Provisional text

OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 20 May 2021(1)

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

E

v

Finanzamt N (C?45/20)

and

Z

v

Finanzamt G (C?46/20)

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Request for a preliminary ruling – Value added tax – Deduction of input tax – Council Directive 2006/112/EC, as amended by Council Directive 2009/162/EC – Articles 167 and 168(a) – Installation of a photovoltaic energy system – Establishment of an office in an otherwise private family dwelling – Immovable property – Mixed-use assets – Allocation to assets of a business – Compatibility with EU law of a Member State time limit for allocation and presumption of allocation to private assets absent evidence to the contrary – Loss of the right to deduct input tax)

1. These requests for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany, ‘the referring court’), seek clarification of the Court’s case-law on allocation of capital goods (2) and, more specifically, immovable property (3) used for both business and private purposes (‘mixed-use assets’), to a taxpayers private assets, or to the assets of a taxpayer’s business, or to a combination of both (‘the allocation decision’). More specifically, the questions address the consequences flowing from the allocation decision for the right to deduct input tax, under Articles 167 and 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, (4) as amended by Council Directive 2009/162/EC of 22 December 2009 amending various provisions of Directive 2006/112/EC on the common system of value added tax (5) (‘the VAT Directive’).

2. The questions ask about the compatibility with EU law, particularly in the light of the Court's ruling in the judgment of 25 July 2018, *Gmina Ryjewo*, (6) of what is in effect a limitation period under German law for communication to the German tax authorities of the allocation decision, the expiry of which has been interpreted in the case-law of the referring court as resulting in the loss of the right to deduct input tax. The same appears to follow from the presumption in the referring court's case-law of allocation of mixed-use assets to a taxpayer's private assets, which applies in the absence of sufficient indications to the contrary.

3. I have reached the conclusion that, in the circumstances of the main proceedings, an interpretation of Member State law in the case-law of the referring court, and pursuant to which a taxable person loses the right to deduct input tax for failure to communicate an allocation decision with respect to mixed-use assets within the time limit for so doing operative under Member State law, is incompatible with Articles 167 and 168(a) of the VAT Directive, for inconsistency with the principles of fiscal neutrality and proportionality, given that there is no indication in the case file of any active concern with respect to tax evasion. (7) The same conclusion applies to the aforementioned assumption of allocation to the private assets of the taxpayer when it results in loss of the right to deduct.

I. **Legal framework**

A. **EU law**

4. Article 167 of the VAT Directive states:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

5. Article 168(a) of the VAT Directive states:

'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;

…'

6. Article 168a(1) of the VAT Directive states:

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

By way of derogation from Article 26, changes in the proportion of use of immovable property referred to in the first subparagraph shall be taken into account in accordance with the principles provided for in Articles 184 to 192 as applied in the respective Member State.'

7. Article 250(1) of the VAT Directive states:

'Every taxable person shall submit a VAT return setting out all the information needed to calculate

the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.'

B. **German law**

8. Paragraph 15(1) of the Umsatzsteuergesetz (Law on value added tax; 'the UStG') states:

'A trader may deduct the following as input tax:

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

9. Paragraph 18(3) of the UStG states:

'The trader must transfer by electronic means, in the prescribed form, for the civil year or for a shorter taxable period, a tax return in which he calculates himself, in conformity with Paragraph 16(1) to (4) and Paragraph 17, the tax payable or the excess that results in his favour (tax declaration). In the cases envisaged by Paragraph 16(3) and (4), the fiscal declaration must be transmitted in a deadline of one month after the expiry of the shorter taxable period. In order to avoid undue hardship, the Finanzamt can on demand renounce electronic transmission. In such a case, the trader must transmit a tax declaration on the form provided by the administration and sign it manually.'

10. Paragraph 149(2) of the Abgabenordnung (Fiscal Code), in the version in force at the time of the litigation, (8) states:

'Unless otherwise stated in fiscal law, fiscal declarations which relate to a civil year or a moment determined by law must be deposited at the latest five months thereafter …'

II. **Facts, procedure and the questions referred**

A. **C?45/20, *E* v *Finanzamt N* ('Case E')**

11. The applicant in Case E runs a scaffolding business. In 2014, he put together a draft for the construction of a family house which, in conformity with architectural plans dated 29 July 2014, included on its ground floor a 16.57 m2 office. The house was otherwise reserved for private purposes and was to have a total surface area of 149.75 m2. The bills for the construction of the house, including the office, were established in the period running from October 2014 to November 2014. (9)

12. E did not seek pro-rata deduction of input tax with respect to the office in the provisional (monthly) declarations he was required to deposit for the years 2014 and 2015, by virtue of the second sentence of Paragraph 18(2) of the UStG, but sought it for the first time in his annual VAT declaration for the year 2015, under the first sentence of Paragraph 18(3) of the UStG. (10) That declaration was received by the Finanzamt ('Tax Office') on 28 September 2016.

13. The Tax Office, by a decision of 5 April 2017, fixed E's turnover tax for 2015, without allowing the deduction of [X] euros, corresponding, according to E, to the input tax relevant to the office in question. The Tax Office rejected the objection as unfounded by decision of 17 January 2018. An appeal introduced with respect to this claim was equally rejected. In its judgment of 19 March 2018, the Sächsisches Finanzgericht (Finance Court, Saxony, Germany) indicated that the deduction of input tax sought was not possible, because the allocation of the good to business assets had not occurred in time, that is to say, by 31 May 2015.

14. The order for reference states that, according to the case-law of the referring court, it follows from the principle of immediate deduction of the input tax incurred that the allocation decision must be taken upon the acquisition or production of the good in question. (11) The case-law of the referring court further provides that, for reasons of practicability, the taxable person can communicate the allocation decision by indicators testifying to this. However, pursuant to Paragraph 18(3) of the UStG, this is to be at the latest and definitively, in a turnover tax declaration for the year covering the acquisition. (12) This moment is set in the case-law of the referring court at the expiry of the general legal time limit for the deposit of the final tax declaration, pursuant to Paragraph 149(2) of the Fiscal Code. That moment in the main proceedings was 31 May of the following year, namely 2015. (13) Further, pursuant to the case-law of the referring court, extension of the deadline for the deposit of the final tax declaration does not amount to an extension of the deadline with respect to communication of the elements attesting to the allocation decision. (14)

15. By his appeal to the referring court E argued that it was not essential for him to have communicated to the Tax Office the further elements indicating his allocation decision via the declaration concerning his turnover taxes, given that the architectural plans for the effective use of the office exclusively for business purposes constituted sufficient indicators of its allocation to the assets of the business.

B. **C?46/20, *Z* v *Finanzamt G* ('Case Z')**

16. Case Z concerns the deduction as input tax of VAT incurred in 2014 in installing a photovoltaic energy system. The applicant Z used some of the electricity generated by the system himself and supplied the rest to a power supplier's transmission system. The contract relevant to the injection of energy into the electricity network was concluded during the financial year in question, and envisaged remuneration to which tax was added.

17. On 29 February 2016, Z filed a turnover tax declaration for the contested financial year and declared input tax in the amount of [X] euros. The amount related to the input tax concerning, essentially, the tax appearing on the bill of 11 September 2014 for the delivery and the installation of the photovoltaic energy system. Z had filed no declaration relevant to this system. The defendant Finanzamt G initially approved the turnover tax declaration for the contested year.

18. After a special turnover tax check, the Tax Office took the view that the deduction of the input tax featuring in the bill of 11 September 2014 could not be granted. According to the Tax Office, Z had not allocated the good in question to business assets in time, that is, by 31 May 2015.

19. The Tax Office therefore fixed Z's turnover tax for the contested year by a decision of 30 November 2016, last modified by a decision of 27 March 2017. A complaint was rejected by a decision of 18 May 2017, as was an appeal. In its judgment of 12 September 2018, the Finanzgericht Baden-Württemberg (Finance Court, Baden- Württemberg, Germany), held that Z, who had a right to choose how to allocate the photovoltaic energy system in issue, had not allocated it in good time to assets of the business. This resulted from case-law binding the Finanzgericht (Finance Court) (see point 14 above). This approach remained valid in the light of subsequent case-law of the Court.

20. Before the Finanzgericht (Finance Court) Z argued that, particularly in the light of *Gmina Ryjewo*, the case-law of the referring court relevant to the communication, within a brief time limit, of the elements evidencing the allocation of mixed-use assets, had to be questioned.

21. The order for reference states that the Tax Office defended the decision taken in the

complaint, and observed that the applicant, prior to the commercial exploitation of the photovoltaic energy system, was not acting as a trader in the sense of the legislation on turnover tax, and in the scenario on which the Court gave its judgment in *Gmina Ryjewo*, the right of allocation was non-existent.

22. In those circumstances, the referring court decided to stay the proceedings in both C?45/20 and C?46/20 and sent the following questions to the Court for a preliminary ruling:

‘(1) Does Article 168(a), read in conjunction with Article 167 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax conflict with national case-law precluding the right to deduct VAT in cases in which the trader is entitled to choose the allocation of a supply at the time of purchase if no allocation decision identifiable by the tax authorities has been communicated upon the expiry of the statutory deadline for submission of the annual VAT return?

(2) Does Article 168(a) of [Directive 2006/112] conflict with national case-law whereby allocation to private assets is assumed or presumed in the absence of (sufficient) evidence of allocation to the assets of the business?’

23. Written questions were addressed by the Court to the Federal Republic of Germany and the Commission. The Federal Republic of Germany responded on 14 December 2020, and the Commission on 16 December 2020.

24. Written observations on the questions referred for a preliminary ruling were submitted by Finanzamt N (with respect to Case E), the Federal Republic of Germany and the Commission. There was no hearing.

III. **Preliminary observations**

25. I propose responding to the issues raised in the order for reference in the following sequence.

26. The first issue to be addressed must necessarily be whether both E and Z had a right to deduct input tax at the time of the acquisition of the mixed-use assets in question, namely a house in Case E and a photovoltaic energy system in Case Z. This assessment is linked directly to the allocation decision, because, as pointed out in the written observations of the Federal Republic of Germany, whether or not input tax is deductible depends on the manner in which that person allocated the mixed-use assets concerned. (15)

27. Secondly, as further suggested in the written observations of the Federal Republic of Germany, equally central to the resolution of the dispute in the main proceedings is whether or not an identifiable allocation decision with respect to the mixed-use assets is a substantive or formal requirement in EU VAT law. This is so because failure of a taxable person to comply with a formal requirement, unlike substantive requirements, does not necessarily deprive that taxable person of its right to deduct input tax. (16) As will be explained below, I have reached the conclusion that the existence of an identifiable allocation decision is a substantive requirement of the right to deduct input tax on mixed-use assets, but one which can be determined by elements attesting, objectively, to the existence of the allocation decision. To date, the case-law has not required taxable persons to make a specific and dedicated declaration to Member State tax authorities with respect to the allocation decision. In this section, I will also address the scope of Member State discretion with respect to imposing time limits for the communication of an identifiable allocation to the national tax authorities.

28. Thirdly, after addressing these issues I will then conclude by answering the questions referred.

29. As for the relevance of *Gmina Ryjewo*, it is important to note that *Gmina Ryjewo* did not concern the consequences flowing from (i) allocation of mixed-use capital goods wholly to the assets of the business, (ii) their retention wholly within private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into a business only to the extent to which they are actually used for business purposes. (17)

30. *Gmina Ryjewo* rather concerned the consequences following when immovable property was used by a municipality initially for the purposes of non-taxable transactions, but later taxable transactions, and what this meant with respect to deduction of input tax incurred in the construction of that immovable property. In consequence, I agree with submissions made in the written observations of Finanzamt N to the effect that, contrary to views that may have been expressed in legal doctrine, *Gmina Ryjewo* does not stand for the proposition that it is no longer necessary for an allocation decision to be made with respect to mixed-use assets in order to determine if the taxable person is acting as such.

31. Both the Federal Republic of Germany and Finanzamt N have argued, in their written observations, in favour of minimising the impact of *Gmina Ryjewo* to the outcome of the main proceedings due, inter alia, to the differences between what was in issue in *Gmina Ryjewo*, and what is in issue in the main proceedings. It suffices to say that reference will be made in this Opinion to *Gmina Ryjewo* to the extent that it is pertinent to the legal problem to be here resolved.

IV. **Assessment**

A. **Existence of the right to deduct**

32. Article 167 of the VAT Directive is the starting point in the case-law. Pursuant to Article 167, a right to deduction arises at the time the deductible event becomes chargeable. The capacity in which the person is acting at that time is crucial in determining the existence of the right to deduct. (18)

33. Pursuant to Article 168(a) of the VAT Directive, the goods or services relied on to give entitlement to that right must be used by the taxable person for the purposes of his or her own taxed output transactions and those goods or services must be supplied by another taxable person as inputs. (19) Given that both the office in issue and the photovoltaic energy system appear to have been used for business purposes, this requirement will be satisfied if they were supplied by another taxable person as inputs. (20)

34. Under the established case-law of the Court, there is no right to deduct input tax with respect to goods allocated wholly to private assets. (21) There is a partial right to deduct if mixed-use goods are partly allocated to business assets. The part which is not used for providing taxable business services or deliveries does not fall within the VAT system and cannot be taken into account for the purposes of Article 168(a) of Directive 2006/112. (22) However, if mixed-use assets are allocated wholly to the business assets then all input tax is deductible. (23) If a taxable person chooses to treat capital goods used for both business and private purposes, as business assets, the VAT due as input tax on the acquisition of those assets is in principle wholly and immediately deductible. (24)

35. However, an important amendment to the VAT Directive that was introduced by Directive 2009/162, namely Article 168a, is pertinent to the main proceedings. As can be seen in point 6

above, VAT on expenditure related to immovable property shall be deductible only up to the proportion of the property's use for purposes of the taxable person's business. While this is a matter for verification by the referring court, both the office within the house in Case E and the photovoltaic energy system in Case Z would seem to be immovable property. (25)

36. What is sought by the applicants in the main proceedings, in any event, is partial deduction of input tax, in the light of partial allocation of mixed-use assets to business assets. In Case E, the deduction sought is partial because it relates only to the office in the house. In Case Z, the deduction sought is partial because the deduction sought with respect to the photovoltaic energy system is proportionate and linked to the extent to which it is used for economic purposes. (26)

37. It is settled case-law that a person who incurs investment expenditure with the intention, confirmed by objective evidence, of engaging in economic activity within the meaning of Article 9(1) of the VAT Directive must be regarded as a taxable person. (27) It is to be recalled that, pursuant to Article 168 of the VAT Directive, VAT is deductible in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person. Acting in the capacity of a taxable person, he or she has, therefore, in accordance with Article 167 et seq. of that directive, the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he or she intends to carry out and which give rise to the right to deduct. That right to deduct arises, in accordance with Articles 63 and 167 of the VAT Directive, at the time when the tax becomes chargeable, namely when the goods are delivered. (28)

38. I take the view, however, that under the established case-law, the taxable person is not, in effect, *bound* to deduct input tax as soon as the right to do so arises in two important contexts which are relevant to the main proceedings. First, while Finanzamt N and the Federal Republic of Germany are right to assert that the Court has held that the right to deduct input tax must be exercised immediately in respect of all the taxes charged on transactions relating to inputs, (29) this does not mean that EU law permits Member States, in all circumstances, effectively to cancel the right to deduct in the event of non-compliance with the time limit set by Member State law for making an application for deduction to the tax authorities, particularly in the absence of evidence of fraud. (30) This will be further elaborated upon in points 50 to 60 below.

39. Secondly, as argued in the written observations of the Commission, the making of a specific application to the taxation authorities for the deduction of input tax is not essential to proving the existence of an allocation decision as at the time of the acquisition of the mixed-use assets in issue.

40. Whether a taxable person acts as such for the purposes of an economic activity (see Article 9(1) of the VAT Directive) is a question of fact which must be assessed in the light of all the circumstances of the case, including the nature of the asset concerned and the period between the acquisition of the asset and its use for the purposes of the taxable person's economic activity. It is for the referring court to make that assessment. (31)

41. Importantly, the Court held in *Gmina Ryjewo* that 'although a clear and express declaration of the intention to use the goods for economic purposes at the time of their acquisition may suffice for a finding that the goods were acquired by the taxable person acting as such, the absence of such a declaration does not exclude the possibility that such an intention may be conveyed implicitly'. (32) As mentioned above, the Court so interpreted 'economic activity' in Article 9(1) of the VAT Directive in the context of the dispute in *Gmina Ryjewo* in which the right to deduct was sought with respect to a change in the purpose to which a capital asset was put from a non-economic one to an economic one. (33) Since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, (34) the principle set in *Gmina Ryjewo*

must apply equally to establishing the existence of an allocation decision. I agree with the Commission when it argues that this interpretation is the only one consistent with the broad concept of acquisition as a ‘taxable person’ established in the case-law. (35)

42. What needs to be determined, therefore, is whether E and Z acquired or produced the capital goods concerned with the intention, confirmed by objective evidence, of carrying out an economic activity and did, consequently, act as taxable persons within the meaning of Article 9(1) of the VAT Directive. (36) Is there a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct? (37)

43. While this assessment is for the referring court, there is nothing in the case file to indicate the absence of the requisite link with respect to either the construction of the office in Case E (38) or the photovoltaic energy system in Case Z, in the light of the objective content of the transactions in question (39) as described in the order for reference. The period between the acquisition of these assets and their use for the purposes of the taxable persons’ economic activities was relatively short. Both the office in question and the photovoltaic energy system were goods, by their nature, fit for such purposes. (40) Most importantly, for the purposes of the main proceedings, the absence of an immediate request to the fiscal authorities for deduction of input tax is not conclusively determinative of whether a right to deduct existed at the time of acquisition, even though, under the case-law of the referring court, invocation of the right to deduct is a serious indicator of allocation of assets to the business. (41)

44. Thus, the failure of E to declare the office in provisional tax declarations is not an obstacle in and of itself to the right to deduct input tax. Further, no direct support is found in the Court’s case-law for any requirement under German law for an applicant in the position of either E or Z to supply an active declaration of the existence of an allocation decision at acquisition, even if deduction of input tax is sought *after* the VAT declaration relevant to the period of the acquisition of the goods. In the light of the ruling in *Gmina Ryjewo*, what is required are elements attesting objectively to the existence of the allocation decision to business assets, such a decision being necessary to determine if VAT is deductible with respect to mixed-use assets. (42) Seeking deduction in the VAT declaration relevant to the period of the acquisition can prove the existence of an allocation decision, (43) but this is not, under the case-law of the Court, absolutely obligatory. It is for the referring court to determine whether the plans for the effective use of the office in Case E, and the bill of 11 September 2014 for the delivery and installation of the photovoltaic energy system in Case Z constituted elements sufficient to attest, objectively, to the existence of an allocation decision, in combination with all other pertinent facts before it.

45. This approach also respects the foundations of the VAT rules on adjustments and deductions. It is noteworthy that ‘adjustment periods for deductions do not have, as such, any effect on the origin of the right to deduction of VAT … which … is determined solely by the capacity in which the interested party is acting when acquiring the goods concerned’. (44) The purpose of the system of adjustment of deductions is to ensure the accuracy of deductions and hence the neutrality of the tax burden. (45) Indeed, it is established in the case-law of the Court that the detailed rules governing the exercise of the right to deduct are only formal requirements or conditions. (46)

46. Finally, as mentioned in point 21 above, doubt has been expressed as to whether Z was acting as a trader at the time of the acquisition of the photovoltaic energy system, while querying Z’s right to deduct in the light of the ruling in *Gmina Ryjewo*. However, the photovoltaic energy system was used, at least partially, for the purposes of Z’s own taxed output transactions, the investment was incurred for engaging in an economic activity, and the deduction was for the

purposes of transactions Z intended to carry out (point 37 above). Further, contrary to providing indications that would limit Z's potential for categorisation as a 'taxable person', *Gmina Ryjewo* supports generous interpretation of the term 'taxable person'. (47)

47. In conclusion, while this is a matter for the referring court to verify in the light of the legal principles discussed above, E would seem to have had a right to partial deduction of input tax on acquisition of the office in question, as did Z on acquisition of the photovoltaic energy system.

B. **Identifiable allocation decision as a substantive or formal requirement and the time limit for its communication to fiscal authorities**

1. ***Identifiable allocation decision***

48. Under the established case-law of the Court, Member State tax authorities must have the information necessary to establish that the substantive requirements giving rise to the right to deduct input tax paid in a given case have been satisfied, notwithstanding any alleged failure to satisfy formal conditions. (48) As has been explained above, the allocation decision is essential to establishing the right to deduct. It is not a mere formal requirement for the purposes of control. (49) Nor is it an obligation relating to accounts and tax returns. (50) On the contrary, absence of an identifiable allocation decision prevents the production of conclusive evidence that the substantive requirements have been satisfied, (51) given that it is the allocation decision itself that determines if deduction of input tax with respect to mixed-use assets is possible at all, and the extent to which it is deductible.

49. Therefore, as argued in the written observations of Finanzamt N, existence of an identifiable allocation decision is a material requirement, but it is to be underscored that deduction of the input tax in the VAT declaration period relevant to the pertinent acquisition is only one element, albeit a potentially determinative one, attesting to the existence of the allocation decision. (52) Equally, the absence of such a declaration does not absolutely preclude the existence of an allocation decision.

2. ***The time limit for communication of an allocation decision***

50. The tax authorities are to have the necessary data to establish that the substantive conditions for deduction of VAT paid as input tax are met, which is for the referring court to verify. (53) Where the tax authority has the information necessary to establish that the taxable person, as the recipient of the supplies in question, is liable to VAT, it cannot, in relation to the right of that taxable person to deduct that input tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes. (54)

51. The question therefore arises as to whether the imposition of the time limit in issue, the resulting loss of the right to deduct arising from the referring court's case-law, and a presumption in the case-law of the referring court of allocation to private assets in the absence of evidence of allocation to the assets of the business, are additional conditions having such an effect.

52. Pursuant to Articles 167 and 179 of the VAT Directive, the right to deduct is generally exercised during the same period as that in which it has arisen, namely, at the time the tax becomes chargeable. (55) However, pursuant to Articles 180 and 182 of the VAT Directive, a taxable person may be authorised to make a deduction beyond this period, subject to certain conditions and procedures determined by national legislation. (56)

53. It is already established in the case-law that imposition by Member States of time limits in which to deduct input VAT are accepted in EU law to secure legal certainty, subject to the

requirements of effectiveness and equivalence. (57) It is for the referring court to determine whether the outer time limit of 31 May 2015, with respect to the annual VAT return for 2014, for communication of the allocation decision, which is effectively a time limit for exercise of the right to deduct input tax, complies with the principles of effectiveness and equivalence.

54. Under the case-law of the Court, with respect to the principle of effectiveness, the total duration of the limitation period is to be taken into account, and Member State courts are to consider whether that time limit renders the right to deduct input tax impossible in practice or excessively difficult. (58)

55. Absent the loss *in toto* under Member State law of the right to deduct input tax for failure to communicate to the tax authorities, by 31 May 2015, the elements attesting, objectively, to the existence of an allocation decision, the time limit in issue would not seem to be objectionable from the perspective of EU law. (59)

56. However, it is further established in the case-law that penalising the failure on the part of the taxable person to comply with the obligations relating to accounts and tax returns through denial of the right of deduction, goes further than is necessary to attain the objective of ensuring the correct application of those obligations, since EU law does not prevent Member States from imposing, where necessary, a fine or a financial penalty proportionate to the seriousness of the offence, (60) as proportionate alternatives to cancellation of the right to deduct.

57. In short, Member State action must not have an excessive effect on the principle of VAT neutrality. (61) More specifically, when no issue arises with respect to tax evasion or detriment to the budget of the State, the Court has held that, in view of the dominant position of the right to deduct in the common system of VAT, loss of the right to deduct if the tax is accounted for out of time appears disproportionate. (62) Belated accounting cannot, per se, be equated with evasion. (63) An appropriate response, in such circumstances, is an administrative fine, (64) or payment of default interest. (65)

58. The Court has further held that since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent upon the competent tax authorities to establish, to the requisite legal standard, that the objective evidence establishing the existence of a fraud or abuse is present. It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence. (66) Such evidence does not appear in the case file.

59. The position would be different if breach of the deadline of 31 May 2015 meant that the substantive requirement of elements attesting objectively to the existence of the partial allocation to business assets could not be satisfied. (67) However, if communication of the allocation decision, through sufficient elements attesting to its objective existence, was received by the tax authorities on 28 September 2016 in Case E and on 29 February 2016 in Case Z, the substantive requirements for deduction of VAT might well be met. (68) Further, the period of delay of both E and Z could not be described as administratively unmanageable. E’s request for deduction of input tax was received by the Tax Office on 28 September 2016, that is, 16 months after the deadline of 31 May 2015, and Z filed a turnover tax declaration on 29 February 2016, nine months after the expiry of the 31 May 2015 deadline.

60. For the sake of completeness, it could be added that doubt over compliance with the principle of proportionality, and excessive impact on the principle of neutrality, might also arise with respect to the case-law of the referring court, mentioned in point 14 above, to the effect that an extension of the deadline for filing annual accounts does not extend the deadline for the communication of the allocation decision with respect to mixed-use assets. It might also be

queried by reference to the principle of equivalence.

V. **Answers to the questions referred**

61. I have reached the conclusion that, in the circumstances of the main proceedings, national case-law precluding the right to deduct VAT in cases in which the trader is entitled to choose the allocation of a supply at the time of purchase, but no allocation decision identifiable by the tax authorities has been communicated to those tax authorities upon the expiry of the statutory deadline for submission of the annual VAT return, is incompatible with Article 168(a), read in conjunction with Article 167 of the VAT Directive. The same must necessarily apply to a presumption of allocation of mixed use assets to private assets when the penalty is, equally, the loss of the right to deduct.

62. Under the established case-law of the Court, the right of deduction forms an integral part of the VAT scheme and in principle may not be limited. The deduction rules are intended to free the taxable person completely of the burden of the VAT accruing or paid in all its economic activities. The common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT, are taxed in a neutral way. (69)

63. Pursuant to Article 273 of the VAT Directive, Member States may adopt measures to ensure the correct collection of VAT and prevent evasion, but such measures must be consistent with the principles of proportionality, and neutrality, (70) and must not systematically undermine the right to deduct VAT. (71)

64. Finally, given that the order for reference queries, principally, the compatibility of the case-law of the referring court with pertinent principles of EU law, it is to be recalled that the requirement to interpret national law in conformity with EU law includes the obligation, on national courts, to change their established case-law where necessary if that case-law is based on an interpretation of national law that is incompatible with EU law. (72)

VI. **Conclusion**

65. I therefore propose the following answers to the questions referred by the Bundesfinanzhof (Federal Finance Court, Germany):

‘1. In the circumstances of the main proceedings, national case-law precluding the right to deduct VAT in cases in which the trader is entitled to choose the allocation of a supply at the time of purchase, but no allocation decision identifiable by the tax authorities has been communicated to those tax authorities upon the expiry of the statutory deadline for submission of the annual VAT return, is incompatible with Article 168(a), read in conjunction with Article 167, of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EC of 22 December 2009.

2. In the circumstances of the main proceedings, national case-law whereby allocation to private assets is assumed or presumed in the absence of (sufficient) evidence of allocation to the assets of the business is incompatible with Article 168(a) of Directive 2006/112, as amended by Council Directive 2009/162.’

1 Original language: English.

2 It is, however, for the referring court to ascertain in the light of national law whether the goods here in issue are ‘capital goods’. Under Article 189(a) of the VAT Directive, Member States may

define the concept of ‘capital goods’. The Court has ruled that that concept covers goods used for the purposes of economic activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but are written off over several years. See, for example, judgment of 27 March 2019, *Mydibel* (C?201/18, EU:C:2019:254, paragraph 23), referring to judgment of 16 February 2012, *Eon Aset Menidjmunt* (C?118/11, EU:C:2012:97, paragraph 35).

3 See further point 35 below.

4 OJ 2006 L 347, p. 1.

5 OJ 2010 L 10, p. 14.

6 C?140/17, EU:C:2018:595 (‘*Gmina Ryjewo*’).

7 Judgment of 12 July 2012, *EMS-Bulgaria Transport* (C?284/11, EU:C:2012:458, paragraphs 65 to 70). See also, for example, judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C?8/17, EU:C:2018:249, paragraph 39), referring to judgment of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614, paragraph 52 and the case-law cited). See also recently judgments of 26 April 2018, *Zabrus Siret*, (C?81/17, EU:C:2018:283, paragraphs 32 to 34 and 49 to 51), and of 2 July 2020, *Terracult* (C?835/18, EU:C:2020:520, paragraphs 37 and 38).

8 According to the written observations of the Federal Republic of Germany, the version in force from 1 November 2011 is the relevant version.

9 According to the written observations of Finanzamt N.

10 According to the written observations of the Finanzamt N.

11 BFH-Urteile in BFHE 234, 519, BStBl II 2014, 76, Rz 23; in BFH/NV 2012, 808, Rz 18; in BFH/NV 2012, 1828, Rz 28ff.; in BFH/NV 2013, 266, Rz 38.

12 BFH-Urteile in BFHE 234, 519, BStBl II 2014, 76, Rz 24ff., 34; in BFHE 234, 531, BStB1 II 2014, 81, Rz 24ff.; in BFH/NV 2013, 266, Rz 40f; BFH-Beschluss in BFH/NV 2017, 922, Rz 5, jeweils m.w.N, and the case-law respectively cited.

13 BFH-Urteile in BFHE 234, 519, BSt1 II2014, 76, Rz 33 ff.; in BFH/NV 2013, 266, Rz 40f.; in BFH/NV 2014, 1097, Rz 14;BFH-Beschlüsse in BFH/NV 2014, 914, Rz 6; in BFH/NV 2017, 922, Rz 5. According to the order for reference, it is now 31 July of the following year.

14 BFH-Urteile in BFHE 234, 531, BStB1 II 2014, 81, Rz 36 f; in BFH/NV 2012, 808, Rz, 18.

15 For example, judgment of 22 March 2012, *Klub* (C?153/11, EU:C:2012:163, paragraphs 38 and 39, and the case-law cited).

16 For example, judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C?8/17, EU:C:2018:249, paragraphs 30 to 33 and the case-law cited). See also, for example, judgments of 12 July 2012, *EMS-Bulgaria Transport* (C?284/11, EU:C:2012:458, paragraphs 60 to 63), and of 15 November 2017, *Geissel and Butin* (C?374/16 and C?375/16, EU:C:2017:867, paragraph 40).

17 Judgment of 23 April 2009, *Puffer* (C?460/07, EU:C:2009:254, paragraph 39 and the case-law cited). See also, for example, judgments of 16 February 2012, *Eon Aset Menidjmunt* (C?118/11, EU:C:2012:97, paragraph 53), and of 9 July 2015, *Trgovina Prizma* (C?331/14, EU:C:2015:456, paragraph 20).

18 Opinion of Advocate General Kokott in *Gmina Ryjewo* (C?140/17, EU:C:2018:273, point 28), referring to judgment of 11 July 1991, *Lennartz* (C?97/90, EU:C:1991:315, paragraphs 8 and 9); and judgments of 28 February 2018, *Imofloresmira – Investimentos Imobiliários* (C?672/16, EU:C:2018:134, paragraph 35), and of 30 March 2006, *Uudenkaupungin kaupunki* (C?184/04, EU:C:2006:214, paragraph 38).

19 For example, judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C?516/14, EU:C:2016:690, paragraph 40), referring to judgment of 22 October 2015, *PPUH Stehcemp* (C?277/14, EU:C:2015:719, paragraph 28).

20 This element not addressed directly in the case file. However, it is not in dispute that both E and Z paid input tax on the goods in question.

21 For example, judgment of 8 March 2001, *Bakcsi* (C?415/98, EU:C:2001:136, paragraph 27). In the context of land, see judgment of 9 July 2015, *Trgovina Prizma* (C?331/14, EU:C:2015:456, paragraph 21).

22 Judgment of 4 October 1995, *Armbrecht* (C?291/92, EU:C:1995:304, paragraph 28).

23 Judgment of 22 March 2012, *Klub* (C?153/11, EU:C:2012:163, paragraph 38 and the case-law cited).

24 For example, judgment of 18 July 2013, *Medicom and Maison Patrice Alard* (C?210/11 and C?211/11, EU:C:2013:479, paragraph 24).

25 Article 13b of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) (OJ 2011 L 77, p. 1), as amended by Council Implementing Regulation (EU) No 1402/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services (OJ 2013 L 284, p. 1). See further, for example, judgment of 15 November 2012, *Leichenich* (C?532/11, EU:C:2012:720).

26 On the importance of apportionment with respect to mixed-use assets, see judgment of 8 May 2019, *Zwi?zek Gmin Zag??bia Miedziowego* (C?566/17, EU:C:2019:390).

27 Judgment of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 20),

28 Ibid., referring to judgments of 29 November 2012, *Gran Via Moine?ti* (C?257/11, EU:C:2012:759, paragraph 27), and of 22 March 2012, *Klub* (C?153/11, EU:C:2012:163, paragraph 36 and the case-law cited).

29 For example, judgment of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614, paragraph 44).

30 Judgment of 12 July 2012, *EMS-Bulgaria Transport* (C?284/11, EU:C:2012:458, paragraphs 65 to 70). See further, for example, judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C?8/17, EU:C:2018:249, paragraph 39), referring to judgment of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614, paragraph 52 and the case-law cited). See also recently judgments of 26 April 2018, *Zabrus Siret* (C?81/17, EU:C:2018:283, paragraphs 32 to 34 and 49 to 51), and of 2 July

2020, *Terracult*, C?835/18, EU:C:2020:520, paragraphs 37 and 38).

31 Judgment of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 21), referring to judgment of 22 March 2012, *Klub* (C?153/11, EU:C:2012:163, paragraphs 40 and 41). See also, for example, judgment of 8 March 2001, *Bakcsi* (C?415/98, EU:C:2001:136, paragraph 29).

32 Judgment of 25 July 2018, *Gmina Ryjewo* (C?140/17, EU:C:2018:595, paragraph 47).

33 Point 30 above.

34 See further point 58 below.

35 *Gmina Ryjewo* (paragraph 54).

36 Judgment of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 23).

37 Ibid., paragraph 27, referring to judgment of 29 October 2009, *AB SKF* (C?29/08, EU:C:2009:665, paragraph 57). As the Court observed in its judgment of 16 February 2012, *Eon Aset Menidjmunt* (C?118/11, EU:C:2012:97, paragraphs 45 and 47 and the case-law cited), 'the criterion relating to the use of goods or services for the purposes of transactions within the scope of the undertaking's economic activity varies according to whether a service or capital goods are being acquired' (paragraph 45). The right to deduct arises in all events 'where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies' (paragraph 47). See also on the existence of the requisite link, judgment of 8 May 2019, *Zwi?zek Gmin Zag??bia Miedziowego* (C?566/17, EU:C:2019:390, paragraph 27 and the case-law cited).

38 Case E is indeed similar to that considered by the Court in the judgment of 21 April 2005, *HE* (C?25/03, EU:C:2005:241, see particularly paragraph 52).

39 Judgment of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 29), referring to judgment of 21 February 2013, *Becker* (C?104/12, EU:C:2013:99, paragraphs 22, 23 and 33).

40 With respect to the building of the office and the acquisition of the photovoltaic energy system, it does not appear from the case file that either E or Z were acting in a private capacity. See, for example, judgment of 9 July 2015, *Trgovina Prizma* (C?331/14, EU:C:2015:456, paragraph 21 and the case-law cited).

41 BFH-Urteile in BFHE 234, 531, BStB1 II 2014, 81, Rz23; in BFH/NV 2013, 266, Rz 37; BFH-Beschluss vom 20.09.2012 – VB 109/11, BFH/NV 2013, 98, Rz 3.

42 It is to be noted, however, that Member State rules of evidence must not undermine the effectiveness of EU law and must be consistent with the rights guaranteed by EU law, in particular by the Charter of Fundamental Rights of the European Union. See e.g. judgment of 4 June 2020, *C.F. (Tax audit)* (C?430/19, EU:C:2020:429, paragraph 45), referring to judgment of 16 October 2019, *Glencore Agriculture Hungary* (C?189/18, EU:C:2019:861, paragraph 37).

43 As pointed out in the written observations of the Federal Republic of Germany, the Court so held in its judgment of 11 July 1991, *Lennartz* (C?97/90, EU:C:1991:315, paragraph 26).

44 Judgment of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 36), referring to judgment of 11 July 1991 *Lennartz* (C?97/90, EU:C:1991:315, paragraphs 8 and 20).

45 For example, judgment of 30 March 2006, *Uudenkaupungin kaupunki* (C?184/04,

EU:C:2006:214, paragraph 26).

46 For example, judgment of 19 October 2017, *Paper Consult* (C?101/16, EU:C:2017:775, paragraph 40).

47 Judgment of 25 July 2018 (C?140/17, EU:C:2018:595, paragraphs 54 and 55).

48 Judgment of 7 March 2018, *Dobre* (C?159/17, EU:C:2018:161, paragraph 38).

49 See judgment of 7 March 2018, *Dobre* (C?159/17, EU:C:2018:161, paragraph 32).

50 Ibid., paragraph 34.

51 Ibid., paragraph 35, referring to the judgment of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614, paragraph 46).

52 Point 44 above.

53 Judgment of 12 September 2018, *Siemens Gamesa Renewable Energy România* (C?69/17, EU:C:2018:703, paragraph 43).

54 Judgment of 7 August 2018, *TGE Gas Engineering* (C?16/17, EU:C:2018:647, paragraph 46 and the case-law cited). See similarly, for example, judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C?516/14, EU:C:2016:690, paragraph 42 and the case-law cited).

55 Judgment of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614, paragraph 31).

56 Ibid., paragraph 32 and the case-law cited. In the judgment of 27 March 2019, *Mydibel* (C?201/18, EU:C:2019:254, paragraph 22), the Court observed that ‘Article 187 of [the VAT Directive] describes certain detailed rules for the adjustment of VAT deduction as regards capital goods. In particular, it is clear from Article 187(1) of that directive that, as regards such goods, adjustment is spread over five years and that period may be extended up to 20 years for immovable property acquired as capital goods.’

57 Ibid., paragraphs 33 to 38 and the case-law cited. See also e.g. judgment of 26 April 2018, *Zabrus Siret* (C?81/17, EU:C:2018:283, paragraph 38) and the judgment of 2 July 2020, *Terracult* (C?835/18, EU:C:2020:520, paragraph 32).

58 Judgments of 12 July 2012, *EMS-Bulgaria Transport* (C?284/11, EU:C:2012:458, paragraphs 52 and 58), and of 26 April 2018, *Zabrus Siret* (C?81/17, EU:C:2018:283, paragraphs 38 and 41). See also, for example, the judgment of 2 July 2020, *Terracult* (C?835/18, EU:C:2020:520, paragraph 32).

59 This is subject to the principle that Member State time limits cannot ‘be used in such a way that they would have the effect of systematically undermining the right to deduct VAT’. See judgment of 21 March 2018, *Volkswagen* (C?533/16, EU:C:2018:204, paragraph 48).

60 Judgment of 12 September 2018, *Siemens Gamesa Renewable Energy România* (C?69/17, EU:C:2018:703, paragraph 37), referring to judgments of 9 July 2015, *Salomie and Oltean* (C?183/14, EU:C:2015:454, paragraph 63), and of 7 March 2018, *Dobre* (C?159/17, EU:C:2018:161, paragraph 34). See also, for example, judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C?516/14, EU:C:2016:690, paragraphs 47 and 48).

61 Judgment of 8 May 2019, *EN.SA.* (C?712/17, EU:C:2019:374, paragraph 33).

62 Judgment of 12 July 2012, *EMS-Bulgaria Transport* (C?284/11, EU:C:2012:458, paragraphs 65 to 70). See also judgment of 26 April 2018, *Zabrus Siret* (C?81/17, EU:C:2018:283, paragraph 51). C.f. judgment of 19 October 2017, *Paper Consult* (C?101/16, EU:C:2017:775, paragraph 43).

63 Judgment of 12 July 2012, *EMS-Bulgaria Transport* (C?284/11, EU:C:2012:458, paragraph 74). See also judgment of 19 October 2017, *Paper Consult* (C?101/16, EU:C:2017:775, paragraph 56), where the Court held that while ‘failure to file tax declarations laid down by law may be regarded as indicative of evasion, it does not prove irrefutably that VAT evasion has occurred.’

64 Judgment of 26 April 2018, *Zabrus Siret* (C?81/17, EU:C:2018:283, paragraph 49).

65 Judgment of 12 July 2012, *EMS-Bulgaria Transport* (C?284/11, EU:C:2012:458, paragraph 75).

66 Judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C?8/17, EU:C:2018:249, paragraph 39), referring to judgment of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614, paragraph 52).

67 It is for the taxable person seeking deduction of VAT to establish that he or she meets the conditions for eligibility. The tax authorities may thus require the taxable person himself or herself to produce the evidence they consider necessary for determining whether or not the deduction requested should be granted. See judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C?516/14, EU:C:2016:690, paragraph 46 and the case-law cited).

68 This is different from the situation I considered in my Opinion in *V?dan* (C?664/16, EU:C:2018:346, see in particular point 80) in which retention of invoices prevented the production of conclusive evidence that the substantive requirements had been satisfied.

69 Judgment of 26 April 2017, *Farkas* (C?564/15, EU:C:2017:302, paragraphs 42 to 43 and the case-law cited). See also, for example, judgments of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C?516/14, EU:C:2016:690, paragraphs 37 to 39); of 26 April 2018, *Zabrus Siret* (C?81/17, EU:C:2018:283, paragraphs 32 to 34); and of 21 November 2018, *Fontana* (C?648/16, EU:C:2018:932, paragraphs 39 to 40).

70 Judgment of 21 November 2018, *Fontana* (C?648/16, EU:C:2018:932, paragraph 35 and the case-law cited).

71 Judgment of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614, paragraph 49 and the case-law cited).

72 For example, judgment of 4 March 2020, *Telecom Italia* (C?34/19, EU:C:2020:148, paragraph 60 and the case-law cited).