

JUDGMENT OF THE COURT (First Chamber)

9 September 2004 \*

In Case C-269/03,

REFERENCE for a preliminary ruling under Article 234 EC

from the Cour d'appel (Luxembourg), made by decision of 18 June 2003, received on 20 June 2003, in the proceedings:

**Administration de l'enregistrement et des domaines,**

**État du grand-duché de Luxembourg**

v

**Vermietungsgesellschaft Objekt Kirchberg SARL,**

\* Language of the case: French.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas and S. von Bahr (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Administration de l'enregistrement et des domaines and the Luxembourg Government, by F. Kremer, avocat,
- Vermietungsgesellschaft Objekt Kirchberg SARL, by P. Kinsch, avocat,
- the Commission of the European Communities, by E. Traversa and G. Berscheid, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 March 2004,

gives the following

### Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of the provisions of Article 13(C) 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, hereinafter ‘the Sixth Directive’).
  
- 2 That question was raised in the course of proceedings between the Administration de l’enregistrement et des domaines (Registration and Land Authority, hereinafter ‘the Authority’) and the État du grand-duché de Luxembourg (State of the Grand Duchy of Luxembourg), on the one hand, and Vermietungsgesellschaft Objekt Kirchberg SARL (hereinafter ‘VOK’), a company with limited liability established in Luxembourg (Luxembourg), on the other, regarding the amount of value added tax (hereinafter ‘VAT’) deducted by VOK in connection with the letting of immovable property.

### Community legislation

- 3 Articles 13(B)(b) and (C) of the Sixth Directive provide:

‘B. Other exemptions

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring

the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(b) the leasing or letting of immovable property ... :

...

### C. Options

Member States may allow taxpayers a right of option for taxation in cases of:

(a) letting and leasing of immovable property;

...

Member States may restrict the scope of this right of option and shall fix the details of its use.'

## National legislation

- 4 Article 44(1)(g) of the Law of 12 February 1979 (*Mémorial* A 1979, p. 451) on value added tax, as amended, provides:

‘The following are exempted from value added tax within the limits and under the conditions to be laid down by Grand-Ducal Regulation:

...

(g) the leasing or letting of immovable property ...’

- 5 Article 45 of that law provides for the possibility of waiving that exemption subject to complying with the provisions of the regulation implementing that law.

- 6 The Grand-Ducal Regulation of 7 March 1980 laying down the limits and conditions for the exercise of the right of option to apply value added tax to transactions in immovable property (*Mémorial* A 1980, p. 242, hereinafter ‘the Grand-Ducal Regulation’) was adopted in implementation of the Law of 12 February 1979. Article 1 thereof permits taxpayers to ‘opt to apply value added tax to the transactions in immovable property referred to hereafter:

...

(b) any person who, by written privately negotiated contract, leases or lets immovable property to a taxable person’.

7 Article 3, first paragraph, of the Grand-Ducal Regulation provides:

‘The right of option can be exercised only in respect of immovable property which is used exclusively or, in the case of mixed use, mainly by ... the tenant for the pursuit of activities permitting it to deduct input tax.’

8 Under Article 5 of the Grand-Ducal Regulation:

‘Any person exercising the right of option must lodge a written declaration of option for approval by the Registration Authority.

In the case of a supply for consideration, the approval must have been obtained prior to the formal completion of the official document evidencing the transaction. The Authority shall decide on the declaration of option by the end of the month in which it is submitted.

In the case of letting, application of the tax shall be authorised from the first day of the month following that in which the declaration of option was approved. The administrative decision must be made during the month within which that declaration is received.’

## The main proceedings and the question referred for a preliminary ruling

- 9 VOK had an office building constructed in Luxembourg which it let to a firm of auditors from 1 January 1993, the date of completion of the building's construction. Since the commencement of the letting, VOK has sent that firm monthly invoices subject to VAT.
- 10 VOK exercised its right to opt for VAT by submitting to the Authority, on 29 June 1993, a declaration of option for approval. The approval was granted to VOK on 30 June 1993 with effect from 1 July 1993.
- 11 VOK submitted its VAT returns deducting all the VAT which it had paid on account of the construction works.
- 12 Pursuant to Article 5 of the Grand-Ducal Regulation, the Authority however refused the deduction of 50% of the input VAT paid, on the ground that the letting during the six months from January to June 1993 was exempt from VAT because it was not covered by the approval. As a result it issued notices correcting, of its own motion, the VAT returns.
- 13 VOK made a complaint to the Authority's Director.
- 14 The latter adopted a decision in January 1998 on the basis of which new corrective notices were issued in the following February. He decided, first, that the date of commencement of the building's use was 1 January 1993. Since the option took

effect only from 1 July 1993, the letting of the building was not subject to VAT during half of 1993 and the input VAT could be deducted only up to 50%, which justified the correction of the 1993 return. He decided, secondly, that the exercise of the option should entail a second correction in 1994, namely that 9/10ths of the VAT which was not deductible in 1993 should be corrected in VOK's favour. In the result 5% of the input VAT paid was not deductible and therefore payable by VOK.

15 VOK brought proceedings in March 1998 against the decision of the Director of the Authority. By judgment of 7 November 2001, the Tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) upheld VOK's claim by overruling the application of Article 5 of the Grand-Ducal Regulation and holding that VOK had carried on an activity subject to VAT during the whole of 1993.

16 The Authority and the État du grand-duché de Luxembourg lodged an appeal against that judgment on 14 March 2002.

17 Since it was uncertain about the lawfulness of an approval procedure such as that provided for by the Luxembourg legislation in the light of the provisions of Article 13(C) of the Sixth Directive relating to the leasing or letting of immovable property, considered in the light of the principle of the right of deduction, the Cour d'appel (Court of Appeal) decided, by judgment of 18 June 2003, to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does subparagraph (a) of the first paragraph of Article 13(C) of the Sixth ... Directive ... permit a Member State which has exercised the power to allow taxpayers a right of option for taxation in cases of letting and leasing of immovable property to make full deduction of the input VAT conditional upon non-retroactive approval of the tax authorities first being obtained?'



**The question referred for a preliminary ruling**

- 18 VOK and the Commission maintain that the provisions of Article 13(C) of the Sixth Directive relating to the letting or leasing of immovable property cannot be interpreted as meaning that they permit the Member States to adopt legislation, such as that in issue in the main proceedings, involving a process of prior approval leading, in certain cases, to the impossibility of deducting all input VAT.
- 19 In that regard, it is appropriate to note that the right to deduct is a fundamental principle of the VAT system. It is important to scrutinise whether an approval process, such as that adopted by the Grand Duchy of Luxembourg, is an improper implementation of the right to opt for taxation provided for by the provisions of Article 13(C) of the Sixth Directive, in that it adversely affects that principle.
- 20 It is clear from those provisions that the taxation of leasing and letting transactions is a power which the legislature has conferred on the Member States in derogation from the general rule established in Article 13(B)(b) of the Sixth Directive, according to which leasing and letting transactions are, as a rule, exempt. The right to deduct does not therefore operate automatically in that context but only if the Member States have made use of the power under Article 13(C) of the Sixth Directive and subject to the taxpayers exercising the right of option allowed to them.
- 21 As the Court has previously held, Member States may, by virtue of this power, allow persons benefiting from the exemptions provided for by the Sixth Directive to waive the exemption in all cases or within certain limits or subject to certain detailed rules. It follows that the Member States have a wide discretion under Article 13(B) and (C)

of the Sixth Directive (see Case C-381/97 *Belgocodex* [1998] ECR I-8153, paragraphs 16 and 17).

- 22 The Grand Duchy of Luxembourg, exercising the power under the second paragraph of Article 13(C) of the Sixth Directive, has limited the right of option to cases where the tenant is himself a taxpayer with the right to deduct and has made the exercise of that option subject to a process of prior approval.
- 23 It must be held that that approval process is, as is clear from the Advocate General's Opinion, a detail of the use of the right of option within the meaning of the second paragraph of Article 13(C) of the Sixth Directive.
- 24 It is appropriate to review whether that detailed procedure enables the right of option to be implemented without improperly undermining the right to deduct.
- 25 According to the État du grand-duché de Luxembourg and the Authority, the approval process is necessary in order to enable the Authority to check that the statutory conditions relating, in particular, to the tenant's VAT status are fulfilled. Those two appellants in the main proceedings state that that process contributes to legal certainty by enabling a lessor to be made aware as soon as possible of the impossibility of making a letting of immovable property subject to VAT. They add that the said process is intended, in particular, to avoid evasion or abuse and is not intended in any way to restrict the right to deduct.

- 26 In that regard, it can be accepted, first, that where a Member State makes the right of option for taxation subject to certain statutory conditions, a process of prior approval enables the fulfilment of those conditions to be established.
- 27 It should be noted, secondly, that in the main proceedings it is not disputed that it would have been sufficient if the party concerned, VOK, had submitted its declaration of option prior to the commencement of the letting, in practice before the end of December 1992, in order to obtain the approval in the course of that month and to be able to exercise fully its right to deduct, from the commencement of the lease on 1 January 1993.
- 28 It thus appears that such approval process is not intended adversely to affect the right to deduct, but, on the contrary, enables that right to be fully exercised, subject to compliance with certain requirements, in particular, the submission of a declaration of option and the attaining of the approval within certain time-limits.
- 29 The lack of retroactivity of the approval process does not make it disproportionate. On the contrary, it may be regarded as useful in order to encourage lessors to submit their declaration of option in advance. It cannot be excluded, indeed, that a retroactive approval process is likely to produce the opposite effect by leading lessors to submit their declaration of option late and that it would therefore be less appropriate for the purpose of ensuring the proper implementation of the exercise of the right of option and attaining the objective of legal certainty mentioned in paragraph 25 of this judgment.
- 30 In those circumstances, the answer to the question referred must be that the provisions of subparagraph (a) of the first paragraph and of the second paragraph of Article 13(C) of the Sixth Directive do not preclude a Member State, which has exercised the power to allow taxpayers a right of option for taxation on leasing or

letting transactions of immovable property, from adopting legislation which makes full deduction of the input VAT paid conditional upon non-retroactive, prior approval of the tax authorities.

## Costs

- 31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**The provisions of subparagraph (a) of the first paragraph and of the second paragraph of Article 13(C) 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 do not preclude a Member State, which has exercised the power to allow taxpayers a right of option for taxation on leasing or letting transactions of immovable property, from adopting legislation which makes full deduction of the input VAT paid conditional upon non-retroactive, prior approval of the tax authorities.**

Signatures.