62020CJ0045
JUDGMENT OF THE COURT (Eighth Chamber)

14 October 2021 (*1)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 167, Article 168(a), Article 250 and Article 252 – Deduction of input tax – Immovable property – An office room – Photovoltaic system – Allocation decision giving rise to a right of deduction – Communication of the allocation decision – Limitation period for exercising a right to deduct – Presumption of allocation to the private assets of the taxable person where the allocation decision is not communicated – Principle of neutrality – Principle of legal certainty – Principles of equivalence and proportionality)

In Joined Cases C?45/20 and C?46/20,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decisions of 18 September 2019, received at the Court on 29 January 2020, in the proceedings

E

v

Finanzamt N (C?45/20),

and

Z

v

Finanzamt G (C?46/20),

THE COURT (Eighth Chamber),

composed of A. Prechal (Rapporteur), President of the Second Chamber, acting as President of the Eighth Chamber, J. Passer and N. Wahl, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

–

E, by H. Weiss, Rechtsanwalt,

–

Finanzamt N, by B. Krimmel, acting as Agent,

–

the German Government, by J. Möller, S. Eisenberg and S. Heimerl, acting as Agents,

–

the European Commission, by J. Jokubauskait? and R. Pethke, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2021,

gives the following

Judgment

1

These requests for a preliminary ruling concern the interpretation of Article 167 and 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), as amended by Council Directive 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14) (‘the VAT Directive’).

2

The requests have been made in two sets of proceedings, namely, in Case C?45/20, between E and Finanzamt N (Tax Office N, Germany) and, in Case C?46/20, between Z and Finanzamt G (Tax Office G, Germany), concerning the rejection by those tax authorities of deductions of value added tax (VAT) made by E and Z, on account of the failure to take an allocation decision identifiable by the tax authorities before the statutory deadline for submitting the annual turnover-tax return expired.

Legal context

European Union law

3

Under Article 2(1) of the VAT Directive:

‘The following transactions shall be subject to VAT:

(a)

the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…

(c)

the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…’

4

Article 9(1) of that directive provides:

‘“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.’

5

Article 63 of the VAT Directive states:

‘The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

6

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

7

Article 168 of the VAT 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 168a of that directive provides:

‘1. In the case of immovable property forming part of the business assets of a taxable person and used both for purposes of the taxable person’s business and for his private use or that of his staff, or, more generally, for purposes other than those of his business, VAT on expenditure related to this property shall be deductible in accordance with the principles set out in Articles 167, 168, 169 and 173 only up to the proportion of the property’s use for purposes of the taxable person’s business.

By way of derogation from Article 26, changes in the proportion of use of immovable property referred to in the first subparagraph shall be taken into account in accordance with the principles

provided for in Articles 184 to 192 as applied in the respective Member State.

2. Member States may also apply paragraph 1 in relation to VAT on expenditure related to other goods forming part of the business assets as they specify.’

9

The first paragraph of Article 179 of the VAT Directive is worded as follows:

‘The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.’

10

Under Articles 180 and 182 of the VAT Directive, Member States may authorise a taxable person to make a deduction which he or she has not made in accordance with Articles 178 and 179 of that directive. In that case, they are to determine the conditions and detailed rules.

11

Article 250(1) of the VAT Directive provides:

‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.’

12

Article 252 of that directive provides:

‘1. The VAT return shall be submitted by a deadline to be determined by Member States. That deadline may not be more than two months after the end of each tax period.

2. The tax period shall be set by each Member State at one month, two months or three months.

Member States may, however, set different tax periods provided that those periods do not exceed one year.’

13

Article 261(1) of the VAT Directive reads as follows:

‘Member States may require the taxable person to submit a return showing all the particulars specified in Articles 250 and 251 in respect of all transactions carried out in the preceding year. That return shall provide all the information necessary for any adjustments.’

14

Under Article 273 of that directive:

‘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.'

German law

15

Paragraph 15, entitled 'Deduction of input tax', of the Umsatzsteuergesetz (Law on turnover tax) of 21 February 2005 (BGBl. 2005 I, p. 386), in the version applicable to the disputes in the main proceedings ('the UStG'), is worded as follows:

'(1) A trader may deduct the following as input tax:

1.

the tax lawfully payable on goods and services provided to his or her business by another trader.
…

…

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

…

(1b) Where a trader uses immovable property both for the purposes of his or her business and for purposes other than those of his or her business, or for the private use of his or her staff, the tax on supplies, importation or intra-Community acquisition and on all other services connected with that immovable property shall not be deductible in so far as it is not related to the use of that immovable property for the purposes of the business. …'

16

Paragraph 18 of that Law, entitled 'Taxation procedure', provides in subparagraph 3 thereof:

'The trader must submit … for the calendar year, or where appropriate, for a shorter taxable period, a tax return in which he or she calculates himself or herself, in accordance with Paragraph 16(1) to (4) and Paragraph 17, the tax payable or the excess that results in his or her favour (tax return). …'

17

Paragraph 149, entitled 'Submission of tax returns', of the Abgabenordnung (Tax Code, BGBl. 2002 I, p. 3866), in the version applicable to the disputes in the main proceedings ('the AO'), provides:

'(1) The tax laws determine who is required to submit a tax return. …

(2) Unless otherwise provided by tax legislation, tax returns relating to a calendar year or to a period determined by law must be submitted at the latest five months after the end of the calendar year or five months after the end of the period determined by law …'

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

18

The facts in Case C?45/20 may be summarised as follows. E runs a scaffolding business and in 2014 he commissioned a firm of architects to draw up building plans for a single-family house. Those plans stated that the house would have a floor space of 149.75 m2 and that on the ground floor there would be a room described as an 'office', with an area of 16.57 m2. The invoices relating to the construction of that house were drawn up between October 2014 and November 2015.

19

In his annual turnover-tax return for 2015, which was received at Tax Office N on 28 September 2016, E claimed for the first time a right to deduct input tax paid in respect of the construction of that office. Following a tax inspection, Tax Office N refused that deduction. E's complaint against that refusal and his action before the Sächsisches Finanzgericht (Finance Court, Saxony, Germany) against the decision taken on that complaint were dismissed. That court justified its decision by stating, in essence, that the asset concerned had been allocated to those of the business after 31 May 2016, the date on which the deadline for submitting the annual turnover-tax return for 2015 expired, pursuant to Paragraph 149(2) of the AO.

20

As regards the facts relating to Case C?46/20, the following matters are to be noted. In 2014, Z purchased a photovoltaic system and the electricity generated by it was used in part for his own consumption and in part resold to an energy supplier. The contract for the sale of electricity, concluded in 2014 between Z and that supplier, provided for remuneration to which turnover-tax was added. On 29 February 2016, Z submitted a turnover-tax return for the year 2014 to Tax Office G. In that return, Z deducted for the first time amounts which related essentially to the input tax paid, appearing on an invoice dated 11 September 2014 for the supply and installation of his photovoltaic system. Following a tax inspection, Tax Office G refused that deduction on the ground that Z had not taken a decision allocating that asset to those of his business by 31 May 2015, the date on which the deadline for submitting the annual turnover-tax return, laid down in Paragraph 149(2) of the AO, expired. Z's complaint against that refusal and his action before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany) against the decision taken on his complaint were dismissed.

21

E and Z each brought an appeal on a point of law before the referring court, the Bundesfinanzhof (Federal Finance Court, Germany), in support of which they both submit, in essence, that the tax authorities were required to take into account evidence showing their decision to allocate mixed-use assets to their business assets, such as building plans designating the use of a room as an office or the actual use of assets for the purposes of the business. E and Z also argue that the condition relating to the communication within the period laid down in Paragraph 149(2) of the AO of evidence showing a decision to allocate mixed-use assets to business assets, laid down in the referring court's case-law, cannot be maintained in the light of the statement of the law in the

judgment of 25 July 2018, Gmina Ryjewo (C?140/17, EU:C:2018:595).

22

In accordance with its case-law, the referring court considers that the appeals on a point of law of E and Z are unfounded under national law, since the evidence of the decision of the partial allocation of E’s building, or of the allocation of Z’s photovoltaic system in full, to the respective business assets was not communicated to the competent tax offices before the expiry of the deadline laid down in Paragraph 149(2) of the AO for submitting the annual turnover-tax return. In accordance with the criteria developed by that court in its case-law, the tax deduction deriving from those allocations is permissible only in so far as that communication is effected prior to that deadline.

23

However, the referring court is uncertain whether its interpretation of national law is compatible with EU law and, in particular, with the judgment of 25 July 2018, Gmina Ryjewo (C?140/17, EU:C:2018:595).

24

In the first place, the referring court asks whether, in the absence of rules of EU law specifying the method of adoption and the time limit for communicating evidence showing a decision to allocate an asset to business assets, a Member State may require that that decision be communicated within a relatively short period, such as that referred to in Paragraph 149(2) of the AO, failing which it will be time-barred.

25

According to the referring court, that requirement may be regarded as compatible with EU law in that the exercise of the right to choose to allocate an asset to business assets relates to a substantive condition governing the right of deduction. In addition, the imposition by a Member State of a period within which to communicate evidence showing the allocation decision would be justified in view of the legal vacuum left by the VAT Directive in that regard and of the principle of legal certainty. Furthermore, the imposition of such a period falls within the competence conferred on the Member States by the provisions of Title XI of the VAT Directive as regards the establishment of the formal conditions for exercising the right of deduction.

26

However, the referring court considers that although the facts which gave rise to the judgment of 25 July 2018, Gmina Ryjewo (C?140/17, EU:C:2018:595) differ from those of the present joined cases, the Court set out, in that judgment, a number of indicators by which it may be ascertained whether a taxable person has acted as such, but which are not necessarily capable of being communicated to the competent tax authorities within a relatively short period. Furthermore, according to the referring court, it could be inferred from that judgment that the requirement that an allocation decision be taken within a relatively short period infringes the principle of neutrality.

27

In the second place, the referring court is uncertain as to the consequences of a failure to comply with that period. According to that court, arguably it cannot be established that an asset has been allocated to business assets in the absence of evidence, identifiable by the tax authorities, that the taxable person has chosen to make such an allocation. There is thus a presumption that any asset

that has not been expressly allocated by a taxable person to the assets of his or her business must form part of his or her private assets. However, the referring court also states that it is apparent from the judgment of 25 July 2018, Gmina Ryjewo (C?140/17, EU:C:2018:595) that the absence of a declaration of allocation does not preclude such an intention of allocation from being implied and that the question whether the person concerned acted as a taxable person must be assessed in the light of a broad interpretation of that concept. On the basis of those considerations, it could be argued that there is a presumption of 'acquisition as a taxable person' when a trader acquires an asset which, by its nature, may as a rule also be used for the purposes of his or her business, and which has not been allocated by that trader exclusively to his or her business.

28

In those circumstances the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions, worded identically in both joined cases, to the Court of Justice for a preliminary ruling:

'(1)

Does Article 168(a), read in conjunction with Article 167 of [the VAT Directive] conflict with national case-law precluding the right to deduct VAT in cases in which the trader is entitled to choose the allocation of a supply at the time of purchase if no allocation decision identifiable by the tax authorities has been communicated upon the expiry of the statutory deadline for submission of the annual VAT return?

(2)

Does Article 168(a) of [the VAT Directive] conflict with national case-law whereby allocation to private assets is assumed or presumed in the absence of (sufficient) evidence of allocation to the assets of the business?'

Consideration of the questions referred

29

By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 168(a) of the VAT Directive, read in conjunction with Article 167 thereof, must be interpreted as precluding national provisions interpreted by a national court in such a manner that where a taxable person has the right to decide to allocate an asset to his or her business assets and where, at the latest upon expiry of the statutory period for submitting the annual turnover-tax return, the competent national tax authority has not been put in a position to establish such an allocation of that asset by means of an express decision or sufficient evidence, it may refuse the right to deduct VAT in respect of that asset on the ground that it has been allocated to the taxable person's private assets.

30

In order to answer that question, it is necessary, first of all, to determine the conditions governing a taxable person's right to decide to allocate an asset to his or her business assets and, then, to examine the circumstances in which the competent national authority may refuse to allow deduction where that choice has not been communicated to that authority at the latest by the expiry of the statutory deadline for submitting the annual turnover-tax return.

31

In the first place, as regards the conditions governing a taxable person’s right to decide to allocate an asset to his or her business assets, it should be borne in mind that, according to the settled case-law of the Court, 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 EU legislation (judgment of 18 March 2021, A. (Exercise of the right of deduction), C?895/19, EU:C:2021:216, paragraph 32 and the case-law cited). That right, provided for in Article 167 et seq. of the VAT Directive, is an integral part of the VAT scheme and in principle may not be limited (judgment of 21 March 2018, Volkswagen, C?533/16, EU:C:2018:204, paragraph 39 and the case-law cited).

32

The deduction system is intended to relieve the taxable person entirely of the burden of the VAT due or paid in the course of all of his or her economic activities. The common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are in principle themselves subject to VAT, are taxed in a neutral way (judgment of 18 March 2021, A. (Exercise of the right of deduction), C?895/19, EU:C:2021:216, paragraph 33 and the case-law cited).

33

The right to deduct VAT is subject to compliance with the substantive and formal conditions laid down by the VAT Directive (see, to that effect, judgments of 21 March 2018, Volkswagen, C?533/16, EU:C:2018:204, paragraph 40, and of 18 March 2021, A. (Exercise of the right of deduction), C?895/19, EU:C:2021:216, paragraph 35 and the case-law cited).

34

The substantive conditions for the right to deduct are those which govern the actual substance and scope of that right, such as those provided for in Chapter 1 of Title X of the VAT Directive, entitled ‘Origin and scope of right of deduction’ (judgment of 28 July 2016, Astone, C?332/15, EU:C:2016:614, paragraph 47 and the case-law cited). Thus, under Article 168(a) of the VAT Directive, goods in respect of which the taxable person intends to assert the right to deduct must have been acquired by him or her in that capacity at the time of acquisition. In addition, those goods must be used by the taxable person for the purposes of his or her own taxed output transactions and those goods must be supplied by another taxable person as inputs (see, to that effect, judgments of 15 September 2016, Barlis 06 – Investimentos imobiliários e Turísticos, C?516/14, EU:C:2016:690, paragraph 40, and of 25 July 2018, Gmina Ryjewo, C?140/17, EU:C:2018:595, paragraph 34 and the case-law cited). In addition, Article 167 of the VAT Directive makes clear that the right to deduct input VAT arises at the time when the deductible tax becomes chargeable, namely when the goods are supplied (see, to that effect, judgment of 22 October 2015, Sveda, C?126/14, EU:C:2015:712, paragraph 20 and the case-law cited).

35

The formal conditions for the right to deduct regulate the rules governing its exercise and monitoring thereof and the smooth functioning of the VAT system, such as the obligations relating to accounts, invoicing and filing returns (see, to that effect, judgments of 28 July 2016, Astone, C?332/15, EU:C:2016:614, paragraph 47, and of 18 March 2021, A. (Exercise of the right of deduction), C?895/19, EU:C:2021:216, paragraph 37 and the case-law cited). Articles 250, 252

and 261 of the VAT Directive, which require taxable persons to submit VAT returns and govern the law of the Member States as regards the deadlines for so doing, thus lay down formal conditions.

36

That distinction between the substantive and formal conditions governing the right of deduction is important, since, according to settled case-law, the fundamental principle of VAT neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements (see, to that effect, judgment of 28 July 2016, Astone, C?332/15, EU:C:2016:614, paragraph 45 and the case-law cited).

37

Furthermore, it should be observed that, in respect of goods which may be used both for business and private purposes, a taxable person is entitled, for the purposes of VAT, to decide whether they are to be allocated to his or her business assets. Those goods include capital goods which, under Article 189(a) of the VAT Directive, may be defined by the Member States and which, according to the case-law of the Court, cover goods used for the purposes of economic 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, judgment of 27 March 2019, Mydibel, C?201/18, EU:C:2019:254, paragraph 23 and the case-law cited).

38

It is settled case-law that where capital goods are used both for business and for private purposes the taxable person has the choice, for the purposes of the deduction of VAT, of (i) allocating those goods wholly to the assets of his or her business, (ii) retaining them wholly within his or her private assets, or (iii) integrating them into his or her business only to the extent to which they are actually used for business purposes (see, to that effect, judgments of 14 July 2005, Charles and Charles-Tijmens, C?434/03, EU:C:2005:463, paragraph 23, and of 16 February 2012, Eon Aset Menidjmunt, C?118/11, EU:C:2012:97, paragraph 53 and the case-law cited).

39

Should the taxable person choose to treat capital goods used for both business and private purposes as business goods, the input VAT due on the acquisition of those goods is, in principle, immediately deductible in full (judgment of 14 July 2005, Charles and Charles-Tijmens, C?434/03, EU:C:2005:463, paragraph 24 and the case-law cited). With regard to immovable property, Article 168a of the VAT Directive states, however, that VAT on expenditure related to that property is to be deductible only up to the proportion of the property’s use for purposes of the taxable person’s business.

40

If a taxable person chooses to integrate capital goods only partly into his or her business, the input VAT payable on his or her acquisition is, in principle, deductible only to the extent to which they are actually used for the purposes of the business (see, to that effect, judgment of 16 February 2012, Eon Aset Menidjmunt, C?118/11, EU:C:2012:97, paragraph 56 and the case-law cited).

41

It must also be observed that when such goods are acquired, it is the taxable person’s choice to

act as such, that is, for the purposes of his or her economic activity, as provided for in Article 9(1) of the VAT Directive, which determines the application of the VAT system and, therefore, of the deduction mechanism (see, to that effect, judgment of 22 March 2012, Klub, C?153/11, EU:C:2012:163, paragraphs 39 and 40 and the case-law cited). It follows that that choice is, as the Advocate General noted in points 48 and 49 of his Opinion, a substantive condition governing the right to deduct.

42

According to the settled case-law of the Court, the question whether, at the time when he or she received delivery of the goods, the taxable person was acting as a taxable person is a question of fact which it is for the competent national court to determine, on the basis of objective evidence and following an examination of all the circumstances of the case before it (see, to that effect, judgments of 14 February 1985, Rompelman, 268/83, EU:C:1985:74, paragraph 24, and of 25 July 2018, Gmina Ryjewo, C?140/17, EU:C:2018:595, paragraphs 38 and 39 and the case-law cited).

43

In order to determine whether a taxable person acted in that capacity when acquiring goods, the Court has clarified that although a clear and express declaration of the intention to use the goods for economic purposes at the time of their acquisition may suffice for a finding that the goods were acquired by the taxable person acting as such, the absence of such a declaration does not exclude the possibility that such an intention may be conveyed implicitly (judgment of 25 July 2018, Gmina Ryjewo, C?140/17, EU:C:2018:595, paragraph 47).

44

The fact that that clarification was provided by the Court in response to a question referred for a preliminary ruling in a case which concerned the right to adjust deductions of VAT paid for immovable property acquired by a body governed by public law registered as a taxable person does not, contrary to the arguments of Tax Office N, affect its relevance in disputes such as those in the main proceedings. That clarification applies to all cases in which goods are allocated to the economic activity of a taxable person, in accordance with the generous interpretation of the concept of acquisition ‘as a taxable person’, provided by the Court (see, to that effect, judgment of 25 July 2018, Gmina Ryjewo, C?140/17, EU:C:2018:595, paragraph 54). The VAT Directive does not, therefore, make the grant of a right of deduction conditional upon the adoption and communication of an express allocation decision.

45

The factors which may implicitly show that intention include, in particular, the nature of the goods concerned, the capacity in which the person acted and the period which elapsed between the acquisition of the goods and their use for the purposes of the taxable person’s economic activity (judgment of 25 July 2018, Gmina Ryjewo, C?140/17, EU:C:2018:595, paragraphs 38, 49 and 50).

46

By contrast, it is irrelevant that the goods in question were not immediately used for taxable transactions, since the use to which goods are put merely determines the extent of the initial deduction or the extent of any subsequent possible adjustments but does not affect the issue of whether a right of deduction arises (judgment of 25 July 2018, Gmina Ryjewo, C?140/17, EU:C:2018:595, paragraph 51 and the case-law cited).

47

In the present case, it will, therefore, be for the referring court to assess whether it may be inferred from all the circumstances of the disputes in the main proceedings that E and Z have each acted as a taxable person when acquiring the mixed-use assets at issue in the main proceedings, namely, respectively, an office room in a building used essentially for private purposes and a photovoltaic system partly used for private purposes, and expressed the intention of allocating them to their businesses.

48

In that respect, as regards E, the allocation of a reasonable-sized room as an office on the building plans for a single-family house may constitute evidence of such an intention. However, since a room so described on the building plans for a single-family house is not necessarily, in actual fact, allocated to the use of the taxable person’s business activity, it is important to substantiate that person’s intention to allocate that room to his or her business by other objective evidence of that use. In Z’s case, the conclusion, in the year of purchase and installation of a photovoltaic system, of a contract relating to the sale of the electricity produced by that system may constitute evidence that it is allocated to an economic activity if the conditions for that sale correspond to those offered to business operators rather than to individuals.

49

Furthermore, VAT deductions made by taxable persons in their tax returns are capable of establishing such an allocation decision where they are the consequence thereof. Such deductions are also evidence that a taxable person had the intention of allocating goods to his or her business at the time of their acquisition. It has thus been held that where a taxable person deducts, in his or her tax return to the tax authorities, the amounts due by way of VAT upon acquiring the goods, he or she is deemed to have allocated those goods to his or her business (see, to that effect, judgment of 11 July 1991, Lennartz, C?97/90, EU:C:1991:315, paragraph 26). By contrast, as the Advocate General observed in points 43 and 44 of his Opinion, the absence of deductions in the provisional VAT return for the period in which the goods were acquired does not, in itself, support the conclusion that the taxable person chose not to allocate the goods concerned to his or her business.

50

In the second place, as regards a taxable person’s obligation to communicate his or her allocation decision to the tax authorities at the latest by the expiry of the statutory deadline for submitting the annual turnover-tax return – in the present case, by 31 May of the year following that in which the allocation decision was taken – it must be borne in mind that, under the first paragraph of Article 179 of the VAT Directive, the right of deduction is generally exercised during the same period as that during which it has arisen, that is to say, having regard to Article 167 of the VAT Directive, at the time when the tax becomes chargeable (see, to that effect, judgment of 18 March 2021, A. (Exercise of the right of deduction), C?895/19, EU:C:2021:216, paragraph 41 and the case-law cited).

51

Nevertheless, pursuant to Articles 180 and 182 of the VAT Directive, a taxable person may be authorised to make a deduction even if he or she did not exercise his or her right during the period in which the right arose, subject to compliance with certain conditions and procedures determined

by national legislation (see judgment of 26 April 2018, Zabrus Siret, C?81/17, EU:C:2018:283, paragraph 37 and the case-law cited).

52

Furthermore, in accordance with Article 250(1) of the VAT Directive, read in conjunction with Article 252 thereof, national legislation must lay down the obligation on the taxable person to submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made, in respect of a tax period of not more than one year, and within a deadline that may not be more than two months after the end of each tax period.

53

In addition, Article 261(1) of that directive allows Member States to require the taxable person to submit a return showing all the abovementioned particulars in respect of all transactions carried out in the preceding year, without, however, setting a deadline for submitting that return.

54

In the light of those provisions, the VAT Directive does not preclude obligations, such as those applicable in the present case, which require taxable persons to inform the tax authorities of their decision to allocate capital goods to their business assets by making the corresponding deductions in their provisional VAT returns and in their annual turnover-tax return that must be submitted to those authorities no later than five months after the year in which that allocation decision was taken.

55

However, in so far as national case-law penalises the failure to comply with that deadline within which a taxable person is supposed expressly, or implicitly but clearly, to inform the tax authorities of that decision, by the loss of his or her right of deduction derived from that decision, it should be observed that although the adoption of an allocation decision is a substantive condition for exercising that right, as is apparent from paragraph 41 above, its communication to the tax authorities is only a formal condition. According to the settled case-law of the Court, a failure to comply with formal requirements cannot, as a rule, lead to a loss of the right to deduct (see, to that effect, judgment of 28 July 2016, Astone, C?332/15, EU:C:2016:614, paragraph 45 and the case-law cited).

56

The case may be different if non-compliance with such formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied (see, to that effect, judgment of 28 July 2016, Astone, C?332/15, EU:C:2016:614, paragraph 46 and the case-law cited).

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In addition, under Article 273 of the VAT Directive, Member States may impose other obligations which they deem necessary for the correct collection of VAT and for the prevention of evasion. However, the measures that the Member States may adopt under that provision must not go further than is necessary to attain such objectives. They may not, therefore, be used in such a manner that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT (see, to that effect, judgment of 12 April 2018, Biosafe – Indústria de Reciclagens, C?8/17, EU:C:2018:249, paragraph 38 and the case-law cited). In that

regard, it has been held that a penalty consisting in an absolute refusal of the right to deduct where the tax is accounted for out of time appeared disproportionate where no evasion or detriment to the budget of the State could be ascertained (see, to that effect, judgment of 12 July 2012, EMS-Bulgaria Transport, C?284/11, EU:C:2012:458, paragraphs 68 to 70).

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In the present case, subject to verification by the referring court, the failure by E and Z to comply with the deadline by which they were they were supposed to communicate their allocation decision is not such as to prevent them from producing conclusive evidence that they had taken such a decision at the time of acquiring the capital goods at issue in the main proceedings. In addition, it does not appear that such a deadline was imposed by the German legislature in order to prevent fraud or abuse.

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However, it is also apparent from the settled case-law of the Court that the possibility of exercising the right of deduction without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, in the light of his or her rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely. Consequently, a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of input tax, by making him or her forfeit his or her right of deduction, cannot be regarded as incompatible with the regime established by the VAT Directive, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law (principle of equivalence) and, secondly, that it does not in practice render impossible or excessively difficult the exercise of the right of deduction (principle of effectiveness) (judgment of 26 April 2018, Zabrus Siret, C?81/17, EU:C:2018:283, paragraphs 38 and the case-law cited).

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As regards compliance with the principle of equivalence, it is clear that the period laid down in the national legislation at issue in the main proceedings corresponds to that allowed for taxpayers to submit tax returns in general. Subject to verification by the referring court, that national legislation does not, therefore, appear to have provided, in VAT matters, for a different regime from that applicable in other domestic tax matters.

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As regards compliance with the principle of effectiveness, that period does not appear, in itself, to render the exercise of the right of deduction virtually impossible or excessively difficult, since the first paragraph of Article 179 of the VAT Directive provides that that right is to be exercised, as a rule, during the same period as that in which it arose (see, by analogy, judgment of 28 July 2016, Astone, C?332/15, EU:C:2016:614, paragraph 38).

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However, Member States must, in accordance with the principle of proportionality, employ means which, whilst enabling them effectively to attain the objective pursued by national legislation, are the least detrimental to the principles laid down by EU legislation, such as the fundamental principle of the right to deduct VAT (judgment of 26 April 2018, Zabrus Siret, C?81/17, EU:C:2018:283, paragraph 50 and the case-law cited).

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It is, therefore, necessary for the referring court to assess whether the limitation period at issue in the main proceedings, which corresponds to that laid down in Article 149(2) of the AO for the submission of the annual turnover-tax return, namely 31 May of the year following that in which the allocation decision was taken, is proportionate to the objective of ensuring compliance with the principle of legal certainty.

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In that regard, account must be taken, in the first place, of both of the possibility for the national authorities of imposing penalties on a negligent taxable person that would be less detrimental to the principle of neutrality than the outright rejection of the right of deduction, such as administrative financial penalties, and of the fact that a period expiring after 31 May of the year following that in which the allocation decision was taken does not appear, prima facie, incompatible with observance of the principle of legal certainty and, in the second place, of the pre-eminent place of the right of deduction in the common VAT system.

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In the light of all the foregoing considerations, the answer to the questions referred is that Article 168(a) of the VAT Directive, read in conjunction with Article 167 thereof, must be interpreted as not precluding national provisions interpreted by a national court in such a manner that where a taxable person has the right to decide to allocate an asset to his or her business assets and where, at the latest upon expiry of the statutory period for submitting the annual turnover-tax return, the competent national tax authority has not been put in a position to establish such an allocation of that asset by means of an express decision or sufficient evidence, that authority may refuse the right to deduct VAT in respect of that asset on the ground that it has been allocated to the taxable person’s private assets, unless the specific legal arrangements under which that option may be exercised show that it does not comply with the principle of proportionality.

Costs

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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 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EU of 22 December 2009, read in conjunction with Article 167 of Council Directive 2006/112/EC, must be interpreted as not precluding national provisions interpreted by a national court in such a manner that where a taxable person has the right to decide to allocate an asset to his or her business assets and where, at the latest upon expiry of the statutory period for submitting the annual turnover-tax return, the competent national tax authority has not been put in a position to establish such an allocation of that asset by means of an express decision or sufficient evidence, that authority may refuse the right to deduct value added tax in respect of that asset on the ground that it has been

allocated to the taxable person’s private assets, unless the specific legal arrangements under which that option may be exercised show that it does not comply with the principle of proportionality.

[Signatures]

(*1) Language of the case: German