Case C-395/09

Oasis East sp. z o.o.

v

Minister Finansów

(Reference for a preliminary ruling from the

Naczelny S?d Administracyjny)

(Sixth VAT Directive – Directive 2006/112/EC – Accession of a new Member State – Right to deduct input tax – National legislation excluding the right to deduct tax on the provision of certain services – Commercial partners established in a territory classified as a ‘tax haven’ – Option for Member States to retain rules excluding the right to deduct at the time when the Sixth VAT Directive entered into force)

Summary of the Judgment

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))

Article 17(6) 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, the provisions of which have, substantially, been reproduced in Article 176 of Directive 2006/112 on the common system of value added tax, must be construed as not authorising the retention of national legislation, applicable when Sixth Directive 77/388 entered into force in the Member State concerned, which excludes in general the right to deduct input value added tax paid at the time of the purchase of imported services, the price of which is directly or indirectly paid to a person established in a State or territory classified as a ‘tax haven’ by that national legislation.

Member States are not empowered to maintain exclusions from that right which apply in a general manner to any expenditure related to the acquisition of goods or services.

(see paras 30, 32, operative part)

JUDGMENT OF THE COURT (Seventh Chamber)

30 September 2010 (*)

(Sixth VAT Directive – Directive 2006/112/EC – Accession of a new Member State – Right to deduct input tax – National legislation excluding the right to deduct tax on the provision of certain services – Commercial partners established in a territory classified as a ‘tax haven’ – Option for Member States to retain rules excluding the right to deduct at the time when the Sixth VAT Directive entered into force)

In Case C?395/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Naczelny S?d Administracyjny (Poland), made by decision of 6 August 2009, received at the Court on 13 October 2009, in the proceedings

Oasis East sp. z o.o.

v

Minister Finansów,

THE COURT (Seventh Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J. Malenovský and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2010,

after considering the observations submitted on behalf of:

– Oasis East sp. z o.o., by M. Wojda and J. Martini,

– the Polish Government, by M. Szpunar and M. Jarosz, acting as Agents,

– the European Commission, by M. Owsiany-Hornung, K. Herrmann and D. Triantafyllou, 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 Article 17(2) and (6) 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) (‘the Sixth Directive’), the provisions of which have, substantially, been reproduced in Article 176 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The reference has been made in proceedings between Oasis East sp. z o.o. (‘Oasis East’) and the Minister Finansów (Polish Minister for Finance).

Legal context

European Union legislation

3 Article 17(2) and (6) of the Sixth Directive, in the version resulting from Article 28f thereof, provides:

‘(2) In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax [(“VAT”)] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…

(6) Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of [VAT]. [VAT] shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force.’

4 The Sixth Directive was repealed and replaced by Directive 2006/112.

5 Article 176 of Directive 2006/112 provides:

‘The Council, acting unanimously on a proposal from the Commission, shall determine the expenditure in respect of which VAT shall not be deductible. VAT shall in no circumstances be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Pending the entry into force of the provisions referred to in the first paragraph, Member States may retain all the exclusions provided for under their national laws at 1 January 1979 or, in the case of the Member States which acceded to the Community after that date, on the date of their accession.’

National legislation

6 Article 25(1)(a) of the Ustawa o podatku VAT z roku 1993 (Law on value added tax) of 8 January 1993 (‘1993 Law on VAT’), provides:

‘Reduction of the amount or the refund of the difference of the tax due shall not apply to imported services purchased by the taxable person in connection with which payment of the amount due is made directly or indirectly to a person having its place of residence, registered office or central management in a territory or country referred to in Annex 9 to this Law.’

7 Annex 9 to the 1993 Law on VAT, entitled ‘List of countries (territories) in the case of which the VAT on the importation of services does not reduce the amount of VAT due or confer an entitlement to refund of the difference of the VAT due’, contains the following list:

‘(1) the Principality of Andorra;

(2) Anguilla – an autonomous dependent territory of the United Kingdom of Great Britain and Northern Ireland;

(3) Antigua and Barbuda;

(4) Aruba – an autonomous territory of the Kingdom of the Netherlands;

(5) the Commonwealth of the Bahamas;

(6) the State of Bahrain;

(7) Barbados;

(8) Belize;

(9) Bermuda – a dependent territory of the United Kingdom of Great Britain and Northern Ireland;

(10) the British Virgin Islands, a dependent territory of the United Kingdom of Great Britain and Northern Ireland;

(11) the Cook Islands – an autonomous territory in association with New Zealand;

(12) the Commonwealth of Dominica;

(13) Gibraltar – a dependent territory of the British Crown;

(14) Grenada;

(15) Guernsey/Sark/Alderney – dependent territories of the British Crown;

(16) Hong Kong – a special administrative region of the People’s Republic of China;

(17) Jersey – a dependent territory of the British Crown;

(18) the Cayman Islands – a dependent territory of the United Kingdom of Great Britain and Northern Ireland;

(19) the Republic of Liberia;

(20) the Principality of Liechtenstein;

(21) Macao – a special administrative region of the People’s Republic of China;

(22) the Republic of the Maldives;

(23) the Isle of Man – a dependent territory of the British Crown;

(24) the Republic of the Marshall Islands;

(25) the Republic of Mauritius;

(26) the Principality of Monaco;

(27) Montserrat – a dependent territory of the United Kingdom of Great Britain and Northern Ireland;

(28) the Republic of Nauru;

(29) the Netherlands Antilles – an autonomous territory of the Kingdom of the Netherlands;

(30) Niue – an autonomous territory in association with New Zealand;

(31) the Republic of Panama;

(32) the Independent State of Samoa;

(33) the Republic of the Seychelles;

(34) the Federation of St Christopher and Nevis;

(35) Saint Lucia;

(36) Saint Vincent and the Grenadines;

(37) the Kingdom of Tonga;

(38) the Turks and Caicos Islands – a dependent territory of the United Kingdom of Great Britain and Northern Ireland;

(39) the United States Virgin Islands – an unincorporated territory of the United States;

(40) the Republic of Vanuatu;

(41) the United Arab Emirates.'

8 That tax system was, in essence, maintained by the provisions of the Ustawa o podatku VAT z roku 2004 (Law on value added tax) of 11 March 2004 ('2004 Law on VAT'), namely by Article 88(1)(1) of that law, read in conjunction with Annex 5 thereto, the list in that annex comprising 39 States and territories instead of 41. Those provisions entered into force on 1 May 2004.

The dispute in the main proceedings and the question referred

9 Oasis East produces and sells water refrigeration devices. As part of its activities, which also include after-sales services, it makes use of services offered by an undertaking established in one of the territories listed in Annex 9 to the 1993 Law on VAT, which has been replaced by Annex 5 to the 2004 Law on VAT. That undertaking provides management and technical assistance services to Oasis East. Those services relate, in particular, to the following activities: marketing, organisation and participation in international trade fairs, operational activities relating to production planning, engineering services, financial and accounting consultancy, transport organisation, services connected with the use of information-technology services, and coordination

of purchases and sales.

10 On 28 December 2007, before the Katowice tax authority, Oasis East asked whether, from 1 May 2004, it was entitled to deduct the input tax paid at the time of the importation of administrative services in respect of which payment had been made to an undertaking which had established its registered office in one of the territories listed in Annex 5 to the 2004 Law on VAT.

11 By decision of 4 April 2008, the Director of the Katowice tax authority replied in the negative to the question posed by Oasis East. He expressed the view that Oasis East was not entitled to deduct the input tax, given that the price of the services concerned had been paid to an undertaking which had established its place of residence, registered office or central management in one of the States or territories listed in Annex 5 to the 2004 Law on VAT.

12 The Director of the Katowice tax authority stated that the national legislation was not incompatible with European Union law, since Article 17(6) of the Sixth Directive allowed Member States to retain all of the exclusions provided for under national legislation at the time when that directive entered into force. He inferred from this that the Republic of Poland had retained the power to maintain in force the restrictions relating to the deduction of VAT which were in existence on the date of its accession to the European Union.

13 On 18 June 2008, Oasis East brought an action before the Wojewódzki S?d Administracyjny w Gliwicach (Regional Administrative Court, Gliwice) against that decision of 4 April 2008.

14 By decision of 22 December 2008, that court dismissed Oasis East's action. It held that the retention in national law of the exclusion provided for in Article 88(1)(1) of the 2004 Law on VAT did not amount to a breach of Article 17(6) of the Sixth Directive.

15 In its appeal in cassation lodged on 9 March 2009, Oasis East restated the argument invoked before the lower court. In those circumstances, the Naczelny S?d Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Community law (in particular, Article 17(6) of [the Sixth Directive …], now Article 176 of … Directive 2006/112/EC …) entitle a Member State to apply national provisions which exclude the right of a taxable person to reduce the amount of tax due, or to receive a refund of the difference, in the case of the purchase of imported services in connection with which payment of the amount due is made directly or indirectly to a person having its place of residence, registered office or central management in one of the territories or countries referred to in national law as so-called "tax havens", regard being had to the fact that such exclusion was applied in the Member State prior to its accession to the Community?'

The question referred for a preliminary ruling

16 By its question, the referring court asks whether Article 17(6) of the Sixth Directive, the provisions of which have, in essence, been reproduced in Article 176 of Directive 2006/112, authorises the retention of national legislation, applicable at the time when the Sixth Directive entered into force in the Member State concerned, which excludes in general the right to deduct input VAT paid at the time of the acquisition of imported services, the price for which has been paid, either directly or indirectly, to a person established in a State or territory classified by that legislation as a 'tax haven'.

17 Since the wording of the question referred relates to both Article 17(6) of the Sixth Directive and Article 176 of Directive 2006/112, it is necessary to point out, first of all, that those two

provisions are essentially identical.

18 In order to answer that question, it is necessary to bear in mind that the right of deduction laid down in Article 17(2) of the Sixth Directive, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT and in principle may not be limited (see Case C?409/99 *Metropol and Stadler* [2002] ECR I?81, paragraph 42; Case C?465/03 *Kretztechnik* [2005] ECR I?4357, paragraph 33; and Joined Cases C?538/08 and C?33/09 *X Holding and Oracle Nederland* [2010] ECR I?0000, paragraph 37).

19 The principle of the right to deduct VAT is, however, subject to the derogation in Article 17(6) of the Sixth Directive. The Member States are thereby authorised to retain their existing legislation as at the date of entry into force of the Sixth Directive in regard to exclusion from the right of deduction until such time as the Council has adopted the provisions envisaged by that article (see Case C?371/07 *Danfoss and AstraZeneca* [2008] ECR I?9549, paragraph 28, and *X Holding and Oracle Nederland*, paragraph 38).

20 Since the Council has not adopted any such provisions, the Member States may retain their existing legislation in regard to exclusion from the right to deduct VAT. European Union law therefore does not yet contain any provision listing the expenditure excluded from the right to deduct (see Case C?280/04 *Jyske Finans* [2005] ECR I?10683, paragraph 23, and *Danfoss and AstraZeneca*, paragraph 29).

21 With regard to the scope of the derogation scheme provided for in Article 17(6) of the Sixth Directive, the Court has, however, held that that provision presupposes that the exclusions which Member States may retain were lawful under Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16) (‘the Second Directive’), which predated the Sixth Directive (see Case C?305/97 *Royscot and Others* [1999] ECR I?6671, paragraph 21, and *X Holding and Oracle Nederland*, paragraph 40).

22 In that regard, while Article 11(1) of the Second Directive established the right to deduct, Article 11(4) thereof provided that the Member States could exclude from the system of deduction certain goods and services, in particular those capable of being exclusively or partially used for the private needs of the taxable person or his staff.

23 Consequently, the power granted to the Member States in Article 17(6) of the Sixth Directive does not constitute an unfettered discretion to exclude all, or virtually all, goods and services from the right to deduct VAT, and thus to render meaningless the system established in Article 11(1) of the Second Directive. That power does not therefore apply to general exclusions and does not release Member States from the obligation sufficiently to define the goods and services in relation to which the right to deduct is excluded (see, to that effect, *Royscot and Others*, paragraphs 22 and 24, and Case C?434/03 *Charles and Charles-Tijmens* [2005] ECR I?7037, paragraphs 33 and 35).

24 Furthermore, as the scheme here involves a derogation from the principle of the right to deduct VAT, it must be interpreted strictly (see *Metropol and Stadler*, paragraph 59, and Case C?414/07 *Magoora* [2008] ECR I?10921, paragraph 28).

25 So far as concerns the main proceedings and the possible applicability of the derogation provided for in Article 17(6) of the Sixth Directive, it must be noted that that directive entered into force in Poland on the date of the accession of that Member State to the European Union, namely 1 May 2004. Therefore, that is the material date for the purposes of the application of the

abovementioned provision in respect of that Member State (*Magoora*, paragraph 27).

26 Since the Polish Government has referred to the fact that the wording of Article 176 of Directive 2006/112 establishes a distinction between Member States which acceded to the European Union prior to 1 January 1979 and those, such as the Republic of Poland, which acceded after that date, suffice it to note that that distinction is designed only to determine the date prior to which provision had to be made in national legislation for expenditure which did not give rise to a right to deduct VAT.

27 Consequently, Article 176 of Directive 2006/112 cannot give rise to a different interpretation, with regard to the scope of the exclusions under consideration, depending on whether the Member State concerned acceded to the European Union prior to 1 January 1979 or after that date. In those circumstances, the intervention of Article 176 of that directive did not affect the case-law relating to the interpretation of Article 17(6) of the Sixth Directive.

28 For the purposes of assessing the national legislation at issue in the main proceedings in the light of the derogation provided for therein, it must be noted, as has also been stressed by the referring court, that that legislation constitutes a general measure restricting the right to deduct input VAT in relation to any purchases of imported services, the price of which is directly or indirectly paid to a person established in a State or territory classified as a ‘tax haven’ by that legislation.

29 However, such legislation includes a limitation of the right to deduct VAT which goes beyond that authorised by Article 17(6) of the Sixth Directive.

30 The Court has ruled that the Member States are not empowered to maintain exclusions from the right to deduct VAT which apply in a general manner to any expenditure related to the acquisition of goods or services (see, to that effect, Case C?74/08 *PARAT Automotive Cabrio* [2009] ECR I?3459, paragraphs 28 and 29, and *X Holding and Oracle Nederland*, paragraph 44).

31 With regard, finally, to the view put forward by the Polish Government that the national legislation responds to the need to prevent tax evasion, it should be noted that, although the Court recognised, in Case C?255/02 *Halifax and Others* [2006] ECR I?1609, paragraph 70, that the principle of prohibiting abusive practices also applies to the sphere of VAT, that principle cannot allow Member States to widen the scope of the derogation scheme here at issue. Furthermore, although, as is stated by the referring court, the restrictions provided for by Polish law were based on the need to prevent certain types of tax evasion and avoidance, Article 27 of the Sixth Directive provides, to that end, for a special procedure allowing the Council to authorise any Member State to introduce special derogating measures.

32 In the light of the foregoing, the answer to the question referred is that Article 17(6) of the Sixth Directive, the provisions of which have, in essence, been reproduced in Article 176 of Directive 2006/112, must be construed as not authorising the retention of national legislation, applicable when the Sixth Directive entered into force in the Member State concerned, which excludes in general the right to deduct input VAT paid at the time of the purchase of imported services, the price of which is directly or indirectly paid to a person established in a State or territory classified as a ‘tax haven’ by that national 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 (Seventh Chamber) hereby rules:

Article 17(6) 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, as amended by Council Directive 95/7/EC of 10 April 1995, the provisions of which have, in essence, been reproduced in Article 176 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be construed as not authorising the retention of national legislation, applicable when Sixth Directive 77/388 entered into force in the Member State concerned, which excludes in general the right to deduct input value added tax paid at the time of the purchase of imported services, the price of which is directly or indirectly paid to a person established in a State or territory classified as a 'tax haven' by that national legislation.

[Signatures]

* Language of the case: Polish.