.

26 For those reasons, the first question must be answered in the negative.

27 The German Government claims that where a partnership issues new shares it is effecting a supply of services for consideration within the meaning of Article 2 of the Sixth Directive.

28 First, there exists between the provider and the recipient of the supply a legal relationship within which a mutual exchange of supplies is effected. The remuneration paid by the recipient, namely the payment in cash, constitutes consideration for the service rendered by the supplier, namely the grant of a share in the partnership. Second, there is an intrinsic link between the supply made and the remuneration obtained. The new partner makes a payment to the partnership with the objective of participating in the activities of the partnership *qua* undertaking. Payment of his contribution in cash is the condition of the acquisition of his status as a partner. A taxable transaction for the purposes of Article 2(1) of the Sixth Directive therefore takes place.

29 However, that transaction is exempt under Article 13B(d)(5) of the Sixth Directive, which provides that 'transactions... in shares... in companies or associations' are to be exempted.

30 In that context, the input tax cannot be deducted. It follows from the Court's case-law that where a taxable person supplies a service to another taxable person who uses it for an exempt transaction, the latter is not entitled to deduct the VAT already paid.

31 The Commission submits that, according to settled case-law, the mere acquisition and the mere holding of shares do not constitute an economic activity for the purposes of the Sixth Directive. Although the case in which that principle was established concerned holdings, the same conclusion holds good for the admission of a partner to a partnership, as in the present case.

32 The Commission raises the question whether the position might be different in the case of direct or indirect involvement in the management of the company in which the investment is made. In its view, such involvement cannot result solely from the acquisition or exercise of the status of partner. It would be necessary in that regard for the partner to carry out additional activities, which was not the position in the case before the national court.

33 Furthermore, Article 13B(d)(5) of the Sixth Directive has no relevance to the mere acquisition of shares. That provision does not apply to the creation of shares upon initial acquisition, but concerns transactions relating to shares already in existence.

34 The Commission therefore proposes that the Court answer the first question by stating that a partnership which admits a partner in consideration for payment of a contribution in cash does not effect a supply to the incoming partner of services for consideration for the purposes of Article 2(1) of the Sixth Directive.

Findings of the Court

35 The first question is intended to establish whether a partnership which admits a partner in consideration for payment of a contribution in cash effects towards the new partner a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive.

36 It follows from Article 2 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. Under Article 4(1) of that directive, a taxable person means any person who independently carries any economic activity. 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.

37 According to the Court's case-law (Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111, paragraph 12, and Case C-80/95 *Harnas & Helm* [1997] ECR I-745, paragraphs 13 and 14), Article 4 of the Sixth Directive confers a very wide scope on VAT. The Court has held that the concept of 'exploitation' within the meaning of Article 4(2) refers, in accordance with the requirements of the principle of neutrality of the system of VAT, to all transactions, whatever their legal form, by which it is sought to obtain income from the property in question on a continuing basis.

38 However, the Court has also specified that the mere acquisition and holding of shares in a company is not to be regarded as an economic activity, within the

meaning of the Sixth Directive, conferring on the holder the status of a taxable person. 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 (see *Harnas & Helm*, cited above, paragraph 15).

39 It follows that the entry of a new partner into a partnership in consideration for a contribution in cash, in circumstances such as those of the main case, does not constitute an economic activity, within the meaning of the Sixth Directive, on the part of the partner.

40 If the taking of shares does not in itself constitute an economic activity within the meaning of the Sixth Directive, the same must be true of activities consisting in the transfer of such shares (Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 33).

41 The admission of a new partner into a partnership does not therefore constitute a supply of services to him.

42 In that context, it is irrelevant whether the admission of the new partner must be regarded as the act of the partnership itself or as that of the other partners, since the admission of a new partner does not in any event constitute a supply of services for consideration for the purposes of the directive.

43 In the light of the foregoing, the answer to the first question must be that a partnership which admits a partner in consideration of payment of a contribution in cash does not effect towards that person a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive.

Second question

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

Costs

45 The costs incurred by the German Government and by the Commission, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 27 September 2001, hereby rules:

A partnership which admits a partner in consideration of payment of a contribution in cash does not effect towards that person a supply of services for consideration within the meaning 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.

Puissochet Gulmann Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 26 June 2003.

R. Grass — Registrar

J.-P. Puissochet — President of the Sixth Chamber