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JUDGMENT OF THE COURT (Second Chamber)

22 March 2012 ( * )

?VAT — Directive 2006/112/EC — Article 168 — Right of deduction — Origin of the right of deduction — Right of a company to deduct the input VAT paid for the acquisition of capital goods not yet brought into use for the company's business activities'

In Case C-153/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Bulgaria), made by decision of 22 March 2011, received at the Court on 28 March 2011, in the proceedings

Klub 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, A. Rosas, A. Ó Caoimh, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

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 Article 168(a) 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 Klub OOD (‘Klub’) and the Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Appeals and Enforcement Management Directorate, Varna, at the Central Administration of the National Revenue Agency) concerning an adjusted tax notice refusing to allow it the right to deduct value added tax (VAT) on the acquisition of a maisonette.

Legal context

European Union law

3

Under Article 9(1) of the VAT Directive:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

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

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.’

5

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

6

In accordance with Article 167 of the directive, ‘[a] right of deduction shall arise at the time the deductible tax becomes chargeable’.

7

Article 168 of the directive provides:

‘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;

…’

8

Article 273 of the directive reads as follows:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

National law

9

In accordance with Article 6(3)(1) of the Law on value added tax (Zakon za danak varhu dobavenata stoynost, DV No 63, 4 August 2006; ‘the ZDDS’), ‘the separation or provision of goods for the personal use of a taxable natural person, the owner, his workers or employees, or third parties, provided that the tax credit was fully or partially deducted at the time of their manufacture, import or acquisition’ is to be regarded as a supply of goods for consideration.

10

Article 12(1) of the ZDDS defines a taxable supply as ‘any supply of goods or services within the meaning of Articles 6 and 9, where it is effected by a person taxable under the present law and where the place of performance is on national territory, and any supply taxed at zero rate and effected by a taxable person, unless the present law provides otherwise’.

11

Article 69(1) of the ZDDS provides:

‘Where the goods and services are used for the purposes of taxable supplies effected by the registered person, that person is entitled to deduct:

1. the tax on the goods and services which the supplier who is a registered person under the present law has supplied to him or is obliged to supply to him.’

12

Article 70(1) of the ZDDS provides:

‘The right of deduction of a tax credit does not apply, even where the requirements of Article 69 or Article 74 are satisfied, if:

…

2. the goods or services are intended for gratuitous supplies or for activities other than the economic activity of the taxable person;

…’

13

Under Article 79(1) and (2) of the ZDDS:

‘(1) A registered person who has wholly or partly deducted a tax credit on goods or services manufactured, purchased, acquired or imported by him and subsequently uses them for exempt supplies or for supplies or activities in respect of which there is no right of deduction of a tax credit shall owe an amount of tax corresponding to the tax credit deducted.

(2) A registered person who has wholly deducted a tax credit on goods or services manufactured, purchased, acquired or imported by him and subsequently uses them both for supplies in respect of which there is a right of deduction of a tax credit and for exempt supplies or for supplies or activities in respect of which there is no right of deduction of a tax credit, where that person cannot determine what proportion of those goods and services were used for supplies in respect of which there is a right to a tax credit and what proportion for supplies in respect of which there is no right to a tax credit, shall owe an amount of tax calculated in accordance with paragraph 7.’

14

Article 79(7) of the ZDDS contains formulae for calculating the tax payable in the cases referred to in Article 79(2).

15

Article 38(3) of the Law on planning (Zakon za ustroystvo na teritoriyata, DV No 1, 2 January 2001; ‘the ZUT’) provides:

‘In a building for residential use in co-ownership, residential space or a separate dwelling may be adapted and its use altered to make a doctor’s surgery, an office or an atelier for individual creative activity, allowing persons from outside to gain access to the building, provided that the premises are on the ground floor or in the basement and are adapted in accordance with sanitary, health, fire prevention and other technical requirements, on the basis of the express agreement in writing, certified before a notary, of all the owners of dwellings adjacent to the premises in question. Exceptionally, the adaptation of the above premises situated on other storeys above

ground level may be authorised solely on the basis of a decision of a general meeting of the co-owners, adopted in accordance with the procedure prescribed for that purpose, with the express agreement in writing, certified before a notary, of all the owners of dwellings adjacent to the premises in question.'

16

Article 177(1) of the ZUT states:

'After the completion of the works and, if appropriate, of the checks prior to their commissioning, the developer shall register the bringing into use of the building with the authority which issued the building permit, and at the same time submit the final report provided for in Article 168(6), the contracts entered into with operators with a view to connection to the technical infrastructure networks, and a document from the Survey, Cartographic and Cadastral Office attesting that the condition laid down in Article 175(5) has been satisfied.'

17

Under Article 177(3) of the ZUT:

'Within seven days from receipt of the application, the authority which issued the building permit shall, after making sure that the documentation is complete, register the bringing into use of the building site and issue a permit for bringing into use.'

18

According to Article 178(1) of the ZUT, the use of building sites in whole or in part is prohibited until they have been brought into use by the competent authority pursuant to Article 177 of the ZUT.

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

19

Klub operates a hotel in the Bulgarian seaside resort of Varna.

20

In May 2009 Klub purchased a maisonette for residential use in Sofia. The VAT on that purchase was deducted, but no tax declaration concerning the payment of local taxes for the maisonette was submitted to the tax authorities.

21

Klub did not alter the use of the property and did not open accounts in its own name for the supply of water and electricity.

22

The tax authorities concluded that the maisonette at issue in the main proceedings was intended for residential use, not for business use. Since they considered that the maisonette was not being used for the activity of the business, they took the view that its acquisition had not given rise to a right to deduct the input VAT, and consequently issued Klub with an adjusted tax notice.

23

Klub contested the tax notice before the Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, who upheld the notice.

24

Klub brought proceedings before the Administrativen sad Varna (Administrative Court, Varna).

25

Before that court, Klub submitted that the immovable property at issue in the main proceedings was intended for business use, since it intended to use it for meetings for negotiations with tour operators.

26

A tax declaration in respect of local taxes mentioning the use of the maisonette as business premises was subsequently submitted.

27

The tax authorities considered that Klub had not shown that at the time of the tax assessment the maisonette was used for business purposes, nor that it would be in future.

28

A letter from the city council of Sofia stating that it had no information regarding any application for a certificate of bringing into use for that maisonette was produced in the main proceedings.

29

According to the referring court, Article 70(1)(2) of the ZDDS has been the subject of contradictory interpretations by the Varhoven administrativen sad (Supreme Administrative Court).

30

Part of the case-law accepts that taxable persons may deduct the input VAT paid on the purchase of immovable property, on the ground that it is possible to determine the use of the property only after it has been brought into use, or that the taxable person’s business activities include future supplies.

31

Another part of the case-law takes the view that, to enjoy the right to deduct the VAT on the purchase of immovable property which has not yet been brought into use, the taxable person must show that the property was used for the purposes of his economic activity before the tax assessment.

32

The referring court considers that the latter literal interpretation of national law is not consistent with the principles of European Union law governing the origin of the right to deduct the input VAT

paid in respect of capital goods.

33

In that context, the Administrativen sad Varna decide to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1.

Is Article 168(a) of [the VAT Directive] to be interpreted as meaning that, once a taxable person has exercised his option and allocated immovable property constituting capital goods to his business assets, it must be presumed (assumed in the absence of evidence to the contrary) that those goods are used for the purposes of taxable supplies effected by the taxable person?

2.

Is Article 168(a) of [the VAT Directive] to be interpreted as meaning that the right of deduction of a tax credit on the purchase of immovable property which is allocated to the business assets of a taxable person arises immediately in the tax period in which the tax became due, regardless of the fact that the property cannot be used in view of the absence of authorisation for its use as required by law?

3.

Is an administrative practice such as that of the Natsionalna agentsia za prihodite (National Revenue Agency), according to which the right of deduction of a tax credit claimed by persons taxable under the ZDDS on capital goods purchased by them is refused on the grounds that those goods are used for the private purposes of the owners of the companies, without VAT being imposed on this use, consistent with the directive and the case-law on its interpretation?

4.

In circumstances such as those of the main proceedings, does the applicant company have a right of deduction of a tax credit on the purchase of immovable property, namely a maisonette in Sofia?’

Consideration of the questions referred

Questions 1 to 3

34

By its first three questions, which should be considered together, the referring court essentially asks whether Article 168(a) of the VAT Directive must be interpreted as meaning that the right to deduct input VAT paid for the acquisition of immovable property representing capital goods allocated to the assets of the business arises in the tax period in which the tax became due, regardless of the fact that the capital goods were not immediately used for business purposes. The referring court also asks correlatively whether the right to deduct the input VAT paid for capital goods acquired by a taxable person may be refused him on the ground that the goods are used for private purposes.

35

It should be recalled at the outset that the deduction system established by the VAT Directive is meant to relieve the operator entirely of the burden of the VAT paid or payable in the course of all

his economic activities. Thus, the common system of VAT seeks to ensure complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (see, inter alia, Case 268/83 Rompelman [1985] ECR 655, paragraph 19, and Case C-118/11 Eon Aset Menidjmunt ECR [2012], paragraph 43).

36

It follows from Article 168 of the VAT Directive that, in so far as the taxable person, acting as such at the time when he acquires goods, uses the goods for the purposes of his taxable transactions, he is entitled to deduct the VAT paid or payable in respect of the goods (see, to that effect, Case C-97/90 Lennartz [1991] ECR I-3795, paragraph 8, and Case C-25/03 HE [2005] ECR I-3123, paragraph 43). In accordance with Articles 63 and 167 of the VAT Directive, the right to deduct arises at the time when the deductible tax becomes chargeable, namely when the goods are delivered (see, to that effect, Case C-378/02 Waterschap Zeeuws Vlaanderen [2005] ECR I-4685, paragraph 31).

37

Conversely, where the goods are not used for the purposes of the taxable person's economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive but are used by him for private consumption, no right to deduct can arise (see, to that effect, Lennartz, paragraph 9, and HE, paragraph 43).

38

In the case of a transaction consisting in the acquisition of capital goods intended partly for private use and partly for business use, the taxable person may choose to allocate the goods entirely to the assets of the business (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 the case-law cited). In principle, the input VAT due on the acquisition of those goods is then fully deductible. In those circumstances, where capital goods allocated to the business have created an entitlement to full or partial deduction of the 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 Charles and Charles-Tijmens, paragraphs 24 and 25 and the case-law cited; Case C-460/07 Puffer [2009] ECR I-3251, paragraph 41; and Eon Aset Menidjmunt, paragraph 54).

39

Thus 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 (see, to that effect, Lennartz, paragraph 15, and Eon Aset Menidjmunt, paragraph 57).

40

A taxable person acts as such where he acts for the purposes of his economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive (see, to that effect, Case C-415/98 Bakcsi [2001] ECR I-1831, paragraph 29).

41

Whether a taxable person acts as such is a question of fact which must be assessed in the light of all the circumstances of the case, including the nature of the asset concerned and the period between the acquisition of the asset and its use for the purposes of the taxable person's economic

activity (see, to that effect, Bakcsi, paragraph 29, and Eon Aset Menidjmunt, paragraph 58). It may also be taken into consideration whether active steps such as those mentioned in Article 38(3) of the ZUT have been taken to carry out the alterations and obtain the authorisations needed for business use of the asset.

42

If the taxable person were denied deduction of input VAT payable for subsequent taxable business uses, despite his initial wish to allocate the capital goods in their entirety to his business, with future transactions in mind, he would not be relieved entirely of the burden of the tax relating to the asset which he uses for the purposes of his economic activity and the taxation of his business activities would lead to double taxation contrary to the principle of fiscal neutrality inherent in the common system of VAT (see, to that effect, Puffer, paragraphs 45 and 46).

43

The principle of the neutrality of VAT with regard to the taxation of the business requires that the investment expenditure incurred for the needs and objectives of a business be regarded as economic activity giving rise to an immediate right of deduction of the input VAT due (see, to that effect, Rompelman, paragraph 22, and Puffer, point 47).

44

Consequently, an individual who acquires goods for the purposes of an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive does so as a taxable person even if the goods are not used immediately for that economic activity (see, to that effect, Lennartz, paragraph 14).

45

It is for the referring court to assess whether, in the dispute in the main proceedings, Klub in fact acquired the capital goods at issue for the purposes of its economic activity. If that is so, the company can deduct, immediately and in full, the VAT on the item allocated entirely to its business assets, even if it is not used immediately for the purposes of its economic activity.

46

It should be added that, in the absence of fraud or abuse, and subject to any adjustments which may be made in accordance with the conditions laid down by the VAT Directive, the right of deduction, once it has arisen, is retained (see, to that effect, Case C-400/98 Breitsohl [2000] ECR I-4321, paragraph 41, and Case C-255/02 Halifax and Others [2006] ECR I-1609, paragraph 84).

47

As the Court has held in this respect, where the taxable person has been unable to use the goods or services which gave rise to a deduction in the context of taxable transactions by reason of circumstances beyond his control, the right of deduction is retained since, in such a case, there is no risk of fraud or abuse capable of justifying subsequent repayment of the sums deducted (Case C-396/98 Schloßstrasse [2000] ECR I-4279, paragraph 42).

48

On the other hand, in situations of fraud or abuse in which the taxable person pretended that he wished to pursue a particular economic activity but in fact sought to acquire as his private assets

goods in respect of which a deduction could be made, the tax authorities may claim, with retroactive effect, repayment of the sums deducted, since those deductions were made on the basis of false statements (see Schloßstrasse, paragraph 40 and the case-law cited).

49

It may be recalled that a finding of abuse requires two conditions to be satisfied. First, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing it, must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Secondly, it must be apparent from a number of objective factors that the essential aim of the transaction concerned is to obtain a tax advantage (see, to that effect, Halifax and Others, paragraphs 74 and 75).

50

The measures which the Member States may adopt under Article 273 of the VAT Directive to ensure the correct collection of VAT and to prevent evasion must not go further than is necessary to attain those objectives and must not undermine the neutrality of VAT (see Case C-385/09 Nidera Handelscompagnie [2010] ECR I-10385, paragraph 49).

51

In the present case, it is for the referring court to ascertain whether, in the light of objective factors, there is a fraudulent practice as defined in paragraph 49 above.

52

It follows from the foregoing that Article 168(a) of the VAT Directive must be interpreted as meaning that a taxable person who has acquired capital goods while acting as such and has allocated the goods to the assets of the business is entitled to deduct the VAT on the acquisition of those goods in the tax period in which the tax became due, regardless of the fact that the goods are not immediately used for business purposes. It is for the national court to ascertain whether the taxable person acquired the capital goods for the purposes of his economic activity and to assess, if need be, whether there is a fraudulent practice.

Question 4

53

By its fourth question, the referring court asks whether, in circumstances such as those of the main proceedings, the applicant is entitled to deduct the input VAT paid on the purchase of immovable property in Sofia.

54

It must be recalled that under Article 267 TFEU the Court has no power to apply rules of European Union law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the institutions of the European Union (see, to that effect, Case C-203/99 Veedfald [2001] ECR I-3569, paragraph 31, and Case C-54/07 Feryn [2008] ECR I-5187, paragraph 19).

55

In the present case, the referring court by its question is asking the Court to apply Article 168 of

the VAT Directive directly to the facts at issue in the main proceedings, even though it is for the national court to decide those proceedings, basing its decision if appropriate on the answer to the other questions referred for a preliminary ruling.

56

The Court therefore does not have jurisdiction to answer Question 4.

Costs

57

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:

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 taxable person who has acquired capital goods while acting as such and has allocated the goods to the assets of the business is entitled to deduct the value added tax on the acquisition of those goods in the tax period in which the tax became due, regardless of the fact that the goods are not immediately used for business purposes. It is for the national court to ascertain whether the taxable person acquired the capital goods for the purposes of his economic activity and to assess, if need be, whether there is a fraudulent practice.

[Signatures]

( * ) Language of the case: Bulgarian.