JUDGMENT OF THE COURT (Third Chamber)

29 November 2012 (*)

(Directive 2006/112/EC – Value added tax – Articles 167, 168 and 185 – Right of deduction – Adjustment of deductions – Acquisition of land and buildings constructed on that land, with a view to demolishing the buildings and carrying out a construction project on the land)

In Case C?257/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucure?ti (Romania), made by decision of 20 December 2010, received at the Court on 26 May 2011, in the proceedings

SC Gran Via Moine?ti SRL

v

Agen?ia Na?ional? de Administrare Fiscal? (ANAF),

Administra?ia Finan?elor Publice Bucure?ti Sector 1

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta (Rapporteur), acting for the President of the Third Chamber, K. Lenaerts, G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: Y. Bot,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2012,

after considering the observations submitted on behalf of:

– SC Gran Via Moine?ti SRL, by A. Lefter, V. R?doi and M. Mitroi, avoca?i,

– the Romanian Government, by R.H. Radu, R.?I. Munteanu and I. Bara, acting as Agents,

– the European Commission, by C. Soulay and L. Bouyon, 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 relates to the interpretation of Articles 167, 168 and 185(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The reference has been made in the course of proceedings between, on the one hand, SC

Gran Via Moine?ti SRL (‘GVM’) and, on the other, the Agen?ia Na?ionala de Administrare Fiscal? (ANAF) (National Agency for Fiscal Administration; ‘the ANAF’) and the Administra?ia Finan?elor Publice Bucure?ti Sector 1 (Administration of Public Finance for Bucharest Sector 1; ‘the AFP’), concerning the value added tax (‘VAT’) to which GVM was subject on account of the acquisition of land and buildings constructed on that land for the purposes of carrying out a construction project.

Legal context

3 Under Article 9(1) of Directive 2006/112:

‘“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 Article 167 of that directive provides:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

5 Article 168 of that 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;

...’

6 Article 184 of that directive provides:

‘The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.’

7 Article 185 of that directive reads as follows:

‘1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.’

8 According to Article 186 of that directive, Member States are to lay down the detailed rules for applying Articles 184 and 185.

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

9 By a contract of sale concluded on 16 March 2007, GVM acquired a plot of land and the buildings constructed on it.

10 In accordance with that contract, a demolition permit for those buildings was also transferred to GVM.

11 On the basis of that permit, GVM carried out demolition works, as attested in a report of 30 September 2008.

12 Moreover, on 16 April 2008, a planning certificate was issued to GVM, with a view to obtaining a building permit to develop a residential complex on the land at issue.

13 GVM deducted the VAT relating to all of the land and buildings purchased and drew up a VAT return, registered on 27 October 2008 with the AFP, showing a negative balance with an option for reimbursement.

14 Following a tax audit, the AFP drew up, on 8 May 2009, a tax inspection report and, on 12 May 2009, issued a tax assessment stating that, given the demolition of those buildings, it was necessary to adjust the VAT relating to the demolished buildings, which had been deducted by GVM.

15 By a complaint made on 19 June 2009, GVM sought the annulment of both the tax inspection report and the tax assessment, claiming that its intention had been to acquire the land at issue solely for the purposes of developing a residential complex on it and that, in those circumstances, the purchase of the buildings on that land was unavoidable. Consequently, GVM did not adjust the VAT for the purchase of those buildings, which it had initially deducted, since their demolition was part of its investment plan and the residential project was intended to be used to carry out taxed transactions.

16 By a decision of 11 September 2009, the ANAF rejected that complaint on the ground that GVM had unlawfully deducted the VAT relating to those buildings, since it had purchased them not for the purposes of carrying out taxed transactions, but only in order to demolish them. In that regard, ANAF points out that those buildings had been recorded in its accounts as stock and not as fixed assets.

17 By an action brought on 8 October 2009 before the referring court, GVM sought the annulment of that decision, the tax inspection report of 8 May 2009 and the tax assessment issued on 12 May 2009 by the AFP.

18 In that context the Curtea de Apel Bucure?ti (Court of Appeal of Bucharest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In the light of Articles 167 and 168 of Directive 2006/112 …, can the purchase, by a commercial company liable for VAT, of a number of buildings scheduled for demolition, together with a plot of land, with a view to developing a residential complex on that land constitute a preparatory activity, that is to say, investment expenditure for the purposes of constructing a residential complex, entitling that company to deduct the VAT on the purchase of the buildings?

(2) In the light of Article 185(2) of Directive 2006/112, is the demolition of the buildings scheduled for demolition, which were purchased together with the plot of land, with a view to developing a residential complex on the land, subject to adjustment of the VAT on the purchase of

the buildings?’

Consideration of the questions referred

The first question

19 By its first question, the referring court asks, in essence, whether Articles 167 and 168 of Directive 2006/112 must be interpreted as meaning that a company which has acquired land and buildings constructed on that land, for the purpose of demolishing the buildings and developing a residential complex on the land, has the right to deduct the VAT relating to the acquisition of those buildings.

20 It must first be borne in mind that, according to settled case?law of the Court of Justice, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by the relevant European Union legislation (Joined Cases C?80/11 and C?142/11 *Mahagében and Dávid* [2012] ECR, paragraph 37 and the case?law cited).

21 The Court has repeatedly held that the right to deduct provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, inter alia, Joined Cases C?110/98 to C?147/98 *Gabalfrisa and Others* [2000] ECR I?1577, paragraph 43; Case C?63/04 *Centralan Property* [2005] ECR I?11087, paragraph 50; Joined Cases C?439/04 and C?440/04 *Kittel and Recolta Recycling* [2006] ECR I?6161, paragraph 47; and *Mahagében and Dávid*, paragraph 38).

22 The deduction system is intended 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 the purpose or results of those activities, provided that they are themselves subject to VAT (see Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case C?37/95 *Ghent Coal Terminal* [1998] ECR I?1, paragraph 15; *Gabalfrisa and Others*, paragraph 44; Case C?32/03 *Fini H* [2005] ECR I?1599, paragraph 25; *Centralan Property*, paragraph 51; and *Mahagében and Dávid*, paragraph 39).

23 It is clear from the wording of Article 168 of Directive 2006/112 that, to qualify for the right to deduct, first, the person concerned must be a ‘taxable person’ within the meaning of that directive and, second, the goods and services in question must be used for the purposes of his taxed transactions (see *Centralan Property*, paragraph 52).

24 Under Article 9(1) of that directive a ‘taxable person’ is defined by reference to the term ‘economic activity’ (see *Fini H*, paragraph 19).

25 In this regard, it should be borne in mind that an individual who acquires goods for the purposes of an economic activity within the meaning of that provision does so as a taxable person, even if the goods are not used immediately for that economic activity (see Case C?97/90 *Lennartz* [1991] ECR I?3795, paragraph 14).

26 According to the settled case?law of the Court, the economic activity referred to in Article 9(1) of Directive 2006/112 may consist in several consecutive transactions and, among those, preparatory acts, such as the acquisition of business assets and therefore the purchase of immovable property, must be regarded as constituting economic activity (see *Rompelman*,

paragraph 22; *Lennartz*, paragraph 13; Case C?110/94 *INZO* [1996] ECR I?857, paragraph 15; and *Fini H*, paragraphs 21 and 22). Any person performing such preparatory acts is consequently regarded as a taxable person within the meaning of that provision and is entitled to deduct the VAT (*Fini H*, paragraph 22).

27 Furthermore, a person who incurs investment expenditure with the intention, confirmed by objective evidence, of engaging in economic activity within the meaning of Article 9(1) of Directive 2006/112 must be regarded as a taxable person. Acting in that capacity, he has therefore, in accordance with Article 167 et seq. of the directive, the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct (see, to that effect, *Rompelman*, paragraphs 23 and 24; *INZO*, paragraphs 16 and 17; *Ghent Coal Terminal*, paragraph 17; *Gabalfrisa and Others*, paragraph 47; and Case C?400/98 *Breitsohl* [2000] ECR I?4321, paragraph 34).

28 Accordingly, it is the acquisition of goods by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods or services are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 168 of Directive 2006/112 and the extent of any adjustments in the course of the following periods, adjustments which must be made under the conditions laid down in Article 184 et seq. of that directive (see *Lennartz*, paragraph 15; *Ghent Coal Terminal*, paragraph 18; Case C?396/98 *Schloßstrasse* [2000] ECR I?4279, paragraph 37; *Breitsohl*, paragraph 35; *Centralan Property*, paragraph 54; Case C?118/11 *Eon Aset Menidjmunt* [2012] ECR, paragraph 57; and Case C?334/10 *X* [2012] ECR, paragraph 17).

29 In this context, the Court has held that, in the absence of fraud or abuse and subject to adjustments which may be made in accordance with the conditions laid down in Article 185 of Directive 2006/112, the right to deduct, once it has arisen, is retained even if the economic activity envisaged does not give rise to taxed transactions (see *INZO*, paragraphs 20 and 21; *Ghent Coal Terminal*, paragraphs 19 to 23; *Schloßstrasse*, paragraph 42; Case C?98/98 *Midland Bank* [2000] ECR I?4177, paragraph 22; and *Fini H*, paragraph 22).

30 As regards the dispute before the referring court, it is clear from the documents before the Court that GVM’s purchase of the land and the buildings at issue in the main proceedings constitutes a preparatory act whose purpose, as demonstrated by the issuing of the building permit mentioned in paragraph 12 above, was the construction of a residential complex on that land in the course of GVM’s property development activities.

31 In making that purchase, GVM therefore performs an economic activity as a taxable person, within the meaning of Article 9(1) of Directive 2006/112.

32 As regards the second condition referred to in paragraph 23 above, namely the use of the input goods or services for the purposes of taxed output transactions, it is clear from the documents before the Court that, as soon as it acquired the land and the buildings at issue in the main proceedings, GVM indicated its intention to demolish the buildings in order to develop a residential complex on the land.

33 That intention was confirmed by objective evidence, since, on acquisition of the buildings at issue in the main proceedings, a demolition permit had been transferred to GVM and, before even submitting its VAT return, it had carried out demolition works on those buildings and a planning certificate had been issued to it, with a view to obtaining a building permit to develop the residential complex.

34 However, in such circumstances, that intention does not have the effect of depriving GVM of the right to deduct the VAT relating to the acquisition of the buildings at issue in the main proceedings.

35 Those buildings were acquired along with the land on which they had been constructed and that land continues to be used by GVM for the purposes of its taxed transactions. In those circumstances the replacement of dilapidated structures with more modern buildings which, consequently, are used for taxable output transactions in no way breaks the direct link between, on the one hand, the input acquisition of the buildings at issue and, on the other, the economic activities carried out thereafter by the taxable person. The acquisition of those buildings and their subsequent destruction with a view to building more modern new ones can, therefore, be regarded as a series of linked transactions for the purposes of subsequent taxable transactions in the same way as the acquisition of new buildings and their direct use (see Case C?234/11 *TETS Haskovo* [2012] ECR, paragraph 34).

36 In those circumstances, the answer to the first question is that Articles 167 and 168 of Directive 2006/112 must be interpreted as meaning that, in circumstances such as those in the main proceedings, a company which has acquired land and buildings constructed on that land, for the purpose of demolishing the buildings and developing a residential complex on the land, has the right to deduct the VAT relating to the acquisition of those buildings.

The second question

37 By its second question, the referring court asks, in essence, whether Article 185 of Directive 2006/112 must be interpreted as meaning that the demolition of buildings constructed on a plot of land, acquired with a view to developing a residential complex in place of those buildings, entails an adjustment to the initial deduction of the VAT relating to the acquisition of those buildings.

38 According to the case?law of the Court, the rules relating to the adjustment of deductions are an essential element of the system established by Directive 2006/112 in that they seek to ensure the accuracy of deductions and, consequently, the neutrality of the tax burden (see Case C?184/04 *Uudenkaupungin kaupunki* [2006] ECR I?3039, paragraph 26). By those rules, the directive aims to establish a close and direct relationship between the right to deduct input VAT and the use of the goods or services concerned for taxed output transactions (see *Centralan Property*, paragraph 57, and *TETS Haskovo*, paragraph 31).

39 The adjustment mechanism provided for in Directive 2006/112 is an integral part of the VAT deduction scheme established by that directive (see *TETS Haskovo*, paragraph 30).

40 So far as concerns the coming into existence of an obligation to make an adjustment of an input VAT deduction, Article 185(1) of that directive establishes the principle that such an adjustment is made in particular where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted (see *TETS Haskovo*, paragraph 32).

41 However, as regards the dispute before the referring court, the demolition of the buildings at issue in the main proceedings does not constitute a change within the meaning of Article 185(1) of

the directive since, as is clear from paragraphs 32 to 35 above, that demolition was envisaged by GVM upon acquisition of the buildings.

42 In those circumstances, the answer to the second question is that Article 185 of Directive 2006/112 must be interpreted as meaning that, in circumstances such as those in the main proceedings, the demolition of buildings, acquired together with the plot of land on which they were constructed, which is carried out with a view to developing a residential complex in place of those buildings does not result in an obligation to adjust the initial deduction of the VAT relating to the acquisition of those buildings.

Costs

43 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 (Third Chamber) hereby rules:

1. **Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in circumstances such as those in the main proceedings, a company which has acquired land and buildings constructed on that land, for the purpose of demolishing the buildings and developing a residential complex on the land, has the right to deduct the value added tax relating to the acquisition of those buildings.**

2. **Article 185 of Directive 2006/112 must be interpreted as meaning that, in circumstances such as those in the main proceedings, the demolition of buildings, acquired together with the plot of land on which they were constructed, which is carried out with a view to developing a residential complex in place of those buildings does not result in an obligation to adjust the initial deduction of the value added tax relating to the acquisition of those buildings.**

[Signatures]

* Language of the case: Romanian.