Case C-460/07

Sandra Puffer

v

Unabhängiger Finanzsenat, Außenstelle Linz

(Reference for a preliminary ruling
from the Verwaltungsgerichtshof (Austria))

(Sixth VAT Directive — Article 17(2) and (6) — Right to deduct input tax — Construction costs of a building allocated to a taxable person's business — Article 6(2) — Private use of part of the building — Financial advantage compared to non-taxable persons — Equal treatment — State aid under Article 87 EC — Exclusion from right to deduct)

Summary of the Judgment

1. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Deduction of input tax — Capital goods allocated in their entirety or in part to a taxable person's private assets*

   (Council Directive 77/388, Art. 17)

2. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Deduction of input tax — Construction of a mixed-use building*
   (Council Directive 77/388, Arts 6(2)(a) and 17(2)(a))

3. *State aid — Meaning*
   (Art. 87(1) EC)

4. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Deduction of input tax — Exclusions from the right of deduction — Option for Member States to retain exclusions existing on entry into force of the Sixth Directive*
   (Council Directive 77/388, Art. 17(6))

1. Where a taxable person chooses to treat an entire building as forming part of the assets of his business and uses part of that building for private purposes he is both entitled to deduct the input value added tax paid on all construction costs relating to that building and subject to the corresponding obligation to pay value added tax on the amount of expenditure incurred to effect such use. By contrast, if a taxable person chooses, when acquiring capital goods, to allocate them entirely to his private assets or to allocate only part of them to his business activities, no right to deduct can arise in relation to the part allocated to his private assets. On that hypothesis, subsequent use for business purposes of the part of the goods allocated to private assets is not capable of giving rise to a right to deduct, because Article 17(1) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes lays down that the right to deduct is to arise at the time when the deductible tax becomes chargeable. There is no adjustment mechanism to that effect under Community legislation as it stands.

   (see paras 42-44)

2. Articles Articles 6(2)(a) and 17(2)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes do not infringe the general principle of equal treatment under Community law by conferring on taxable persons, by means of a full and immediate right to deduct input value added tax on the construction of a mixed-use building and the subsequent staggered imposition of that tax on the

private use of the building, a financial advantage compared with non-taxable persons and with taxable persons who use their building only as a private residence.

In that connection, with regard to the private use of mixed-use capital goods, it is possible that Article 6(2)(a) of the Sixth Directive does not ensure, on its own, the same treatment of taxable persons and non-taxable persons or of other taxable persons who acquire goods of the same kind on a private basis and are, as a result of that fact, bound to pay immediately and in full the value added tax imposed. It cannot be ruled out that the objective of relieving the taxable person entirely, by the mechanism laid down in Article 17(1) and (2) and Article 6(2)(a) of the Sixth Directive, of the burden of value added tax payable or paid in the course of all their economic activities, including any financial charge encumbering the property during the period between the initial investment expenditure and the commencement of actual business use, can give rise to a financial advantage with regard to the private use of those goods by those taxable persons. Thus, the possible difference of treatment of taxable and non-taxable persons results from the application of the principle of fiscal neutrality, the primary purpose of which is to ensure the equal treatment of taxable persons. That potential difference results, also, from the pursuit by those persons of their economic activities as defined in Article 4(2) of the Sixth Directive. Finally, it is linked to the specific status of taxable persons provided for in the Sixth Directive, which results inter alia in the fact that, in accordance with Article 21 of that directive, they are liable to value added tax and must collect it. Since those characteristics distinguish the position of taxable persons from that of non-taxable persons who do not exercise such economic activities, a possible difference in treatment results from the application of different rules to different situations, thus not giving rise to any infringement of the right to equal treatment. The same applies to a taxable person who has allocated the capital goods, in their entirety, to his private assets, since he does not intend to use those goods to pursue his economic activities, but to use them for private purposes. Nor can a different view be reached as regards a taxable person who carries out only exempt operations, since such a taxable person is subject to the same value added tax burden as a non-taxable person and his status thus largely similar to the latter.

(see paras 55-59, 62, operative part 1)

3. Article 87(1) EC must be interpreted as not precluding a national measure which transposes Article 17(2)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes and which provides that the right to deduct input value added tax payable is confined to taxable persons carrying out taxable transactions, to the exclusion of those carrying out only exempt transactions, in so far as that national measure may confer a financial advantage only on taxable persons carrying out taxable transactions.

The restriction of the right to deduct input tax payable to only taxable transactions is an integral part of the value added tax system set up by Community legislation which must be implemented in the same way by all Member States. Consequently, the condition of intervention by the State is not met, meaning that Article 87(1) EC cannot apply.

(see paras 70, 71, operative part 2)

4. Article 17(6) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that the derogation it contains does not apply to a provision of national law which amends legislation existing when that directive entered into force, which is based on an approach which differs from that of the previous legislation and which laid down new procedures. In that regard, it is irrelevant whether the national legislature amended the previous national legislation on the basis of a correct or incorrect interpretation of Community law. The question whether such an amendment of a provision of national law also affects, with regard to the applicability of the second subparagraph of Article 17(6) of Sixth Directive 77/388, another provision of national law depends on whether those provisions of national law are inter-dependent or autonomous, which is a matter for the national court to determine.

(see para. 98, operative part 3)