Case C-162/07

Ampliscientifica Srl

and

Amplifin SpA

v

Ministero dell'Economia e delle Finanze

and

Agenzia delle Entrate

(Reference for a preliminary ruling from the

Corte suprema di cassazione)

(Sixth VAT directive – Taxable persons – Second subparagraph of Article 4(4) – Parent companies and subsidiaries – Implementation by the Member State of the single taxable person scheme – Conditions – Consequences)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Taxable persons*

(Council Directive 77/388, Art. 4(4), second subpara.)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Mechanism to simplify declarations and payments of value added tax*

(Council Directive 77/388)

1. The second subparagraph of Article 4(4) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is a provision which, in order to be implemented by a Member State, requires prior consultation by that State of the Advisory Committee on value added tax and the adoption of national legislation authorising persons, in particular companies, established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links, no longer to be treated as separate taxable persons for the purposes of value added tax in order to be treated as a single taxable person to whom a single value added tax identification number is allocated and, accordingly, the sole person entitled to submit value added tax declarations. Where there has been no prior consultation of the Advisory Committee on value added tax, national legislation which meets those criteria constitutes legislation adopted in breach of the procedural requirement laid down in the second subparagraph of Article 4(4) of Sixth Directive 77/388.

(see para. 23, operative part 1)

2. The principle of fiscal neutrality does not preclude national legislation which simply treats

taxable persons wishing to opt for a mechanism to simplify value added tax declarations and payments differently according to whether the parent company or body has held more than 50% of the share capital or stock of the persons with whom it is linked since at least the beginning of the calendar year preceding that in which the declaration was made or, on the contrary, satisfies those conditions only after that date. Moreover, neither the principle prohibiting the abuse of rights nor the principle of proportionality precludes such legislation.

(see para. 32, operative part 2)

JUDGMENT OF THE COURT (Third Chamber)

22 May 2008 (*)

(Sixth VAT directive – Taxable persons – Second subparagraph of Article 4(4) – Parent companies and subsidiaries – Implementation by the Member State of the single taxable person scheme – Conditions – Consequences)

In Case C?162/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte Suprema di Cassazione (Italy), made by decision of 30 November 2006, received at the Court on 26 March 2007, in the proceedings

Ampliscientifica Srl,

Amplifin SpA

v

Ministero dell'Economia e delle Finanze,

Agenzia delle Entrate,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, A. Ó Caoimh, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Mazák,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 January 2008,

after considering the observations submitted on behalf of:

– Ampliscientifica Srl and Amplifin SpA, by M. Garavoglia, Avvocato,

– the Italian Government, by I. M. Braguglia, acting as Agent, and G. De Bellis, Avvocato dello Stato,

– the Cypriot Government, by E. Syméonidou, acting as Agent,

– the United Kingdom Government, by C. Gibbs, acting as Agent, and I. Hutton, Barrister,

– the Commission of the European Communities, by A. Aresu and M. Afonso, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the second subparagraph of Article 4(4) of the 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, the 'Sixth Directive').

2 The reference was made in proceedings between Ampliscientifica Srl ('Ampliscientifica') and Amplifin SpA ('Amplifin') on the one hand and the Ministero dell'Economia e delle Finanze (Ministry of Finance) and the Agenzia delle Entrate (Revenue Authority) on the other concerning an additional assessment to value added tax ('VAT') which was addressed to Amplifin in respect of the years 1990 and 1991.

Legal context

Community legislation

3 Article 4(1) of the Sixth Directive provides as follows:

'"Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.'

4 The second subparagraph of Article 4(4) of the Sixth Directive is worded as follows:

'Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links.'

5 Article 27(1) of the Sixth Directive provides as follows:

'The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.'

6 Article 29 of the Sixth Directive sets up an Advisory Committee on VAT.

National legislation

The Decree of the President of the Republic No 633

7 The third paragraph of Article 73 of the Decree of the President of the Republic No 633 of 26 October 1972 establishing and regulating value added tax (ordinary supplement to GURI No 292 of 11 November 1972), as amended by the Decree of the President of the Republic No 24 of 29 January 1979 (GURI No 30 of 31 January 1979), provides as follows:

'The Minister of Finance shall have authority to issue decrees laying down appropriate rules which provide that declarations of subsidiary companies may be submitted by the parent company or body to the office for the place at which it is registered for tax purposes and that payments … may be made to that office of the total amount due by the parent company or body and by the subsidiary companies, net of any deductible excess. The declarations, which are also to be signed by the parent company or body, must also be submitted to the offices for the places at which the subsidiary companies are registered for tax purposes, without prejudice to the other obligations and liabilities of those companies. A company shall be regarded as a subsidiary where over 50% of the shares or stock in that company has been held by another company since the beginning of the previous calendar year.'

The Ministerial Decree of 13 December 1979

8 The authority provided for in the third paragraph of Article 73 was implemented by the Ministerial Decree of 13 December 1979 adopting rules on value added tax relating to payments and declarations by subsidiary companies (GURI No 344 of 19 December 1979), as amended by the Ministerial Decree of 18 December 1989 (GURI No 301 of 28 December 1989 ('the 1979 Decree'). The 1979 Decree organises and facilitates the manner in which payments and declarations can be made by parent companies and subsidiaries by enabling the parent company, to a certain extent, to act on behalf of its subsidiary company or companies.

9 Article 2 of the 1979 Decree states that 'only … companies in which the parent company or body or other subsidiary of that company or body within the meaning of this article has held more than 50% of the share capital or stock since the beginning of the previous calendar year shall be regarded as subsidiary companies'.

10 Article 3 of the 1979 Decree states accordingly that the declaration of the parent company 'also to be signed by the representatives of the subsidiary company, must indicate … the VAT number of the subsidiary companies as well as the competent (VAT) office for each of them'.

11 The first paragraph of Article 5 of the 1979 Decree provides as follows:

'A parent company or body wishing to rely on this decree must also submit the annual declarations of its subsidiaries to the [VAT] office for the place at which it is registered for tax purposes. Those declarations, which are also to be signed by the representative of the parent company or body, must also be submitted, together with their annexes, by the subsidiary companies to the competent VAT office for each of them. The name of the parent company or body along with the appropriate VAT number must be stated in the declarations of the subsidiary company.'

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

12 The dispute in the main proceedings concerns the tax declarations submitted by Ampliscientifica for 1990 and by Amplifin for 1990 and 1991 ('the contetsted declarations'). Ampliscientfica and Amplifin are companies incorporated under Italian law which formed part of the Amplifon group, which was engaged in the research and development of new scientific

instruments.

13 More than 50% of the share capital of Amplifscientifica, which was formed in February 1989, was subscribed by Amplaid SpA, 99% of which was in turn controlled by Amplifin. Ampliscientifica's business ceased in February 1993. For the 1990 tax year, Amplifin submitted to the Milan VAT office the declaration provided for under the 1979 Decree, after making an entry in its accounts transferring a VAT debt for which Ampliscientifica had previously been liable. For the 1991 tax year, it did the same with another of its subsidiaries that was involved in the real estate sector, Ampliare Srl, formed in November 1990, which resulted in a significant VAT credit being transferred to it.

14 The Milan VAT office took the view that Amplifin was not entitled to submit the contested declarations, since Article 2 of the 1979 Decree provides that, in order for the simplified VAT payment scheme to be applicable, the link between the parent company or body and the subsidiary company must have existed 'from the beginning of the calendar year' preceding the year in which the declaration was made. It therefore issued notices of additional assessment for 1990 (in respect of the VAT debt of Ampliscientifica) and 1991 (in respect of the VAT credit of Ampliare Srl).

15 Ampliscientfica and Amplifin challenged those notices before the Commissione tribuatria provinciale di Milano (Provincial Tax Court, Milan), which granted their applications in separate judgments on 5 November 1996.

16 The Milan VAT office appealed before the Commissione tributaria della Lombardia (Tax Court, Lombardy), which granted its appeals by judgements of 31 May and 17 November 1999, taking the view that, under the 1979 Decree, Amplifin had failed to comply with the condition stipulating the period for which share capital must be held in subsidiary companies and was not at that time entitled to submit the contested declarations. Ampliscientifica and Amplifin lodged appeals before the Corte Suprema di Cassazione, which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the [second subparagraph] of Article 4(4) of the Sixth Directive … be construed as a rule that is insufficiently precise, with the effect that the Member States are permitted to apply the VAT scheme set out in that rule to specific situations involving economic, financial or legal links among different persons, or as a rule that is sufficiently precise and which, therefore, once a Member State has decided to adopt that scheme, requires provision to be made for it to be applied in all cases involving the links set out in that rule?

(2) (i) Regardless of the reply to be given to the question (1), is the imposition of a temporal restriction – in the sense that the link must have existed for a significant period of time – as a precondition for the application of the scheme, where the persons concerned are not permitted to demonstrate that there is a valid economic reason for the link being forged, disproportionate in relation to the objectives of the directive and to the need for compliance with the principle prohibiting the abuse of rights? (ii) Is that legislation to be regarded in any event as contrary to the principle of the neutrality of VAT?'

The questions

Question 1

17 The first question is based on the premiss that the 1979 Decree, under which the reminders for VAT non-payment at issue in the main proceedings were issued, constitutes an implementation of the authority conferred on all Member States by the second subparagraph of Article 4(4) of the

Sixth Directive to treat as a single taxable person for VAT purposes different persons who are established in the territory of the country but are legally independent where those persons are closely bound to one another by financial, economic and organisational links. In other words, the 1979 Decree is, at least in part, a measure transposing the second subparagraph of Article 4(4) of the Sixth Directive.

18 It should be noted, first of all, as the very wording of that provision makes clear, that it can be implemented only after the Advisory Committee on VAT has been consulted. However, it is not disputed that, in the case of the 1979 Decree, the Italian Republic did not consult that committee.

19 It is to be observed, secondly, that the effect of implementing the scheme established in the second subparagraph of Article 4(4) of the Sixth Directive is that national legislation adopted on the basis of that provision allows persons, in particular companies, which are bound to one another by financial, economic and organisational links no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person. Thus, where that provision is implemented by a Member State, the closely linked person or persons within the meaning of that provision cannot be treated as a taxable person or persons within the meaning of Article 4(1) of the Sixth Directive (see, to that effect, Case C?355/06 *van der Steen* [2007] ECR I?0000, paragraph 20). It follows that treatment as a single taxable person precludes persons who are thus closely linked from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations.

20 The second subparagraph of Article 4(4) of the Sixth Directive therefore necessarily requires, where that provision is implemented by a Member State, the national implementing legislation to provide that the taxable person is a single taxable person and that a single VAT number be allocated to the group. The fact that express reference was made in the Sixth Directive to an individual VAT identification number only after the introduction of Article 28h of that directive, which forms the basis of the new Article 22(1)(c) to (e) of the directive, by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1), namely after the tax years in question in the main proceedings, can have no bearing on the foregoing consideration, since the use of such a number is dictated by the need, both for the economic operators and the tax authorities of the Member States, to identify with a degree of certainty those effecting transactions subject to VAT. The clarifications brought about by Article 28h thus simply confirm a pre-existing rule that is integral to the proper functioning of the common system of VAT.

21 The transposition of the second subparagraph of Article 4(4) of the Sixth Directive must therefore be distinguished from the setting up of a mechanism to simplify VAT declarations and payments which enables, inter alia, companies within the same group to remain separate taxable persons, even where VAT may be consolidated in the accounts of the parent company.

22 It is in the light of those considerations and of the view expressed by the Italian Government at the hearing and in its letter of 24 July 2003 to the Commission in the context of infringement proceeding No 2002/5456 that the 1979 Decree does not constitute a measure transposing the second subparagraph of Article 4(4) of the Sixth Directive that the Corte Suprema di Cassazione must determine whether the national legislation applicable to the contested declarations satisfies the criteria referred to at paragraphs 19 and 20 above. It must be stressed that, should that be the case, such legislation would have been adopted in breach of the procedural requirement laid down in the second subparagraph of Article 4(4) of the Sixth Directive, namely consultation of the Advisory Committee on VAT.

23 The answer to the first question must therefore be that the second subparagraph of Article 4(4) of the Sixth Directive is a provision which, in order to be implemented by a Member State,

requires prior consultation by that State of the Advisory Committee on VAT and the adoption of national legislation authorising persons, in particular companies, established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links, no longer to be treated as separate taxable persons for the purposes of VAT in order to be treated as a single taxable person to whom a single VAT identification number is allocated and, accordingly, the sole person entitled to submit VAT declarations. It is for the national court to determine whether national legislation, such as that at issue in the main proceedings, satisfies those criteria, subject to the qualification that, where there has been no prior consultation of the Advisory Committee on VAT, national legislation which meets those criteria constitutes legislation adopted in breach of the procedural requirement laid down in the second subparagraph of Article 4(4) of the Sixth Directive.

Question 2

24 In essence, the second question concerns whether the temporal restriction imposed by the 1979 Decree in order for a parent company or body to be able to make VAT declarations and payments in accordance with the simplified rules laid down in that provision is in breach of the principles of proportionality and fiscal neutrality and the rules against the abuse of rights. In order to qualify for that provision, the parent company or body must have held more than 50% of the share capital or stock of the persons with whom it is closely linked, such as subsidiary companies, since at least the beginning of the calendar year preceding that in which the declaration is made.

25 As regards, first, the principle of fiscal neutrality, it is a fundamental principle of the common system of VAT (see, inter alia, Case C?454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I?6973, paragraph 59) which precludes, on the one hand, treating similar goods, which are thus in competition with each other, differently for VAT purposes (Case C?283/95 *Fischer* [1998] ECR I?3369, paragraphs 21 and 27, and Case C-481/98 *Commission* v *France* [2001] ECR I?3369, paragraph 22) and, on the other, treating similar economic transactions, which are therefore in competition with each other, differently for VAT purposes (Case C?109/02 *Commission* v *Germany* [2003] ECR I?12691, paragraph 20; Case C?382/02 *Cimber Air* [2004] ECR I?8379, paragraph 24; and Case C?97/06 *Navicon* [2007] ECR I?0000. paragraph 21).

26 National legislation which simply treats taxable persons wishing to opt for a mechanism to simplify VAT declarations and payments differently according to whether the persons in question have had a link established by a specific holding in the capital of a subsidiary for a longer or shorter period than that referred to at paragraph 24 above applies to all economic operators equally, regardless of whether they are competing with each other in connection with their operations or their goods. The principle of fiscal neutrality does not preclude such legislation, which makes a distinction that is objectively justified in order that the economic reality underlying a legal transaction may be established so that recourse may be had to simplified VAT declaration and payment procedures. As was observed at paragraph 22 above, it is for the referring court to determine whether the national legislation applicable to the contested declarations constitutes such a provision.

27 Next, the principle prohibiting the abuse of rights is intended to ensure, particularly in the field of VAT, that Community legislation is not extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (Case C?255/02 *Halifax* [2006] ECR I?1609, paragraphs 69 and 70).

28 The effect of that principle is therefore to prohibit wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (see, to that effect, Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR

I?7995, paragraph 55).

29 Moreover, preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (*Halifax*, paragraph 71).

30 Clearly, national legislation, such as that at issue in the main proceedings, which requires economic operators to demonstrate, by means of a certain continuity in their activities and operations, that recourse to a mechanism to simplify VAT declarations and payments is not simply motivated by the intention to obtain a tax advantage, inter alia by entering a VAT debit or credit in the accounts of the parent company or body, which would have the effect, in the first case, of reducing its taxable income and, in the second, of securing it an immediate tax credit, but is the result of a more long-term economic decision, is not contrary to the principle prohibiting the abuse of rights.

31 Lastly, as regards the principle of proportionality, national legislation which, in the same way as the 1979 Decree, lays down a time?limit of between one and two years in order for taxpayers to be able to make VAT declarations and payments in accordance with simplified procedures is, in the light of the objective of combating tax evasion and bogus legal arrangements, consistent with the principle of proportionality. Conversely, if no time?limit had been imposed, the effect might have been to permit individual operations to be carried out justifying the ad hoc formation of legal structures. Such national legislation is likely to encourage abuse and evasion, the prevention of which is precisely one of the objectives pursued by Community law (see, to that effect, Case C?494/04 *Heintz van Landewijck* [2006] ECR I?5381, paragraphs 42 and 43, and Case C-374/06 *BATIG* [2007] ECR I?000, paragraph 39).

32 The answer to the second question must therefore be that the principle of fiscal neutrality does not preclude national legislation which simply treats taxable persons wishing to opt for a mechanism to simplify VAT declarations and payments differently according to whether the parent company or body has held more than 50% of the share capital or stock of the persons with whom it is closely linked since at least the beginning of the calendar year preceding that in which the declaration was made or, on the contrary, satisfies those conditions only after that date. It is for the national court to determine whether national legislation, such as that at issue in the main proceedings, constitutes such a provision. Moreover, neither the principle prohibiting the abuse of rights nor the principle of proportionality precludes such legislation.

Costs

33 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 (Third Chamber) hereby rules:

1. **The second subparagraph of Article 4(4) of the 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 is a provision which, in order to be implemented by a Member State, requires prior consultation by that State of the Advisory Committee on value added tax and the adoption of national legislation authorising persons, in particular companies, established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links, no longer to be treated as separate taxable persons for the purposes of value added tax in order to be treated as a single taxable person to whom a single value added tax identification number is allocated and, accordingly, the sole person entitled to submit value added tax declarations. It is for the national court to determine whether national legislation, such as that at issue in the main proceedings, satisfies those**

criteria, subject to the qualification that, where there has been no prior consultation of the Advisory Committee on value added tax, national legislation which meets those criteria constitutes legislation adopted in breach of the procedural requirement laid down in the second subparagraph of Article 4(4) of Sixth Directive 77/388.

2. **The principle of fiscal neutrality does not preclude national legislation which simply treats taxable persons wishing to opt for a mechanism to simplify value added tax declarations and payments differently according to whether the parent company or body has held more than 50% of the share capital or stock of the persons with whom it is linked since at least the beginning of the calendar year preceding that in which the declaration was made or, on the contrary, satisfies those conditions only after that date. It is for the national court to determine whether national legislation, such as that at issue in the main proceedings, constitutes such a provision. Moreover, neither the principle prohibiting the abuse of rights nor the principle of proportionality precludes such legislation.**

[Signatures]

* Language of the case: Italian.