Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

30 March 2023 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(c) – Supply of services for consideration – Article 9(1) – Meanings of ‘taxable person’ and ‘economic activity’ – Municipality which arranges for asbestos removal for the benefit of its residents who own immovable property and who have expressed the wish for that – Reimbursement of the municipality by a subsidy from the competent provincial authority of 40% to 100% of the costs – Article 13(1) – Municipalities not subject to tax for the activities or transactions carried out as public authorities)

In Case C?616/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 16 April 2021, received at the Court on 5 October 2021, in the proceedings

Dyrektor Krajowej Informacji Skarbowej

v

Gmina L.,

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún, President of the Chamber, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Dyrektor Krajowej Informacji Skarbowej, by B. Ko?odziej, D. Pach and T. Wojciechowski,

– the Gmina L., by R. Majerowska, radca prawny,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by ?. Habiak and V. Uher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1), Article 9(1) and Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between the Gmina L. (the Municipality of L.), located in Poland, and the Dyrektor Krajowej Informacji Skarbowej (Director of the National Treasury Information Bureau, Poland) concerning an advance tax ruling addressed to that municipality in respect of its liability to pay value added tax (VAT) on asbestos removal activities which it seeks to carry out and the right to deduct the input VAT incurred on those transactions.

Legal context

European Union law

3 Article 2(1) of Directive 2006/112 provides:

‘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 9(1) of that directive states:

‘“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 According to Article 13(1) of that directive:

‘States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.’

6 Article 28 of that directive is worded as follows:

‘Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.’

Polish law

7 The ustawa o samorz?dzie gminnym (Law on Municipalities) of 8 March 1990 (Dz. U of 1990, No 16, item 95), in the version applicable to the dispute in the main proceedings, includes Article 7, paragraph 1 of which is worded as follows:

‘The municipalities’ own tasks shall include meeting the collective needs of the community. Own tasks shall, in particular, include matters relating to:

(1) spatial planning, property management, environmental protection, nature conservation and water management

…

(5) healthcare; …’

8 The ustawa Prawo ochrony ?rodowiska (Environmental Protection Law) of 27 April 2001 (Dz. U of 2001, No 62, item 627), in the version applicable to the dispute in the main proceedings, provides in Article 400(2):

‘Provincial funds for environmental protection and water management, hereinafter referred to as “provincial funds”, are local government legal persons …’

9 Article 400b(2) and (2a) of that law states:

‘2. The purpose of provincial funds shall be to fund environmental protection and water management within the scope set forth in Article 400a(1)(2), (2a), (5) to (9a), (11) to (22) and (24) to (42).

2a. The purpose of the National Fund and of provincial funds shall also be to create conditions for the implementation of funding for environmental protection and water management, in particular by supporting and promoting activities aimed at such implementation as well as by cooperating with other entities, including local government units, entrepreneurs and entities established outside the Republic of Poland.’

10 The ustawa o podatku od towarów i us?ug (Law on Tax on Goods and Services) of 11 March 2004 (Dz. U. of 2004, No 54, item 535), in the version applicable to the dispute in the main proceedings, is intended to transpose Directive 2006/112 into Polish law.

11 Article 5 of that law states:

‘The following shall be subject to the tax on goods and services …:

(1) the supply of goods or services for consideration within the national territory;

…’

12 Article 15 of that law provides as follows:

‘1. Legal persons, bodies without legal personality and natural persons who independently carry out one of the economic activities referred to in paragraph 2 are considered to be taxable

persons, irrespective of the purposes or results of that activity.

2. 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. Economic activity shall include, in particular, the exploitation of tangible or intangible property on a continuing basis for the purposes of obtaining income therefrom.

…

6. Taxable persons shall not include public authorities and the offices of such bodies as regards tasks established by specific provisions for the performance of which they have been appointed, with the exception of transactions carried out under private law contracts.'

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

13 In the context of the programme for asbestos removal in Poland, drawn up in accordance with a resolution of the Council of Ministers of the Republic of Poland of 14 July 2009 on the establishment of a multiannual programme entitled 'National Programme for the Removal of Asbestos for 2009-2032', the Municipal Council of the Municipality of L. entrusted to the mayor of that municipality responsibility for implementing actions to that effect, by Resolution 227/VI/2019 of 26 April 2019, entitled 'Updating the Asbestos Removal Programme of the City of L. for 2018-2032'.

14 According to the annex to that resolution, those actions consist of removing products and waste containing asbestos from residential and commercial buildings, with the exception of immovable property on which an economic activity is carried out. It is also provided in that annex that the inhabitants concerned are not to bear any costs in connection with the asbestos removal activity, since the Municipality of L. is responsible for financing, with the help of the Wojewódzki Fundusz Ochrony ?rodowiska i Gospodarki Wodnej (Provincial Fund for Environmental Protection and Water Management; 'the Environmental Protection Fund').

15 By ordinance 62/9/2019 of 23 September 2019 laying down detailed rules for the implementation of that resolution and on the establishment of a committee responsible for examining requests for disposal of products and waste containing asbestos, the mayor of the Municipality of L. set out the practical aspects of the asbestos removal activities. First, that municipality envisaged issuing a call for tenders in order to have that work carried out, with the successful tenderer having to issue invoices including VAT. Second, on the basis of those invoices paid by it, the municipality then intended to obtain subsidies from that fund, of an amount covering between 40% and 100% of the expenditure incurred on the basis of compliance with the conditions laid down by that fund.

16 In that context, on 7 January 2020, the Municipality of L., which has a VAT registration number, requested an advance tax ruling from the Director of the National Treasury Information Bureau, in order to determine whether it would be subject to VAT in the context of those transactions, the Municipality of L. taking the view that it should not be subject to VAT, since such transactions would be, in its view, carried out in its capacity as a public authority.

17 In his advance tax ruling of 13 March 2020, the Director of the National Treasury Information Bureau took the view that the Municipality of L. acted as a taxable person for VAT purposes and that, consequently, it should be allowed to deduct the input VAT paid.

18 That municipality challenged that advance tax ruling before the Wojewódzki S?d Administracyjny w Lublinie (Regional Administrative Court, Lublin, Poland) and obtained its

annulment. By judgment of 21 July 2020, that court held, in essence, that that municipality would act as a public authority in the context of a task established by specific provisions and for the performance of which it had been designated, and not as a taxable person for VAT purposes.

19 The Director of the National Treasury Information Bureau brought an appeal on a point of law against that judgment before the referring court.

20 It is in those circumstances that the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the provisions of [Directive 2006/112], in particular Article 2(1), Article 9(1) and Article 13(1) of that directive, be interpreted as meaning that a municipality (a public authority) is to be regarded as a taxable person for VAT purposes in respect of the implementation of a programme for the removal of asbestos from properties located within that municipality which are owned by residents who do not incur any expense in that regard? Or is the implementation of such a programme included in the activities of the municipality as a public authority which are undertaken in order to fulfil its tasks of protecting the health and life of its residents and protecting the environment, in which connection the municipality is not regarded as a taxable person for VAT purposes?’

Consideration of the question referred

21 By its question, the referring court asks, in essence, whether Article 2(1), Article 9(1) and Article 13(1) of Directive 2006/112 must be interpreted as meaning that where a municipality has arranged by means of an undertaking to carry out transactions involving asbestos removal and collection of asbestos products and waste, for the benefit of its residents who own immovable property and who have expressed interest in that regard, where such an activity is not intended to obtain income on a continuing basis and does not give rise, on the part of those residents, to any payment, since those transactions are financed by public funds, constitutes a supply of services subject to VAT.

22 It should be recalled at the outset that it is for the referring court, which alone has jurisdiction to assess the facts, to determine the nature of the transactions at issue in the main proceedings (judgment of 13 January 2022, *Termas Sulfurosas de Alcafache*, C?513/20, EU:C:2022:18, paragraph 36).

23 That said, it is nevertheless for the Court to provide that court with all the guidance as to the interpretation of EU law which may be of assistance in adjudicating on the case before it (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 35 and the case-law cited).

24 In that regard, in order to fall within the scope of Directive 2006/112, the offer of asbestos removal for certain immovable properties made by a municipality to its residents who own immovable property must, first, constitute a supply of services made by that municipality for consideration for those residents, within the meaning of Article 2(1)(c) of that directive, and, second, have been carried out in the course of an economic activity, within the meaning of Article 9(1) of that directive, with the result that that municipality has also acted as a taxable person.

The existence of a supply of services for consideration

25 According to settled case-law, in order for such transactions to be ‘for consideration’ within the meaning of Article 2(1)(c) of Directive 2006/112, there must be a direct link between that supply of services, on the one hand, and the consideration actually received by the taxable

person, on the other. Such a direct link is established where there is a direct link between the provider of the supply of services, on the one hand, and the recipient, on the other, a legal relationship in which there is reciprocal performance, the remuneration received by the provider of the transactions constituting the actual consideration for the service supplied to that recipient (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 36 and the case-law cited).

26 In the present case, it is apparent from the information provided by the referring court that the Municipality of L. intends to instruct an undertaking to carry out, for its residents, who are the owners of immovable property containing asbestos, at their request, asbestos removal activities and the collection of asbestos products and waste. In that regard, it must be stated that those transactions constitute a supply of services within the meaning of Article 24(1) of that directive.

27 However, it is for the referring court to determine who is the supplier and who is the recipient of that supply of services.

28 In that regard, it is apparent from the order for reference that a contract must be concluded between the Municipality of L. and the undertaking which the latter has selected, relating to the transactions referred to in paragraph 26 of the present judgment, and that, on that basis, that municipality will receive from that undertaking an invoice which it alone will pay, since the residents concerned make no payment in consideration for the asbestos removal and the collection of asbestos products and waste.

29 It should therefore be noted that the advantage conferred on that municipality in consideration for the payment lies not only, with regard to the residents concerned, in the removal of the danger to human health and life resulting from exposure to asbestos, but also, more broadly, in the improvement of the quality of life in the territory administered by the Municipality of L.

30 However, it is apparent from the documents before the Court that the Polish tax authorities take the view that, since the residents concerned would be the first recipients of the advantage procured by that supply of services, namely the removal of asbestos from their immovable properties, those residents should be regarded as having instructed the Municipality of L., which then acted as a commission agent, within the meaning of Article 28 of Directive 2006/112.

31 Under that provision, where a taxable person acting in his or her own name but on behalf of another person takes part in a supply of services, he or she is to be deemed to have received and supplied those services himself or herself. Therefore, if that municipality, as agent, entrusts the undertaking in question with eliminating asbestos, in its own name but on behalf of the residents concerned, it will be treated, for VAT purposes, as if it had itself carried out the removal of asbestos at the homes of those residents.

32 It is not apparent from the information provided by the referring court and subject to the classification of the facts by that court that Article 28 of Directive 2006/112 is applicable in the case in the main proceedings, given that, according to the case-law, that provision requires that there be a mandate under which the commission agent acts, on behalf of the principal, in the provision of services, which entails the conclusion, between the commission agent and the principal, of an agreement concerning the granting of the mandate concerned (see, to that effect, judgment of 12 November 2020, *ITH Comercial Timi?oara*, C?734/19, EU:C:2020:919, paragraphs 51 and 52).

33 Thus, by agreeing to participate in the municipal procedure for the removal of asbestos from their immovable properties, the owners concerned merely submit an application to the Municipality of L., which checks whether those properties are eligible for asbestos removal. Consequently, the

owners do not entrust that municipality with the task of eliminating asbestos on their behalf, but hope to be recipients of the asbestos removal programme. It is therefore that municipality, and not the owners concerned, which decides on the success of that approach. Apart from the submission of an application, the owners concerned have no influence on the provision of the services.

34 Consequently, although, in the light of the foregoing considerations, it must be stated that the conditions for the application of Article 28 of Directive 2006/112 are not satisfied in a situation such as that of the present case and, therefore, that the Municipality of L. has not acted in the name of its residents concerned, it remains to be determined, however, whether the Municipality of L. may be regarded as the provider of the supply of services at issue in the main proceedings, within the meaning of Article 2(1)(c) of that directive.

35 First, it should be recalled that, in order for a supply of services to be considered to be 'for consideration', within the meaning of Directive 2006/112, it is not necessary that the consideration for the supply of services must be obtained directly from the recipient thereof, since it may be obtained from a third party (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 40 and the case-law cited).

36 Second, the fact that the price paid for a supply of a service 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 for consideration, since that circumstance is not such as to affect the direct link between the transactions supplied and the consideration received or to be received, the amount of which is determined in advance and according to well-established criteria (see, to that effect, 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).

37 Consequently, in the light of the case-law cited in paragraphs 25, 35 and 36 of the present judgment, the fact that the Municipality of L. initially itself would assume responsibility for the entirety of the cost of providing the services provided, at the market price, by the selected undertaking and that, as the case may be, subsequently, a third party, namely the provincial authority concerned, through the Environmental Protection Fund, would reimburse that municipality by means of a subsidy covering between 40% and 100% of that cost, is not conclusive.

38 In so far as the repayment of that municipality by that fund is subject to the completion of the asbestos removal activity, which, subject to the assessment of the facts by the referring court, would not have been envisaged by the same municipality without the assistance of that fund, it must be held that, notwithstanding the absence of a contract between the same fund and the relevant residents of the Municipality of L., there is a direct link, within the meaning of the case-law cited in paragraph 25 of the present judgment, since the supply of services and its consideration are mutually linked, as one is carried out only on condition that the other is also supplied, and vice versa (see, to that effect, judgment of 11 March 2020, *San Domenico Vetraria*, C?94/19, EU:C:2020:193, paragraph 26 and the case-law cited).

39 It must therefore be held that two supplies of services coexist in the present case, namely, on the one hand, that provided by the undertaking selected and paid by the Municipality of L. and, on the other hand, the supply of which, first, the provider is that municipality, second, the recipients are the relevant residents of the municipality and, third, the subsidy that is paid to that municipality by the Environmental Protection Fund.

40 There is no doubt that the first of those supplies of services corresponds to the definition of a supply of services for consideration within the meaning of Article 2(1)(c) of Directive 2006/112. If,

in the light of the considerations set out in paragraphs 35 to 38 of the present judgment, the referring court were to reach the same conclusion, following its assessment of the facts, concerning the second of those supply of services, that is to say, that of which the Municipality of L. is the provider, it would have to determine whether that supply of services is carried out in the context of an economic activity, given that, according to the case-law, an activity may be classified as an ‘economic activity’, within the meaning of the second subparagraph of Article 9(1) of that directive, only where that activity corresponds to one of the chargeable events defined in Article 2(1) of that directive (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 32 and the case-law cited).

The supply of services in the course of an economic activity

41 At the outset, it should be recalled that the analysis of the wording of Article 9(1) of Directive 2006/112, while highlighting the scope of the concept of ‘economic activity’, also clarifies the objective nature of that concept, in the sense that the activity is considered per se and without regard to its purpose or results (judgment of 25 February 2021, *Gmina Wroc?aw (Transformation of the right of usufruct)*, C?604/19, EU:C:2021:132, paragraph 69 and the case-law cited).

42 An activity is thus, in general, classified as ‘economic’ where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 47 and the case-law cited).

43 Given the difficulty of establishing a precise definition of economic activity, all the circumstances in which it is supplied have to be examined (see, to that effect, judgment of 12 May 2016, G*emeente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 29 and the case-law cited), by making a case-by-case assessment, referring to the typical conduct of an active entrepreneur in the field concerned, here, an asbestos removal undertaking.

44 In that regard, first, it should be noted that, while an entrepreneur aims to derive from his or her activity income of a permanent nature (see, to that effect, judgment of 20 January 2021, *AJFP Sibiu and DGRFP Bra?ov*, C?655/19, EU:C:2021:40, paragraphs 27 to 29 and the case-law cited), the Municipality of L. does not employ staff for asbestos removal and does not seek customers, but merely sets up, in the context of a programme defined at national level, asbestos removal activities, which will take place after the owners of immovable property situated in the municipality and likely to be concerned by that programme have expressed their wish to benefit from it and have been deemed eligible for it. Moreover, by definition, an asbestos removal activity in a given municipality is not of a recurrent nature, which distinguishes the present case from those in which municipal services were of a permanent nature.

45 Secondly, it is apparent from the information provided by the referring court that the Municipality of L. will offer to remove the asbestos from the properties concerned and to collect asbestos products and waste free of charge, although it will have previously paid the undertaking in question at market price.

46 The Court has already had occasion to rule that, when a municipality recovers, only a small part of the costs which it has incurred, the balance being financed by public funds, such a difference between those costs and the amounts received in return for the services offered is such as to exclude the existence of consideration (see, to that effect, judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 33 and the case-law cited). That is all the more so where, as in the present case, the consideration paid by the recipients of the supply of services is non-existent.

47 Consequently, even taking into account the subsidies granted to the Municipality of L. by the Environmental Protection Fund, which relate to 40% to 100% of the costs incurred, the nature of such a supply of services does not correspond to the approach that would have been taken, where applicable, by an asbestos removal undertaking which would have endeavoured, by setting its prices, to absorb its costs and to make a profit. Moreover, the costs connected with the organisation, by that municipality, of the asbestos removal campaign to its residents are not reimbursed, since only activities delegated to the selected undertaking are reimbursed. Thus, that municipality bears only risks of loss, without any prospect of profit.

48 Thirdly, it does not appear to be economically viable, for such an asbestos removal undertaking, to not to impose on the recipients of its supply of services any costs which it has incurred, while awaiting partial compensation, by means of a subsidy, of those costs. Not only would such a mechanism place its cash flow in a structurally loss-making situation, given, first of all, the absence of a profit margin, next, the lack of reimbursement of the costs associated with the organisation of the asbestos removal campaign and, finally, the significant fluctuation in the percentage of reimbursements, which may vary between 40% and 100% of the sums paid to the selected undertaking, but, in addition, that mechanism would place an unusual uncertainty on it for a taxable person, since the question of whether, and to what extent, a third party will reimburse such a significant part of the costs incurred remains in fact open until the decision of that third party, subsequent to the transactions at issue.

49 Consequently, it does not appear, subject to determination by the referring court, that the Municipality of L. carries out, in the present case, an activity of an economic nature within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112.

The absence of liability to tax arising from the performance of transactions by a body governed by public law acting as a public authority

50 Since the Municipality of L. does not carry out, in the light of the considerations set out in paragraphs 41 to 49 above, an activity falling within the scope of Directive 2006/112, it is not necessary to determine whether that activity would also have been excluded from that scope in accordance with Article 13(1) of that directive.

51 In the light of the foregoing considerations, the answer to the question referred is that Article 2(1), Article 9(1) and Article 13(1) of Directive 2006/112 must be interpreted as meaning that where a municipality has arranged by means of an undertaking to carry out transactions involving asbestos removal and collection of asbestos products and waste, for the benefit of its residents who own immovable property and who have expressed interest in that regard, where such an activity is not intended to obtain income on a continuing basis and does not give rise, on the part of those residents, to any payment, since those transactions are financed by public funds, does not constitute a supply of services subject to VAT.

Costs

52 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:

Article 2(1), Article 9(1) and Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as meaning that where a municipality has arranged by means of an undertaking to carry out transactions involving asbestos removal and collection of asbestos products and waste, for the benefit of its residents who own immovable property and who have expressed interest in that regard, where such an activity is not intended to obtain income on a continuing basis and does not give rise, on the part of those residents, to any payment, since those transactions are financed by public funds, does not constitute a supply of services subject to value added tax.

[Signatures]

* Language of the case: Polish.