Case C-42/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

24 January 2019

Referring court:

Supremo Tribunal Administrativo (Portugal)

Date of the decision to refer:

5 December 2018

Appellant:

Sonaecom SGPS S.A.

Respondent:

Fazenda Pública (on behalf of the Autoridade Tributária e Aduaneira)

Subject matter of the main proceedings

Appeal against the judgment of the Tribunal Administrativo e Fiscal do Porto (Porto Administrative and Tax Court) which dismissed the legal challenge brought by Sonaecom SGPS, S.A. against the notices of assessment of value added tax (VAT) and compensatory interest for the periods January, February, March, April, June, July, August, October and December 2005 in the overall sum of EUR 1 088 675.77.

Subject matter and legal basis of the request for a preliminary ruling

The dispute in the main proceedings concerns the issue whether the deduction of value added tax borne by a company, with a view, first, to procuring services and, second, to paying a commission for a service which was intended as an investment, complies with the deductibility rules laid down in the Sixth VAT Directive, where the company's planned procurement and the investment both failed to materialise.

Legal basis: Article 267(3) TFEU.

Questions referred

(1) Is it compatible with the deductibility rules laid down in the Sixth VAT Directive, specifically Articles 4(1) and (2) and 17(1), (2) and (5), to deduct tax borne by the appellant, Sonaecom SGPS, in respect of consultancy services connected with a market study commissioned with a view to acquiring shares, where that acquisition did not materialise?

(2) Is it compatible with the deductibility rules laid down in the Sixth VAT Directive, specifically Articles 4(1) and (2) and 17(1), (2) and (5), to deduct tax borne by the appellant, Sonaecom SGPS, in respect of the payment to BCP of a commission for organising and putting together a bond loan, allegedly taken out with a view to integrating the financial structure of its affiliated companies, and which, since those investments failed to materialise, was ultimately transferred to Sonae, SGPS, the parent company of the group?

Provisions of EU law cited

Articles 4(1) and (2) and 17(1), (2) and (5) 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).

Provisions of national law cited

Código do Imposto sobre o Valor Acrescentado (Code on Value Added Tax):

Article 9(28)(a):

‘The following shall be exempt from the tax: 28 — ... (a) the granting and negotiation of credit, in any form, including discount and rediscount transactions, and the administration and management of credit by the person who granted it.’

Article 20(1) (which lists the situations in which there is a right to a deduction):

‘the tax which applies to goods and services procured, imported or used by the taxable person for the following purposes: (a) the supply of goods and the provision of services which are subject to tax and are not exempt;’

Brief summary of the facts and procedure

1 The appellant, Sonaecom SGPS, S.A., is a holding company which is engaged in the acquisition, holding and management of shares with full rights to the resulting income. In addition, it also provides strategic coordination and management services to companies operating in the telecommunications, media, software and systems integration markets.

2 In the course of its business, it procured consultancy services from Wilmer Cutler Pickering Hale and Dorr, and from ABN Amro Corporate Finance Ltd in connection with a market study, an activity carried on by those companies, for the purpose of possible active acquisitions of share capital by Sonaecom SGPS, S.A.

3 The appellant bore the value added tax ('VAT') in respect of the payment for those consultancy services, having applied a VAT reverse-charge in the amounts of EUR 167 129.10 and EUR 45 498.46 in relation to those costs.

4 The appellant also deducted VAT in the sum of EUR 769 500 in the return for June 2005 relating to the payment of a commission to Banco BCP Investimento S.A. in respect of a contract to organise, put together and guarantee the placement of a private issue of 3 000 000 bonds known as 'Obrigações Sonaecom SGPS 2005' (Sonaecom SGPS 2005 Bonds), which were intended to finance the company's operations in the service known as 'Triple Play'.

5 Following an audit, the Autoridade Tributária e Aduaneira (Tax and Customs Authority) took the view that the appellant could not deduct the VAT incurred in respect of those consultancy services. It considered that such consultancy services 'connected with the market study commissioned for the purpose of acquiring share capital in other companies are intended to assist in the acquisition of securities which will confer on the owners an entitlement to dividends which are outside the scope of VAT taxation, given that the purchase, sale and possession of shares do not constitute an economic activity'.

6 The Tax and Customs Authority also took the view that the taxable person did in fact carry out transactions which fall within the scope of the tax and are subject to VAT in the national territory. However, it considered that, since such inputs were intended to be used by the taxable person in order to acquire share capital in other companies, an activity which falls outside the scope of the tax, they do not give rise to a right of deduction by virtue of Article 20(1)(a) of the Portuguese Code on Value Added Tax.

7 Consequently, the Tax and Customs Authority carried out arithmetic adjustments to the taxable amount in the sum of EUR 982 127.56, which gave rise to the notices of assessment from January to April, June to August, October and December in the sum of EUR 982 127.57 in tax and EUR 106 548.20 in compensatory interest.

8 The applicant brought an action before the Tribunal Administrativo e Fiscal do Porto against those assessments, and in the judgment handed down by that court it was concluded that the evidence provided made it clear that the then applicant has the characteristics of a mixed holding company, because it manages shares and at the same time provides technical administration and management services to the affiliated companies.

9 In that judgment, the Tribunal Administrativo e Fiscal do Porto took the view that the commercial nature of the actions taken in the activity of managing shareholdings (Articles 2 and 463(5) of Portugal's Código das Sociedades Comerciais (Corporate Code) does not mean that that activity may be qualified as an economic activity within the meaning of Article 4(2) of the Sixth Directive, as is clear from the settled case-law of the Court of Justice of the European Union, and therefore it amounts to an activity which is outside the scope of VAT and is not subject to VAT.

10 Having analysed the nature of the then applicant's mixed holding company, the Tribunal Administrativo e Fiscal do Porto took the view in that judgment that, in order for the VAT borne by the applicant, in its capacity as a mixed holding company, to be deductible, the input transactions would have to have a direct and immediate connection with the output operations, the nature of which then gives rise to a right of deduction. That court thus took the view that it would be necessary for the transactions to have been economic transactions for VAT purposes and for the expenses incurred in procuring the goods or services in respect of which input VAT was incurred to have been included in the cost components of output operations with a right of deduction, since only in that way would the right of deduction be justified in view of the objective of tax neutrality.

11 With regard to the first of the transactions at issue in the proceedings at first instance (the payment for outside consultancy services with a view to the acquisition of shares which did not materialise), the Tribunal Administrativo e Fiscal do Porto concluded in its judgment that it was an operation to give effect to the objectives pursued by the applicant as part of an activity which falls outside the scope of VAT (the activity of acquiring and managing shares does not constitute the pursuit of an economic activity for the purposes of the Sixth Directive) and, to that extent, has no possibility of a tax deduction under Article 4(1) and (2) of the Sixth Directive.

12 As regards the second of the transactions dealt with in the proceedings in question (payment of a commission to BCP Investimento, SA in respect of a contract to organise, put together and guarantee the placement of a private issue of 3 000 000 bonds in the sum of EUR 150 000 000), the Tribunal Administrativo e Fiscal do Porto concluded in its judgment that, since it has been established specifically that the capital in question was transferred in full to the group's parent company (Sonae, SGPS S.A.), it has not been demonstrated that that capital benefited the affiliated companies, and to what extent, or that it had been employed in an output

transaction giving rise to a right of deduction (Articles 20 and 9(28)(a) of the Portuguese Code on Value Added Tax.

13 In conclusion, the Tribunal Administrativo e Fiscal do Porto held in its judgment that, by virtue of Article 4(1) and (2) of the Sixth Directive and Article 20(1)(a) of the Code on Value Added Tax, and by virtue of the latter provision in conjunction with Article 9(28)(a) and (f) of the Code on Value Added Tax, the VAT borne by the applicant (in the procurement of the auditing services with a view to acquiring shares and in the payment of the commission to BCP Investimentos, SA for organising and putting together a bond loan) is not deductible.

14 Sonaecom SGPS S.A. lodged an appeal against that judgment at the Supremo Tribunal Administrativo (Supreme Administrative Court).

The essential arguments of the parties to the main proceedings

15 Sonaecom SGPS S.A. claims that 'the tax borne by the appellant in the acquisitions at issue in the main proceedings will always be deductible given that, by their nature, those acquisitions must at least be regarded as forming part of the costs which the applicant had to incur in order to be able to perform properly the services which it regularly provides for its affiliates'.

16 Sonaecom SGPS S.A. claims that, given that it is a mixed holding company and that its interventions in the management of the affiliated companies are repeated and significant, in particular through cooperation in the development of their strategy and in the provision of services for remuneration, it, in turn, frequently needs to procure a huge variety of supplies and services from third parties.

17 The appellant submits that the present case concerned the provision of services to affiliated companies by Sonaecom SGPS S.A which received the relevant consideration in a manner and to a level of satisfaction which was never questioned by the Tax Authority. Similarly, it notes that those supplies of services are transactions which are taxed at the full rate of VAT (they fall within the scope of the tax and are not exempt) and that that tax was in fact charged in respect of those transactions, which means that there is a direct relationship between the outputs and the procurement of the services, and therefore the VAT borne in respect of that procurement must be deductible.

18 The applicant argues further that the fact that the acquisition of shares did not materialise does not negate that interpretation, given that such an occurrence does not preclude the view that the procurement of the services for which VAT was paid took place as part of an activity carried on by the appellant which involves making transactions that are subject to, and not exempt from the tax. Finally, Sonaecom SGPS S.A. concludes by stating that, for that reason, the issue concerns procured services which are directly connected with its activity of providing technical and management services to its affiliates — an activity which is subject

to and not exempt from VAT — and not with the activity of 'holding and managing shares'.

19 Having been called upon to provide an opinion on the appeal lodged, the Assistant State Counsel at the Supremo Tribunal Administrativo considers that, in addition to managing shares, holding companies may perform the activities authorised by Articles 4 and 5 of the Portuguese Companies Code.

20 The activity of those companies is therefore not limited, in legal terms, to acquiring, holding and selling shares, which the Court of Justice of the European Union has held in its case-law do not amount to an economic activity within the meaning of Article 4(2) of the Sixth Directive.

21 On that basis, the Assistant State Counsel concludes that holding companies, in the course of their activity of providing services, may not be precluded from performing transactions which are subject to VAT, with the ensuing right of deduction, to be implemented in general terms. In the present case, input transactions must have a direct and immediate connection with the output transactions and the latter must, by their nature, give rise to a right of deduction.

22 In the light of the evidence in the case file, the Assistant State Counsel considers that that is not the case with either of the two transactions at issue in the main proceedings.

23 The Assistant State Counsel is therefore of the view that the judgment handed down by the Tribunal Administrativo e Fiscal do Porto is not vitiated by any error of assessment.

Brief summary of the basis for the reference

24 The referring court wishes to ascertain whether the restriction on the right to deduct VAT is compatible with the VAT deductibility rules laid down in the Sixth Directive, specifically Articles 4(1) and (2) and 17(1), (2) and (5), in so far as it does not allow the deduction of the tax borne by the appellant in respect of consultancy services connected with a market study with a view to the acquisition of shares, which did not materialise, and in respect of the payment to BCP of a commission for organising and putting together a bond loan, allegedly taken out with a view to integrating the financial structure of its affiliated companies, where that investment also failed to materialise and [the bond loan] was eventually transferred in full to Sonae SGPS S.A., the parent company of the group.

25 The referring court cites judgments of the Court of Justice which dealt with the treatment of shares for VAT purposes, namely *Polysar* (C-60/90, EU:C:1991:268), *Harnas & Helm* (C-80/95, EU:C:1997:56) and *Portugal Telecom* (C-496/11, EU:C:2012:557).

26 The Supremo Tribunal Administrativo considers that, notwithstanding the case-law cited above, in which the Court of Justice of the EU ruled on issues that were similar, but not identical, it is not aware of any decisions in which the Court of Justice of the European Union gave a ruling on transactions with the specific aspects of the transactions at issue in the main proceedings, in which the acquisition of shares connected with the market study services procured did not materialise and in which the bond loan taken out for the purpose of integrating the financial structure of its affiliated companies was eventually transferred to the parent company of the group, because those investments did not materialise.

27 The referring court also considers that, having regard to the principle that national law must be interpreted in conformity with EU law, it is necessary to submit a request for a preliminary ruling to the Court of Justice of the European Union.