Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

5 July 2018 *

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Articles 2, 9 and 168 — Economic activity — Direct or indirect involvement of a holding company in the management of its subsidiaries — Letting of a building by a holding company to its subsidiary — Deduction of input tax — VAT paid by a holding company on expenditure incurred in acquiring shares in other companies)

In Case C-320/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 22 May 2017, received at the Court on 29 May 2017, in the proceedings

Marle Participations SARL

v

Ministre de l'Économie et des Finances,

THE COURT (Seventh Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, C. Toader and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Marle Participations SARL, by L. Poupot, avocat,

– the French Government, by D. Colas, E. de Moustier and A. Alidière, acting as Agents,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the Austrian Government, by G. Eberhard, acting as Agent,

– the European Commission, by R. Lyal and N. Gossement, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: French.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2, 9 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between Marle Participations SARL and the ministre de l'Economie et des Finances (Minister for the Economy and Finance, France) concerning the deductibility of the value added tax (VAT) paid by the applicant in the main proceedings in respect of expenditure relating to the acquisition of securities.

EU legal framework

3 Article 2(1)(c) of the VAT Directive states:

'The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such'.

4 Article 9(1) of that directive reads as follows:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

5 Under Article 135 of that directive:

'1. Member States shall exempt the following transactions:

…

(l) the leasing or letting of immovable property.

2. The following shall be excluded from the exemption provided for in point (l) of paragraph 1:

(a) the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

(b) the letting of premises and sites for the parking of vehicles;

…

Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1.'

6 Article 137 of the directive provides:

'1. Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

…

(d) the leasing or letting of immovable property.

2. Member States shall lay down the detailed rules governing exercise of the option under paragraph 1.

Member States may restrict the scope of that right of option.'

7 According to Article 167 of the VAT Directive:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

8 Article 168 of the directive reads as follows:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods and services, carried out or to be carried out by another taxable person;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;

(e) the VAT due or paid in respect of the importation of goods into that Member State.'

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Marle Participations is the holding company of the Marle group, which is in the business of manufacturing orthopaedic implants. Marl Participation's objects include the management of shareholdings in several subsidiaries of the Marle group, to which it also let a building.

10 It is clear from the documents submitted to the Court that, starting in 2009, Marle Participations conducted a restructuring operation which led it to make sales and acquisitions of securities. It deducted in full the VAT charged on various expenses connected with that restructuring operation.

11 Following an audit of accounts, the tax authorities called into question the company's deduction of VAT and issued it accordingly with additional VAT assessments, on the ground that the expenditure in respect of which the company claimed deduction of VAT contributed to the implementation of capital transactions which fell outside the scope of the right of deduction.

12 Marle Participations unsuccessfully challenged those additional VAT assessments before the tribunal administratif de Châlons-en-Champagne (Administrative Court, Châlons-en-Champagne, France), then before the cour administrative d'appel de Nancy (Administrative Court of Appeal, Nancy, France).

13 Consequently, Marle Participations appealed on a point of law to the referring court.

14 In its order for reference, the Conseil d'État (Council of State, France) states, referring to the judgments of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495), and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496), that it follows from Article 168 of the VAT Directive that, although the mere acquisition and holding of shares in a company is not to be regarded as an economic activity conferring on the holder the status of a taxable person, the position will be otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the interests are held, through the carrying out of transactions subject to VAT, such as the supply to those companies of financial, commercial and technical services.

15 Furthermore, it follows from the judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496), that expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in their management and which, on that basis, carries out an economic activity must be regarded as belonging to its general expenditure and the tax paid on that expenditure must, in principle, be deducted in full, unless certain output economic transactions are exempt from tax.

16 The referring court notes, however, that in the present case the only services that Marle Participations provided to the subsidiaries in whose regard it incurred expenditure for the purpose of acquiring their securities, or that it sought to develop in respect of those subsidiaries, related to the letting of buildings.

17 In those circumstances the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the letting of a building by a holding company to a subsidiary constitute direct or indirect involvement in the management of that subsidiary, the effect of which being that the acquisition and holding of shares in that subsidiary are considered economic activities within the meaning of the [VAT] Directive, and, if so, under what conditions?'

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether the VAT Directive must be interpreted as meaning that the letting of a building by a holding company to its subsidiary constitutes involvement in the management of that subsidiary which must be considered to be an economic activity, within the meaning of Article 9(1) of that directive, giving rise to the right to deduct the VAT on the expenditure incurred by the company for the purpose of acquiring shares in that subsidiary and, if so, under what conditions.

19 As a preliminary point, it should be observed that, although the VAT Directive gives a very wide scope to VAT, only activities of an economic nature are covered by that tax (judgment of 29 October 2009, *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 34). It is apparent from Article 2 of that directive that, among the services supplied within the territory of a Member State, only services supplied for consideration by a taxable person acting as such are subject to VAT (order of 12 January 2017, *MVM*, C-28/16, EU:C:2017:7, paragraph 24).

20 According to the first subparagraph of Article 9(1) of that directive, 'taxable person' means any person who, independently, carries out any economic activity, whatever the purpose or results of that activity.

21 'Economic activities' are defined in the second subparagraph of Article 9(1) of the VAT Directive as covering all activities of producers, traders and persons supplying services, including the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

22 An analysis of those definitions shows that the scope of the term 'economic activities' is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. Accordingly, an activity is, as a general rule, categorised as 'economic' where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (judgment of 29 October 2009, *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 37 and the case-law cited).

23 Moreover, it is clear from the Court's case-law that, within the framework of the VAT system, taxable transactions presuppose the existence of a transaction between the parties in which a price or consideration is stipulated (judgment of 29 October 2009, *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 43) and that a supply of services is effected 'for consideration' within the meaning of Article 2 of the Sixth Directive only if there is a direct link between the service provided and the consideration received (judgment of 29 October 2009, *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 45).

24 It should also be noted that, as the Court has consistently held, the right to deduct VAT provided for in Article 167 et seq. of the VAT Directive is a fundamental principle of the common system of VAT and in principle may not be limited. That right is exercisable immediately in respect of all the taxes charged on input transactions (order of 12 January 2017, *MVM*, C-28/16, EU:C:2017:7, paragraph 26).

25 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (order of 12 January 2017, *MVM*, C-28/16, EU:C:2017:7, paragraph 27 and the case-law cited).

26 However, under Article 168(a) of the VAT Directive, in order to have a right of deduction, it is necessary, first, that the person concerned be a taxable person, within the meaning of that directive, and, second, that the goods or services relied on to confer entitlement to that right be used by the taxable person for the purposes of his own taxed output transactions, and that, as inputs, those goods or services be supplied by another taxable person (judgment of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 39).

27 More specifically, as regards a holding company's right of deduction, the Court has previously held that a holding company does not have the status of taxable person within the meaning of Article 9 of the VAT Directive and, accordingly, does not have the right to deduct tax under Articles 167 and 168 of that directive when it has as its sole purpose the acquisition of shares in other undertakings and does not involve itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 18).

28 The mere acquisition and holding of shares in a company is not to be regarded as an economic activity, within the meaning of the VAT Directive, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because

any dividend yielded by that holding is merely the result of ownership of the property (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 19).

29 However, the Court has ruled that the position is otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company as shareholder (see, inter alia, judgments of 14 November 2000, *Floridienne and Berginvest*, C-142/99, EU:C:2000:623, paragraph 18; of 27 September 2001, *Cibo Participations*, C-16/00, EU:C:2001:495, paragraph 20; of 6 September 2012, *Portugal Telecom*, C-496/11, EU:C:2012:557, paragraph 33; and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 20).

30 It is apparent from settled case-law of the Court that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity, within the meaning of Article 9(1) of the VAT Directive, in so far as it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply by a holding company to its subsidiaries of administrative, accounting, financial, commercial, information technology and technical services (see, inter alia, judgments of 14 November 2000, *Floridienne and Berginvest*, C-142/99, EU:C:2000:623, paragraph 19; of 27 September 2001, *Cibo Participations*, C-16/00, EU:C:2001:495, paragraph 22; and of 6 September 2012, *Portugal Telecom*, C-496/11, EU:C:2012:557, paragraph 34).

31 In that regard, it must be noted that the examples of activities constituting involvement of the holding company in the management of its subsidiaries set out in the Court's case-law are not exhaustive.

32 The term 'involvement of a holding company in the management of its subsidiary' must, accordingly, be understood as covering all transactions constituting an economic activity, within the meaning of the VAT Directive, performed by the holding company for the benefit of its subsidiary.

33 In the present case, it is apparent from the documents submitted to the Court that the only services that Marle Participations supplied to the subsidiaries in whose regard it incurred expenditure for the purpose of acquiring their securities, or that it sought to develop in respect of those subsidiaries, related to the letting of a building used by an operational subsidiary as a new production site.

34 In that regard, it should also be noted that the taxation of leasing and letting transactions is a power, provided for in Article 137(1)(d) of the VAT Directive, which the EU legislature has conferred on the Member States in derogation from the general rule established in Article 135(1)(l) of that directive, under which leasing and letting transactions are exempt from VAT. The Member States may therefore, by virtue of this power, allow persons benefiting from that exemption to waive it (see, to that effect, judgment of 12 January 2006, *Turn- und Sportunion Waldburg*, C-246/04, EU:C:2006:22, paragraphs 26 and 27).

35 In the light of the considerations set out in paragraphs 19 to 23 and 34 of the present judgment, the letting of a building by a holding company to its subsidiary amounts to involvement in the management of that subsidiary, which must be considered to be an economic activity giving rise to the right to deduct the VAT on the expenditure incurred by the company for the purpose of acquiring securities of that subsidiary, on condition that that supply of services is made on a continuing basis, that it is carried out for consideration and that it is taxed, meaning that the letting is not exempt, and that there is a direct link between the service rendered by the supplier and the consideration received from the beneficiary. It is for the referring court to determine whether those conditions are satisfied in the case pending before it.

36 As regards the conditions for exercising the right of deduction and, more specifically, its extent, it must be noted that the Court has previously ruled, in the judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 33), that expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management of those subsidiaries and which, on that basis, carries out an economic activity must be regarded as belonging to its general expenditure and the VAT paid on that expenditure must, in principle, be deducted in full.

37 However, expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management of only some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded as only partially belonging to its general expenditure, so that the VAT paid on that expenditure may be deducted only in proportion to the expenditure which is inherent in the economic activity, in accordance with the apportionment criteria defined by the Member States, which, when exercising that power, must have regard to the aims and broad logic of the VAT Directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to economic and to non-economic activity, which it is for the national courts to ascertain (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 33).

38 In the main proceedings, it is thus for the referring court to assess whether the acquisition of securities which led to the expenditure in respect of which Marle Participations claimed the deduction of VAT concerns only the subsidiaries to which that company let the building or whether the acquisition also concerns other subsidiaries.

39 Therefore, it is for the referring court to establish, in the light of the information available to it, whether, and to what extent, Marle Participations may deduct the VAT paid, taking account of the criteria mentioned in paragraphs 36 and 37 of the present judgment.

40 Moreover, it must be noted that, for the purposes of assessing the deduction granted to a holding company that involves itself directly or indirectly in the management of its subsidiaries in which it has bought shares, no account can be taken of the turnover achieved by that company from the letting services supplied to those subsidiaries and the income that it draws from its stake in the capital of those subsidiaries, in order to prevent that right from being invoked for fraudulent or abusive ends.

41 It is true that it is settled case-law that the right of deduction may be refused when it is established, in the light of objective evidence, that that right is being invoked for fraudulent or abusive ends. The fight against tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive and EU law cannot be relied on for fraudulent or abusive ends (judgments of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraphs 42 and 43 and the case-law cited, and of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 43).

42 However, the measures adopted by the Member States must not go beyond what is necessary to achieve such objectives. Therefore, they cannot be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT (judgments of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 57, and of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 50).

43 First, it is settled case-law that expenditure incurred by a holding company involved in the management of a subsidiary in respect of the various services it has purchased in connection with the acquisition of a shareholding in that subsidiary forms part of the taxable person's general costs and is, as such, a cost component of its products, and therefore has, in principle, a direct and immediate link

with the holding company's economic activity as a whole (judgments of 27 September 2001, *Cibo Participations*, C-16/00, EU:C:2001:495, paragraph 35, and of 29 October 2009, *SKF*, C-29/08, EU:C:2009:665, paragraph 58).

44 Second, the right to deduct VAT must be guaranteed, without it being subjected to a criterion relating, inter alia, to the result of the economic activity of the taxable person, in accordance with Article 9(1) of the VAT Directive under which a taxable person 'shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity'.

45 In the light of the foregoing, the answer to the question referred is that the VAT Directive must be interpreted as meaning that the letting of a building by a holding company to its subsidiary amounts to 'involvement in the management' of that subsidiary, which must be considered to be an economic activity, within the meaning of Article 9(1) of that directive, giving rise to the right to deduct the VAT on the expenditure incurred by the company for the purpose of acquiring shares in that subsidiary, where that supply of services is made on a continuing basis, is carried out for consideration and is taxed, meaning that the letting is not exempt, and there is a direct link between the service rendered by the supplier and the consideration received from the beneficiary. Expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the subsidiaries' management by letting them a building and which, on that basis, carries out an economic activity has to be regarded as belonging to its general expenditure and the VAT paid on that expenditure must, in principle, be capable of being deducted in full.

46 Expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management of only some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded as only partially belonging to its general expenditure, so that the VAT paid on that expenditure may be deducted only in proportion to the expenditure which is inherent in the economic activity, in accordance with the apportionment criteria defined by the Member States, which, when exercising that power, must have regard to the aims and broad logic of that directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to economic and to non-economic activity, which it is for the national courts to ascertain.

Costs

47 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 (Seventh Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the letting of a building by a holding company to its subsidiary amounts to 'involvement in the management' of that subsidiary, which must be considered to be an economic activity, within the meaning of Article 9(1) of that directive, giving rise to the right to deduct the value added tax (VAT) on the expenditure incurred by the company for the purpose of acquiring shares in that subsidiary, where that supply of services is made on a continuing basis, is carried out for consideration and is taxed, meaning that the letting is not exempt, and there is a direct link between the service rendered by the supplier and the consideration received from the beneficiary. Expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the

subsidiaries' management by letting them a building and which, on that basis, carries out an economic activity has to be regarded as belonging to its general expenditure and the VAT paid on that expenditure must, in principle, be capable of being deducted in full.

Expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management of only some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded as only partially belonging to its general expenditure, so that the VAT paid on that expenditure may be deducted only in proportion to the expenditure which is inherent in the economic activity, in accordance with the apportionment criteria defined by the Member States, which, when exercising that power, must have regard to the aims and broad logic of that directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to economic and to non-economic activity, which it is for the national courts to ascertain.

[Signatures]