Neutral Citation Number: [2013] IEHC 195

THE HIGH COURT

[2012 No. 138 R]

BETWEEN

RYANAIR LIMITED

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

Judgment of Ms. Justice Laffoy delivered on 2nd day of May, 2013.

The proceedings

1. This judgment concerns an appeal by way of case stated by Her Honour Judge Linnane, Judge of the Circuit Court, pursuant to s. 941, by virtue of s. 943, of the Taxes Consolidation Act 1997, as applied to value added tax (VAT) by s. 119 of the Value Added Tax Consolidation Act 2010 (the Act of 2010).

2. At the commencement of the case stated it is recorded that the matter came before the Circuit Court by way of an appeal against a determination of the Appeal Commissioner that the Appellant is not entitled to deduct input VAT on professional fees invoiced to the Appellant by third party service providers in connection with the Appellant's bid to acquire the share capital of Aer Lingus (the Bid), which determination was delivered in two parts in 2009 and 2010. The case stated is concise. I propose outlining what I consider to be the contents thereof which are relevant to this Court's determination.

Contents of case stated

3. The issue for determination, as set out in the case stated, is whether the Appellant is entitled to deduct input VAT on professional fees incurred by the Appellant in relation to the Bid.

4. The facts as proved, on the basis of the evidence adduced, or admitted before the Circuit Court, are recorded as follows in the case stated:

(a) The Appellant carries on a business of air passenger transport. Although the income from this activity is not subject to Irish VAT, the Appellant is entitled to reclaim input VAT on costs related to this activity (e.g. aircraft costs, fuel, general overhead expenses, etc.). That right of deduction is based on s. 12(1)(b)(i) of the Value Added Tax Act 1972 (the Act of 1972), being the Act in force at the relevant time, which is now consolidated into the Act of 2010.

(b) The Court's finding on the factual basis of the Bid is recorded at paragraphs 4.3 and 4.4 of the case stated as follows:

> "4.3 In October 2006, the Appellant launched a formal bid to acquire the shares of Aer Lingus. The Appellant's intention was that, if the Bid was successful, it would operate an airline business through a single Irish corporate group while maintaining the separate brands of Ryanair and Aer Lingus and operating each through separate companies. The Appellant considered that it would use its significant expertise to improve the performance of Aer Lingus and would deliver these improvements by providing management services to Aer Lingus.
>
> 4.4 While the Appellant succeeded in acquiring approximately 29% of Aer Lingus, it was unable to acquire 100% of the Aer Lingus share capital due to a number of factors. These included various onerous conditions imposed by the EU Competition Authority and resistance by other Aer Lingus shareholders, most notably trade unions and the Irish Government. As a result, the Appellant was not successful in its bid to acquire the entire share capital of Aer Lingus, and was thus not in a position to, nor did it, provide any management services to Aer Lingus."

In the written submissions of the Respondent it is stated that at the time of the Bid, which I understand to mean prior to the Bid, the Appellant had a stake of 16% in Aer Lingus, so that what happened was that the Appellant's stake increased to approximately 29%. Even if that is the case, I attach no significance to it. The kernel of the finding of the Circuit Court Judge is that the Bid, which was not successful, was for the entire share capital in Aer Lingus.

(c) It is recorded that the Appellant incurred VAT on "professional fees" in connection with the Bid and that it sought to claim this as deductible VAT on the basis that it considered the VAT to have been incurred in connection with its VAT taxable supplies. The claim was refused by the Respondent on the basis that the VAT on professional costs in connection with the Bid "do not form an integral part of the Appellant's overall economic activity as a transport operator, and have no connection to its general business and do not form part of the overheads of the Appellant". In the written submissions filed on behalf of the Appellant in this Court, the professional services supplied to the Appellant in connection with the Bid are described as "legal and tax advice", whereas in the written submissions filed on behalf of the Respondent the VAT in issue is ascribed to "legal and stockbroking fees", which replicates what is stated at para. 8.3 of the case stated. Although of no particular relevance, it is common case that the quantum of the refund claimed is €770,700.

(d) Having recorded the submissions made on behalf of the Appellant and on behalf of the Respondent and the authorities cited in the Circuit Court, the determination of the Circuit Court Judge delivered on the 3rd May, 2011 was set out at para. 8.

(e) It was stated in para. 8.3 that the Appellant had argued that the costs incurred in relation to the Bid –

> ". . . were incurred for the purpose of the [Appellant's] taxable supplies, being its general VAT taxable business and/or the specific taxable activity of the provision of management services to Aer Lingus. Its intention was not to be a passive investor in Aer Lingus shares but to enhance its operation and to make it more profitable by bringing its expertise and experience to reduce costs and increase actual efficiencies. It intended to achieve this by providing vatable management services to Aer Lingus but leaving it as a separate legal entity."

The factual position, that the Bid was unsuccessful and no management services were provided, was then reiterated in para. 8.4. It was stated that the Appellant operates an international airline business providing flights and can reclaim VAT on that activity. It was stated that it was not in the business of providing management services.

(f) In paragraph 8.5 it was stated that it "is clear from the decisions of the European Court of Justice that the acquisition and holding of shares in a subsidiary is not an economic activity within the meaning of Article 4(2) of the Sixth VAT Directive and gives no right to deduct tax under Article 17 of the Sixth Directive".

(g) The decision in the *Cibo* case referred to later was then cited and it was considered in the succeeding paragraphs.

(h) In paragraph 8.11 the Court's conclusion was set out as follows:

> "The situation in [the Appellant's] case is that it did not acquire the entire share capital of Aer Lingus. It did not provide any management services. It is not in the business of providing management services but is an airline business providing flights to customers. Accordingly, the costs incurred in respect of professional fees in the acquisition of shares in Aer Lingus was not part of the general costs of its business and has no link between its output transactions, being its business of supply of flights or its intention to provide management services."

On the basis of the analysis and application of the law set out below, I am satisfied that the contention of counsel for the Appellant that there is a contradiction between paragraph 4.3 and paragraph 8.11 of the case stated must be rejected.

(i) The Court further held that the question of apportionment did not arise.

(j) The Appellant's appeal was dismissed.

Question for the High Court

5. The question on which the opinion of the High Court is sought in the case stated is formulated as follows:

> "Whether [the Circuit Court Judge] was correct in law in concluding that the Appellant is not entitled to deduct VAT on the costs incurred by it in respect of the acquisition of shares in Aer Lingus".

Structure of judgment

6. The structure of the remainder of this judgment is as follows:

(a) the relevant legislative provisions will be outlined;

(b) the Appellant's case and the Respondent's response will be outlined;

(c) the authorities relied on by the parties will be outlined and discussed;

(d) the issues raised and my conclusions thereon will be summarised;

(e) the question posed in the case stated will be answered; and

(f) the Appellant's application for a reference to the Court of Justice of the European Union will be addressed.

Legislative provisions

7. The Court is concerned with the application of the relevant provisions of both European Union legislation and domestic legislation, as they were in force in 2006.

Sixth Directive

8. The relevant European Union legislation was the Sixth VAT Directive (77/388/EEC) (the Sixth Directive).

9. Article 2 of the Sixth Directive provided that there "shall be subject to value added tax", *inter alia*, –

> "the supply of goods and services effected for consideration within the territory of the country by a taxable person acting as such".

10. In Article 4(1) the expression "taxable person" was defined as meaning –

> "Any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity".

Paragraph 2 of Article 4 stipulated that the economic activities referred to in paragraph 1 –

> "shall comprise all activities of producers, traders and persons supplying services including mining and agricultural

activities and activities of professions."

It was also provided that the –

> "exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity."

It was acknowledged by counsel for the Respondent that the Appellant is in an unusual situation in that, as recorded in the case stated, the income from its business activity is not subject to VAT, although it is entitled to reclaim input VAT on costs related to that activity.

11. Article 13B of the Sixth Directive, insofar as is relevant for present purposes, provided:

> "Without prejudice to other Community provisions, Member States shall exempt . . .
>
> (d) the following transactions:
>
> . . .
>
> 5. Transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, ..."

12. Article 17 of the Sixth Directive provided as follows in paragraphs 1 and 2:

> "1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.
>
> 2. Insofar 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 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; . . ."

Paragraph 5 of Article 17 envisaged that there might be apportionment and provided as follows:

> "As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.
>
> This proportion shall be determined in accordance with Article 19, for all the transactions carried out by the taxable person."

It appears from the written submissions filed on behalf of the Respondent that the issue of "apportionment" arose before the Appeal Commissioner. However, the reality is that neither side has argued that the question of apportionment arises, although the Respondent did address it. In broad terms, the position of the Appellant is that it is entitled to deduct the entirety of the input VAT incurred on the professional fees in relation to the Bid, whereas the position of the Respondent is that the Appellant is not entitled to deduct any part of it, because there is no actual taxable supply (the Bid being exempt and the intended management services being only notional) to which the cost component can be directly linked.

Act of 1972

13. The provision of domestic legislation referred to in the case stated is s. 12 of the Act of 1972. That section, which was headed "Deduction for tax borne or paid", was the parallel provision to Article 17 of the Sixth Directive. In subs. (1)(a) various deductible categories of tax charged or chargeable, the detail of which is not material for present purposes, were listed after an introduction in the following terms:

> "In computing the tax payable by him in respect of a taxable period, a taxable person may, insofar as the goods and services are used by him for the purpose of his taxable supplies or any of the qualifying activities, deduct . . .".

The expression "qualifying activities" was defined in subs. (1)(b). Insofar as the definition is relevant for present purposes, it provided as follows:

> "In paragraph (a) 'qualifying activities' means –
>
> (i) transport outside the State of passengers and their accompanying baggage, . . ."

That provision was alluded to in the case stated because it is the provision on which the Appellant's right to deduct VAT is based.

14. The only other provision of the Act of 1972 to which the Court was referred was the First Schedule, being the parallel provision to Article 13(B) of the Sixth Directive, which listed "Exempted Activities", which included a variety of financial services, including the issue of, or any dealing in, stocks and shares and other securities. It is accepted by the Appellant that the mere purchase of share capital in a company is not an economic activity justifying a VAT deduction or repayment, so that on this point both parties are *ad idem*.

The Appellant's case and the Respondent's response in outline

15. In broad terms, there are two limbs to the Appellant's case.

16. The first limb is that the purchase of share capital in a company, for example, the Appellant's Bid to acquire the share capital in Aer Lingus, when it occurs in connection with performing economic activities, for example, the provision of management services to Aer Lingus, gives rise to an entitlement to repayment of VAT incurred in relation to expenses associated with the purchase of the share capital. On this point, the Appellant relies on the judgment of the European Court of Justice (ECJ) delivered on 27th September,

2001 in *Cibo Participations SA v. Directeur Régional des inpôts du Nord-Pas-de-Calais* Case C-16/00; [2001] ECR 6663. The response of the Respondent is that the factual situation of the Appellant is distinguishable from the factual situation in the *Cibo* case. Further, the Respondent's position is that the Appellant cannot demonstrate that there is a direct and immediate link between the input credits in respect of which the VAT deduction is claimed, on the one hand, and the output supplies of the Appellant, that is to say, the provision of air passenger transport, on the other hand, as laid down in the Cibo decision. Nor can the Appellant demonstrate that the acquisition costs form part of the general costs of the Appellant having a direct link with the Appellant's business as a whole. Two authorities in relation to share transactions are relied on in support of the Respondent's submissions:

> (a) the decision of the ECJ in *Kretztechnik AG v. Finanzamt Linz* Case C – 465/03 [2005] ECR 4357; and
>
> (b) the decisions of various taxation fora in the United Kingdom in *BAA Limited v. Commissioners for Her Majesty's Revenue and Customs*, culminating with the decision of the Court of Appeal, under neutral citation [2013] EWCA Civ 112.

17. The second limb of the Appellant's case is that, if the purchaser of the share capital in a company is ultimately unable to perform the intended economic activities, that is immaterial to its entitlement to a VAT deduction or repayment in respect of VAT incurred on expenses associated with the purchase of the share capital. That limb was advanced in reliance on a number of decisions of the ECJ, the earliest of which was the decision in *Rompelman v. Minister Van Financiën* (Case C – 268/83) [1985] ECR 655, which cases were followed in this jurisdiction by the decision of the High Court (Clarke J.) in *Crawford (Inspector of Taxes) v. Centime Ltd.* [2006] 2 I.R. 106. The Appellant's argument is that it is the intention to engage in the economic activity, subject to that intention being supported by objective evidence, which gives rise to the entitlement to deduction or repayment of VAT. It is the Appellant's case that the Circuit Court Judge has found as a fact that the Appellant had the requisite intention. In my view, the only finding of an intention to engage in economic activity discernible in the case stated is the intention to provide management services to Aer Lingus. In their written submissions furnished to this Court, counsel for the Appellant put a gloss on the contents of the case stated in attempting to advance another intended economic activity – to create, manage and operate a "mega carrier" to rival Lufthansa and Air France/KLM, which is an interpretation of the findings in the case stated which is not sustainable. The response of the Respondent on the second limb is that reliance by the Appellant on the line of authority invoked is wholly inappropriate and is based on a misconstruction of the import of the decisions.

First limb authorities
CIBO judgment

18. The *Cibo* judgment was delivered on a reference to the ECJ for a preliminary ruling on the interpretation of Article 4(1) and (2), Article 13B(d) and Article 17(2)(a) and (5) of the Sixth Directive from the tribunal adminstratif de Lille. As is set out in the judgment, Cibo was a holding company which owned significant shareholdings in three undertakings specialising in bicycles. The issue before the Court arose from the refusal of the tax authorities in France to allow Cibo to deduct VAT for a period from the end of 1993 to the end of 1994 in respect of supply of various services for which it was invoiced by third parties in connection with the acquisition of shares in its subsidiaries. The services in question included the auditing of companies, assistance with negotiation of the purchase price of the shares, organising the takeover of the companies and legal and tax services. Two of the three questions referred to, and answered by, the ECJ are relevant to the issues in this case. Neither answer supports the Appellant's claim for deduction of VAT.

19. In the judgment, the first question referred was summarised as follows (at para. 14):

> "By its first question, the national court essentially asks what are the criteria for establishing whether 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 4(2) of the Sixth Directive."

20. In setting out its findings, and before answering that question, the Court stated as follows (at paras. 18 – 21 inclusive):

> "18. The Court has consistently held that Article 4 of the Sixth Directive must be interpreted as meaning that a holding company whose sole purpose is to acquire holdings in other undertakings and which does not involve itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not have the status of taxable person and has no right to deduct tax under Article 17 of the Sixth Directive . . ..
>
> 19. It is clear from case-law that that conclusion is based, amongst other things, on the finding that the mere acquisition and holding of shares in a company is not to be regarded as an economic activity, within the meaning of the Sixth 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 . . ..
>
> 20. However, the Court has held that it 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 . . ..
>
> 21. It is clear . . . that direct or indirect involvement in the management of subsidiaries must be regarded as an economic activity within the meaning of Article 4(2) of the Sixth Directive where 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 such as Cibo of administrative, financial, commercial and technical services to its subsidiaries."

21. The ECJ then set out its answer to the first question (in para. 22) as follows:

> "The answer to the first question referred for a preliminary ruling must therefore be 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 4(2) of the Sixth Directive where 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, financial, commercial and technical services."

That answer cannot be applied to the Appellant's situation so as to give rise to a conclusion that there is an entitlement on the part of the Appellant to a deduction or repayment of VAT on the professional fees, as contended by the Appellant. As a matter of fact, there was no involvement by the Appellant in the management of Aer Lingus, because the Bid was unsuccessful and, therefore, no economic activity was engaged in by the Appellant.

22. The other question which is relevant for present purposes was designated by the ECJ as the third question and was characterised as follows by the ECJ:

> "By its third question . . . the national court essentially asks whether a holding company may deduct VAT charged on expenditure incurred in respect of various services obtained in connection with the acquisition of a shareholding in a subsidiary."

23. Before answering that question, the ECJ made certain observations. For instance, in paragraph 27, it emphasised the neutrality of the common system of VAT stating:

> "It should be observed at the outset 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 complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT . . .."

24. The Appellant attached significance to that observation and also, although in effect ignoring its import, to the following statement in the next paragraph (para. 28):

> "Article 17(5) of the Sixth Directive, in the light of which Article 17(2) must be interpreted, lays down the rules applicable to the right to deduct VAT where the VAT relates to input transactions used by the taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, limiting the right of deduction to that portion of the VAT which is attributable to the former transactions. The use of the words for transactions in Article 17(5) shows that, in order to give rise to the right to deduct under paragraph 2, the goods or services acquired must have a direct and immediate link with the output transactions in respect of which VAT is deductible, and that the ultimate aim pursued by the taxable person is irrelevant in this respect."

25. The ECJ, in the next paragraph (para. 29), reiterated that, according to settled case-law, the relevant provisions of Article 17 of the Sixth Directive must be interpreted as meaning that, in principle, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions in respect of which VAT is deductible is necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement.

26. It was then stated (at para. 30) that it should also be borne in mind that, according to the fundamental principle which underlies the VAT system, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components. The judgment continued as follows (at para. 31):

> "It follows from that principle, as well as from the rule that, in order to give rise to the right to deduct, the goods or services purchased must have a direct and immediate link with the output transactions in respect of which VAT is deductible, that there was a right to deduct the VAT borne by those goods or services because the expenditure incurred in acquiring them was a component of the cost of those output transactions. The expenditure must therefore form part of the costs of the output transactions in respect of which VAT is deductible which use the goods and services acquired . . .."

27. The ECJ elaborated on those principles at paragraphs 32 to 34 inclusive as follows:

> "32. Clearly, there is no direct and immediate link between the various services purchased by a holding company in connection with its acquisition of a shareholding in a subsidiary and any output transaction or transactions in respect of which VAT is deductible. The amount of VAT paid by the holding company on the expenditure incurred for those services does not directly burden the various cost components of its output transactions in respect of which VAT is deductible. That expenditure does not form part of the costs of the output transactions which use the services.
>
> 33. On the other hand, the costs of those services are part of the taxable person's general costs and are, as such, cost components of an undertaking's products. Such services therefore do, in principle, have a direct and immediate link with the taxable person's business as a whole . . ..
>
> 34. In this connection, it is clear from the first paragraph of Article 17(5) of the Sixth Directive that, where a taxable person uses goods and services in order to carry out both transactions in respect of which VAT is deductible and transactions in respect of which it is not, he may deduct only that proportion of the VAT which is attributable to the former."

28. The third question was then answered as follows (at para. 35):

> "The answer to the third question referred for a preliminary ruling must therefore be that expenditure incurred by a holding company in respect of the various services which it purchased in connection with the acquisition of a shareholding in a subsidiary forms part of its general costs and therefore has, in principle, a direct and immediate link with its business as a whole. Thus, if the holding company carries out both transactions in respect of which VAT is deductible and transactions in respect of which it is not, it follows from the first paragraph of Article 17(5) of the Sixth Directive that it may deduct only that proportion of the VAT which is attributable to the former."

In both para. 33 and para. 35, the ECJ found, on the facts, a direct and immediate link between the costs of the share acquisition and CIBO's "business as a whole". The Respondent's submission that it is absolutely fundamental to the decision in the *CIBO* case that the subsidiaries were actually acquired and the management services actually provided by CIBO to them is correct. Whether the Respondent's submission that, even if the Appellant has acquired Aer Lingus and had provided management services, the costs of the acquisition would not be a component of the Appellant's general costs is correct or not, is irrelevant unless the Appellant succeeds on the second limb.

29. Counsel for the Appellant submitted that the *CIBO* judgment is clear authority for the principle that expenditure incurred by a holding company in respect of various services it purchased in connection with the acquisition of a shareholding in a subsidiary, for example, legal and tax advice, has, in principle, a direct and immediate link with its business as a whole, and, as such, is VAT deductible, regardless of whether it achieves its ultimate aim. While recognising the difference between the position of *Cibo* and the position of the Appellant – *Cibo* succeeded in acquiring the shareholding and did, in fact, provide the management services to its

subsidiaries, whereas the Appellant was not successful in acquiring the share capital in Aer Lingus – it was submitted that, had the Appellant succeeded in its Bid and performed the economic activities as it intended, its entitlement to a VAT repayment as sought would be indisputable. Of course, that point is academic, because it did not happen. However, as I understand the Appellant's case, that submission then evolved into the second limb of the Appellant's case, it being submitted that the central issue for this Court is whether an intention to perform an economic activity, such as the intention to provide management services to the company whose shares it is attempting to acquire, is sufficient to give rise to an entitlement to a VAT repayment in respect of VAT expenses incurred in connection with the attempted acquisition of share capital in the company. While, as emphasised by the Appellant, the ECJ stated in para. 28 that the right to deduct under paragraph 2 of Article 17 in respect of output transactions may arise regardless of whether the taxpayer achieves its ultimate aim, that merely reflects Article 4(1). Carrying out economic activity renders a person a taxable person irrespective of the purpose or results of the activity. A crucial factor in this case is that, even if the Bid had been successful, it would not have constituted an economic activity and, as a matter of fact, it was not accompanied by any other economic activity. Therefore, the Appellant's case stands or falls on its second limb.

30. Therefore, unless the Appellant succeeds on the second limb, the answer given by the ECJ to the third question cannot be applied to the Appellant's situation so as to give rise to a conclusion that the expenditure incurred by the Appellant in respect of services purchased in connection with the failed Bid, even if they could be regarded as forming part of the Appellant's general costs, entitles the Appellant to a deduction in respect of the VAT element thereof. That is because the Appellant did not use those services in order to carry out transactions in respect of which VAT is deductible. In simple terms, the factual position is that it used the services to carry out the Bid, which was not an economic activity, and it had no involvement in any other economic activity in connection with the Bid. A fundamental flaw in the Appellant's case is that it has ignored the implications of the last sentence of para. 35.

Kretztechnik judgment

31. The decision of the ECJ in the *Kretztechnik* case was on a reference from an Austrian Court. Kretztechnik was a company limited by shares established in Austria, which was involved in the development and distribution of medical equipment. It resolved to increase its share capital from €10m to €12.5m. With a view to raising the capital needed for that increase, it applied for admission to Frankfurt Stock Exchange. It was successful and was listed on that stock exchange in March 2000. Its capital was increased by the issue of bearer shares. It sought a deduction of the input VAT paid by it on supplies linked with its admission to the stock exchange. The local tax office did not allow the deduction, on the basis that the issuing of shares is regarded in Austria as being exempt from VAT on the basis of a provision of national law analogous to Article 13B(d)(5) of the Sixth Directive. Kretztechnik challenged that decision to the Independent Tax Tribunal, Linz, which sought a preliminary ruling from the ECJ on three questions.

32. The first question was whether, in becoming listed on a stock market and in issuing shares in that connection to new shareholders in return for the issue price, a public limited company, which Kretztechnik was, makes a supply for consideration within the meaning of Article 2(1) of the Sixth Directive. In answering that question the ECJ made it clear that the nature of the transaction does not differ according to whether it is carried out by a company in connection with its admission to a stock exchange or by a company not quoted on a stock exchange. The ECJ stated (at para. 22) that the taxability of a share issue depends on whether the transaction constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive. The ECJ analysed the nature of the transaction by reference to observations in the Opinion of the Advocate General and answered the question as follows (at para. 26 and 27):

> ". . . a company that issues new shares is increasing its assets by acquiring additional capital, whilst granting the new shareholders a right of ownership of part of the capital thus increased. From the issuing company's point of view, the aim is to raise capital and not to provide services. As far as the shareholder is concerned, payment of the sums necessary for the increase of capital is not a payment of consideration but an investment or an employment of capital.
>
> It follows that a share issue does not constitute a supply of goods or of services for consideration within the meaning of Article 2(1) of the Sixth Directive. Therefore, such a transaction, whether or not carried out in connection with admission of the company concerned to a stock exchange, does not fall within the scope of that directive."

That answer has no bearing on the issues in this case, because, as I have recorded at para. 14 above, the parties are *ad idem* that the transaction in issue here, the Bid, on its own, is not an economic activity.

33. Having answered the first question in the negative, the second question referred to the Court did not arise. The third question did arise. It was whether there is a right under Article 17(1) and (2) of the Sixth Directive to deduct input tax on the ground that the services in respect of which input tax is claimed (for example, legal and technical advice) are used for the purposes of the undertaking's taxable transactions. The ECJ (at para. 34) reiterated that the common system of VAT "ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT". It also reiterated that for VAT to be deductible, the input transactions must have a direct and immediate link with the output transactions giving rise to a right of deduction, so that the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them "was a component of the cost of the output transactions that gave rise to the right to deduct", citing, *inter alia*, the *Cibo* decision at para. 31. The ECJ continued (at para. 36 and 37):

> "36. In this case, in view of the fact that, first, a share issue is an operation not falling within the scope of the Sixth Directive and, second, that operation was carried out by Kretztechnik in order to increase its capital for the benefit of its economic activity in general, it must be considered that the costs of the supplies acquired by that company in connection with the operation concerned form part of its overheads and are therefore, as such, component parts of the price of its products. Those supplies have a direct and immediate link with the whole economic activity of the taxable person (see . . . *Cibo* . . ., paragraph 33).
>
> 37. It follows that, under Article 17(1) and (2) of the Sixth Directive, Kretztechnik is entitled to deduct all the VAT charged on the expenses incurred by that company for the various supplies which it acquired in the context of the share issue carried out by it, provided, however, that all the transactions carried out by that company in the context of its economic activity constitute taxed transactions. A taxable person who effects both transactions in respect of which VAT is deductible and transactions in respect of which it is not may, under the first subparagraph of Article 17(5) of the Sixth Directive, deduct only that proportion of the VAT which is attributable to the former transactions (. . . *Cibo* . . ., paragraph 34)."

34. The Respondent referred the Court to the decision in the *Kretztechnik* case, obviously, in anticipation that the Appellant would seek to rely on it, which its counsel did in reply. It is clear from paragraph 7 of the case stated that the *Kretztechnik* case was referred to in the submissions made in the Circuit Court, but it is not clear which of the parties cited it. In any event, in replying to the submissions of the Respondent's counsel, counsel for the Appellant did submit that, having regard to the answer of the ECJ to the

third question referred to it, the Appellant can claim that the costs of the supplies acquired by it in connection with the Bid do form part of its overheads and, as such, are component parts of the price of its products so that the supplies have a direct and immediate link with the whole economic activity of the Appellant. To reiterate what has been stated in the discussion on the *CIBO* case earlier, that becomes relevant only if the Appellant succeeds on the second limb. Moreover, the Appellant has ignored the implications of para. 35 of the judgment in the *Cibo* case, which was reiterated in para. 37 of the *Kretztechnik* case.

35. Counsel for the Respondent emphasised how the factual position of the Appellant is distinguishable from the factual position of Kretztechnik. In making the Bid, the Appellant did not seek to increase its capital base. Counsel for the Respondent submitted that, if it had, it could argue that such an increase was part of the general cost component of its business, namely, the supply of air transportation. However, what occurred in 2006 was that some Aer Lingus shares were acquired by the Appellant, but their acquisition cannot be a cost component of the supply of air transport by the Appellant. While, once again, pointing out that there is no finding in the case stated as to the extent to which, as a result of the Bid, the Appellant's shareholding in Aer Lingus was increased, it must be acknowledged that that distinction is real. However, I have come to the conclusion that it is not necessary to form a view as to whether the costs incurred by the Appellant in connection with the Bid form part of the Appellant's overheads, so as to be a component part of the price of its products within the meaning of paragraph 36 in the judgment in the *Kretztechnik* case, unless the Appellant succeeds on the second limb. The important point is that, in the application of paragraph 37 of the judgment in the *Kretztechnik* case to the factual position of the Appellant, the reality is, as stated earlier in the discussion on the *CIBO* decision, that the Bid was not an economic activity and, as a matter of fact, no transaction was carried out by the Appellant in connection with or accompanying the Bid in respect of which VAT was deductible.

BAA decisions

36. Two of the BAA decisions (the decisions of the Upper Tribunal and of the Court of Appeal) post-dated the decision of the Circuit Court in this case, and the decision of the First-tier Tribunal was apparently not cited. The factual background to the case was the acquisition by an investment consortium in which, a Spanish company, Ferrovial, using a UK holding and management company incorporated in March 2006, Airport Development Investments Limited (ADIL), as a special purpose vehicle for the takeover, which was completed in June 2006, acquired the entire issued share capital in the UK airport operator, BAA Plc, which subsequently became BAA Airports Ltd (BAA) in August 2006. ADIL claimed that it was entitled to reclaim the input tax for VAT charged on supplies of professional and advisory services received by it in connection with the takeover bid. The factual position was complicated because ADIL was not registered for VAT until September 2006, when it joined the BAA VAT Group and became a taxable person with a VAT registration. It was at that stage that BAA, as the representative member of the Group, claimed recovery, as input tax, of the VAT incurred and paid by ADIL on the supplies to it prior to the takeover.

37. Delivering the judgment of the Court of Appeal, Mummery L.J. considered two main questions, which he outlined as follows (at para. 5):

> "(1) *Economic activity*
>
> Was ADIL carrying on 'economic activity' at the relevant time?
>
> i.e. when it incurred liability to pay the input tax to its professional advisers on the supplies connected with the takeover. If it was not, that is the end of the matter: there would be no right to recover input tax. If, however, it was carrying on economic activity, there is a second question
>
> (2) *Direct and immediate link*
>
> Was there a 'direct and immediate' link between (a) the supplies of services to ADIL, on which ADIL incurred input tax at the relevant time, and (b) the outward taxable supplies (outputs as distinct from inputs) of the BAA VAT Group, of which ADIL had subsequently become a member, and which outputs might be attributed to ADIL?"

As in this case, the law in force in the United Kingdom at the relevant time was the Sixth VAT Directive (77/388/EEC).

38. In answering the first question, Mummery L.J. stated (at para. 98):

> "To start at the beginning with the relevant date. That was the date on which ADIL incurred the liability to VAT on the services supplied to it. ADIL's only evident and proven intention at that time was to take over BAA by acquiring the shares in it. Acquiring the BAA shares was an act which would have economic consequences, but that is not the same as carrying on an *economic activity* for VAT purposes: ADIL's activities at that time neither involved the making of, nor even the intention of making, taxable supplies of goods or services."

39. Notwithstanding that he answered the first question in the negative, Mummery L. J. went on to consider the second question as follows (at para. 102):

> "At the relevant date when ADIL incurred the liability to VAT on fees for professional and advisory services, the supplies to ADIL were only in connection with the act of taking over BAA. They were unconnected with any supply that ADIL intended at that date to make, let alone had actually made. BAA outward supplies in the course of its economic activity were not connected at the relevant date with the supplies to ADIL on which input tax was incurred."

Mummery L.J. also dealt with the additional complication of the "Group" factor and he held that BAA's outward supplies and the VAT charged on them could not be attributable to ADIL to produce the requisite direct and immediate link between them.

40. It was submitted on behalf of the Respondent that, by analogy to the BAA case, there is no evidence here that the Appellant intended to make "taxable" supplies, that is to say, supply of management services for consideration, emphasis being put on "taxable". In reply, counsel for the Appellant referred to paragraph 4.3 of the case stated, which is quoted at para. 5(b) above. The Respondent's emphasis on "taxable" supplies of goods and services seems to be derived from paragraph 98 of the judgment of Mummery L.J. quoted above. In the succeeding paragraph, Mummery L.J. noted that the First-tier Tribunal had found that there was no evidence before it of the making of taxable supplies or of an intention, at the relevant date, to make taxable supplies. This seems to be a reference to paragraph 81 of the decision of the First-tier Tribunal, where it was recorded that, from completion of the takeover in June 2006, it was expected that ADIL would charge its subsidiaries fees for its services. However, no such charges were levied and it was stated that it was not clear whether there was, prior to the completion of the takeover, an intention to make intra-group charges. The First-tier Tribunal concluded that, in any event, there was no evidence before the Tribunal that such an intention

was formed prior to the completion of the takeover.

41. In relation to the Appellant, it is true that there is no express finding in paragraph 4.3 of the case stated that the intention of the Appellant was to charge Aer Lingus for provision of management services. However, reading paragraph 4.3 in conjunction with paragraph 8.3, I do not think it would be reasonable to infer from the former that the reference there to "providing management services to Aer Lingus" should be construed as referring to supplies which were not taxable. On the contrary, I consider that this Court is entitled to interpret Clause 4.3 of the case stated, in conjunction with Clause 8.3, which refers to the intention of the Appellant to provide "vatable management services to Aer Lingus", as meaning that the Appellant intended to provide such management services for consideration. It must be emphasised that that conclusion has been reached without resorting to the decision of the Supreme Court in *Re Frederick Inns Limited* [1994] 1 ILRM 387. That decision was referred to by counsel for the Appellant in the context of an objection by counsel for the Respondent at the hearing to the memorandum and articles of association of the Appellant, which are not referred to in the case stated, being the subject of submissions. In particular, the conclusion has been reached only on the basis of the proper construction of the case stated and not on the contents on the memorandum and articles of association or on the basis that it would be *ultra vires* the powers of the Appellant to provide management services gratuitously to Aer Lingus,

42. By way of general observation, the decision of the Court of Appeal in the BAA case, in applying the Cibo principles, is not of particular assistance to either party on the case stated. Significantly, the status of ADIL was not comparable to the status of the Appellant at the relevant time, the relevant time being when each obtained the professional services in connection with the proposed takeover.

Second limb authorities
Rompelman judgment

43. The decision of the ECJ in the *Rompelman* case was on a reference from the Court in the Netherlands. I gratefully adopt the following outline of the factual underlay, which is set out in the judgment of Clarke J. in the Centime case (at para. 11):

> "In this case the taxpayers had acquired the right to future joint title to two units in premises on which construction had been proceeding for some time prior to their acquisition. The taxpayers declared to the relevant Dutch tax office that the premises would be leased to business users and an appropriate VAT refund claim was subsequently made. At the date of the claim the premises in question had not yet been leased and the Dutch Revenue rejected the claim on the grounds that no exploitation of the units acquired had yet been started because they had not yet been let. The taxpayers made the case that exploitation of an asset starts as soon as a right over it is acquired. Such a preparatory act, it was contended, must be considered as being part of the exercise of an economic activity because it is a necessary condition for the taking place of the activity."

44. Against that factual background, the question referred by the Court in the Netherlands, as set out in para.10 of the judgment of the ECJ, was in the following:

> "Does 'exploitation' within the meaning of the second sentence of Article 4(2) of the Sixth Directive commence as soon as a person purchases future property with a view to letting that property in due course?

The ECJ interpreted that question as follows (at para. 14):

> "The question submitted by the national court is in substance designed to ascertain whether the acquisition of a right to the future transfer of ownership of part of a building yet to be constructed with a view to letting such premises in due course may be regarded as an economic activity within the meaning of Article 4(1) of the Sixth Directive.

45. Having outlined the provisions of Article 4 and Article 17(1) and (2), the ECJ stated (at para. 19):

> "From the provisions set forth above it may be concluded 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 value-added tax therefore 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.

In their submissions, counsel for the Appellant added emphasis to the words "whatever their purpose or results" and the words "are taxed in a wholly neutral way" in that quotation.

46. The ECJ stated (at paras. 22 and 23):

> "22. As regards the question of the time when the exploitation of immovable property commences, it must first be pointed out that the economic activities referred to in Article 4 (1) may consist in several consecutive transactions, as is indeed suggested by the wording of Article 4 (2) which refers to 'all activities of producers, traders and persons supplying services'. The preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, which form part of those transactions must themselves be treated as constituting economic activity.
>
> 23. In this regard, it is not necessary to distinguish the various legal forms which such preparatory acts may take, in particular between the acquisition of a right to the transfer of the future ownership of property and the acquisition of the property itself. Furthermore, 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. It would be contrary to that principle if such an activity did not commence until the property was actually exploited."

Counsel for the Appellant did not quote the first sentence in the above quotation, but added emphasis to the last sentence, seemingly ignoring the factual context of the principle being adumbrated, that is to say, that acts had actually been carried out as part of transactions which are considered to be economic activity within the meaning of Article 4.

47. At para. 24 of the judgment, which is quoted in the Centime case, the ECJ stated:

> "As regards the question whether Article 4 must be interpreted as meaning that a declared intention to let future property is a sufficient ground for assuming that the acquired property is to be used for a taxable activity and that therefore, on

> that basis, the investor must be treated as a taxable person, it must first be pointed out that it is for the person applying to deduct VAT to show that the conditions for deduction are met and in particular that he is a taxable person. Therefore Article 4 does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation."

The ECJ then (at para. 25) answered the question submitted by the Netherlands Court by stating that –

> ". . . the acquisition of a right to the future transfer of property rights in part of a building yet to be constructed, with a view to letting such premises in due course, may be regarded as an economic activity within the meaning of Article 4 (1) of the Sixth Directive. However, that provision does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation."

48. To reiterate what has been adverted to earlier, what has been wholly ignored by the Appellant in seeking to rely on the decision in the *Rompelman* case is that it was concerned with the exploitation of immovable property for the purpose of obtaining income therefrom on a continuing basis, which is deemed to be an economic activity within the meaning of Article 4. As the ECJ stated in the *Cibo* case, as quoted earlier, the mere acquisition of financial holdings in other undertakings does not amount to exploitation of property for the purpose of obtaining income therefrom on a continuing basis, because any dividend yielded by the holding is merely the result of ownership of the property. In my view, the principle established in the Rompelman case, which was followed by Clarke J. in the *Centime* case, has no application to a situation where a taxable person makes a bid for shares in a company, incurs costs which are subject to VAT in the process, is ultimately unsuccessful in the bid, and, consequently, is unable to establish engagement in any connected economic activity.

Centime judgment

49. In contrast, the principle laid down by the ECJ in the *Rompelman* case was applicable in the *Centime* case. In that case, Centime had been incorporated for the purposes of developing a stadium. It had entered into a contract and had paid a deposit for the purchase of a substantial amount of land which was conditional upon planning permission being granted for the development. Subsequently, it abandoned its plans to develop such a stadium, but in the interim it had incurred significant expenditure and it had sought repayment of value added tax charged by suppliers on amounts expended by it. The issue before the High Court was whether Centime was a taxable person. Applying the decision of the ECJ in the *Rompelman* case, Clarke J. held that the true test of a taxable person for the purposes of the Value Added Tax Acts in relation to lands was whether that person had a *bona fide* intention to engage in economic activity to commercially exploit the lands in question and such intention was required to be supported by objective evidence. From the national law perspective, what the case was about was the appropriateness of the criteria applied by the Revenue Commissioners to determine whether an applicant, in order to establish the status of a taxable person, had provided objective evidence as to his intention to develop or exploit the land in question. The decision in the *Centime* case has no relevance to the issue the Court has to determine on this case stated.

50. Counsel for the Appellant cited a number of other cases in which the *Rompelman* principle was followed and which were considered in the *Centime* case. I propose only to refer to the two authorities which were referred to in the submissions to the Circuit Court.

INZO judgment

51. The first is the decision of the ECJ in *Intercommunale voor Zeewaterontzilting (INZO) (In Liquidation) v. Belgian State* (Case 110/94) [1996] ECR 1 - 857. As Clarke J. succinctly summarised them in the Centime case (at p. 115), the facts in that case were that the taxpayer, having commissioned a feasibility study on a proposed desalination project and, having acquired assets to that end, was allowed to reclaim value added tax, notwithstanding the fact that it had decided to abandon the project, of its own volition, because of the unfavourable prognosis which emerged from the feasibility study. In the Centime case, Clarke J. pointed out that the ECJ made certain comments in the *INZO* case on what might be called the *Rompelman* test, setting the comments out as follows (at p. 115):

> "(i) economic activities may consist of several consecutive transactions and preparatory acts must be treated as constituting economic activity (see paragraph 15 of the judgment);
>
> (ii) it would be contrary to the principle of neutrality if economic activity did not commence until property was actually exploited (paragraph 16)
>
> (iii) even the first investment expenditure for the purposes of the business may be regarded as an economic activity and, in this regard, the tax authority must take into account the declared intention of the business (see paragraph 17) and
>
> (iv) it is for the claimant of a deduction to show that the conditions for deduction are met and Article 4 does not preclude the tax authority from obtaining objective evidence in support of the declared intention (see paragraph 23)."

At the risk of seemingly adopting a simplistic approach, it must be observed that the *Rompelman* test could not be applied to the Appellant, because, as a matter of fact, apart from making the Bid, the Appellant did not do any act in support of its intention to supply management services to Aer Lingus.

52. The judgment of the ECJ discloses that INZO had acquired certain capital goods and commissioned a study on the profitability of a project for the construction of a desalination plant, laying particular emphasis on that study. In contrast, it has not been suggested, and it is difficult to see how it could be, that the legal and stockbroking fees incurred by the Appellant were incurred in relation to its intention to provide management services to Aer Lingus. The findings set out in the case stated must be interpreted as recognising that the Appellant, as an entity involved in air transport, would not require the advice of lawyers and stockbrokers to provide management services to another entity involved in air transport, with a view to improving the latter's performance, because what the Circuit Court Judge found was that the intention of the Appellant was to use "its significant expertise to improve the performance of Aer Lingus". Aside from that, the Appellant was not in a position to carry out the intended economic activity, because it was not successful in the Bid.

Ghent Coal judgment

53. The second is the decision of the ECJ in *Belgian State v. Ghent Coal Terminal NV* Case C – 37/95, [1998] ECR 1 – 1. The facts there were that in 1980 Ghent Coal had purchased land in the harbour area of Ghent. It subsequently carried out investment work and immediately deducted the VAT paid on the goods and services relating to that work in the period between 1st January, 1981 and 31st December, 1983. On 1st March, 1983, on the initiative of the City of Ghent, Ghent Coal exchanged the land in question for other land situated elsewhere in the Ghent harbour area. Consequently, it never used the land in respect of which it carried out the investment work giving rise to the VAT deduction. The tax authorities in Belgium sought repayment of the VAT deducted in connection with the investment work on the basis that the land had not been used for the purpose of carrying out taxable transactions. Citing its decision in the *Rompelman* case, the ECJ stated (at para. 15) that the common system of value added tax ensures that all economic activities, whatever their purpose or results, provided they are themselves subject to VAT, are taxed in a wholly neutral way. It continued (at para. 17):

> "It follows that a taxable person acting as such is entitled to deduct the VAT payable or paid for goods or services supplied to him for the purpose of investment work intended to be used in connection with taxable transactions."

54. In the *Ghent Coal* case, it was clear on the facts that what Ghent Coal deducted was VAT paid for goods and services supplied to it for the purposes of investment work intended to be used in connection with taxable transactions. In contrast, there is no finding of fact in the case stated that the services supplied by the lawyers and the stockbrokers, which gave rise to the fees on which the Appellant paid VAT, were directly connected to the Appellant's intention to provide management services to Aer Lingus, if it was successful in the Bid, which is not surprising having regard to what has been suggested in discussing the *INZO* decision earlier is the proper interpretation of the findings of the Circuit Court Judge.

Rompelman line of authorities: general observations

55. I consider that the attempt by the Appellant in the second limb of its case to assimilate its position in relation to its intention to provide management services to Aer Lingus, if it was successful in the Bid, and the position of the taxpayer in *Rompelman* and in the other cases in which *Rompelman* was followed, is totally misconceived. The legal principles applied in the *Rompelman* case and in the other cases cannot be stretched to encapsulate the Appellant's intention to provide management services to Aer Lingus, if it was successful in the Bid, given that –

> (a) the only activity which the Appellant carried out was the Bid, which, it is common case was not an economic activity within the meaning of Article 4,
>
> (b) notwithstanding that there is a finding in the case stated that it was the intention of the Appellant to supply management services to Aer Lingus if the Bid was successful, the Bid was not successful and the Appellant did not take any steps or carry out any acts whatsoever in support of that intention, and
>
> (c) the findings in the case stated cannot be interpreted as meaning that the services the Appellant obtained in connection with the Bid in respect of which it paid, and now seeks to recover, VAT had a direct and immediate link, or, indeed, any link, with the intended provision of management services to Aer Lingus.

Summary of issues and conclusions thereon

56. The first issue for determination by the Court, is whether, in making the Bid to acquire the entire issued share capital of Aer Lingus, the Appellant was a taxable person carrying out an economic activity within the meaning of Article 4 of the Sixth Directive. It clearly was not, having regard to the fact that the transaction in question was exempt from VAT by virtue of Article 13(B)(d)(5) of the Sixth Directive and the First Schedule to the Act of 1972. Further, the *Cibo* decision is clear authority that it was not.

57. The second issue is whether the intention of the Appellant, in connection with the Bid to acquire the entire share capital in Aer Lingus, to provide management services to Aer Lingus, as found by the Circuit Court Judge, which for the reasons outlined earlier are assumed to be services to be provided for consideration, constituted an economic activity within the meaning of Article 4 by application of the decision in the *Cibo* case. It did not. Unlike the factual situation in the *Cibo* case, the Appellant was not in a position to, and did not provide, or take any steps or do any act towards provision of, management services to Aer Lingus, because the Bid was unsuccessful.

58. The third issue is whether, by analogy to the decision of the ECJ in the *Rompelman* case, and in the subsequent cases in which it was followed, the finding of an intention on the part of the Appellant to provide management services to Aer Lingus, in the event that the Bid was successful, may be regarded as an economic activity within the meaning of Article 4 of the Sixth Directive, so as to entitle the Appellant to deduct VAT. It may not, for the reasons summarised in para. 55 above.

59. Although the conclusions which have been reached on the foregoing issues mean that it has not been established that there was any economic activity on the part of the Appellant in connection with the Bid, so that that is the end of the matter, the other issues raised are summarised and addressed below to the extent which I consider to be appropriate.

60. The fourth issue is whether there existed a direct and immediate link between the legal and stockbroking services purchased by the Appellant in connection with the Bid and the output transactions in respect of which the Appellant is entitled to deduct VAT, that is to say, air passenger transport (*per* s. 12(1)(b)(i) of the Act of 1972). Clearly, following the ECJ finding in the *Cibo* case (at para. 32), there was no such direct link.

61. The final issue is whether the costs of those legal and stockbroking services, even if part of the Appellant's general costs so as to have a direct and immediate link with its business as a whole (on which it is not necessary to express a view because the Appellant has not succeeded on the second limb), the VAT element thereof is deductible. Those costs were wholly incurred in connection with the acquisition of the share capital of Aer Lingus, which was not a transaction in respect of which VAT was deductible. The VAT element of those costs, accordingly, was wholly attributable to a transaction in respect of which VAT was not deductible. Apportionment in accordance with Article 17(5) of the Sixth Directive does not arise. That conclusion accords with the proper application of the principle set out in paras. 34 and 35 in the *Cibo* case and paras. 36 and 37 in the *Kretztechnik* case, to the facts here.

Answer to question in case stated

62. The answer to the question on which the opinion of this Court is sought in the case stated is as follows:

> For the reasons set out in this judgment the Circuit Court Judge was correct in law in concluding that the Appellant is not

entitled to deduct VAT on the costs incurred by it in respect of the acquisition of shares in Aer Lingus.

Application for reference under Article 267

63. Counsel for the Appellant requested the Court, if in doubt as to the proper application of European Union law to the question raised in the case stated, to refer the matter for a ruling thereon to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union. Having considered in detail and applied the decisions of the ECJ which are relevant to the question posed in the case stated, I did not consider it necessary, in order to enable judgment to be given on that question, that that question or any question be referred to the Court of Justice. Accordingly, the Appellant's application is refused.