Case C-504/10

Tanoarch s.r.o.

v

Da?ové riadite?stvo Slovenskej republiky

(Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky)

(Taxation – VAT – Right of deduction – Assignment of a share in the rights relating to an invention, held by a number of undertakings, to an undertaking which has the right to use that invention in its entirety – Abusive practice)

Summary of the Judgment

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

(Council Directive 2006/112, Arts 9(1) and 168)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Restriction of the right to deduct*

(Council Directive 2006/112, Art. 168)

1. A taxpayer may, in principle, claim a right of deduction of input value added tax paid or payable for the supply of a service, carried out for consideration, when the applicable national law permits the assignment of a share in the co?ownership of an invention which confers rights relating to the invention.

The concept of economic activity encompasses any activity of producers, traders or persons supplying services. The terms ‘supply of goods’ and ‘supply of services’ are objective in nature and apply without regard to the purpose or results of the transactions concerned. Thus, the assignment of a share in the co-ownership of an invention, notwithstanding the fact that that invention was not registered as a patent, may, in principle, be an economic activity subject to value added tax. It follows that such a transaction may give rise to a right of deduction of input value added tax paid or payable.

The question whether the assignment at issue is carried out for the sole purpose of obtaining a tax advantage is entirely irrelevant in determining whether it constitutes a supply of a service and an economic activity within the meaning of the relevant provisions of Directive 2006/112 on the common system of value added tax.

(see paras 45-48, operative part 1)

2. In the sphere of value added tax, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, second, it is apparent from a number of objective factors that the essential aim of the transactions

concerned is solely to obtain that tax advantage.

With regard to the tax treatment of a transaction in which a share in the co- ownership of an invention which confers rights relating to the invention is assigned, it is for the referring court to establish, taking into account all the factual circumstances characterising such a supply of the service, whether or not there has been an abuse of rights with regard to the right of deduction of input value added tax.

(see paras 52, 54, operative part 2)

JUDGMENT OF THE COURT (Seventh Chamber)

27 October 2011 (*)

(Taxation – VAT – Right of deduction – Assignment of a share in the rights relating to an invention, held by a number of undertakings, to an undertaking which has the right to use that invention in its entirety – Abusive practice)

In Case C?504/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Slovakia), made by decision of 28 September 2010, received at the Court on 21 October 2010, in the proceedings

Tanoarch s.r.o.

v

Da?ové riadite?stvo Slovenskej republiky,

THE COURT (Seventh Chamber),

composed of R. Silva de Lapuerta (Rapporteur), acting as President of the Seventh Chamber, E. Juhász and D. Švaby, Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 15 September 2011,

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 2(1) 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 directive’).

2 The reference was made in proceedings between Tanoarch s.r.o. (‘Tanoarch’) and the Da?ové riadite?stvo Slovenskej republiky (Tax Directorate of the Slovak Republic) concerning the right to deduct value added tax (‘VAT’) in respect of the assignment of a co-ownership share transfer of a share in an invention which has not yet given rise to registration of a patent.

European Union law

3 Article 2(1) of the directive provides that inter alia the supply of goods and services for consideration within the territory of a Member State by a taxable person acting as such shall be subject to VAT.

4 The second subparagraph of Article 9(1) of the directive states:

‘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 According to Article 24(1) of the directive, a supply of services is to mean any transaction which does not constitute a supply of goods.

6 Article 25 of the directive states:

‘A supply of services may consist, inter alia, in one of the following transactions:

a) the assignment of intangible property, whether or not the subject of a document establishing title;

b) the obligation to refrain from an act, or to tolerate an act or situation;

c) the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.’

7 Article 62 of the directive provides that, for the purposes of the directive, ‘chargeable event’ is to mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled.

8 Pursuant to Article 63 of the directive, the chargeable event is to occur and VAT to become chargeable when the goods or the services are supplied.

9 According to Article 167 of the directive, a right of deduction shall arise at the time the deductible tax becomes chargeable.

10 Under Article 168 of the directive:

‘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 or services, carried out or to be carried out by another taxable person;

...’

National law

11 Pursuant to Article 49(1) of Law No 222/2004 on VAT, in the version applicable to the case in the main proceedings (‘the law on VAT’), the taxpayer’s right to deduct tax on the goods or services arises when the tax on those goods or services becomes chargeable.

12 Under Article 49(2) of that law, the taxpayer may deduct from the tax which he is liable to pay the tax on goods and services used for the purposes of his economic activity as a taxpayer, subject to the provisions of paragraphs Article 49(3) and (7). The taxpayer may deduct the tax if it is charged to him by another taxpayer in the Slovak Republic on goods and services which have been or are to be supplied to the taxpayer.

13 Under Article 51(1)(a) of the Law on VAT, the taxpayer may claim his right of deduction under Paragraph 49 of that law if he is in possession of the taxpayer’s invoice when deducting the tax in accordance with Article 49(2) of that law.

14 Article 10 of Law No 435/2001 on patents, in the version applicable to the present case (‘Law on patents’), provides:

‘1. The rights relating to an invention, including the right to make an application, belong to the inventor.

2. The inventor is the person who has created the invention by his own creative activity.

3. Co-inventors enjoy rights relating to an invention to the extent that they have contributed to the creation of the invention. If they do not agree otherwise or if the court does not decide otherwise, the shares of co-inventors in the creation of an invention shall be deemed equal.’

15 Article 12 of the Law on patents provides:

‘1. The rights relating to an invention also revert to successors ...

2. The rights relating to an invention are transferred to another person in the cases defined by the particular legislation at issue.

3. To be valid, a contract for the assignment of the rights relating to an invention must be drawn up in writing.

4. In the case of assignment or transfer of the rights relating to an invention taking place after the lodging of an application, those rights shall be assigned or transferred together with the assignment or transfer of the rights derived from the application. However, the assignment or transfer of rights deriving from the application shall take effect with regard to third parties only from the date of registration of the patent applications, except in cases where the third party was aware of the assignment or transfer, or should, in the circumstances, have been aware of it.’

16 The relationship between co-owners of a patent are laid down in Article 20(1) to (3) of the Law on patents as follows:

‘1. Unless otherwise provided in the present law, the provisions of the particular legislation at issue apply to the relationship between co-owners of a patent.

2. The share of co-ownership in respect of a patent is derived from the extent of the rights

relating to the invention attributable to each co-inventor in his capacity as owner of the patent, or as the assignee of the owner of the patent.

3. Each co-owner has the right to use the patented invention, but may not grant a third party the right to use the invention, unless otherwise agreed between the co-owners.'

17 Under Article 37(1) and (5) of the Law on patents, the application may be brought by the person or persons who have rights relating to the invention. The application must contain data identifying the inventor or co-inventors and the document concerning the rights relating to the invention, if the applicant is not the inventor.

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

18 On 26 February 2007, a number of natural and legal persons, including Tanoarch and VARS Slovakia s.r.o. ('VARS'), two companies having their registered office in Banská Bystrica (Republic of Slovakia) lodged an application with the Industrial Property Office of the Slovak Republic for a patent for an invention called 'Method for the preparation of a high-purity talc product'.

19 On 5 July 2007, Tanoarch and VARS concluded a contract for assignment of co?ownership of intellectual property rights. Under that contract, for the conclusion of which the two parties were represented by the same natural person Mr Kovanda, VARS assigned to Tanoarch 50% of its share of co-ownership in respect of the patent which was not yet registered.

20 The contract stated that the price of the assignment of the share of co-ownership in the rights relating to the invention had been fixed, on the basis of an expert report, at SKK 258 million and, on the basis of a complementary determination of value, at a sum of SKK 774 million. The price for the assignment of half of the rights of co-ownership was consequently laid down, pursuant to the abovementioned contract, at SKK 387 million net of VAT. Under the terms of the contract, the assignment of the rights relating to the invention was stipulated for a price which had to be paid in cash or in kind unless otherwise provided by the parties.

21 On the basis of an invoice dated 5 July 2007, Tanoarch, on 27 August 2007, filed a VAT tax return for the July 2007 tax period. In that tax declaration, reference was made to a sum of around SKK 73 530 000 being the VAT deductible on the invoice issued by VARS for assignment of the co-ownership share. That company had not paid the input VAT due in respect of that amount. VARS was placed in administration in the course of 2008.

22 Tanoarch also deducted VAT in respect of other invoices concerning the assignment of rights relating to the invention issued by VARS for the tax periods from August to September 2007.

23 In those circumstances, the Da?ový úrad (tax office) of Banská Bystrica, in its capacity as the competent tax authority, carried out an audit at the offices of Tanoarch in order to establish whether the application for deduction of VAT was well founded. By decision of 24 June 2008, that tax office then refused to carry out the deduction as stated in Tanoarch's tax declaration.

24 Tanoarch appealed against that decision. By decision of 23 October 2008, the Da?ové riadite?stvo Slovenskej republiky as the administrative authority responsible for dealing with the appeal, dismissed Tanoarch's application and confirmed the tax office's decision.

25 In the course of the fiscal audit, it was found that five of the companies which lodged a patent application, including Tanoarch and VARS, were established at the same address at Banská Bystrica. In addition, the same person, that is Mr Kovanda, was appointed as managing director of those companies.

26 On 13 January 2009, Tanoarch appealed to the Krajský súd (regional court) of Banská Bystrica for that decision of 23 October 2008 to be set aside. By judgment of 1 April 2009, that court dismissed the appeal.

27 Tanoarch thereupon appealed to the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).

28 The Najvyšší súd Slovenskej republiky has doubts as to whether the provisions of the Law on VAT and the Law on patents, according to which the income derived from the invention is limited to income from the use thereof, are compatible with the provisions of the Sixth Council Directive 77/388/EEC 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). It therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does Article 2(1) of the [Sixth Directive] permit a provision whereby a taxpayer may deduct, from his own tax liability, tax on goods and services which he uses for the purposes of his business as a taxpayer, if that tax has been charged to him by another inland taxpayer, on goods and services supplied or to be supplied, in circumstances where the plaintiff, in his capacity as co-applicant in respect of an invention in respect of which a patent has yet to be granted, already owns, as a matter of law, the right independently to use the invention which is the subject?matter of the patent as a whole?

2. Does the [Sixth] Directive permit the interpretation that a taxpayer’s existing legal right independently to use a patent results in the legal impossibility of using a service for supplies of goods and services as a taxpayer, and that this results in the legal consumption of the service acquired?

3. Is the abuse of a taxpayer’s right to deduct input VAT pursuant to the judgment of the Court in Case C-255/02 *Halifax and Others* [2006] ECR I?1609, affected by the fact that, in the case in the main proceedings, the invention has not yet been registered as a patent and only parts thereof are transferred?’

Consideration of the reference for a preliminary ruling

Admissibility

29 The defendant in the main proceedings and the Slovak Government argue that the reference for a preliminary ruling is inadmissible because it does not state sufficiently clearly what the subject of the request for interpretation is and the reasons for bringing the matter before the Court, and because it does not refer to all the relevant factual circumstances.

30 In addition, the national court fails to explain how it would have been possible to use the service provided in the case in the main proceedings for the purposes of the required supplies. It also does not explain what Tanoarch’s activities are, or whether that company genuinely carries out any economic activity.

31 In that regard, it should be recalled that, according to settled case-law, it is for the national

courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of European Union law, the Court is, in principle, obliged to give a ruling (see Case C?379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C?390/99 *Canal Satélite Digital* [2002] ECR I?607, paragraph 18; and Case C?373/00 *Adolf Truley* [2003] ECR I?1931, paragraph 21).

32 It also follows from that case-law that the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*PreussenElektra*, paragraph 39; *Canal Satélite Digital*, paragraph 19; and *Adolf Truley*, paragraph 22).

33 In the present case it is not apparent that the questions referred by the national court fall within one of those hypotheses.

34 The order for reference presents in a detailed manner the factual context of the dispute and the rules of national law which may apply to it, together with the questions raised in relation to the interpretation of the provisions of the directive concerning the right of deduction, including the case-law of the Court in the matter.

35 With regard to the arguments submitted concerning the nature of the activities of the applicant in the main proceedings, it is sufficient to note that it is not for the Court of Justice but for the referring court to rule in that regard, it being a matter of a factual nature.

36 The present reference for a preliminary ruling must, therefore, be declared admissible.

Substance

The first and second questions

37 By its first and second questions, which should be answered together, the national court asks, in essence, whether a taxpayer may claim a right of deduction of input VAT paid or due for the supply of a service, carried out for consideration, consisting in the assignment of a share of co-ownership conferring rights relating to an invention, in circumstances characterised in particular by the fact that those rights are held by a number of persons, including the assignor and the acquirer of that right.

38 As a preliminary point, it must be pointed out that, while the referring court refers, in its questions, to the Sixth Directive, it is apparent from the order for reference that the facts in the main proceedings occurred after 1 January 2007, that is to say after the entry into force of Directive 2006/112 which repealed and replaced the Sixth Directive. In those circumstances, reference must be made to the provisions of Directive 2006/112.

39 The referring court’s questions concern the extent of the co-inventor’s rights and, therefore, the question whether those rights may form the subject?matter of a commercial transaction that is liable to VAT. The question also arises as to the effect of the fact that the invention at issue in the main proceedings has not been registered as a patent.

40 In order to reply to those questions, it is necessary to recall that the deduction system established by the directive is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. Thus, the common system of VAT seeks to ensure complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (see Case C?408/98 *Abbey National* [2001] ECR I-1361, paragraph 24; Case C-435/05 *Investrand* [2007] ECR I?1315, paragraph 22; and Case C-174/08 *NCC Construction Danmark* [2009] ECR I?10567, paragraph 27).

41 The right of deduction is, therefore, as an integral part of the VAT scheme, a fundamental principle underlying the VAT system 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-3129, paragraph 37).

42 It follows that a taxable person may deduct all the VAT levied on goods and services acquired for the exercise of his taxable activities (see *NCC Construction Danmark*, paragraph 39).

43 With regard to the case in the main proceedings, it is apparent from the case-file that Tanoarch acquired a share in the co-ownership of an invention. With regard to the legal consequences of that acquisition, it should be noted that, in the procedure laid down by Article 267 TFEU, the functions of the Court of Justice and those of the referring court are clearly separate, and it falls exclusively to the latter to interpret national legislation (see Case C?500/06 *Corporación Dermoestética* [2008] ECR I?5785, paragraph 21). It is thus for the referring court, in the present case, to rule whether the applicable national legislation permits a co-inventor to assign his share in the co-ownership of the invention.

44 By contrast, the Court may provide guidance to the referring court with regard to the consequences of that acquisition for VAT purposes, on the assumption that the assignment of a share of co-ownership must be regarded as compatible with the provisions of national law.

45 With regard to the economic reality of that acquisition, it should be recalled that, in accordance with the second subparagraph of Article 9(1) of the directive, the concept of economic activity encompasses, inter alia, any activity of producers, traders or persons supplying services. The terms ‘supply of goods’ and ‘supply of services’ are objective in nature and apply without regard to the purpose or results of the transactions concerned (see, to that effect, Case C?223/03 *University of Huddersfield* [2006] ECR I?1751, paragraph 48).

46 Thus, the assignment of a share in the co-ownership of an invention, notwithstanding the fact that that invention was not registered as a patent, may, in principle, be an economic activity subject to VAT. It follows that such a transaction may give rise to a right of deduction of input VAT paid or payable.

47 With regard to the intentions of the traders concerned, it should be added that the question whether the assignment at issue in the main proceedings is carried out for the sole purpose of obtaining a tax advantage is entirely irrelevant in determining whether it constitutes a supply of a service and an economic activity within the meaning of the relevant provisions of the directive (see *University of Huddersfield*, paragraph 51).

48 The answer to the first and second questions referred is therefore that a taxpayer may, in principle, claim a right of deduction of input VAT paid or payable for the supply of a service, carried out for consideration, where the applicable national law permits the assignment of a share of the

co-ownership of an invention which confers rights relating to the invention.

The third question

49 By its third question, the referring court wishes in essence to know whether, by reason of a certain number of particular circumstances, the existence of an abuse concerning the right of deduction of input VAT may be established.

50 In order to answer that question, it must be recalled that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the directive (see *Halifax and Others*, paragraph 71, and Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76).

51 The effect of the principle prohibiting abuse of rights 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?162/07 *Ampliscientifica and Amplifin* [2008] ECR I?4019, paragraph 28).

52 In that regard, the Court, at paragraphs 74 and 75 of *Halifax and Others*, held that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, second, it is apparent from a number of objective factors that the essential aim of the transactions concerned is solely to obtain that tax advantage.

53 With regard to the case in the main proceedings, it is for the referring court to assess all the relevant circumstances of that case in order to determine whether, in the light of the case-law referred to above, for VAT purposes, a transaction such as that at issue in the main proceedings may be considered as forming part of an abusive practice. Those circumstances are characterised inter alia by the fact that the invention at issue has not yet been registered as a patent, that the right to that invention is enjoyed by a number of persons most of whom are established at the same address and are represented by the same natural person, that the input VAT payable has not been paid and that the company which assigned the share of co?ownership was placed in administration.

54 In those circumstances, the answer to the third question is that it is for the referring court to establish, taking into account all the factual circumstances characterising the supply of the service in the case in the main proceedings, whether or not there has been an abuse of rights with regard to the right of deduction of input VAT.

Costs

55 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:

1) A taxpayer may, in principle, claim a right of deduction of input VAT paid or payable for the supply of a service, carried out for consideration, where the applicable national law permits the assignment of a share of the co?ownership of an invention which confers rights relating to the invention.

2) It is for the referring court to establish, taking into account all the factual circumstances characterising the supply of the service in the case in the main proceedings, whether or not there has been an abuse of rights with regard to the right of deduction of input VAT.

[Signatures]

* Language of the case: Slovak.