Case C-405/19

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 May 2019

Referring court:

Hof van Cassatie (Court of Cassation, Belgium)

Date of the decision to refer:

26 April 2019

Appellant in cassation:

Vos Aannemingen BVBA

Respondent in cassation:

Belgische Staat

Subject matter of the main proceedings

The appeal in cassation concerns a dispute between Vos Aannemingen BVBA (appellant in cassation, 'the appellant') and the tax administration (Belgische Staat (Belgian State), respondent in cassation) concerning the deductibility of value added tax (VAT) on advertising and administrative costs and on estate agents' fees. The appeal has been brought against a judgment of the Hof van beroep Gent (Court of Appeal, Ghent, Belgium), upholding the tax administration's appeal and declaring the appellant's original claim to be well founded only in part, that is only as regards repayment of the administrative fine imposed. At first instance, the appellant had also claimed a refund of the VAT which it had paid in the sum of EUR 92 313.99, plus interest.

Subject matter and legal basis of the request

Request pursuant to Article 267 TFEU for a preliminary ruling on the interpretation of Article 17 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

Questions referred for a preliminary ruling

‘1. Is Article 17 of Directive 77/388/EEC to be interpreted as meaning that the fact that expenditure also benefits a third party — as is the case where, in connection with the sale of apartments, a project promoter pays advertising costs, administrative costs and estate agents’ commission, which also benefit the landowners — does not preclude the value added tax (VAT) charged on those costs from being fully deductible, provided that it is established that there is a direct and immediate link between the expenditure and the economic activity of the taxable person and that the advantage to the third party is of secondary importance compared to the requirements of the taxable person’s business?

2. Does that principle apply also where the costs in question are not general costs but costs attributable to specific output transactions which may or may not be subject to VAT, such as in this case the sale, on the one hand, of apartments and, on the other, of land?

3. Does the fact that the taxable person is able/entitled to pass on part of the expenditure to the third party whom the expenditure benefits, but does not do so, have any impact on the question of the deductibility of the VAT on those costs?’

Provisions of EU law relied on

Article 17 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 (‘the Sixth Directive’)

Provisions of national law relied on

Article 149 of the Grondwet (Belgian Constitution);

Articles 1319, 1320 and 1322 of the Burgerlijk Wetboek (Belgian Civil Code);

Article 19(1) and (2), Article 1068(1) and point 3 of Article 1138 of the Gerechtelijk Wetboek (Belgian Judicial Code);

Article 45(1) of the Wet van 3 juli 1969 tot invoering van het Wetboek van de belasting over de toegevoegde waarde (Law of 3 July 1969 on the implementation of the Value Added Tax Code; ‘VAT Code’);

Article 1(2) of the Koninklijk Besluit nr. 3 van 10 december 1969 met betrekking tot de aftrekregeling voor de toepassing van de belasting over de toegevoegde

waarde (Royal Decree No 3 of 10 December 1969 on deductions for the application of VAT), in the version applicable before amendment by the Royal Decree of 24 January 2015.

Succinct presentation of the facts and procedure in the main proceedings

1 The appellant's sole economic activity is the construction and sale of apartment buildings. It builds apartments on land owned by third parties and subsequently offers the apartments for sale, in connection with which it incurs advertising and administrative costs and pays commission to estate agents. The appellant appears in the deeds of sale of the apartments as the seller of the building, while the landowner appears as the seller of the land.

2 The appellant deducted in full the VAT on the advertising and administrative costs and estate agents' fees.

3 After initiating a review, the tax administration took the view, in respect of the period from 1 January 1999 to 30 September 2001 inclusive, that VAT was deductible only in so far as it related to the sale of the buildings and not in so far as it related to the sale of the land. According to the tax administration, the right of deduction applies only to a percentage determined by a fraction in which the price of the building is the numerator and the price of the building plus the price of the land is the denominator.

4 The administration issued an order for payment, pursuant to which the appellant, reserving all rights, paid VAT in the amount of EUR 92 313.99, together with interest and fines.

5 The appellant subsequently lodged an objection to the order for payment and claimed a refund of the sums it had paid.

By decision of 21 March 2016, the rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (East Flanders Court of First Instance, Ghent Division, Belgium) upheld the appellant's claim. The Court of First Instance considered in that respect, in essence, that the sale of the building and of the land constitutes a single supply, so that the advertising and estate agency services paid for by the appellant can be regarded in their entirety as forming part of the general costs of its sole economic activity. Furthermore, the Court of First Instance considered that the fact that the landowner may derive an advantage from the advertising costs and commission must be regarded as being of secondary importance compared to the appellant's requirements.

6 The administration appealed against that decision to the Court of Appeal, Ghent. By judgment of 28 November 2017 the appeal was allowed and the appellant's original claim upheld only in part, that is to say, only as regards the administrative fine imposed.

Essential arguments of the parties in the main proceedings

7 According to the appellant, the advertising and administrative costs and estate agents' commission have a direct and immediate link with the operation of its economic activity, so that deduction in full of the input tax is justified.

In its view, the appeal court could not lawfully deny the right to full deduction of the input tax on that expenditure on the grounds that the appellant's submission that, in order for the VAT to be deducted, it was sufficient for there to be a direct and immediate link with its taxable transactions could not be accepted, that the appellant had disregarded the fact that it is legally possible to sell land and buildings separately, and that, although there was a certain link between the sale of the buildings and the sale of the land, this did not constitute the direct and immediate link referred to.

8 Furthermore the appellant claims that when an input transaction is, objectively, carried out for the subsequent performance of certain or all of the taxable person's taxable activities, that taxable person can deduct the input tax in full, even if the transaction is for the benefit of a third party and the third party would normally have had to bear part of the expenditure, provided that the personal advantage to the third party is secondary to the requirements of the taxable person's business.

According to the appellant, the appeal court did not address the appellant's argument that the indirect advantage afforded to the landowners is secondary to the requirements of its business, and so the court was not entitled to justify its decision merely by finding that the appellant could pass on part of the costs to the landowners and that the costs in question would normally have to be borne by them.

9 Finally, the appellant submits that a taxable person acting as such at the time when it obtains a service and who uses the service for specific transactions in the context of its economic activities may deduct the VAT due or paid in respect of that service, even if the costs involved are not general but specific costs.

In the appellant's view, the appeal court should not therefore have refused to allow the deduction in full of the input tax on the aforementioned expenditure on the ground that the costs in question were incurred for the purpose of selling specific buildings and land.

Succinct presentation of the reasoning in the request for a preliminary ruling

10 According to point 1 of Article 45(1) of the VAT Code, which transposed Article 17(2) of the Sixth Directive, every taxable person may deduct from the tax which he is liable to pay the tax charged in respect of goods delivered to him and services supplied, in so far as he uses the goods and services for the purposes of carrying out taxable transactions.

11 According to settled case-law of the Court of Justice of the European Union, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (see, in particular, judgment of 29 October 2009, *SKF*, C-29/08, paragraph 57).

It is, however, also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the entirety of the taxable person's economic activities (see, in particular, judgment of 29 October 2009, *SKF*, C-29/08, paragraph 58).

12 In its judgment in *AES-3C* of 18 July 2013 (C-124/12) the Court of Justice ruled, referring to its judgment in *Fillibeck* of 16 October 1996 (C-258/95), that the Sixth Directive must be interpreted as meaning that transport provided for employees free of charge by the employer between their homes and the workplace serves, in principle, the employees' private purposes and thus serves purposes other than those of the business, and that there is therefore in principle no right to deduction of the VAT charged in respect of those transport services. However, where, having regard to certain circumstances, such as the difficulty of finding other suitable means of transport and changes in the place of work, the requirements of the business make it necessary for the employer to provide transport for employees, the supply of those transport services is not effected for purposes other than those of the business, in which case the VAT charged on those services can be deducted (paragraph 29). The Court of Justice further recalled that the fact that personal benefit may be derived by employees from such transport must be regarded as being of only secondary importance compared to the needs of the business (paragraph 33).

13 In its judgment in *Iberdrola* of 14 September 2017 (C-132/16), the Court of Justice determined that Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, which corresponds to Article 17(2)(a) of the Sixth Directive, must be interpreted as meaning that a taxable person has the right to deduct input VAT in respect of a supply of services consisting of the construction or improvement of a property owned by a third party when that third party enjoys the results of those services free of charge and when those services are used both by the taxable person and by the third party in the context of their economic activity, in so far as those services do not exceed that which is necessary to allow that taxable person to carry out the taxable output transactions and where their cost is included in the price of those transactions.

14 According to the referring court, although those judgments also concern situations in which a third party gains an advantage from an input service, they do not establish with any certainty whether the appellant's legal analysis is correct and whether, in a situation such as that of the case in the main proceedings, the VAT on the advertising and administrative costs and estate agents' commission paid by the appellant in connection with the sale of the apartments can be deducted in full, even where those expenses also benefit the landowners and could in part be passed on to them, provided that it is established that the advantage to those landowners is of secondary importance compared to the requirements of the appellant's business.

15 The referring court thus considers it necessary to put the aforementioned questions to the Court of Justice for a preliminary ruling.