Case C?118/11

Eon Aset Menidjmunt OOD

v

Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

(Reference for a preliminary ruling from the Administrativen sad Varna)

(VAT — Directive 2006/112/EC — Articles 168 and 176 — Right of deduction — Condition relating to use of goods and services for the purposes of taxed transactions — Origin of the right to deduct — Motor vehicle leasing contract — Financial leasing contract — Vehicle used by employer to transport free of charge an employee between his home and his workplace)

Summary of the Judgment

1. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Taxable transactions — Acquisition of capital goods — Meaning*

(Council Directive 2006/112, Art. 14(1) and (2)(b))

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

(Council Directive 2006/112, Art. 168(a))

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

(Council Directive 2006/112, Arts 168 and 176)

1. When a financial leasing contract relating to a motor vehicle provides either that ownership of that vehicle is to be transferred to the lessee on the expiry of that contract or that the lessee is to possess all the essential powers attaching to ownership of that vehicle and, in particular, that substantially all the rewards and risks incidental to legal ownership of that vehicle are transferred to the lessee and that the present value of the amount of the lease payments is practically identical to the market value of the property, the transaction must be treated as the acquisition of capital goods.

(see para. 40)

2. On a proper construction of Article 168(a) of Directive 2006/112 on the common system of value added tax, a leased motor vehicle is to be regarded as used for the purposes of the taxable person's taxed transactions if there is a direct and immediate link between the use of that vehicle and the taxable person's economic activity. The time when the right to deduct arises and when it is necessary to take into account the existence of such a link is on the expiry of the period to which each payment relates.

Further, a motor vehicle leased under a financial leasing contract and placed in the category of

capital goods is to be regarded as used for the purposes of taxed transactions if the taxable person acting as such acquires that vehicle and allocates it entirely to the assets of his undertaking, input value added tax payable being fully and immediately deductible, and any use of that vehicle for the taxable person's private purposes or for those of his staff or for purposes other than those of his undertaking being treated as a supply of services carried out for consideration. It is the acquisition of the goods by a taxable person acting as such that determines the application of the value added tax system and therefore of the deduction mechanism. The use to which the goods are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled. The question whether a taxable person has acquired goods acting as such, that is, for the purposes of his economic activity within the meaning of Article 9 of the directive, is a question of fact that must be determined in the light of all the circumstances of the case, including the nature of the goods concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person's economic activity.

(see paras 57, 58, 64, operative part 1)

3. Articles 168 and 176 of Directive 2006/112 on the common system of value added tax do not preclude national legislation which provides for the exclusion from the right to deduct of goods and services intended to be supplied free of charge or for activities outside the scope of the taxable person's economic activity, provided that goods categorised as capital goods are not allocated to the assets of the undertaking.

(see para. 74, operative part 2)

JUDGMENT OF THE COURT (Second Chamber)

16 February 2012 (*)

(VAT — Directive 2006/112/EC — Articles 168 and 176 — Right of deduction — Condition relating to use of goods and services for the purposes of taxed transactions — Origin of the right to deduct — Motor vehicle leasing contract — Financial leasing contract — Vehicle used by employer to transport free of charge an employee between his home and his workplace)

In Case C?118/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Bulgaria), made by decision of 24 February 2011, received at the Court on 7 March 2011, in the proceedings

Eon Aset Menidjmunt OOD

v

Direktor na Direktsia Obzhalvane i upravlenie na izpalnenieto — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Ó Caoimh, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Bulgarian Government, by T. Ivanov and D. Drambozova, acting as Agents,

– the European Commission, by L. Lozano Palacios and D. Roussanov, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 168, 173 and 176 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

2 The reference has been made in proceedings between Eon Aset Menidjmunt OOD ('Eon Aset) and the Direktor na Direktsia Obzhalvane i upravlenie na izpalnenieto — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Varna Appeals and administration of enforcement office of the Central Office of the National Revenue Agency), concerning the adjusted tax notice imposing on Eon Aset a value added tax ('VAT') liability, as a result of a refusal to allow the right to deduct.

Legal context

European Union law

3 The second subparagraph of Article 9(1) of the VAT Directive provides:

'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'.

4 Article 14(1) of the VAT Directive provides:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner'.

5 Under Article 14(2)(b) of the VAT Directive, 'the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment' is to be regarded as a supply of goods.

6 Article 24(1) of the VAT Directive provides:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

7 Under Article 26 of the VAT Directive:

‘1. Each of the following transactions shall be treated as a supply of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;

(b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.

2. Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition.’

8 Article 63 of the VAT Directive states that ‘[t]he chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

9 Article 64(1) of the VAT Directive states:

‘Where it gives rise to successive statements of account or successive payments, the supply of goods, other than that consisting in the hire of goods for a certain period or the sale of goods on deferred terms, as referred to in point (b) of Article 14(2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate.’

10 Under Article 167 of the VAT Directive, ‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

11 Under Article 168 of that 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;

...’

12 Article 173(1) of the VAT Directive states:

‘In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.

The deductible proportion shall be determined, in accordance with Articles 174 and 175, for all the transactions carried out by the taxable person.’

13 Article 176 of the VAT Directive provides:

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

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

National law

14 Under Article 6(3)(1) of the law on value added tax (Zakon za danak varhu dobavenata stoynost, DV No 63 of 4 August 2006, ‘the ZDDS’) ‘the divestment or provision of goods for the personal use of a taxable person, a proprietor, his or her employees, or third parties, provided that the input tax has been fully or partially deducted at the time of their manufacture, import or acquisition’ is to be regarded as a supply of goods carried out for consideration.

15 Article 9(3)(1) of the ZDDS treats as a supply of services carried out for consideration ‘a service supplied to a taxable person who is a natural person for his/her personal purposes, a proprietor, his/her employees, or third parties, provided that in the supply of that service use is made of goods in respect of which the input tax has been fully or partially deducted at the time of their manufacture, import or acquisition’.

16 By way of exception to Article 9(3), Article 9(4)(1) of the ZDDS provides that ‘the provision free of charge by the employer to employees, including those employed as managers, of between their homes and workplace, where that service is provided to meet the needs of the taxable person’s economic activity’ does not constitute a supply of services for consideration.

17 Article 69(1) of the ZDDS provides:

‘Where the goods and services are used for the purposes of taxable supplies carried out by the registered taxable person, that person may deduct the following:

1. the tax on the goods and services which the supplier, where that supplier is also a registered taxable person in accordance with this legislation, has supplied to him or is obliged to supply to him;

…’

18 Under Article 70(1) of the ZDDS:

‘Even where the requirements of Article 69 or Article 74 are satisfied, the right of deduction does not apply where:

...

2. the goods or services are intended to be supplied free of charge or for activities other than the economic activity of the taxable person;

...’

19 Under Article 70(3) of the ZDDS:

‘Paragraph 1(2) shall not apply to:

...

2. the provision free of charge by the employer to employees, including those employed as managers, of between their homes and their workplace, to meet the needs of his economic activity;

…’.

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

20 Eon Aset is a company established in Bulgaria, which pursues its economic activities in a number of sectors.

21 In the course of a tax inspection relating to the period from 1 July 2008 to 31 October 2009, the competent authorities found that Eon Aset had entered into, first, a contract with a company for the lease of a motor vehicle for a period between 1 October 2008 and 1 March 2009 and, second, a financial leasing contract with another company, for a period of four years, relating to another motor vehicle.

22 Eon Aset deducted the VAT included in all invoices issued to it during the tax period in which it received them.

23 The authorities took the view that the vehicles had to be regarded as not having been used for the purposes of Eon Aset’s economic activity, in the absence of evidence to that effect.

24 Eon Aset was refused the right to deduct the corresponding VAT, pursuant to Article 70(1)(2) of the ZDDS.

25 Eon Aset disputed that adjusted tax notice by seeking administrative review before the Direktor na Direktsia Obzhalvane i upravlenie na izpalnenieto — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite.

26 When following that review the tax notice was partly upheld, Eon Aset brought proceedings before the Administrativen sad Varna (Varna Administrative Court).

27 In support of its action, Eon Aset claims that the motor vehicles at issue in the main proceedings were used to provide its managing director with transport between his home and his workplace. Relying on Article 70(3)(2) of the ZDDS, Eon Aset considers that the exclusion of the right to deduct prescribed in Article 70(1)(2) of the ZDDS does not apply to the provision free of charge by the employer to staff of transport between home and workplace.

28 Eon Aset also challenges the compatibility of Article 70(1)(2) of the ZDDS with European Union law.

29 In those circumstances the Administrativen sad Varna decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) How must the requirement ‘are used’ established in Article 168 of [the VAT Directive] be

interpreted and, as regards the origin of the right to deduct tax passed on, when must that requirement be satisfied: in the tax period in which the goods were purchased or the services received, or does it suffice that the requirement is satisfied in a subsequent tax period?

(2) In the light of Articles 168 and 176 of [the VAT Directive], is a provision permissible, such as that established in Article 70(1)(2) of [the ZDDS], which allows goods and services 'intended for supplies free of charge or for activities other than the economic activity of the taxable person' to be excluded from the outset from the system of input tax deduction?

(3) If Question 2 is answered in the affirmative: Must Article 176 of [the VAT Directive] be interpreted as meaning that a Member State which sought to take advantage of the option to exclude certain goods and services from the right to deduct and which defined the category of expenditure as follows: goods and services intended for supplies free of charge or for activities other than the economic activity of the taxable person except in the cases mentioned in Article 70(3) of [the ZDDS], has satisfied the requirement adequately to define the category of goods and services, that is, to define these by reference to their nature?

(4) Depending on the answer given to Question 3: In the light of Articles 168 and 173 of [the VAT Directive], how must the allocation (present or future use) of the goods or services acquired by a taxable person be assessed: as a prerequisite for giving rise to the right to deduct VAT or as grounds for the adjustment of the amount of tax to be deducted?

(5) If the allocation (use) must be assessed as grounds for an adjustment to the amount of tax to be deducted, how must Article 173 of [the VAT Directive] be interpreted: does it provide for adjustments to be made in cases in which goods and services are used initially for an activity which is not taxable or following their acquisition not used at all but are at the disposal of the undertaking and in a (tax) period following their acquisition are included in the taxable activity of the taxable person?

(6) If Article 173 of [the VAT Directive] must be interpreted as meaning that the adjustment envisaged also applies to cases in which, following their acquisition, goods and services are used initially for an activity which is not taxable or not used at all but subsequently are included in the taxable activity of the taxable person, in the light of the restriction established by Article 70(1)(2) of [the ZDDS] and the fact that, pursuant to Article 79(1) and (2) of [the ZDDS], adjustments may be made only in cases in which goods whose initial use satisfies the requirement for deduction of tax are subsequently used in a way which no longer satisfies those requirements, has the Member State satisfied its obligation, in relation to all taxable persons, to structure the right to deduct tax passed on as soundly and fairly as possible?

(7) Depending on the answers given to the previous questions: Must it be presumed, having regard to the rules established in [the ZDDS] governing restrictions on the right to deduct VAT and adjustments to the amount of VAT to be deducted, in circumstances such as those of the main proceedings, and in the light of Article 168 of [the VAT Directive], that a taxable person registered for VAT may deduct the VAT passed on in respect of goods and services supplied to him by another taxable person in the (tax) period in which these were supplied to him and in which the tax became chargeable?'

Consideration of the questions referred for a preliminary ruling

Questions 1, 4 and 7

30 By questions 1, 4 and 7, which should be examined together, the referring court seeks essentially to ascertain under which conditions Article 168(a) of the VAT Directive enables a

taxable person to deduct VAT paid, first, in respect of a motor vehicle leasing contract and, second, in respect of the leasing of a motor vehicle under a financial leasing contract, and at what time those conditions must be satisfied in order to give rise to the right to deduct.

Preliminary considerations

31 Under Article 168 of the VAT Directive, a taxable person has the right to deduct VAT provided that goods and services are used for the purposes of his taxed transactions. It is therefore necessary at the outset to categorise the activities at issue in the main proceedings in the light of the concept of 'taxable transaction'.

32 Under Article 24(1) of the VAT Directive, '"supply of services" shall mean any transaction which does not constitute a supply of goods', and the concept of a supply of goods requires, under Article 14(1) of that directive, the 'transfer of the right to dispose of tangible property as owner'.

33 Since the leasing of a motor vehicle does not constitute a supply of goods, it must, as a general rule, be categorised as a supply of services, according to Article 24(1) of the VAT Directive (see, to that effect, Case C?155/01 *Cookies World* [2003] ECR I?8785, paragraph 45, and Case C?425/06 *Part Service* [2008] ECR I?897, paragraph 61).

34 The lease of a motor vehicle under a financial leasing contract may, nonetheless, present features which are comparable to those of the acquisition of capital goods.

35 As the Court has stated, in the context of a provision enabling Member States to exclude capital goods from the system of VAT deductions for a transitional period, the definition of 'capital goods' covers goods used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but are written off over several years (see, to that effect, Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraph 12, and Case C?98/07 *Nordania Finans and BG Factoring* [2008] ECR I?1281, paragraphs 27 and 28).

36 Further, Article 14(2)(b) of the VAT Directive states that the actual handing over of goods pursuant to a contract for the hire of those goods for a certain period, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment is to be regarded as a supply of goods.

37 In the case of a financial leasing contract, there is not necessarily any acquisition of the goods since such a contract may provide that the lessee has the option of not acquiring those goods at the end of the lease period.

38 However, as is clear from the international accounting standard IAS 17 relating to leases, produced in Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ 2008 L 320, p. 1), an operating lease must be distinguished from a finance lease, the nature of the latter being that substantially all the risks and rewards of legal ownership are transferred to the lessee. The fact that a transfer of ownership is provided for on the expiry of the contract or the fact that the present value of the lease payments is practically identical to the market value of the property constitute, separately or together, criteria which permit a determination of whether a contract can be categorised as a finance lease.

39 As the Court has previously stated, the concept of 'supply of goods' does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually

to dispose of it as if the recipient were the owner of the property (see Case C?320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I?285, paragraph 7, and Case C?185/01 *Auto Lease Holland* [2003] ECR I?1317, paragraph 32).

40 Accordingly, where a financial leasing contract relating to a motor vehicle provides either that ownership of that vehicle is to be transferred to the lessee on the expiry of that contract or that the lessee is to possess all the essential powers attaching to ownership of that vehicle and, in particular, that substantially all the rewards and risks incidental to legal ownership of that vehicle are transferred to the lessee and that the present value of the amount of the lease payments is practically identical to the market value of the property, the transaction must be treated as the acquisition of capital goods.

41 It is for the national court to determine, having regard to the circumstances of this case, whether the criteria stated in the preceding paragraph of this judgment are applicable.

The conditions for the right to deduct

42 The effect of Article 168(a) of the VAT Directive is that a taxable person may deduct input VAT in respect of goods or services provided that those goods or services are used for the purposes of his economic activity.

43 It is necessary to recall, in that regard, that the deduction system established by the VAT 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. 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, inter alia, Case C?515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie* [2009] ECR I?839, paragraph 27).

44 Where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted (see Case C?184/04 *Uudenkaupungin kaupunki* [2006] ECR I?3039, paragraph 24, and *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, paragraph 28).

45 The criterion relating to the use of the goods or services for the purposes of transactions within the scope of the undertaking’s economic activity varies according to whether a service or capital goods are being acquired.

46 As regards a transaction consisting of the acquisition of a service, such as the leasing of a motor vehicle, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement (Case C?29/08 *SKF* [2009] ECR I?10413, paragraph 57 and case-law cited).

47 It is, however, also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person’s economic activity as a whole (*SKF*, paragraph 58 and case-law cited).

48 In either of the circumstances referred to in paragraphs 46 and 47 of this judgment, whether there is a direct and immediate link will depend on whether the cost of the input services is

incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities (*SKF*, paragraph 60).

49 While it is for the referring court to assess whether there is a direct and immediate link between the leasing of the motor vehicle at issue in the main proceedings and the economic activity of Eon Aset, it is for the Court to provide that court with helpful guidance with regard to European Union law.

50 In the present case, Eon Aset claimed, before the referring court, that the motor vehicles at issue in the main proceedings, leased under the leasing contract or under the financial leasing contract, were used in order to ensure the transport of its managing director between his home and his workplace.

51 The Court has previously held that the fact that an employee must travel between his home and his workplace in order to be present at work and, consequently, to perform his duties, is not conclusive evidence that transport provided for an employee from his home to his workplace is not to be considered as being for the employee's private use within the meaning of Article 26(1) of the VAT Directive. Indeed, it would be contrary to the purpose of that provision if such an indirect link were sufficient, in itself, to prevent such travel being treated as a supply for consideration (see, to that effect, Case C?258/95 *Fillibeck* [1997] ECR I?5577, paragraph 27).

52 On the other hand, in special circumstances, the requirements of the business may make it necessary for the employer to take responsibility for the provision of transport for employees between their homes and the workplace, with the result that the transport is organised by the employer for purposes which are not other than those of the business (see, to that effect, *Fillibeck*, paragraphs 29 and 30).

53 As regards the leasing of a motor vehicle under a financial leasing contract which can be treated as a transaction consisting of the acquisition of capital goods intended in part for private use and in part for business use, the taxable person has a choice. The taxable person may, for the purposes of VAT, either (i) allocate those goods wholly to the assets of his business, (ii) retain them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrate them into his business only to the extent to which they are actually used for business purposes (see, to that effect, Case C?291/92 *Armbrecht* [1995] ECR I?2775, paragraph 20, and Case C?434/03 *Charles and Charles?Tijmens* [2005] ECR I?7037, paragraph 23 and case-law cited).

54 Should the taxable person choose to treat capital goods used for both business and private purposes as business assets, the input VAT due on the acquisition of those goods is, in principle, fully and immediately deductible. In those circumstances, where goods allocated to the business have created an entitlement to full or partial deduction of input VAT paid, their use for the private purposes of the taxable person or of his staff or for purposes other than those of his business is treated as a supply of services for consideration, pursuant to Article 26(1) of the VAT Directive (see, to that effect, *Charles and Charles?Tijmens*, paragraphs 24 and 25 and case-law cited, and *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, paragraph 37).

55 Should the taxable person decide to retain capital goods entirely within his private assets, whether or not he uses them for both business and private purposes, no portion of the input VAT due or paid on the acquisition of the goods is deductible (Case C?415/98 *Bakcsi* [2001] ECR I?1831, paragraph 27). In that case, the use of those goods for the purposes of the business cannot be subject to VAT (see, to that effect, *Bakcsi*, paragraph 31).

56 Lastly, should the taxable person choose to allocate the goods to the business assets of his

undertaking only to the extent to which they are actually used for the business, the part of the goods excluded from those business assets is not part of the assets of the undertaking and, consequently, does not fall within the scope of the VAT system (see, to that effect, *Armbrecht*, paragraph 28).

57 It must also be stated that it is the acquisition of the goods by a taxable person acting as such that determines the application of the VAT system and therefore of the deduction mechanism. The use to which the goods are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled (see, to that effect, Case C?97/90 *Lennartz* [1991] ECR I?3795, paragraph 15).

58 The question whether a taxable person has acquired goods acting as such, that is, for the purposes of his economic activity within the meaning of Article 9 of the VAT Directive, is a question of fact which must be determined in the light of all the circumstances of the case, including the nature of the goods concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person's economic activity (see, to that effect, *Bakcsi*, paragraph 29).

59 It is for the referring court, as appropriate, to assess whether the motor vehicle leased under a financial leasing contract was allocated to the assets of the undertaking and to determine the scope of the right to deduct available to the undertaking in the event that that vehicle was allocated only partly to its business assets.

The origin of the right to deduction

60 Under Article 167 of the VAT Directive, the right to deduct VAT is to arise at the time when the tax becomes chargeable.

61 That provision must be read in the light of Article 63 of that directive, which provides that VAT is to become chargeable when the goods or the services are supplied.

62 Pursuant to Article 64 of the VAT Directive, where the hire of a motor vehicle can be described as a supply of services giving rise to successive payments, the time when the right to deduct VAT arises and when it is necessary to take into account whether there is a direct and immediate link between the leased vehicle and the taxable person's economic activity is on the expiry of the period to which each of those payments relates.

63 As regards capital goods, the taxable person who allocates those goods in their entirety to the assets of his undertaking has an immediate right to deduct VAT (see, to that effect, *Charles and Charles?Tijmens*, paragraph 24 and case?law cited).

64 It follows from the foregoing that Article 168(a) of the VAT Directive must be interpreted as meaning that:

– a leased motor vehicle is to be regarded as used for the purposes of the taxable person's taxed transactions if there is a direct and immediate link between the use of that vehicle and the taxable person's economic activity and the time when the right to deduct arises and when it is necessary to take into account the existence of such a link is on the expiry of the period to which each payment relates;

– a motor vehicle leased under a financial leasing contract and placed in the category of capital goods is to be regarded as used for the purposes of taxed transactions if the taxable person acting as such acquires that vehicle and allocates it entirely to the assets of his

undertaking, input VAT payable being fully and immediately deductible, and any use of that vehicle for the taxable person's private purposes or for those of his staff or for purposes other than those of his undertaking being treated as a supply of services carried out for consideration.

Questions 2 and 3

65 By questions 2 and 3, the referring court essentially asks whether Article 70(1)(2) of the ZDDS, in so far as it allows the exclusion from the right to deduct of goods and services intended to be supplied free of charge or for activities outside the scope of the taxable person's economic activity, is compatible with Articles 168 and 176 of the VAT Directive.

66 It must initially be borne in mind that, in the context of proceedings brought under Article 267 TFEU, the Court has no jurisdiction to rule either on the interpretation of provisions of national laws or regulations or on their conformity with European Union law. It may, however, supply the national court with an interpretation of European Union law that will enable that court to resolve the legal problem before it (see, inter alia, Case C?124/99 *Borawitz* [2000] ECR I?7293, paragraph 17, and Case C?385/09 *Nidera Handelscompagnie* [2010] ECR I?10385, paragraph 32).

67 In those circumstances, the Court must take the view that, by those questions, the referring court essentially asks whether Articles 168 and 176 of the VAT Directive preclude national legislation which provides for the exclusion from the right to deduct of goods and services intended to be supplied free of charge or for activities outside the scope of the taxable person's economic activity.

68 In that regard, it should be recalled that the right to deduct is an integral part of the VAT scheme which in principle may not be limited and which must be exercised immediately in respect of all the taxes charged on transactions relating to inputs (see Case C?62/93 *BP Soupergas* [1995] ECR I?1883, paragraph 18, and Case C?437/06 *Securenta* [2008] ECR I?1597, paragraph 24).

69 It is clear from Article 168(a) of the VAT Directive and the case-law cited in paragraph 43 et seq. of this judgment that the question of whether there is a right to deduct presupposes that a taxable person acting as such acquires goods or services and uses them for the purposes of his economic activity.

70 The national legislation at issue in the main proceedings excludes any right to deduct where the goods or services are intended to be supplied free of charge or for activities outside the scope of the taxable person's economic activity.

71 Such legislation amounts to excluding the right to deduct VAT where the prerequisites for the existence of that right are not satisfied.

72 Article 70(1) of the ZDDS therefore does not restrict the right to deduct within the meaning of Article 176 of the VAT Directive.

73 It must however be made clear that a Member State cannot refuse to allow taxable persons who have chosen to treat capital goods used both for business and private purposes as business assets to deduct immediately and in full the input VAT payable on the acquisition of those goods, which they are entitled to do in accordance with the settled case?law cited in paragraph 63 of this judgment (see, to that effect, *Charles and Charles?Tijmens*, paragraph 28).

74 Consequently, the answer to questions 2 and 3 is that Articles 168 and 176 of the VAT Directive must be interpreted as not precluding national legislation which provides for the exclusion

from the right to deduct of goods and services intended to be supplied free of charge or for activities outside the scope of the taxable person's economic activity, provided that goods categorised as capital goods are not allocated to the assets of the undertaking.

Questions 5 and 6

Admissibility

75 The Bulgarian Government and the Commission maintain that there is no need to answer questions 5 and 6, since those questions concern a situation which bears no relation to the purpose of the main action.

76 In that regard, it must be observed that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of European Union law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C?415/93 *Bosman* [1995] ECR I?4921, paragraph 59, and Case C?450/06 *Varec* [2008] ECR I?581, paragraph 23 and case?law cited).

77 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious 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 (see, inter alia, *Bosman*, paragraph 61, and *Varec*, paragraph 24 and case?law cited).

78 That is the position in the present case. It is not clear from the order for reference that the goods acquired were used for non-economic activities before being allocated to an economic activity or that they were never used. Accordingly, the situation referred to in those questions bears no relation to the purpose of the main action.

79 Questions 5 and 6 must therefore be declared to be inadmissible.

Costs

80 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 (Second Chamber) hereby rules:

1. **Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that:**

– **a leased motor vehicle is to be regarded as used for the purposes of the taxable person's taxed transactions if there is a direct and immediate link between the use of that vehicle and the taxable person's economic activity and the time when the right to deduct arises and when it is necessary to take into account the existence of such a link is on the expiry of the period to which each payment relates;**

– **a motor vehicle leased under a financial leasing contract and placed in the category of capital goods is to be regarded as used for the purposes of taxed transactions if the taxable person acting as such acquires that vehicle and allocates it entirely to the assets of his undertaking, input value added tax payable being fully and immediately deductible, and any use of that vehicle for the taxable person's private purposes or for those of his staff or for purposes other than those of his undertaking being treated as a supply of services carried out for consideration.**

2. **Articles 168 and 176 of Directive 2006/112 must be interpreted as not precluding national legislation which provides for the exclusion from the right to deduct of goods and services intended to be supplied free of charge or for activities outside the scope of the taxable person's economic activity, provided that goods categorised as capital goods are not allocated to the assets of the undertaking.**

[Signatures]

* Language of the case: Bulgarian.