Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

25 November 2021(*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 2 – Transaction subject to VAT – Concept – Article 168(a), and Article 176 – Right to deduct input VAT – Refusal – Advertising services categorised as excessively expensive and not beneficial by the tax authority – Lack of turnover generated by the taxable person)

In Case C?334/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Veszprémi Törvényszék (Court of Veszprém, Hungary), made by decision of 20 July 2020, received at the Court on 23 July 2020, in the proceedings

Amper Metal Kft.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Seventh Chamber),

composed of I. Ziemele, President of the Sixth Chamber, acting as President of the Seventh Chamber, T. von Danwitz (Rapporteur) and A. Kumin, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Amper Metal Kft., by V. Pallós, ügyvéd,

– the Hungarian Government, by M.Z. Fehér and by R. Kissné Berta, acting as Agents,

– the Czech Government, by M. Smolek, J. Vlá?il and O. Serdula, acting as Agents,

– the European Commission, by A. Armenia and by L. Havas, 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 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 request has been made in proceedings between Amper Metal Kft. and Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Authority, Hungary) concerning the latter’s refusal of the benefit of the right to deduct input value added tax (VAT) paid by Amper Metal for advertising services.

Legal context

European Union law

3 Article 2(1)(c) of the VAT Directive provides:

‘1. The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such’.

4 Article 73 of the VAT Directive provides:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

5 Under Article 80(1) of the VAT Directive, in the cases listed by that provision, in order to prevent tax evasion or avoidance, Member States may take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value.

6 Article 168(a) 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’.

7 Under the first paragraph of Article 176 of the VAT Directive:

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

Hungarian law

8 Article 119(1) of the az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax, ‘the Law on VAT’) provides that, unless otherwise provided by law, the right to deduct the tax arises at the time when the tax due corresponding to the input tax is to be determined, including in the case where the tax due is established pursuant to the provisions

of Article 196/B(2)(a) of that law.

9 Article 120(a) of the Law on VAT, which establishes that, in so far as the taxable person, acting as such, used or otherwise exploited goods or services in order to carry out a taxed supply of goods or services, he or she is entitled to deduct from the tax that he or she is liable to pay the amount of tax he or she was charged, in connection with the purchase of the goods or the use of the services, by another taxable person – including any person or entity subject to simplified corporation tax.

10 Article 8(1)(d) of the az társasági adóról és az osztalék adóról szóló 1996. évi LXXXI. törvény (Law No LXXXI of 1996 concerning tax on companies and dividends; 'the Law on Corporation Tax'), which establishes that profit before tax is to be increased by the amounts of any expenditure or costs by which the profit has been reduced – including depreciation of intangible and tangible fixed assets – that are not related to business or income-generating activities, having regard in particular to the provisions of Annex 3 to that law.

11 Point 4 of Annex 3 to the Law on Corporation Tax provides:

'For the purposes of Article 8(1)(d), the following, inter alia, will not be deemed expenditure or costs incurred for the benefit of business activities: payment (whether total or partial) for a service that exceeds 200 000 Hungarian forint (HUF) [approximately EUR 555], excluding VAT, where it can clearly be concluded on the basis of the circumstances (such as, in particular, the taxable person's business activities, his or her turnover, the nature of the service or the payment for the said service) that use of the service is contrary to the requirements of reasonable management; payments received during a single financial year for services of the same kind from the same person are to be treated jointly'.

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

12 Amper Metal is a Hungarian company active in the electrical installations sector.

13 In 2014 Amper Metal concluded a contract with the company Sziget-Reklám Kft., concerning the provision of advertising services, which consisted of affixing advertising stickers bearing the name of Amper Metal to cars at a motor racing championship in Hungary. Twelve invoices were issued in 2014 by Sziget-Reklám in respect of those services, for a total amount of HUF 48 000 000 (approximately EUR 133 230), to which was added VAT, set at a rate of 27%, corresponding to the sum of HUF 12 960 000 (approximately EUR 35 970). Amper Metal deducted the VAT paid for those services in its tax returns for the period from 1 January to 31 December 2014.

14 Following a subsequent review of those returns, the first-tier Hungarian tax authority rejected that deduction. In addition, by way of a tax adjustment, it ordered Amper Metal to pay a sum corresponding to the amount of VAT improperly deducted and imposed on it a tax fine of HUF 3 240 000 (approximately EUR 8 991), together with a penalty for late payment in the amount of HUF 868 000 (approximately EUR 2 409). The tax authority took the view that the costs relating to the advertising services concerned did not constitute a charge linked to taxed income-generating transactions for Amper Metal and that the VAT paid by Amper Metal was therefore not deductible under Article 120 of the Law on VAT.

15 In support of its decision, that tax authority relied on the opinions of judicial experts in tax and advertising matters. According to those experts, those advertising services were too expensive and were in fact of no use to Amper Metal, in particular in the light of the nature of that company's customers, namely paper factories, hot-lamination workshops and other industrial plants, which were not likely to have their commercial decisions influenced by self-adhesive

stickers on racing cars. The tax authority stated, in that regard, that the advertising services contract did not meet the requirements of ‘reasonable management’ within the meaning of point 4 of Annex 3 to the Law on Corporation Tax.

16 Amper Metal brought an administrative appeal before the second-instance tax authority, which dismissed that appeal and upheld the first-tier tax authority’s decision.

17 It was in that context that Amper Metal brought an action before the referring court seeking the annulment of the decisions of the Hungarian first and second-tier tax authorities. Amper Metal submits that the right to deduct VAT may be exercised even if the expenditure incurred by the taxable person was neither reasonable nor economically profitable, so that the alleged lack of advertising value of the services provided does not affect that right. Similarly, the requirement of a quantifiable benefit, item by item, is contrary to EU law, since the purpose of the common system of VAT is to ensure complete neutrality of the tax burden of all economic activities, whatever their purpose or results, provided that those activities are themselves subject, in principle, to VAT. Amper Metal adds that the taxable amount corresponds to the consideration actually received by the service provider, in this case Sziget-Reklám, so that Amper Metal cannot be denied the right to deduct on the ground that the price paid to that service provider is allegedly disproportionate.

18 The Appeals Directorate of the National Tax and Customs Authority states that the lack of economic rationality precludes the exercise of the right to deduct VAT. It also submits that Article 80(1) of the VAT Directive allows the taxable amount as shown on an invoice to be corrected where that invoice does not correspond to an open market value, which is the case here.

19 The referring court considers that the main question which arises in the context of the dispute in the main proceedings is whether a taxable person carrying out exclusively a taxable activity may claim deduction of input VAT only if he or she can objectively demonstrate, on the basis of specific information, the usefulness of the service used by him or her. According to that court, Article 120(a) of the Law on VAT, which contains the words ‘otherwise exploited’, requires, according to its meaning in Hungarian, use leading to a result, as well as an efficient and profitable operation. The referring court is uncertain whether such a requirement complies with EU law. Thus, it is necessary to clarify whether Article 168(a) of the VAT Directive must be interpreted as meaning that the deductibility of VAT necessarily involves verifiable profitability, taking the form of an increase in the taxable person’s turnover.

20 In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must, or may, [the first sentence of] Article 168(a) of [the VAT Directive] be interpreted as meaning that, under the said provision, in view of its use of the expression “are used”, the right to deduct VAT cannot be refused in respect of a transaction that falls within the scope of the VAT Directive on the ground that, in the opinion of the tax authorities, the service provided by the person issuing the invoice in the course of a transaction between independent parties is not “beneficial” to the taxable activities of the recipient of the invoice, in that:

– the value of the service (advertising) provided by the person issuing the invoice is disproportionate to the benefit (sales revenue/increase in sales revenue) which the service generates for the recipient; or

– the said service (advertising) has not generated any sales revenue for the recipient?

(2) Must, or may, [the first sentence of] Article 168(a) of the VAT Directive be interpreted as meaning that, under this provision, the right to deduct VAT may be refused in respect of a

transaction that falls within the scope of the VAT Directive on the ground that, in the opinion of the tax authorities, the service provided by the person issuing the invoice in the course of a transaction between independent parties is for a disproportionate sum, because the service (advertising) is expensive and the price is excessive in comparison with another service or services?'

Consideration of the questions referred

21 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 168(a) of the VAT Directive must be interpreted as meaning that a taxable person may not deduct input VAT in respect of advertising services on the ground, first, that the price invoiced for such services is excessive in relation to a reference value defined by the national tax authority and, second, that such services have not given rise to an increase in that taxable person's turnover.

22 Under Article 168(a) of the VAT Directive, in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person is entitled, in the Member State in which he carries out these transactions, to deduct from the VAT which he is liable to pay 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.

23 In that regard, it should be recalled that, according to settled case-law, the right to deduct is an integral part of the VAT scheme and in principle may not be limited. It is exercisable immediately in respect of all the taxes charged on input transactions. 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 or her economic activities. The common system of VAT ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. In so far as the taxable person, acting as such at the time when he or she acquires goods or receives services, uses those goods or services for the purposes of his or her taxed transactions, he or she is entitled to deduct the VAT paid or payable in respect of those goods or services (judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraphs 25 to 27, and of 16 September 2020, *Mitteldeutsche Hartstein-Industrie,* C?528/19, EU:C:2020:712, paragraphs 23 to 25 and the case-law cited).

24 In the present case, the referring court raises the question of the meaning of the term 'used', as appears in the wording of Article 168(a) of the VAT Directive. In particular, the referring court asks whether the excessive nature of the price invoiced for the services supplied to the taxable person, on the one hand, and whether the fact that those services did not generate any increase in the taxable person's turnover, on the other, are capable of precluding the right to deduct input VAT in respect of those services.

25 First, as regards the finding that the price invoiced for services supplied to the taxable person was excessive and of its effect on the right to deduct, it should be noted, first, that the application of Article 168(a) of the VAT Directive presupposes the existence of an input transaction which is itself subject to VAT.

26 In that regard, it follows from settled case-law that a supply of services is made for consideration, within the meaning of the VAT Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received, the sums paid constituting actual consideration for an identifiable service supplied in the context of a legal relationship

pursuant to which there is reciprocal performance (judgment of 21 January 2021, *UCMR – ADA*, C?501/19, EU:C:2021:50, paragraph 31 and the case-law cited).

27 There is a direct link where two services are dependent on each other, that is to say, that one is made only on condition that the other is also made, and vice versa (judgment of 11 March 2020, *San Domenico Vetraria*, C?94/19, EU:C:2020:193, paragraph 26 and the case-law cited). In contrast, the fact that the price paid for an economic transaction is higher or lower than the cost price, and, therefore, higher or lower than the open market value, is irrelevant for the purpose of establishing whether it was a transaction effected for consideration, since that circumstance is not such as to affect the direct link between the services supplied or to be supplied and the consideration received or to be received, the amount of which is determined in advance and according to well-established criteria (judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 43, and the case-law cited).

28 Second, as regards the amount of VAT which may be deducted by the taxable person, it should be recalled that, according to the case-law referred to in paragraph 23 of the present judgment, the right to deduct is exercisable, in principle, in respect of all the taxes charged on input transactions, those taxes being calculated by reference to the applicable taxable amount. According to the general rule set out in Article 73 of the VAT Directive, in respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount is to include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply. The taxable amount is therefore the consideration established between the parties and paid to the supplier, and not an objective value, such as the market value or a reference value determined by the tax authorities.

29 Although Article 80 of the VAT Directive establishes an exception to that general rule in order to prevent tax evasion and avoidance, by providing that the taxable amount may correspond to the open market value of the transaction concerned, it must be borne in mind that that provision concerns only the supply of goods and services to recipients with whom there are family or other close personal, management, ownership, membership, financial or legal ties, as defined by the Member State concerned.

30 Secondly, as regards the finding that there was no increase in the taxable person's turnover, which shows that the services supplied to him or her as inputs were ineffective, it should be borne in mind at the outset that Article 168(a) of the VAT Directive presupposes that the goods and services acquired by the taxable person as inputs are used for the purposes of his or her taxed transactions. In particular, under the first paragraph of Article 176 of the VAT Directive, expenditure which is not strictly business expenditure, such as that on luxuries, amusements, or entertainment, is expressly excluded from the right to deduct. Thus, although the expenditure incurred by the taxable person as inputs must be of a business nature and although the goods or services acquired must be used for the purposes of the taxable person's taxed transactions, neither Article 168(a) nor the first paragraph of Article 176 of the Directive make the exercise of the right to deduct subject to a criterion relating to an increase in the taxable person's turnover or, more generally, to a criterion of economic profitability of the input transaction.

31 In contrast, according to settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring

those goods or services was a component of the cost of the taxed output transactions that gave rise to the right to deduct (judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 28, and of 16 September 2020, *Mitteldeutsche Hartstein-Industrie*, C?528/19, EU:C:2020:712, paragraph 26 and the case-law cited).

32 It is also settled case-law that, even where there is no such link, a right of deduction is allowed in favour of the taxable person where the costs of the transactions in question are part of the taxable person's general costs and are, as such, components of the price of the goods or services which he or she supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 29, and of 16 September 2020, *Mitteldeutsche Hartstein-Industrie*, C?528/19, EU:C:2020:712, paragraph 27 and the case-law cited).

33 It follows that whether there is a right to deduct is determined by the nature of the output transactions to which the input transactions are assigned. Whether there is a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities (see, to that effect, judgment of 16 September 2020, *Mitteldeutsche Hartstein-Industrie*, C?528/19, EU:C:2020:712, paragraph 28 and the case-law cited).

34 It is for the tax authorities and the national courts to take into consideration all the circumstances surrounding the transactions concerned and to take account only of the transactions that are objectively linked to the taxable person's taxable activity. The existence of such a link must thus be assessed in the light of the objective content of the transaction in question (see, to that effect, judgments of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C?132/16, EU:C:2017:683, paragraph 31, and of 16 September 2020, *Mitteldeutsche Hartstein-Industrie*, C?528/19, EU:C:2020:712, paragraph 30 and the case-law cited).

35 In the context of that assessment, the absence of an increase in the turnover of the taxable person cannot affect the exercise of the right to deduct. As recalled in paragraph 23 above, the common system of VAT ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. Therefore, the right to deduct, once it has arisen, is retained even if, subsequently, the economic activity envisaged has not been carried out and, therefore, did not give rise to taxed transactions or if the taxable person was 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 or her control (judgment of 12 November 2020, *Sonaecom*, C?42/19, EU:C:2020:913, paragraphs 38 and 40 and the case-law cited).

36 In the present case, in so far as the input transaction, namely the supply of advertising services to Amper Metal, constitutes a transaction subject to VAT, in accordance with the principles set out in paragraphs 26 and 27 above, the fact that the price paid is higher than the market price or any reference value determined by the tax authorities for similar advertising services cannot justify a refusal to exercise the right to deduct to the detriment of the taxable person.

37 In that context, the amount of VAT able to be deducted must be determined in accordance with the relevant taxable amount, in the light of the requirements referred to in paragraph 28 above, namely by reference to the consideration actually paid by the taxable person, as shown by the invoices produced by him or her. By contrast, Article 80 of the VAT Directive is irrelevant in so far as the dispute in the main proceedings concerns a transaction between independent parties.

38 Having regard to the circumstances at issue in the main proceedings, the referring court will have to assess, in the light of the objective content of the advertising services at issue in the main proceedings, whether those services have a direct and immediate link with an output transaction giving rise to the right to deduct or, failing that, with Amper Metal's economic activity as a whole, under its general costs, or whether those services constitute entertainment expenditure which is not strictly business expenditure, within the meaning of the first paragraph of Article 176 of the VAT Directive.

39 It will be for the referring court to determine, in particular, whether the affixing of advertising stickers to cars on the occasion of the motor racing championship at issue in the main proceedings was intended to promote the goods and services marketed by Amper Metal, so that it could be included among Amper Metal's general costs, or whether, in contrast, the expenditure incurred on that occasion proves to be entirely unrelated to Amper Metal's economic activity. In accordance with the finding in paragraph 35 above, the fact that the services acquired by Amper Metal did not lead to an increase in its turnover is irrelevant for the purposes of that assessment.

40 In the light of all the foregoing considerations, it must be held that Article 168(a) of the VAT Directive must be interpreted as meaning that a taxable person may deduct input VAT in respect of advertising services where such a supply of services constitutes a transaction subject to VAT, within the meaning of Article 2 of the VAT Directive, and where it has a direct and immediate link with one or more taxable output transactions or with the taxable person's economic activity as a whole, under his or her general costs, without it being necessary to take into consideration the fact that the price invoiced for such services is excessive in relation to a reference value defined by the national tax authority or that those services have not given rise to an increase in that taxable person's turnover.

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 (Seventh Chamber) hereby rules:

In the light of all the foregoing considerations, it must be held that 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 may deduct input value added tax (VAT) in respect of advertising services where such a supply of services constitutes a transaction subject to VAT, within the meaning of Article 2 of Directive 2006/112, and where it has a direct and immediate link with one or more taxable output transactions or with the taxable person's economic activity as a whole, under his or her general costs, without it being necessary to take into consideration the fact that the price invoiced for such services is excessive in relation to a reference value defined by the national tax authority or that those services have not given rise to an increase in that taxable person's turnover.

[Signatures]

* Language of the case: Hungarian.