Reports of Cases

Case C-332/14

Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR
v
Finanzamt Krefeld

(Request for a preliminary ruling from the Bundesfinanzhof)

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 77/388/EEC — Third subparagraph of Article 17(5) — Field of application — Deduction of input tax — Goods and services used for both taxable and exempt transactions (mixed-use goods and services) — Determination of the assignation of goods and services purchased for the construction, use, conservation and maintenance of a building that serves to carry out, in part, transactions in respect of which VAT is deductible and, in part, transactions in respect of which VAT is not deductible — Amendment of the national legislation laying down the method of calculating the deductible proportion — Article 20 — Adjustment of deductions — Legal certainty — Legitimate expectations)

Summary — Judgment of the Court (Fourth Chamber), 9 June 2016

1. *Harmonisation of fiscal legislation — Common system of value added tax — Deduction of input tax — Goods and services used both for transactions in respect of which VAT is deductible and for transactions in respect of which it is not deductible — Letting of a building for commercial and residential use — Proportional deduction — Calculation — Obligation to assign the input goods and services to the transactions in respect of the construction, acquisition, use, conservation or maintenance of the building before calculating the proportion for the mixed-use goods and services — No such obligation — Allocation key other than a turnover-based allocation key — Lawfulness — Condition*

   (Council Directive 77/388, as amended by Directive 95/7, Art. 17(5))

2. *Harmonisation of fiscal legislation — Common system of value added tax — Deduction of input tax — Adjustment of the initial deduction — Goods and services used both for transactions in respect of which VAT is deductible and for transactions in respect of which it is not deductible — Factors used to determine the amount to be deducted — Adoption of an allocation key other than a turnover-based allocation key — Included*

   (Council Directive 77/388, as amended by Directive 95/7, Art. 20)

3. *Harmonisation of fiscal legislation — Common system of value added tax — Deduction of input tax — Adjustment of the initial deduction — Amendment of the factors used to determine the amount to be deducted — No transitional arrangements — Permissibility in the light of the principles of the protection of legitimate expectations and of legal certainty — Conditions*

   (Council Directive 77/388, as amended by Directive 95/7, Art. 20)

1. Article 17(5) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, must be interpreted as meaning that, where a building is used in order to carry out certain output transactions in respect of which value added tax (VAT) is deductible and others in respect of which it is not, the Member States are not required to prescribe that the input goods and services used for the construction, acquisition, use, conservation or maintenance of that building must, in a first stage, be assigned to those various transactions when such assignation is difficult to carry out, in order that, in a second stage, only the deduction entitlement due in respect of those of the goods and services which are used both for certain transactions in respect of which value added tax is deductible and for others in respect of which it is not is determined by applying a turnover-based allocation key or, provided that this method guarantees a more precise determination of the deductible proportion, on the basis of floor area.

It is true that, in the light of the difference in the extent of the right to deduct according to the intended use of the goods and services on which VAT has been charged, the Member States are, in principle, required to lay down that taxable persons, in order to determine the amount that they are entitled to deduct, must, in a first stage, assign the input goods and services to the various output transactions which have been carried out and for the performance of which they were intended and, in a second stage, apply, in respect of those goods or services, the deduction arrangement corresponding to their assignation; the arrangement laid down in Article 17(5) of the Sixth Directive should be applied so far as concerns goods and services which do not relate to a single type of transaction.

However, national legislation may, first of all, authorise taxable persons not to assign those goods and services, irrespective of the use to which they will be put, where they relate to the acquisition or construction of a mixed-use building and their assignation is, in practice, difficult to carry out.

Next, when the Member States make use of certain of the options provided for in the third subparagraph of Article 17(5) of the Sixth Directive, they may apply a calculation method different from the one consisting in applying a turnover-based allocation key, subject to the condition, in particular, that the method used guarantees a more precise determination of the deductible proportion of the input VAT than that arising from application of the first method. That condition does not, however, mean that the method chosen must necessarily be the most precise possible. It is required merely that the method chosen must guarantee a more precise result than the result which would arise from application of the turnover-based allocation key.

Finally, where a Member State chooses to have recourse to a deduction method different from that provided for by the Sixth Directive, that does not call into question the power available to it to provide that taxable persons are not required to link each of the goods or services used for the acquisition or construction of a mixed-use building to a particular output transaction, since the requirement of precision relates to the method of calculating the deductible proportion of the amount of VAT and not to assignation of the goods and services used.

(see paras 26, 28, 32, 33, 35, 36, operative part 1)

2. Article 20 of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, must be interpreted as requiring value-added-tax deductions made in respect of goods or services falling within Article 17(5) of that directive to be adjusted following the adoption, during the adjustment period in question, of a value-added-tax allocation key used to calculate those deductions that departs from the method provided for by the directive for determining the deduction entitlement.

Article 20(1)(b) of the Sixth Directive provides that initial deductions must be adjusted where, after the return giving rise to the deduction is made, some change occurs in the factors used to determine the amount to be deducted.

The allocation key and, therefore, the method of calculating the amount of the deduction applied constitute factors used to determine the amount to be deducted, within the meaning of Article 20(1)(b) of the Sixth Directive.

(see paras 38, 42, 47, operative part 2)

3. The general principles of EU law of legal certainty and of the protection of legitimate expectations must be interpreted as not precluding applicable national legislation which does not expressly prescribe an input tax adjustment, within the meaning of Article 20 of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, following amendment of the value-added-tax allocation key used to calculate certain deductions or lay down transitional arrangements although the input tax allocation applied by the taxable person in accordance with the allocation key applicable before that amendment had been recognised as generally reasonable by the supreme court.

So far as concerns the lack of an express reference, in national legislation, to the obligation to make an adjustment where the method of calculating the deduction entitlement is amended, it should be recalled that such an obligation results from Article 20 of the Sixth Directive. When the Member States apply the provisions of their domestic law transposing a directive, they are required to interpret them, as far as possible, in accordance with that directive.

It follows that the principles of legal certainty and of the protection of legitimate expectations cannot be interpreted as meaning that, in order for an adjustment of the deduction entitlement to be capable of being imposed in the event of the method of calculating that entitlement being amended, the national legislation by virtue of which that amendment was made must have expressly pointed out that such adjustment is mandatory.

Nevertheless, in particular situations, where the principles of legal certainty and of the protection of legitimate expectations so require, it may be necessary to introduce transitional arrangements appropriate to the circumstances. Thus, a national legislature may breach the principles of legal certainty and of the protection of legitimate expectations when it suddenly and unexpectedly adopts a new law which withdraws a right that taxable persons enjoyed until then, without allowing them the time necessary to adjust, when the objective to be attained did not so require. In particular, taxable persons must have time to adapt when withdrawal of the right which they enjoyed until then obliges them to carry out consequential economic adjustments.

However, even assuming that an amendment of the national legislation defining the method of calculating the deduction entitlement can be regarded as sudden and unexpected, first, an amendment of the calculation method has the effect not of withdrawing the right to deduct possessed by taxable persons but of adapting its ambit.

Secondly, such an amendment does not itself in principle mean that taxable persons carry out consequential economic adjustments and, therefore, time to adapt does not appear strictly necessary.

(see paras 52-54, 57-62, 65, operative part 3)