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OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 20 December 2017 (1)

Case C?532/16

Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos

joined parties:

Akcin? bendrov? SEB bankas

(Request for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania))

(Reference for a preliminary ruling — Value added tax (VAT) — Adjustment of deductions — Applicability — Supply incorrectly subjected to VAT — Modification of the invoice by the supplier)

I. Introduction

1.

Akcin? bendrov? SEB bankas (‘SEB bankas’) purchased plots of land from VKK Investicija UAB (‘the Seller’) for which the latter issued an invoice for payment — inclusive of value added tax. At the time of the sale, both parties considered the land at issue to be ‘building land’, and subject to VAT. Subsequently, SEB bankas obtained a deduction corresponding to the VAT charged.

2.

Three years later, the Seller took the view that the supply of land at issue should actually have been exempted from VAT. It therefore sent SEB bankas a credit note for the original amount invoiced. It also issued a new invoice for the same amount which did not include any VAT.

3.

On the basis of a subsequent tax inspection, the Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos (State Tax Inspectorate attached to the Ministry of Finance, Lithuania) (‘State Tax Inspectorate’) issued a decision that required SEB bankas to reimburse the amount corresponding to the deduction initially granted. It also required payment of a part of the accrued default interest, and imposed a fine.

4.

The case eventually came before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania). That referring court now enquires whether or not the recovery sought from SEB bankas falls under the mechanism of adjustment of deductions provided for in the VAT Directive. (2) It further asks about the relevance of the credit note issued by the Seller and also of the fact that the reclassification of the land at issue occurred following a change in the

practice of the tax administration for the determination of SEB bankas's tax obligations.

II. Legal framework

1. VAT Directive

5.

Article 12(1) of the VAT Directive foresees that:

'Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions:

…

(b)

the supply of building land.'

6.

Under Article 135(1) of that directive:

'Member States shall exempt the following transactions:

…

(k)

the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1).'

7.

Chapter 5 of Title X of the VAT Directive concerns 'adjustment of deductions'. It contains Articles 184 to 192. Article 184 provides that the 'initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled'.

8.

Article 185 of the VAT Directive states that:

'1.

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

2.

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

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

9.

According to Article 186 'Member States shall lay down the detailed rules for applying Articles 184 and 185'.

2. Lithuanian law

10.

Article 65 of Lietuvos Respublikos prid?tin?s vert?s mokes?io ?statymas No IX-751 (Lithuanian Law No IX-751 on value added tax) of 5 March 2002, in the version of Law No IX-1960 of 15 January 2004 ('the VAT Law'), lays down the general rule that 'if, after filing of the VAT return for a tax period, a VAT payer cancelled purchase of a certain amount of the acquired goods, additional price reductions were obtained from the supplier of goods or services, or the VAT amount payable to the supplier of goods or services has decreased for any other reason … and the above amounts of the input and/or import VAT were deducted, the VAT deductions shall be adjusted, by increasing accordingly, in the VAT return for the tax period in which the above circumstances became known, the VAT amount payable into the budget/reducing the VAT amount refundable from the budget'.

11.

Article 68(1) of Lietuvos Respublikos mokes?i? administravimo ?statymas No IX-2112 (Lithuanian Law No IX-2112 on Tax Administration) of 13 April 2004 ('the Tax Administration Law') sets out that '… the taxpayer or the tax administration may calculate or recalculate the tax in respect of a period not exceeding the current calendar year and five preceding calendar years counting back from 1 January of the year in which the tax was initially calculated or recalculated'.

12.

Finally, Article 80(1) of the same law states that 'a taxpayer shall have the right to adjust the tax return if the period for the calculation (recalculation) of taxes laid down in Article 68 of this Law has not expired'.

III. Facts, national proceedings and the questions referred

13.

On 28 March 2007, SEB bankas and 'the Seller' concluded a contract of sale under which SEB bankas purchased six plots of land ('the transaction'). On the same day, the Seller issued an invoice to SEB bankas requiring payment of the taxable amount of 4 067 796.61 Lithuanian litas (LTL) and of LTL 732 203.39 VAT. The total amount on the invoice, including the VAT, was LTL 4800000 ('the 2007 invoice'). SEB bankas included the input VAT in its VAT returns for March 2007 and was granted a deduction.

14.

On 14 April 2010, the Seller issued a VAT credit note to SEB bankas (‘the 2010 credit note’). On the same day, the Seller issued a new invoice for the same total LTL 4800000 (‘the 2010 invoice’). The latter invoice did not indicate any VAT.

15.

The Seller submitted revised VAT returns for March 2007. In 2012, the competent tax authority confirmed that the Seller had correctly adjusted its VAT returns for March 2007.

16.

The order for reference states that SEB bankas did not enter either the 2010 credit note or the 2010 invoice in its accounts. It refused to recognise the 2010 invoice and 2010 credit note, as it considered, in essence, that the Seller was not entitled to change unilaterally the taxable value of the transaction. SEB bankas further considered that under the law in force, the transaction should be considered to be subject to VAT.

17.

As a result of an inspection report of 28 February 2014, based on a tax inspection carried out with SEB bankas, the State Tax Inspectorate came to the conclusion that SEB bankas was obliged to adjust the VAT deduction and to include in its VAT return for April 2010 the amount of VAT stated in the 2010 credit note.

18.

On 16 May 2014, the State Tax Inspectorate incorporated the findings from the tax inspection into a tax decision. Furthermore, it stated that LTL 251472 of default interest was payable and imposed a fine of LTL 71 528. It did however waive the obligation for SEB bankas to pay the default interest in part.

19.

On 10 June 2014, SEB bankas appealed against that tax decision to the Commission for Tax Disputes. On 12 August 2014, the Commission for Tax Disputes annulled the tax decision, because it came to the conclusion that the State Tax Inspectorate had failed to respect the time limit applicable under national law.

20.

The State Tax Inspectorate brought proceedings against the annulment decision before the Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court, Lithuania). On 8 March 2016, that court rejected the State Tax Inspectorate’s application.

21.

The State Tax Inspectorate then lodged an appeal before Lietuvos vyriausiasis administracinis teismas (Lithuanian Supreme Administrative Court), the referring court. That court suspended the proceedings and referred the following questions to the Court:

‘(1)

Must Articles 184 to 186 of [Council Directive 2006/112] be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the deduction adjustment mechanism provided for in Directive 2006/112 is not applicable in cases where an initial deduction of value added tax (VAT) could not have been made at all because the transaction in question was an exempt transaction relating to the supply of land?

(2)

Is the answer to the first question affected by the fact that (1) the VAT on the purchase of the plots of land was initially deducted because of the tax administration's practice under which the supply in question was incorrectly regarded as being a supply of building land subject to VAT, as provided for in Article 12(1)(b) of Directive 2006/112, and/or (2) after the initial deduction made by the purchaser, the supplier of the land issued a VAT credit note to the purchaser adjusting the amounts of VAT indicated (specified) on the initial invoice?

(3)

If the answer to the first question is in the affirmative, are, in circumstances such as those at issue in the main proceedings, Articles 184 and/or 185 of Directive 2006/112 to be interpreted as meaning that, in a case where an initial deduction could not have been made at all because the transaction in question was exempt from VAT, the taxable person's obligation to adjust that deduction must be considered to have arisen immediately or only when it became known that the initial deduction could not have been made?

(4)

If the answer to the first question is in the affirmative, is, in circumstances such as those at issue in the main proceedings, Directive 2006/112, and in particular Articles 179, 184 to 186 and 250 thereof, to be interpreted as meaning that the adjusted amounts of deductible input VAT must be deducted in the tax period in which the taxable person's obligation and/or right to adjust the initial deduction arose?'

22.

SEB bankas, the Lithuanian Government and the European Commission lodged written submissions. They also made oral submissions at a hearing that took place on 4 October 2017.

IV. Assessment

23.

This Opinion is structured as follows: I start with two preliminary points concerning time limits and (re)classification of the transaction for VAT purposes (A). I shall then turn to the applicability of the adjustment mechanism in this case (B). Finally, I shall examine the relevance of the 2010 credit note and of the effects of (re)classification of the transaction for the VAT purposes (C). In view of my proposed negative answer to the first question, there is no need to answer the third and fourth questions posed by the referring court (D).

A. Preliminary remarks

24.

There are two variables that affect the assessment in the present case. They were both raised in

the submissions of the parties as well as at the hearing. Both are matters of national law to be determined by the referring court. However, in view of the discussion in these proceedings, I wish to start with several preliminary clarifications relating to both points. The first one concerns the possibility that the State Tax Inspectorate's claim against SEB bankas might effectively be time-barred (1). The second one relates to the classification of the transaction for VAT purposes under national law (2).

1. Time limits applicable to the claim in the main proceedings

25.

The Commission observes in its written pleadings that, in the light of information provided in the order for reference, the claim brought by the State Tax Inspectorate against SEB bankas appears to be time-barred under national law. The Commission notes that in any case, the national authorities may require the adjustment of deductions only if the applicable time limits have not yet expired.

26.

Article 68(1) of the Tax Administration Law appears to set a time limit of, in principle, five years in which the tax obligations may be calculated or recalculated. The transaction was carried out in March 2007. It seems (and remains for the referring court to verify) that it was in February 2014 that the official step by which the repayment of the respective amount from SEB bankas was sought — when the results of the tax inspection conducted in respect of SEB bankas were formalised. That was followed by a decision taken by the State Tax Inspectorate in May 2014 which confirmed the findings of that tax inspection, set the amount of default interest, and imposed a fine.

27.

I would emphasise that the VAT Directive does not contain any rules on time limits that would be relevant for the claim in the main proceedings. These time limits are thus for the Member States to set, subject to the principles of equivalence and effectiveness, (3) as well as the general obligation flowing from the VAT Directive, read in conjunction with Article 4(3) TEU — to take all appropriate measures to ensure collection of all the VAT due on their territory, and fight against tax evasion. (4)

28.

Nothing in the order for reference indicates that the time limits set by the national law are not compliant with those general requirements. The Court is not in fact being asked to assess this.

29.

This Opinion has as its basis the assumption that the action in the main proceedings complies with the applicable time limits and that the reply to the questions posed is useful. If the applicable time limit is considered to have already lapsed (which is for the referring court to determine), that will render the questions referred in the present case hypothetical, save for the specific scenario of time limits that would cause systemic, structural problems by hampering the effective collection of VAT within the Member State in question. (5)

30.

Beyond that specific and rather singular scenario, I wish to stress that the VAT Directive cannot be

understood as or invoked for extending or eroding clear time limits set by national law. If it is established that the State Tax Inspectorate was out of time to enforce the tax obligation in question vis-à-vis SEB bankas, classification of that tax obligation under such and such heading of the VAT Directive will not change the fact that the claim is time-barred. Out of time means out of time.

2. Classification of the transaction for VAT purposes under national law

31.

Next, it appears from the order for reference as well as from the submissions made to this Court that the interpretation of the notion ‘building land’ under national law changed over the relevant time period. That change in interpretation appears to have affected the treatment of the transaction for VAT purposes.

32.

Under Article 135(1)(k) of the VAT Directive, the ‘Member States shall exempt the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1)’. Pursuant to the latter provision ‘Member States may regard as a taxable person anyone who carries out, on an occasional basis, … the supply of building land’. Pursuant to Article 12(3), that notion ‘shall mean any unimproved or improved land defined as such by the Member States’.

33.

Article 12(1) of the VAT Directive provides the Member States with an option to subject ‘building land’ to VAT. (6) It appears that Lithuania made use of that option. Whether the land concerned by the transaction can be classified in concreto as ‘building land’ is, however, less clear.

34.

According to SEB bankas, at the time of the transaction, the land supplied was considered, under national law, to be ‘building land’ and thus subject to VAT. That followed from the official commentary to the VAT Law, apparently published by the State Tax Inspectorate, and from information issued on 10 November 2009 by the tax administration to SEB bankas.

35.

The Lithuanian Government explained that that classification changed as a result of a decision of the Lietuvos vyriausiasis administracinis teismas (Lithuanian Supreme Administrative Court) that sought to unify previously inconsistent application practice. (7) As a result, the land concerned by the transaction was to be regarded as ex tunc (re)classified by the State Tax Inspectorate as not constituting ‘building land’. That in turn led the State Tax Inspectorate to request reimbursement of the deductible amount from SEB bankas.

36.

I wish to underline that the issue of whether or not that (re)classification of the notion of ‘building land’ is in compliance with EU law is a question that has not been asked by the referring court. It is therefore not touched upon in these proceedings.

37.

The relevance of the (re)classification is raised in a different context, within the second preliminary question, in view of ascertaining whether or not it has any bearing on the applicability of the adjustment mechanism. Whether, on the factual level, the (re)classification indeed took place is a matter for the national court to determine. For my part, I will again proceed on the assumption that the subject of the transaction should not have been considered as ‘building land’ and that, therefore, the transaction should not have been subject to VAT. In other words, I take as the starting point and as a statement of fact that what is expressed in the wording of the first preliminary question is that the parties incorrectly applied VAT to the transaction.

B. Correction of errors concerning the existence of the right to deduct

38.

By its first question, the referring court asks, in essence, whether the mechanism for adjustment of deductions under Article 184 et seq. of the VAT Directive applies to correct a situation in which a deduction was granted in error.

39.

In this part of the Opinion, I first explain that the adjustment mechanism does not apply to the action launched by the State Tax Inspectorate (1). Second, I will consider that even if that mechanism is not applicable, that does not preclude that the repayment of an incorrectly granted deduction must in principle be sought by the tax authorities (2).

1. The applicability of the adjustment mechanism

40.

I will first outline the type of the correction that appears to be provided for through the adjustment mechanism (a), before distinguishing it from the nature of the correction sought in the main proceedings (b).

(a) The nature of the correction concerned by the adjustment mechanism

41.

Taxable persons are, under Articles 167 and 168 of the VAT Directive, entitled to deduct the amount of VAT due (8) in respect of goods and services supplied by another taxable person in so far as those goods and services are used for the purposes of taxed transactions. (9)

42.

As the Court has repeatedly held, the right of deduction provided for in Article 168(a) of the VAT Directive is an integral part of the VAT scheme and in principle may not be limited. That deduction system ‘is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities’. (10)

43.

More specifically, the adjustment mechanism provided for in Article 184 et seq. of the VAT Directive aims to enhance the precision of VAT deductions by monitoring the extent to which the taxable person actually uses those goods for deductible purposes. (11) The Court explained that ‘that mechanism thus aims to establish a close and direct relationship between the right to deduct

input VAT paid and the use of the goods or services concerned for taxable output transactions'. (12) Through its application, transactions carried out at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies subject to VAT. (13) In this way, the adjustment mechanism contributes to ensuring the neutrality of the tax burden. (14)

44.

As far as its exact wording is concerned, Article 184 of the VAT Directive states that 'the initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled'.

45.

Article 185(1) of the VAT Directive further provides that that adjustment shall, 'in particular', be made after the VAT return has been submitted and where some change occurs in the factors used to determine the amount to be deducted. (15)

46.

Furthermore, the use of the words 'for example' show that these factors (namely cancellation of the purchase or price reductions), are not exhaustive. Over the years, related case-law of the Court has also dealt with situations such as demolition and carrying out a construction project, (16) a theft (where the perpetrator has not been identified), (17) or a change in the method used to calculate the deduction entitlement for VAT paid for mixed-use goods and services. (18)

47.

Thus, in general terms, the quoted examples concern factors that may determine the scope of the deduction to which one is entitled and which, by nature, can only be assessed with accuracy over time, due regard being paid to the actual use of the goods in question. That is also confirmed by the logic of Article 187 of the VAT Directive, which provides for yearly adjustment based on the actual use of investment goods.

48.

The question raised in the present case is whether that adjustment mechanism can apply to correct an initial error in the determination that a given transaction is a taxable one while it is not. Is the correction of such an initial error about whether there is a right to deduct of the same nature as the correction that needs to be made to the scope of a right to deduct because there has been a change concerning the supply at issue? Do both types of corrections trigger application of the same mechanism?

(b) The nature of correction sought in the present case

49.

The correction sought in the present case aims at remedying a situation in which the competent tax authority granted a VAT deduction although that deduction apparently should have never been granted at all. As a result of that error the tax authorities requested repayment of the amount corresponding to the deduction granted. Is it possible for that correction to tax obligations to fall under the scope of the VAT adjustment mechanism?

50.

Not according to SEB bankas. That party considers that first, there was no change to the relevant factors affecting its right to deduct subsequent to the transaction. There was therefore no obligation for it to adjust its VAT obligations. The only change that occurred was the (re)classification of the transaction for VAT purposes from ‘subject to VAT’ to ‘VAT exempt’, as it was no longer considered to be ‘building land’ under national law. Second, if it were established that the VAT was not due and that, therefore, the deduction was not justified (quod non according to that party), the restitution of the respective amounts is governed by the law of the Member States, not by the VAT Directive.

51.

The Lithuanian Government argues that the adjustment mechanism is applicable. It bases its position on the wording of Article 184 of the VAT Directive, on the objectives pursued by the adjustment mechanism, as well as on the measures by which that mechanism is implemented. Regarding the wording of Article 184, that government points out that the adjustment of the initial deduction is required where the deduction granted is ‘higher or lower than that to which the taxable person was entitled’. Mathematically speaking, where the initial entitlement was zero, it follows that any deduction made was too high and must be adjusted.

52.

There is no doubt that in the realm of conventional arithmetic, that proposition is correct: any positive number is higher than zero. I am, however, less sure that that equation does justice to the system and logic of the adjustment mechanism.

53.

Starting with the language of Article 185, which details the conditions under which the adjustment mechanism applies, the term ‘change in the factors used to determine the amount to be deducted’ (19) would appear to aim at a different scenario to that in the main proceedings. The error that needs to be corrected in the main proceedings does not concern the question how much SEB bankas should have been entitled to deduct, but rather (the question) whether the entitlement to deduct existed at all. In other words, what the State Tax Inspectorate seeks to correct is the wrongful determination as regards the existence of the right to deduct, not the scope of that right.

54.

I acknowledge that the wording of Article 184, which introduces Chapter 5 of Title X of the VAT Directive on adjustment of deductions, is general and open as to its scope. One can therefore doubt whether it is correct to interpret Article 184, which is expressed in general terms, in the light of the more specific provisions of Article 185. That question is all the more relevant if one considers that the factors provided in Article 185(1) that lead to an adjustment are not exhaustive, as noted above in point 46 of this Opinion.

55.

That being said, Articles 184 to 186 of the VAT Directive form a logical unit within the Chapter 5 of Title X. Thus, they ought to form one coherent whole, and be interpreted having regard to one another and to the overall purpose of the chapter in question. That overall purpose of the mechanism foreseen by that chapter is to correct the amount of the deduction, not the situation where there was no right to deduct to begin with. Where there is no right of deduction, the scope of an adjustment to that right to deduct is not relevant.

56.

The latter understanding seems to be confirmed by the finding made by the Court in Uudenkaupungin kaupunki, which concerned the adjustment mechanism provided for in Article 20 of the Sixth Directive (that was, in essence, equivalent to the one existing under the VAT Directive). (20) The case concerned capital goods that were first used in non-taxable activity and that were later used in activity that was subject to VAT (that change occurred during the relevant adjustment period).

57.

The Court held that the ‘application of the adjustment mechanism depends on the existence of a right to deduct based on Article 17 of the Sixth Directive’. (21) The Court concluded that the subsequent emergence of the right to deduct made it possible for the adjustment mechanism to apply. Before reaching the conclusion, the Court confirmed that at the moment of the acquisition, the entity that subsequently claimed the use of the adjustment mechanism was a taxable person.

58.

The factual scenario of Uudenkaupungin kaupunki was thus different from the case at hand. However, it is still instructive that the applicability of the adjustment mechanism was made conditional upon the existence of the right to deduct (considered, not in relation to the nature of the supply, but to the status of the buyer).

59.

In the light of the foregoing, I am of the view that the adjustment mechanism does not apply to the action in the main proceedings.

2. The principle of fiscal neutrality requiring the repayment of an unlawfully granted deduction

60.

I agree with the position expressed, in essence, by the Commission (and acknowledged on a subsidiary basis by SEB bankas) that the incorrectly granted deduction should still be rectified, again naturally subject to the applicable time limits. That rectification, however, ought to happen pursuant to national law. At the same time, the finding that the error committed in the main proceedings does not fall within the adjustment mechanism does not mean that it falls entirely outside the scope of the common system of VAT and the principle of fiscal neutrality.

61.

As stated in recital 7 to the VAT Directive ‘the common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden …’.

62.

That burden must be imposed equally on taxpayers who are in similar situations. (22) That neutrality is not however respected if it is established that a taxpayer, such as SEB bankas, benefited from an incorrectly granted VAT deduction. The Member State whose tax authorities have granted that deduction is therefore obliged to make sure that that undue tax advantage is corrected.

63.

At the concrete level, that means that the Member States have to put into place measures that make it possible for the tax authorities to request from taxpayers, such as SEB bankas, repayment of the amount corresponding to the deduction, pursuant to applicable provisions of national law and subject to clear and foreseeable time limits.

64.

I note that a similar solution as regards the reference to the respective provisions of national law would be called for even if the adjustment mechanism applied. This is because while Articles 184 and 185 set the material conditions for the application of the adjustment mechanism, Article 186 of the VAT Directive refers to the law of the Member States as regards the procedural arrangements.

65.

It might be added, for the sake of clarity, that that conclusion does not prevent the Member State from foreseeing at the national level procedural rules that would apply both to correct initial errors as to the classification of a transaction (as VAT exempt or subject to VAT) as well as to adjustment of deductions granted in respect of taxable transactions. The fact that the former does not fall within the adjustment mechanism foreseen by the VAT Directive does not mean that it would have to be kept separate at the national level.

66.

In the light of the foregoing, my interim conclusion is that Articles 184 to 186 of the VAT Directive are to be interpreted as meaning that the adjustment mechanism provided for in those provisions does not apply in the situation, such as the one in the main proceedings, where an initial deduction of VAT could not have been made at all because the transaction at issue was exempt from VAT. However, the principle of fiscal neutrality requires that the Member State recover the amount corresponding to a VAT deduction unduly granted, pursuant to the applicable provisions of national law.

C. Is the conclusion affected by the specific circumstances of the case?

67.

By its second question, the referring court asks whether the reply to the first question is affected by the issuance of the 2010 credit note (1), and by the fact that the transaction was first considered as subject to VAT, and was only later treated as exempt from VAT (2).

68.

In view of my proposed answer to the national court’s first question, the second question can be understood as a matter for national law with no need for guidance from this Court. However, as the

second question connects to the first one, it being essentially a further elaboration of it, and in the spirit of cooperation permeating the preliminary rulings procedure, the limited suggestions I can provide on the second question are as follows.

1. Relevance of the 2010 credit note

69.

The relevance of the 2010 credit note can be considered, in my view, from two different perspectives.

70.

First, one could ask whether it may have set out a tax obligation for SEB bankas. The answer is clearly no. Subject to verification by the referring court as to the exact legal effects that national law attaches to such a document, I understand the 2010 credit note to be a document issued by a private party, not an official document issued by the tax authority. As such, it may trigger effects for the party issuing it but not in principle for the other party to a transaction. (23)

71.

Second, one may wonder whether the issuance of the 2010 credit note may have consequences for the applicable time limits, within which the State Tax Inspectorate may change SEB bankas's tax obligations. That again is a matter for the referring court to consider.

72.

There are systems in which national law may provide not only for an 'objective' (that is absolute) time limit but also for a 'subjective' (that is relative) one. The running of the objective time limit is likely to be triggered by the occurrence of a specific event independently of knowledge of the respective party. The subjective one is triggered when that party acquires the knowledge that the relevant event occurred.

73.

If that were the case under national law, it could be argued that upon receipt of the 2010 credit note, SEB bankas learned of the fact that it needed to correct its VAT returns. Thus, such a credit note could perhaps be construed as the starting point of the subjective time limit.

74.

That being said, even if the national law provided for a subjective time limit, it is normally the case that the subjective time limit cannot extend and run beyond the end of the objective one. The running of the subjective time limit may thus start later, but ends at the latest with the end of the objective time limit. Thus, also in this second potential dimension, I have difficulty seeing how exactly the 2010 credit note would be relevant as far as time limits are concerned in the main proceedings.

75.

Thus, on the elements as presented to the Court, I do not consider that the 2010 credit note is relevant for the assessment of SEB bankas's tax obligations.

2. Relevance of the (re)classification of the transaction

76.

In contrast to the 2010 credit note issued by the Seller, the interpretative practice and the specific conduct of the tax administration vis-a-vis SEB bankas matter for the assessment of SEB bankas's tax obligations. This is because, subject to the factual assessment by the national court, they might have given rise to SEB bankas's legitimate expectations as to the scope of its obligations, depending on the nature and content of the assurances provided to it. (24)

77.

The Lithuanian Government recognises that when the transaction occurred, the 'official' interpretation of what was to be considered as 'building land' justified the conclusion that that transaction was subject to VAT. At the same time, that government also noted that that interpretation changed, following a judgment of the Lietuvos vyriausiasis administracinis teismas (Lithuanian Supreme Administrative Court), delivered in 2009. (25)

78.

As the Court recalled in Nigl and Others, 'the principle of legal certainty does not preclude the tax authorities from carrying out, within [the applicable time limits], an assessment for VAT relating to the deducted tax or to services already provided and which should have been subject to VAT'. The Court also held that this is equally true when 'a scheme from which a taxable person for VAT purposes benefits is called into question by the tax authorities, including for a period prior to the date on which such an appraisal is issued, but provided that that appraisal occurs within the limitation period for action on the part of those authorities, and its effects do not apply retroactively to a date earlier than that on which the legal and factual elements on which it is based occurred'. (26)

79.

The same logic appears to hold also for the present case. If the time period for the assessment of SEB bankas's tax obligations is to some extent still open, that is, that the reassessment and recalculation is still allowed because the case remains within the applicable time limits, and if within that period a decision of a higher national court (such as a supreme administrative court) unifies previously inconsistent interpretative practice, the uniform interpretation thus provided may have incidental effects on the interpretation of law to be given in all ongoing cases where that interpretation is of relevance.

80.

Such incidental retrospectivity of decisions of higher courts is, as a matter of fact, quite common. (27) It is the logical consequence of such interpretative decisions, which graft themselves onto the interpreted legislation in question, thus being (unless such effects are explicitly excluded) applicable ex tunc, together with the legislation that was being interpreted.

81.

It could be suggested, as appeared to be the argument of the Commission at the hearing, that with regard to a taxable period that has already lapsed, the application of an interpretative decision of a higher national court would no longer be only retrospective, but truly retroactive.

82.

I do not agree. Until and unless the time period for the recalculation and readjustment provided for in the national law lapses, the assessment of that taxable period is not truly closed. The reassessment is still open and, it might be added that it is open not only for the tax administration, but also for the taxpayer. Thus, within that period, it is also the taxpayer that might wish to invoke an interpretative unification by the decision of a higher national court to his benefit. Put metaphorically, an open window is opened both ways.

83.

However, even if, within the applicable time limits, it is, strictly speaking, possible for the tax authorities to take into account and apply a decision of a higher national court that unified previously inconsistent interpretation of the law, this does not release the competent tax authorities from searching, in each individual case, for a fair balance between the need for uniform application of the law and the particular circumstances of the individual's case, which might have given rise to legitimate expectations on the part of the taxpayer.

84.

In the case at hand, it would, for instance, be conceivable that a fair balance between the possible legal necessity to correct the classification of the transaction and the protection of SEB bankas's legitimate expectations (if following the factual assessment it could be said that those were indeed generated by the behaviour of national authorities) could perhaps lie in allowing for the reclassification of the transaction, while not penalising SEB bankas in any way, that is, by not imposing any default interest or fine upon it. (28)

85.

In the light of the above, my conclusion is that the response to the first preliminary question is not affected by the issuance of the 2010 credit note. However, when the competent authorities correct the tax obligations of a taxable person, such as SEB bankas, following a (re)classification of a supply for VAT purposes, such as the supply of land in the main proceedings, these authorities shall strike an appropriate balance between obligations to ensure fiscal neutrality and uniform application of the law and that person's legitimate expectations.

D. Questions three and four

86.

Although the hypotheses introducing questions three and four in relation to the exact wording of the first question are not crystal clear, from the underlying logic of the order for reference, I understand that the referring court's third and fourth questions are asked only if the adjustment mechanism were found to be applicable to the case in the main proceedings.

87.

Since I am of the view that the adjustment mechanism does not apply to the action in the main proceedings, there is therefore no need to answer questions three and four.

V. Conclusion

88.

In the light of the foregoing, I suggest that the Court respond to Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania) as follows:

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Articles 184 to 186 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax shall be interpreted as meaning that the adjustment mechanism provided for in those provisions does not apply in the situation, such as the one in the main proceedings, where an initial deduction of value added tax could not have been made at all because the transaction at issue was exempt from value added tax. However, the principle of fiscal neutrality requires that the Member State recover the amount corresponding to a value added tax deduction unduly granted, pursuant to the applicable provisions of national law.

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When the competent authorities correct tax obligations of a taxable person, following a (re)classification of a supply for value added tax purposes, such as the supply of land in the main proceedings, these authorities shall strike an appropriate balance between the obligations to ensure fiscal neutrality and the uniform application of the law and that taxable person’s legitimate expectations.

(1) Original language: English.

(2) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

(3) On the principle of effectiveness in this context, see judgment of 14 June 2017, Compass Contract Services (C?38/16, EU:C:2017:454, paragraph 42 and the case-law cited).

(4) See, in this sense, judgments of 7 November 2013, Tulic? and Plavo?in (C?249/12 and C?250/12, EU:C:2013:722, paragraph 41 and the case-law cited), and of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, paragraph 36 and the case-law cited).

(5) See in this sense, judgment of 8 September 2015, Taricco and Others (C?105/14, EU:C:2015:555, in particular paragraphs 46 and 47). But see judgment of 5 December 2017, M.A.S. and M.B. (C?42/17, EU:C:2017:936, paragraphs 51-58).

(6) Judgment of 15 September 2011, S?aby and Others (C?180/10 and C?181/10, EU:C:2011:589, paragraph 33 and the case-law cited). Concerning the scope of the Member States’ discretion in the context of Article 12 of the VAT Directive, see judgment of 16 November 2017, Kozuba Premium Selection (C?308/16, EU:C:2017:869, paragraph 44 et seq. and the case-law cited).

(7) In this regard, the Lithuanian Government referred in particular to the judgment of (the Grand Chamber of) the Lietuvos vyriausiasis administracinis teismas (Lithuanian Supreme Administrative Court) of 7 December 2009, A?438-1346/2009.

(8) See, for example, judgments of 13 December 1989, Genius Holding (C?342/87, EU:C:1989:635, paragraph 13); of 19 September 2000, Schmeink & Cofreth and Strobel (C?454/98, EU:C:2000:469, paragraph 53); and of 6 February 2014, Fatorie (C?424/12, EU:C:2014:50, paragraph 39).

(9) Judgment of 22 October 2015, Sveda (C?126/14, EU:C:2015:712, paragraph 18 and the case-law cited). See also Opinion of Advocate General Kokott in Mateusiak (C?229/15, EU:C:2016:138, point 24 and the case-law cited).

(10) Judgments of 21 March 2000, Gabalfrisa and Others (C?110/98 to C?147/98, EU:C:2000:145, paragraph 44 and the case-law cited); of 30 September 2010, Uszodaépít? (C?392/09, EU:C:2010:569, paragraphs 34 and 35 and the case-law cited); and of 22 March 2012, Klub (C?153/11, EU:C:2012:163, paragraphs 35 and 36 and the case-law cited).

(11) See, in particular, Opinion of Advocate General Kokott in TETS Haskovo (C?234/11, EU:C:2012:352, points 27 and 28).

(12) See judgment of 13 March 2014, FIRIN (C?107/13, EU:C:2014:151, paragraph 50 and the case-law cited).

(13) See, for example, judgments of 16 June 2016, Mateusiak (C?229/15, EU:C:2016:454, paragraph 28 and the case-law cited), and of 13 March 2014, FIRIN (C?107/13, EU:C:2014:151, paragraph 50 and the case-law cited).

(14) Order of 5 June 2014, Gmina Mi?dzyzdroje (C?500/13, EU:C:2014:1750, paragraph 24 and the case-law cited).

(15) Judgment of 16 June 2016, Mateusiak (C?229/15, EU:C:2016:454, paragraph 29 and the case-law cited). See also judgment of 16 June 2016, Kreissparkasse Wiedenbrück (C?186/15, EU:C:2016:452, paragraph 47).

(16) Judgment of 29 November 2012, Gran Via Moine?ti (C?257/11, EU:C:2012:759, paragraphs 37 to 42). See similarly judgment of 18 October 2012, TETS Haskovo (C?234/11, EU:C:2012:644, paragraphs 32 to 37).

(17) The scenario of theft is addressed in the first subparagraph of Article 185(2) of the VAT Directive. Judgment of 4 October 2012, PIGI (C?550/11, EU:C:2012:614).

(18) Judgment of 9 June 2016, Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR (C?332/14, EU:C:2016:417, paragraphs 37 to 47).

(19) Emphasis added.

(20) Judgment of 30 March 2006, Uudenkaupungin kaupunki (C?184/04, EU:C:2006:214). See paragraph 1 of Article 20 of the Sixth Directive entitled ‘Adjustments of deductions’. Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

(21) Judgment of 30 March 2006, Uudenkaupungin kaupunki (C?184/04, EU:C:2006:214, paragraph 37). See also judgment of 2 June 2005, Waterschap Zeeuws Vlaanderen (C?378/02, EU:C:2005:335, paragraph 44) where the Court held that ‘a body governed by public law which purchases capital goods as …a non-taxable person, and subsequently sells those goods as a

taxable person, is not entitled, in respect of that sale, to a right of adjustment based on Article 20 of that directive in order to deduct the VAT paid on the purchase of those goods'. See also order of 5 June 2014, Gmina Mi?dzyzdroje (C?500/13, EU:C:2014:1750).

(22) See, by analogy, judgment of 14 June 2017, Compass Contract Services (C?38/16, EU:C:2017:454, paragraphs 30 to 32 and the case-law cited) which concerns the national rules on repayment, to the issuer of an invoice, of overpaid VAT. Similarly, the Court held that to ensure the neutrality of VAT, it is for the Member States to provide, in their domestic legal systems, for the possibility of adjusting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith or where the issuer of the invoice has in sufficient time wholly eliminated the risk of any loss in tax revenues — judgment of 18 June 2009, Stadeco (C?566/07, EU:C:2009:380, paragraphs 36 and 37 and the case-law cited). See also 19 September 2000, Schmeink & Cofreth and Strobel (C?454/98, EU:C:2000:469, paragraphs 56 to 58).

(23) See, similarly, judgment of 31 January 2013, Stroy trans (C?642/11, EU:C:2013:54, paragraphs 41 to 44).

(24) Judgments of 9 July 2015, Cabinet Medical Veterinar Tomoiag? Andrei (C?144/14, EU:C:2015:452, paragraph 43 and the case-law cited), and Salomie and Oltean (C?183/14, EU:C:2015:454, paragraph 44 and the case-law cited). See also judgment of 14 September 2006, Elmeka (C?181/04 to C?183/04, EU:C:2006:563, paragraph 32 and the case-law cited).

(25) See above footnote No 7.

(26) Judgment of 12 October 2016 (C?340/15, EU:C:2016:764, paragraphs 48 and 49 and the case-law cited).

(27) Recently discussed, in the context of the temporal applicability of the decisions of this Court in the area of VAT, for example in my Opinions in Cussens and Others (C?251/16, EU:C:2017:648, point 35 et seq.) and in Scialdone (C?574/15, EU:C:2017:553, point 179).

(28) As noted above (see point 18 of this Opinion) it follows from the order for reference that the State Tax Inspectorate waived in part the obligation for SEB bankas to pay the accrued default interest.