JUDGMENT OF THE COURT (Eighth Chamber)

15 September 2016 (*)

(Reference for a preliminary ruling — Taxation — Value Added Tax — Sixth Council Directive 77/388/EEC — Right to deduction — Decision 2004/817/EC — Legislative provision of a Member State — Expenditure on goods and services — Extent of use of goods or services for non-economic purposes greater than 90% of total use — Exclusion of the right to deduct)

In Case C?400/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 16 June 2015, received at the Court on 23 July 2015, in the proceedings

Landkreis Potsdam-Mittelmark

v

Finanzamt Brandenburg,

THE COURT (Eighth Chamber),

composed of D. Šváby, President of the Chamber, J. Malenovský and M. Safjan (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Landkreis Potsdam-Mittelmark, by J. Wulf-von Moers, conseil,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Austrian Government, by G. Eberhard, acting as Agent,

– the European Commission, by L. Lozano Palacios and M. Wasmeier, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1 of Council Decision 2004/817/EC of 19 November 2004 authorising Germany to apply a measure derogating from Article 17 of Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 2004 L 357, p. 33; 'the Authorising Decision').

2 The request has been made in proceedings between the Landkreis Potsdam-Mittelmark (administrative district of Potsdam-Mittelmark, Germany) ('the Landkreis') and the Finanzamt Brandenburg (Tax Office, Brandenburg, Germany) ('the Brandenburg Tax Office') concerning the valued added tax (VAT) owed by the Landkreis for the 2008 tax year.

Legal context

EU law

The Sixth Directive

3 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive') was repealed and replaced, as from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14). Since the relevant tax year is 2008, any reference made to the Sixth Directive is to be construed as a reference to Directive 2006/112 and is to be read in accordance with the correlation table set out in Annex XII thereof.

4 Article 4(1) and (2) of the Sixth Directive provided:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. 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 the professions. 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.'

5 Article 6(2)(a) of the Sixth Directive was worded as follows:

'The following shall be treated as supplies 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 is wholly or partly deductible.'

6 Under Article 17(2)(a) of the Sixth Directive:

'In so far 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) [VAT] 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.'

7 Article 27(1) of the Sixth Directive provided:

'The Council, acting unanimously on a proposal from the Commission, may authorise any Member

State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the overall amount of the tax revenue of the Member State collected at the stage of final consumption.'

The Authorising Decision

8 Recital 3 of the Authorising Decision states:

'The derogating measure is intended to exclude expenditure on goods and services completely, from the right to deduct VAT when the goods and services are used more than 90% for the private purposes of the taxable person, or of his employees, or for non-business purposes in general. This measure is a derogation from Article 17 of [the Sixth Directive], as amended by Article 28f of that Directive, and is justified by the need to simplify the procedure for charging VAT; it affects the amount of tax due at the final consumption stage only to a negligible extent.'

9 Article 1 of the Authorising Decision provides:

'By way of derogation from Article 17(2) of [the Sixth Directive] Germany is authorised to exclude expenditure on goods and services from the right to deduct VAT when the goods and services in question are used more than 90% for the private purposes of a taxable person or of his employees, or, more generally, for non-business purposes.'

10 According to Article 2 of the Authorising Decision:

'This Decision shall apply until 31 December 2009.'

11 Article 3 of the Authorising Decision provides that:

'This Decision is addressed to the Federal Republic of Germany.'

German law

12 Paragraph 15 of the Law on Turnover Tax (Umsatzsteuergesetz; 'the UStG') provides:

'1. A commercial operator may deduct, as input VAT:

(a) the tax lawfully due in respect of the supply of goods and services by another commercial operator for the purposes of his business. …

…

Where the extent of a commercial operator's use of any intra-Community supply, importation or acquisition of goods for the purposes of his business is less than 10%, such supply, importation or acquisition shall be deemed not to have been made for the purposes of his business.

…

2. There shall be no right to deduct input VAT in respect of the intra-Community supply, importation or acquisition of goods ... which are used by the trader for the following transactions:

(a) exempt transactions;

…’

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

13 The Landkreis is a local authority which performs, on its own account, tasks that go beyond the powers of the local districts and administrative bodies for which it is responsible. In its capacity as a public authority, the Landkreis is required, inter alia, for the performance of its public functions, to construct and maintain roads and to maintain road safety within its area. The Landkreis performed those tasks through a dedicated business (*Eigenbetrieb*) without legal personality.

14 In the 2008 tax year, the Landkreis acquired various goods, namely machinery, commercial vehicles and equipment, which it used mainly for the purposes of supplies which it made in the exercise of public authority. However, it also used those goods, to the extent of 2.65%, to provide, inter alia, pruning and tree-felling, mowing, sweeping and winter services to third parties. The Landkreis was accountable for VAT with regard to those supplies.

15 The Brandenburg Tax Office did not authorise the deduction of input VAT on the goods referred to in the previous paragraph, on the ground that the extent of use of those goods for the purposes of the Landkreis’s business did not amount to 10%, in accordance with the second sentence of Paragraph 15(1) of the UStG. When the appellant in the main proceedings lodged a complaint, the Brandenburg Tax Office allowed part of the deduction sought, on another ground. As to the remainder, the complaint was dismissed. The Finanzgericht Berlin-Brandenburg (Finance Court, Berlin-Brandenburg, Germany) dismissed the action brought before it by the Landkreis against that decision.

16 By an appeal on a point of law before the Bundesfinanzhof (Federal Finance Court), the Landkreis claimed that the refusal to grant the VAT deduction is contrary to EU law. This is because, according to the Landkreis, while the Authorising Decision authorises the Federal Republic of Germany to apply a measure derogating from Article 17 of the Sixth Directive, it does not authorise it to exclude the right to deduct input VAT in cases — such as the present case — in which the extent of use of the goods concerned for non-economic activities, which fall outside the scope of VAT but which cannot be considered to be ‘for non-business purposes’, is greater than 90%. The Landkreis submits, therefore, that it is entitled to a proportional deduction of 2.65% of the input VAT.

17 In the Landkreis’s view, the refusal to grant the right to deduct input VAT infringes the principle of neutrality as regards competition, because such a refusal means that non-deductible amounts of input VAT are included as a direct cost in the price calculation, despite the fact that the output transactions carried out by the Landkreis in competition with private undertakings are fully taxed. Consequently, the Landkreis claims to have suffered a structural competitive disadvantage.

18 In that context, the referring court points out that, under national law, the Landkreis is not entitled to deduct the input VAT which it has claimed. According to the referring court, this is because it uses the goods in question essentially to perform its public service functions and uses those goods only to the extent of 2.65% for the purposes of making business-related taxable supplies. In those circumstances, there is no right to deduct input VAT, pursuant to the second sentence of Paragraph 15(1) of the UStG, because the extent of use of the goods in question for the purposes of the Landkreis’s business is less than 10%.

19 The referring court recalls that, pursuant to Article 1 of the Authorising Decision, by way of derogation from the provisions of Article 17(2) of the Sixth Directive, the Federal Republic of

Germany is authorised to exclude expenditure on goods and services from the right to deduct VAT when the extent of use of the goods and services in question for the private purposes of a taxable person or of his employees, or, more generally, for non-business purposes, is greater than 90%.

20 On the one hand, the Court of Justice has held that, to the extent that a taxable person intends to use such goods or to use them in part for non-economic activities which fall outside the scope of VAT, he is not entitled to deduct input VAT.

21 On the other hand, where goods are supplied which the taxable person intends to use both for economic activities subject to VAT and for private purposes 'other than those of his business', within the meaning of Article 6(2)(a) of the Sixth Directive, the taxable person may treat all those goods as assets forming part of his business and, on that basis, be entitled to deduct the whole of the input VAT. He must, however, pay the VAT on the non-business use of the goods, as is apparent, inter alia, from the judgement of 23 April 2009, *Puffer* (Case C?460/07, EU:C:2009:254, paragraph 39).

22 The referring court considers that, according to those principles, the right to deduct input tax is necessarily excluded in so far as the goods acquired by the Landkreis are used, to the extent of 97.35%, for the performance of its public function activities, which are non-economic activities falling outside the scope of VAT. In addition, the referring court considers that the Landkreis has, in principle, the right to deduct the input VAT — in respect of the remaining 2.65%. However, this right to deduct is excluded pursuant to the second sentence of Paragraph 15(1) of the UStG.

23 In that regard, the referring court is uncertain as to whether Article 1 of the Authorising Decision authorises the exclusion of the right to deduct the input VAT not only where goods are used for the private purposes of the taxable person or his employees or, more generally, for non-business purposes — as is apparent from its wording —, but also in cases — such as that in the main proceedings — where the extent of use of the goods for non-economic activities, which fall outside the scope of VAT, is greater than 90%.

24 The referring court takes the view that, on the basis of the judgment of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (C?515/07, EU:C:2009:88), the enabling provision in Article 1 of the Authorising Decision may be interpreted as meaning that the right to deduct input VAT may be excluded only in cases in which the goods acquired are used, to an extent greater than 90%, 'for purposes other than those of [the taxable person's] business', and not where the goods are used for non-economic purposes which fall outside the scope of the VAT. In that case, the referring court is of the opinion that the rule set out in the second sentence of Paragraph 15(1) of the UStG does not come within the scope of the Authorising Decision, since the right to deduct input VAT is also excluded where the extent of use of the goods for non-economic purposes is greater than 90%.

25 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'The second sentence of Paragraph 15(1) of the [UStG] provides that where the extent of a commercial operator's use of any intra-Community supply, importation or acquisition of goods for the purposes of his business is less than 10%, such supply, importation or acquisition should be deemed not to have been made for the purposes of his business — and to that extent excludes the right to deduct input VAT.

That rule is based on Article 1 of the Authorising Decision, which authorises the Federal Republic of Germany, by way of derogation from Article 17(2) of the Sixth Directive, to exclude expenditure on goods and services from the right to deduct VAT when the extent of the taxable person's use of

goods and services in question for his own private purposes or those of his employees, or, more generally, for non-business purposes, is greater than 90%.

Does this authorisation — in accordance with its wording — apply only to the cases covered by Article 6(2) of the Sixth Directive (Article 26 of Directive 2006/112 as amended by Directive 2009/162), or does it also apply to all cases in which goods or services are used only partly for business purposes?'

Consideration of the question referred

26 By its question, the referring court asks, in essence, whether Article 1 of the Authorising Decision must be interpreted as meaning that it applies to a situation in which the goods and services that an undertaking acquires are used, to an extent greater than 90%, for non-economic purposes which do not come within the scope of VAT.

27 As is apparent from its wording, the Authorising Decision provides for a derogation from Article 17(2) of the Sixth Directive, pursuant to which a taxable person may deduct input VAT to the extent that the goods and services are used for the purposes of taxable transactions, that it to say for the purposes of an economic activity.

28 In order to decide whether the term 'non-business purposes' in Article 1 of the Authorising Decision may cover a situation — such as that in the main proceedings — in which the Landkreis carries out activities which fall under its responsibility as a public authority — that is to say, non-economic activities — even though they are not carried out for purposes other than those of its business, it is necessary to refer to the meaning given to that term in the Sixth Directive, on the basis of which the Authorising Decision was adopted, pursuant to Article 27(1) thereof.

29 As is apparent from Article 6(2)(a) of the Sixth Directive, the use of goods for purposes other than those of a taxable person's business may be subject to VAT.

30 By contrast, non-economic activities do not fall within the scope of the Sixth Directive (judgments of 13 March 2008, *Securenta*, C?437/06, EU:C:2008:166, paragraphs 30 and 31, and of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, C?515/07, EU:C:2009:88, paragraphs 36 and 37).

31 It follows that Article 6(2)(a) of the Sixth Directive is not intended to establish a rule that transactions that fall outside the scope of the system of VAT may be considered to be carried out for 'purposes other than those of [a taxable person's] business' within the meaning of that provision. Such an interpretation would have the effect of rendering Article 2(1) of the Sixth Directive meaningless (judgment of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, C?515/07, EU:C:2009:88, paragraph 38).

32 Those conclusions are supported by the broad logic of the common system of VAT, under which a distinction is made between economic and non-economic activities according to criteria that are different from those distinguishing between business use and use for non-business purposes, in particular for private purposes.

33 It is settled case-law that, where capital goods are used both for business and for private purposes, the taxpayer has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes (judgment of 23 April 2009, *Puffer* , C?460/07, EU:C:2009:254, paragraph 39 and the case-law cited).

34 By contrast, there is no such freedom of choice when considering whether or not goods are used for economic activities. Where a business uses goods both for economic and non-economic activities, Article 17(2)(a) of the Sixth Directive merely provides a right to deduct input tax. The measures which the Member States are required to adopt in that regard must comply with the principle of fiscal neutrality on which the common system of VAT is based (judgement of 13 March 2008, *Securenta*, C?437/06, EU:C:2008:166, paragraph 36).

35 In accordance with the principle of fiscal neutrality, 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 (judgment of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, C?515/07, EU:C:2009:88, paragraph 27).

36 This requirement is not met, however, if the right to deduct is excluded where the extent of use of business goods for economic activities is less than 10%.

37 The above considerations are fully transposable to the interpretation of the term ‘non-business purposes’ in Article 1 of the Authorising Decision. Given the requirements of unity and consistency in the EU legal order, the terms used by the measures adopted in the same sector must be given the same meaning, unless the EU legislature has expressed a different intention (see, to that effect, judgments of 4 October 2011, *Football Association Premier League and Others* , C?403/08 and C?429/08, EU:C:2011:631, paragraph 188, and of 31 May 2016, *Reha Training*, C?117/15, EU:C:2016:379, paragraph 28). That is not the position in this case.

38 Lastly, as to the argument that the term ‘non-business purposes’ was understood differently in the period prior to the judgment of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (C?515/07, EU:C:2009:88), so that the Authorising Decision, which was adopted on 19 November 2004, might still distinguish between economic and non-economic activities, it must be recalled that the interpretation which the Court of Justice gives to a provision of EU law has retroactive effect and, therefore, it is valid from the time the interpreted provision took effect (judgment of 27 March 1980, *Denkavit italiana*, 61/79, EU:C:1980:100, paragraph 16).

39 The term ‘non-business purposes’ may not, therefore, be given a different meaning in respect of the period prior to the judgment of 12 February 2009, *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (C?515/07, EU:C:2009:88), from which it is apparent that that term does not concern the distinction between economic and non-economic activities.

40 In the light of all of the above considerations, the answer to the question referred is that Article 1 of the Authorising Decision must be interpreted as meaning that it does not apply to a situation in which the goods or services that an undertaking acquires are used, to an extent greater than 90%, for non-economic activities, which fall outside the scope of VAT.

Costs

41 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 (Eighth Chamber) hereby rules:

Article 1 of Council Decision 2004/817/EC of 19 November 2004 authorising Germany to apply a measure derogating from Article 17 of Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that it does not apply to a situation in which the goods or services that an undertaking acquires are used, to an extent greater than 90%, for non-economic activities, which fall outside the scope of value added tax.

[Signatures]

* Language of the case: German.