



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
TAX POLICY  
VAT and other turnover taxes

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TAXUD/C/3 - D(04)19379

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Dear Mr Känngard,

Thank you for your letter from 12 march 2004, about the right to claim back VAT back on early investments, made in a project which later becomes a company.

The issue of deduction of VAT paid on inputs prior to carrying out economic transactions on a regular basis has been submitted on several occasions to the European Court of Justice. I would to refer to case C-110/94 (INZO), C-37/95 (Ghent coal Terminal NV), case C-400/98 (Breitsohl), and cases C-110/98 to C-147/98 (Gabalfrisca).

The following principles laid down by the ECJ seem to me particularly relevant for your case.

In its decision of 21 March 2000, in the joint cases C-110/98 to C-147/98 (Gabalfrisca), the Court stated that:

*"43 It should be noted, first, that the Court has consistently held that the right to deduct provided for in Article 17 et seq. of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. The right to deduct must be exercised immediately in respect of all the taxes charged on transactions relating to inputs (see, in particular, Case C-62/93 BP Supergas v Greek State [1995] ECR I-1883, paragraph 18).*

*44 Next, it must be recalled that the deduction system is meant 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 that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way (see, in particular, Case 268/83 Rompelman v Minister van Financiën [1985] ECR 655, paragraph 19, and Case C-37/95 Ghent Coal Terminal [1998] ECR I-1, paragraph 15).*

*45 As the Court held in Rompelman, paragraph 23, and in Case C-110/94 INZO v Belgian State [1996] ECR I-857, paragraph 16, the principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of and with the view to commencing a business must be*

*regarded as an economic activity and it would be contrary to that principle if such an activity did not commence until the business was actually exploited, that is to say until it began to yield taxable income. Any other interpretation of Article 4 of the directive would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it in accordance with Article 17, and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of a business and expenditure incurred during exploitation.*

*46 Article 4 of the Sixth Directive does not, however, preclude the tax authority from requiring objective evidence in support of the declared intention to commence economic activities which will give rise to taxable transactions. In that context, it is important to state that a taxable person acquires that status definitively only if he made the declaration of intention to begin the envisaged economic activities in good faith. In cases of fraud or abuse, in which, for example, the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations (Rompelman, paragraph 24, and INZO, paragraphs 23 and 24).*

*47 It follows that a person who has the intention, confirmed by objective evidence, to commence independently an economic activity within the meaning of Article 4 of the Sixth Directive and who incurs the first investment expenditure for those purposes must be regarded as a taxable person. Acting in that capacity, he has therefore, in accordance with Article 17 et seq. of the Sixth Directive, the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct, without having to wait for the actual exploitation of his business to begin."*

Moreover, in its decision of 8 June 2000, in case C-400/98 (Breitsohl), the Court stated that:

*"38 The arising of the right to deduct the VAT paid on the first investment expenditure is thus in no way dependent upon formal recognition of the status of taxable person by the tax authority. The only effect of that recognition is that such status, once recognised, cannot, save in situations of fraud or abuse, be withdrawn from the taxpayer with retrospective effect, without infringing the principles of the protection of legitimate expectations and legal certainty."*

I would like to point out that the practical application of these principles laid down by the European Court on specific files like yours, is the competence of the national authorities.

However, if you consider that your tax authority is not applying the Community VAT provisions correctly, you can make a formal complaint to the Commission's services at the following address:

European Commission  
Directorate General "Taxation and Customs Union"  
Unit A3 "Judicial Affairs and Application of the Community Provisions"  
Rue Montoyer, 51  
1000 Brussels  
Belgium

A template of a complaint form can be found under the European Union web site:  
<http://europa.eu.int/comm/sg/lexcomm>.

Yours sincerely,

signed Stephen BILL