Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 April 2018 [1]

Case C-140/17

Szef Krajowej Administracji Skarbowej
v
Gmina Ryjewo

(Request for a preliminary ruling
from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland))

(Request for a preliminary ruling — Common system of value added tax — Deduction of input tax — Acquisition of capital goods — Allocation of the capital goods where their intended economic use remains uncertain — Original use for a (public authority) activity which does not confer entitlement to deduct input tax — Subsequent use for a taxable activity (change of use) — Subsequent deduction of input tax by means of an adjustment of the deduction)

I. Introduction

1. In these proceedings, the Court must decide whether a subsequent deduction of input tax remains possible even where the taxable person did not expressly allocate the goods to his business at the time of acquisition because at that time their subsequent use was not yet specifically foreseeable. This question arises here [2] in the case of a municipality, which at the time of acquisition was also registered as a taxable person and which used the goods acquired to generate taxable revenues only four years later (but still within the period for the adjustment of input tax).

2. If the sequence of events were reversed, the municipality would indisputably have had a right to deduct input tax. Such a deduction would have been adjusted subsequently simply by taxing the application. May, however, a taxable person now be charged VAT depending on the chance chronological sequence in which the capital goods are used?

3. In the case of a natural person who has acquired goods exclusively for his private use, the Court has — since the judgment in *Lennartz* [3] — ruled against a deduction of input tax, even where the goods are subsequently put to economic use. The legal situation has, however, changed in the meantime, such that it is necessary to clarify whether that case-law may be continued. Does it likewise apply, as the case may be, where a municipality was registered as a taxable person at the time of acquisition and did not expressly allocate the goods to its public authority remit? Is it relevant in that connection that a municipality is to be regarded as a non-taxable person only subject to the conditions laid down in Article 13 of the VAT Directive?

1 Original language: German.

2 Similar cases include: order of 5 June 2014, *Gmina Międzyzdroje* (C-500/13, EU:C:2014:1750) and judgment of 2 June 2005, *Waterschap Zeeuws Vlaanderen* (C-378/02, EU:C:2005:335).

3 Judgment of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315).

II. Legal context

A. EU law

4. Article 13 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [4] ('the VAT Directive') establishes when bodies governed by public law are not to be regarded as taxable persons:

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

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

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

5. Article 167 of the VAT Directive provides:

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

6. Article 168 of the VAT Directive contains the following provision:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person; …'

7. Article 184 of the VAT Directive concerns the adjustment of the initial deduction:

'The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.'

8. Article 187 of the VAT Directive governs the adjustment period:

'1. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured.

Member States may, however, base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years.

4 OJ 2006 L 347, p. 1.

2. The annual adjustment shall be made only in respect of one-fifth of the VAT charged on the capital goods, or, if the adjustment period has been extended, in respect of the corresponding fraction thereof.

The adjustment referred to in the first subparagraph shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired, manufactured or, where applicable, used for the first time.'

B. Polish law

9. Article 15 of the Polish Law on the tax on goods and services ('the Law on VAT')[5] governs which persons are liable to tax:'1. "Taxable persons" shall mean legal persons, organisational entities without legal personality and natural persons independently pursuing an economic activity as referred to in paragraph 2, regardless of the purpose or result of such activity.

2. Economic activities shall comprise all activities of producers, traders and service providers, including economic operators which extract natural resources and farmers, as well as the activities of the professions. Activities consisting in the exploitation of goods or intangible assets and rights on a continuing basis for the purpose of obtaining income therefrom shall, in particular, be regarded as economic activity. …

6. "Taxable persons" shall not include public authorities and offices which support public authorities with regard to the tasks established by specific provisions, for the accomplishment of which they have been appointed, with the exception of activities carried out by them under private law contracts.'

10. Article 86(1) of the Law on VAT provides:

'In so far as goods and services are used to conduct taxable transactions, a taxable person within the meaning of Article 15 shall have the right to deduct the amount of input tax from the amount of tax due, subject to Articles 114, 119(4), 120(17) and (19) and 124.'

11. Article 91 of the Law on VAT contains provisions on the adjustment of input tax:

'2. In the case of goods and services which are treated by the taxable person as forming part of his depreciable fixed assets or intangible assets and rights under the provisions applying to income tax, and also land and rights of perpetual usufruct over land …, the taxable person shall effect the adjustment referred to in paragraph 1 over the five subsequent years, and, in the case of land and rights of perpetual usufruct over land, over ten years, from the year in which they were surrendered for use. …

7. The provisions of paragraphs 1 to 6 shall apply *mutatis mutandis* where the taxable person … did not have the right to deduct the whole amount of the input tax due on the goods and services used by that taxable person, and that right to deduct the input tax due on those goods or services was subsequently amended.'

5 Ustawa o podatku od towarów i usług of 11 March 2004 (consolidated text, *Dziennik Ustaw* 2011, No. 177, item 1054, as amended).

III. Dispute in the main proceedings

12. The dispute in the case pending before the referring court concerns whether the municipality of Ryjewo ('the municipality') is entitled, at a later date, to claim a proportional deduction of input tax in relation to its investment expenditure. The facts underlying the dispute were that the municipality had a local community centre built and initially used it for governmental purposes. The construction costs included VAT.

13. At the time of construction, the municipality was registered as a taxable person for the purposes of VAT and submitted corresponding tax returns. However, a deduction of input tax was not initially claimed because the community centre was not used for taxable transactions. In that connection, nor was the community centre constructed expressly designated as forming part of the municipality's 'business assets'.

14. Four years after completion of the community centre, the nature of its use was changed, such that the municipality now also uses it for taxed transactions. In the municipality's view, it is entitled, with effect from the start of the rental of the cultural centre for a fee, to deduct part of the input tax arising from the invoices documenting the expenditure incurred in the centre's construction by means of the multi-annual adjustment provided for in Article 91(7) and (7a) in conjunction with Article 91(1) and (2) of the Polish Law on VAT.

15. However, the tax authority found that the municipality did not have the right to deduct VAT from the expenditure incurred in the construction and operation of the cultural centre. The Minister for Finance was of the view that the goods and services acquired for investment purposes — that is the construction of the community centre, which was to be transferred free of charge to the Municipal Cultural Centre — were not acquired in the context of an economic activity, and therefore the municipality did not act as a taxable person for the purposes of VAT. In the minister's opinion, the subsequent use of the capital goods for an economic activity does not mean that the municipality acted as a taxable person at the time of acquisition.

16. The court of first instance took the opposing view. It found that it could not be ruled out on the basis of the facts of the present case that, at the time of the acquisition of the goods and services procured for investment purposes, the municipality intended to use those goods at a later date as part of its economic activity. It found that the initial use of the goods and services acquired by the taxable person for purposes not subject to taxation does not deprive that person of the right to deduct the input tax subsequently if the intended use of those goods and services were to change and they were to be used for taxable purposes.

17. The Minister for Finance lodged an appeal on a point of law against the judgment of the regional administrative court. The Supreme Administrative Court in Poland, the court having jurisdiction in the matter, has now decided to initiate a preliminary ruling procedure.

IV. Procedure before the Court

18. The Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) has referred the following questions to the Court:

'(1) In the light of Articles 167, 168 and 184 et seq. of the VAT Directive and the principle of neutrality, does a municipality have the right to deduct (by effecting an adjustment) input tax on its investment expenditure in the case where:

– in the initial period after production (acquisition), the capital goods were used for the purposes of a non-taxable activity (in connection with municipality's performance of the tasks of a public authority within its area of responsibility); and

– the use to which the capital goods are put has changed and they will in future be used by the municipality also to carry out taxable transactions?

(2) Is it relevant to the answer to the first question that, at the time when the capital goods were produced or acquired, the municipality's intention to use those goods in future to carry out taxable transactions was not indicated clearly?

(3) Is it relevant to the answer to the first question that the capital goods will be used for the purpose of carrying out both taxable and non-taxable transactions (in connection with the performance of the tasks of a public authority) and that it is not possible to ascribe specific investment expenditure to one of the abovementioned transaction categories?'

19. In the proceedings before the Court, the municipality of Ryjewo, the Republic of Poland, and the European Commission submitted written observations on the questions referred. The municipality, the tax authority of the Republic of Poland, the Republic of Poland, and the European Commission attended the hearing held on 11 January 2018.

V. Legal assessment

20. The questions may be examined together: they all seek to determine whether a municipality can still claim a proportional deduction of input tax at a later date if the use of the community centre constructed has changed such that it is now used to provide taxable and taxed services.

A. Article 168 of the VAT Directive as an expression of the principle of neutrality

21. In accordance with the wording of Article 168(a) of the VAT Directive, a taxable person is to be entitled, 'in so far as the goods … are used for the purposes of the taxed transactions of a taxable person', to deduct the VAT in respect of supplies to him of goods carried out by another taxable person. All those requirements are satisfied here.

22. By contrast, where the deduction of input tax is refused, the taxable use of goods remains liable to VAT. This is clearly incompatible with the concept of neutrality in VAT law. According to the case-law of the Court, the common system of VAT ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject to

VAT.[6] The Court has consistently held that the principle of neutrality in VAT law therefore requires that the trader, as tax collector on behalf of the State, is in principle to be relieved of the final VAT burden,[7] inasmuch as the purpose of the economic activity itself is to achieve sales revenue that is (in principle) subject to tax.[8] This is the case here.

23. In addition, according to the case-law of the Court, the principle of fiscal neutrality inherent in the common system of VAT precludes the double taxation of a taxable person's business activities.[9] The failure to provide relief from the VAT burden associated with the acquisition of goods whilst at the same time taxing the sales revenue achieved using those goods ultimately represents double taxation. This is likewise an argument in favour of the ability to effect a subsequent deduction of input tax in the present situation.

24. Taking account of the now altered legal situation, that outcome — which is consistent with the principle of neutrality — is no longer necessarily at odds with the previous case-law of the Court.

B. Is Article 167 of the VAT Directive an exception to the principle of neutrality?

1. Previous case-law on Article 20 of the Sixth Directive

25. In application of Article 20(2) of Sixth Directive 77/388/EEC,[10] the Court had previously accepted that a person who acquires goods for private purposes and puts the goods to economic use only later is refused the right to deduct input tax.[11] The Court also expressly extended this — not entirely undisputed[12] — case-law to bodies governed by public law.[13]

26. However, in its settled case-law, the Court also points out that a person who acquires goods for the purposes of an economic activity within the meaning of Article 9 also does so as a taxable person where he does not immediately put those goods to use for that economic activity.[14] A private use of goods over a period of 23 months did not prevent a deduction of input tax in full.[15] However, in that case, the person concerned had stated his intention to put the goods to economic use at a later date ('allocation decision') at the time of their acquisition.

6 Judgments of 28 February 2018, *Imofloresmira — Investimentos Imobiliários* (C-672/16, EU:C:2018:134, paragraph 38); of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 3 March 2005, *Fini H* (C-32/03, EU:C:2005:128, paragraph 25 and the case-law cited); and of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraph 19).

7 Judgments of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 25), and of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 39).

8 See the judgments of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 51); of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 57); and my Opinion in *Di Maura* (C-246/16, EU:C:2017:440, point 42).

9 Judgment of 2 July 2015, *NLB Leasing* (C-209/14, EU:C:2015:440, paragraph 40); see also, to that effect, judgments of 22 March 2012, *Klub* (C-153/11, EU:C:2012:163, paragraph 42), and of 23 April 2009, *Puffer* (C-460/07, EU:C:2009:254, paragraph 46).

10 Sixth Directive of 17 May 1977 on the harmonization 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, Article 20(2) of which states: 'The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured.'

11 Judgments of 19 July 2012, *X* (C-334/10, EU:C:2012:473, paragraph 17); of 23 April 2009, *Puffer* (C-460/07, EU:C:2009:254, paragraph 44); of 6 May 1992, *de Jong* (C-20/91, EU:C:1992:192, paragraph 17); and of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315, paragraphs 8, 9 and 17).

12 Extensive criticism by H. Stadie in Rau/Dürrwächter, UStG, § 15, Note 1860 et seq. (as at: 170th update — January 2017).

13 Judgment of 2 June 2005, *Waterschap Zeeuws Vlaanderen* (C-378/02, EU:C:2005:335, paragraphs 39 and 40).

14 Judgments of 19 July 2012, *X* (C-334/10, EU:C:2012:473, paragraph 31); of 22 March 2012, *Klub* (C-153/11, EU:C:2012:163, paragraphs 44 and 52); and of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315, paragraph 14).

15 Judgment of 19 July 2012, *X* (C-334/10, EU:C:2012:473, paragraph 27).

27. There are also judgments in which a subsequent deduction of input tax was refused.[16] However, those judgments all concerned the legal situation as governed by Sixth Directive 77/388/EEC until the entry into force of the VAT Directive. In the relevant provisions of Article 20(2) of Sixth Directive 77/388/EEC, the Directive in fact stated that an adjustment of the deduction relates to the year 'in which the goods were acquired or manufactured'. It is understandable in that regard that the Court — despite the contrary view expressed by Advocate General Jacobs[17] — found in cases such as those that a subsequent deduction cannot be made pursuant to Article 20 of Sixth Directive 77/388/EEC.[18]

2. Origin of the right of deduction

28. Article 167 of the VAT Directive is the starting point for this case-law of the Court. Under Article 167 of the VAT Directive, a right of deduction is to arise at the time the deductible tax becomes chargeable.[19] According to the case-law of the Court, the capacity in which a person is acting at that time is a crucial factor in determining the existence of the right to deduct.[20] The deductible tax becomes chargeable when the supply is effected (Article 63 of the VAT Directive), and thus the acquisition of the goods is decisive.

29. Conversely, where the goods are not used for the taxable person's economic activities within the meaning of Article 9 of the VAT Directive but are used by him 'for his private consumption', no right to deduct can arise.[21] The result of a joint reading of Article 167 and Article 9 of the VAT Directive is that a person who becomes a taxable person only later and who uses the 'privately' acquired goods only at a later date with a view to achieving sales revenue that is subject to tax for the purposes of Article 9 of the VAT Directive cannot, in the Court's view, exercise a right of deduction subsequently.

30. However, if that person acquires the goods as a taxable person, he may claim a deduction of input tax, and indeed a deduction in full, at the time of acquisition. In accordance with the case-law of the Court, a person who incurs initial investment expenditure with the intention, confirmed by objective evidence, of engaging in economic activity independently within the meaning of Article 9 of the VAT Directive is deemed to be a taxable person.[22]

31. It is in fact immaterial that the goods are subsequently used only to an insignificant degree for transactions conferring an entitlement to deduct input tax. Account is taken of such facts only later pursuant to Article 184 et seq. or Article 16 and Article 26 of the VAT Directive, which correct the initial (excessive) deduction.[23] In particular where goods acquired and from which input tax was deducted are subsequently used for purposes other than those of the taxable person's business, those goods are 'applied for private use' (Articles 16 and 26 of the VAT Directive). Such application gives rise to a subsequent taxation of this use for purposes other than those of the taxable person's business.

16 Judgments of 2 June 2005, *Waterschap Zeeuws Vlaanderen* (C-378/02, EU:C:2005:335), and of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315).

17 Opinion of Advocate General Jacobs in *Charles and Charles-Tijmens* (C-434/03, EU:C:2005:48, points 89 and 90).

18 Judgment of 23 April 2009, *Puffer* (C-460/07, EU:C:2009:254, paragraph 44).

19 See also judgment of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315).

20 As expressly held in the judgments of 28 February 2018, *Imofloresmira — Investimentos Imobiliários* (C-672/16, EU:C:2018:134, paragraph 35); of 30 March 2006, *Uudenkaupungin kaupunki* (C-184/04, EU:C:2006:214, paragraph 38); and of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315, paragraphs 8 and 9).

21 As expressly held in the judgment of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315, paragraph 9).

22 As expressly held in the judgments of 29 November 2012, *Gran Via Moineşti* (C-257/11, EU:C:2012:759, paragraph 27); of 8 June 2000, *Breitsohl* (C-400/98, EU:C:2000:304, paragraph 34); and of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraph 47); see also in this regard my Opinion in *X* (C-334/10, EU:C:2012:108, point 81).

23 See also judgments of 29 November 2012, *Gran Via Moineşti* (C-257/11, EU:C:2012:759, paragraph 28), and of 8 June 2000, *Breitsohl* (C-400/98, EU:C:2000:304, paragraph 35).

3. No express provision governing capital contributions

32. The VAT Directive does not, however, contain any express provision governing the reverse case of a 'capital contribution', whereby 'privately acquired' goods are used for economic activities only at a later date.

33. This gives rise to tension with the fundamental principle of neutrality (see, in this regard, point 22 above), to which Advocate General Jacobs [24] has already drawn attention. Different legal consequences ensue depending on the chronological sequence of the goods' economic use, even where the time frame of the economic use and the VAT due as a result are identical. However, Article 184 et seq. of the VAT Directive makes clear that, in the case of a change between tax-exempt and taxable activity, the chronological sequence of the use of the goods acquired is not the determining factor.

34. Such different treatment of undertakings with — aside from their chronological sequence — identical taxable transactions is likewise difficult to justify in the light of Article 20 of the Charter. [25]

4. Consideration of the amended wording of the VAT Directive

35. To my knowledge, the Court has not yet expressly expressed a view on the issue of a subsequent deduction of input tax in the case of the 'capital contribution' of goods not acquired as a taxable person in the light of the new wording of the second subparagraph of Article 187(2) of the VAT Directive.

36. The amended wording [26] of the second subparagraph of Article 187(2) of the VAT Directive no longer takes into account simply the time of acquisition or manufacture, but now also takes account of the first-time use following acquisition ('or, where applicable, used for the first time'). In my view, this covers in particular those cases in which the taxable person had not yet allocated the goods to his economic activity and was thus not yet able to claim a deduction of input tax (which is generally in full and immediate) on their acquisition.

37. According to the wording of the Directive, in such circumstances the date of first-time use forms the basis for subsequent input tax adjustments, a necessary requirement of which is a (subsequent) deduction of input tax when the goods are used. Indeed, if, at the time of acquisition, the acquiring party had already had the corresponding intended use in mind, then a right of deduction would have existed from the very outset and the question of the subsequent deduction of input tax by means of adjustment would not arise. The VAT Directive therefore now expressly assumes an opportunity to effect a subsequent allocation of goods which have already been acquired by putting them to economic use later.

38. Accordingly, under the new legal situation, with regard to a municipality which — in a case comparable to the present one — used a sports hall initially for the purposes of public authority activities and subsequently for taxable transactions, the Court did not object to a subsequent pro rata deduction of input tax. [27]

24 Opinion of Advocate General Jacobs in *Charles and Charles-Tijmens* (C-434/03, EU:C:2005:48, point 75 et seq.).

25 See judgment of 28 February 2018, *Imofloresmira — Investimentos Imobiliários* (C-672/16, EU:C:2018:134, paragraph 44). In that case, the Court expressly ruled that the principle of fiscal neutrality precludes unjustified differences between undertakings with the same profile and carrying on the same activity as regards the tax treatment of identical investment activities.

26 Article 20(2) of Sixth Directive 77/388/EEC stated merely that an adjustment was to be made in relation to the year 'in which the goods were acquired or manufactured'.

27 Order of 5 June 2014, *Gmina Międzyzdroje* (C-500/13, EU:C:2014:1750, paragraph 19 et seq.).

39. Given the initially and specifically planned use for non-economic purposes, there is no immediate right to deduct input tax. However, if the use is subsequently changed within the period for input tax adjustment, then the wording of Article 184 et seq. of the VAT Directive allows a precise, subsequent adjustment of the input tax deduction *ex nunc* and per annum in the corresponding amount with effect from the change of use. If the scale of the economic use subsequently changes once more, an appropriate adjustment may likewise be made pursuant to Article 184 et seq. of the VAT Directive.

40. Such a subsequent adjustment of the input tax not deducted is also consistent with the spirit and purpose of Article 184 et seq. of the VAT Directive. This is because, as the Court has already held, the system of adjustment of deductions (Articles 184 and 185 of the VAT Directive) is an essential element of the system introduced by the VAT Directive in that its purpose is to ensure the accuracy of the deductions and hence the neutrality of the tax burden.[28] Only a subsequent adjustment of that kind entails relief — which is consistent with the principle of neutrality — of the VAT burden borne by the taxable person by virtue of the acquisition of the goods.

41. Furthermore, such an adjustment also prevents the unequal treatment of taxable persons depending on the chronological order of the economic and non-economic use of the goods. This interpretation is thus likewise supported by Article 20 of the Charter. Ultimately, both an unjustified advantage and an unjustified disadvantage for a taxable person are thereby avoided.

42. Both in the light of the tax revenue and having regard to the relief granted for the economic use of goods, a subsequent amendment of the input tax deduction pursuant to Article 184 et seq. of the VAT Directive is also the more precise approach as compared with a deduction of input tax in full on the basis of merely planned (partial) economic use. This is because this does not result in any questionable pre-financing of undertakings[29] by means of the deduction of input tax solely on account of a (planned) minimal economic use and a full allocation of the goods on that basis. It was not without good reason that financing models involving immovable property, which was predominantly used for residential purposes, were subsequently eliminated as far as possible by the EU legislature by means of Article 168a of the VAT Directive.

C. In the alternative: criteria for action as a taxable person

43. Should the Court disagree with my interpretation of Article 184 et seq. (in particular, the second subparagraph of Article 187(2)) of the VAT Directive, the question which must then be decided on here is as follows: how is the assessment whether a municipality acquires the supply of goods or services liable to VAT as a taxable or non-taxable person to be made if it does not expressly announce a decision in that regard at the time of acquisition?

44. The question whether a taxable person has acquired goods acting as such, that is, for the purposes of his economic activity within the meaning of Article 9 of the VAT Directive, is a question of fact which must be determined in the light of all the circumstances of the case, including the nature of the goods concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person's economic activity.[30]

28 Order of 5 June 2014, *Gmina Międzyzdroje* (C-500/13, EU:C:2014:1750, paragraph 24).

29 This effect occurs because the adjustment pursuant to Article 184 et seq. as well as Article 26(1)(a) of the VAT Directive is made only on a proportional basis per annum, and thus the trader is ultimately granted a tax-free loan with regard to that VAT.

30 Judgment of 16 February 2012, *Eon Aset Menidjmunt* (C-118/11, EU:C:2012:97, paragraph 58); see also to that effect: judgments of 8 March 2001, *Bakcsi* (C-415/98, EU:C:2001:136, paragraph 29), and of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315, paragraph 21).

1. Can an allocation decision be made despite a lack of intention?

45. For an immediate deduction of input tax in full to be made, the Court requires an intention, confirmed by objective evidence, to carry on an economic activity independently — within the meaning of Article 9 of the VAT Directive — with the capital goods. [31]

46. In the present case, the municipality did not yet know at the time of acquisition whether and to what extent it would also use the community centre for economic purposes. It could not, therefore, declare any such intention. In that context, a taxable person would thus be required to do something impossible. At most, this would give rise to the questionable incentive to ensure the allocation of those goods as forming part of business assets by making precautionary 'declarations of intent'.

47. The Court avoids this dilemma in *Gmina Międzyzdroje*, [32] in which the second subparagraph of Article 187(2) of the VAT Directive was applicable. In that case, whilst — as the Republic of Poland rightly submits — it does not expressly so acknowledge, the Court does, however, ultimately accept that a municipality has a subsequent right to a pro rata deduction of input tax in respect of investments in a sports hall, which was used to generate taxable rental revenue only a considerable time after its acquisition. In that judgment, the Court did not base its ruling on an allocation decision made at the time of acquisition. It rather found that the deduction of input taxes is linked to the collection of output taxes. [33]

2. Is allocation pursuant to Article 13 of the VAT Directive possible?

48. If, however, account cannot be taken of an intention at the time of acquisition, another criterion is then required. In that connection, regard may be had to Article 13 of the VAT Directive, in any event in the case of bodies governed by public law. The line of argument advanced by the municipality is, in essence, based on consideration of that provision, and the Commission also showed some sympathy for that approach at the hearing.

49. Article 13 of the VAT Directive starts from the assumption that bodies governed by public law are not to be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities. Such activities are activities carried out by those bodies under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators. [34]

50. The decisive factor would therefore be whether the municipality acted in the exercise of its public powers when it made the acquisition. It is likely that this can be assumed only in exceptional circumstances (for example, in a case of expropriation). As a rule, consumer goods are seldom supplied by a body governed by public law in the exercise of public powers. Accordingly, a municipality would in most cases be acting as a taxable person when acquiring goods.

51. I, however, find the line of argument involving Article 13 of the VAT Directive to be unconvincing. It is clear from the very wording of that article that, in respect of transactions in which they engage, bodies governed by public law are to be regarded as non-taxable persons under certain circumstances. The provision is therefore expressly focused on the output side (that is, the provision of supplies) and

31 As expressly held in the judgments of 8 June 2000, *Breitsohl* (C-400/98, EU:C:2000:304, paragraph 34), and of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraph 47); see also, in this regard, my Opinion in *X* (C-334/10, EU:C:2012:108, point 81).

32 Order of 5 June 2014, *Gmina Międzyzdroje* (C-500/13, EU:C:2014:1750).

33 Order of 5 June 2014, *Gmina Międzyzdroje* (C-500/13, EU:C:2014:1750, paragraph 19); see also judgment of 30 March 2006, *Uudenkaupungin kaupunki* (C-184/04, EU:C:2006:214, paragraph 24).

34 Judgment of 29 October 2015, *Saudaçor* (C-174/14, EU:C:2015:733, paragraph 70); see also, to that effect, judgment of 14 December 2000, *Fazenda Pública* (C-446/98, EU:C:2000:691, paragraphs 17 and 22).

not on the input side (that is, the acquisition of supplies). This is made even clearer by the second and third subparagraphs of Article 13(1) of the VAT Directive. Those provisions are concerned with distortions of competition (second subparagraph) and the negligible scale of activities (third subparagraph). Neither provision can be applied to the input side at the time of acquisition.

52. The spirit and purpose of Article 13 of the VAT Directive consists in favouring certain activities of bodies governed by public law [35] whenever and because they are performing tasks in the exercise of public powers. However, if this leads to significant distortions of competition, then pursuant to the second subparagraph of Article 13(1) of the VAT Directive, such economic activities remain taxable in principle, even where those activities are carried out in the exercise of public powers. To this extent, there is once again no favourable treatment.

53. In the present case, applying Article 13 of the VAT Directive to the acquisition would, admittedly, benefit the municipality. If, however, a municipality acquires goods in the exercise of public powers, this approach would potentially disadvantage it. In that situation, logically a deduction would have to be excluded even where the municipality carries out economic activities with the goods acquired as a public authority. However, pursuant to Article 168 of the VAT Directive, the decisive factor as far as the deduction of input tax is concerned is whether the acquisition was subject to VAT and the goods are used for taxable transactions. As Article 14(2)(a) of the VAT Directive makes clear, a taxable supply may also exist where the supplier transfers, by order made by or in the name of a public authority or in pursuance of the law (and is thus compelled by means of public powers), the ownership of property against payment of compensation.

54. Taken as a whole, Article 13 of the VAT Directive is thus silent on the question whether a body governed by public law acts as a taxable or non-taxable person when acquiring goods; it simply states whether it is to be regarded as a taxable person when supplying goods and services.

3. Presumed allocation in the case of a taxable person who later actually uses the goods for taxable transactions

55. If the Court at least shares my view that the lack of a provision governing capital contributions — by contrast to the inclusion of a rule providing for the taxation of applications for private use — is problematic in the light of the principles of neutrality and equal treatment, then it should at least take account of those principles by adopting a generous assessment of acquisition 'as a taxable person'.

56. In the situations in which judgment has been given to date, in which a subsequent deduction of input tax was refused, the purchaser of the goods was a non-taxable person at the time of acquisition (for instance in *Waterschap* [36]) or expressly invested the goods in his business only at a later date (as was the case in *Lennartz* [37]); in each scenario, the purchaser himself was therefore of the view that he had initially acquired them for private purposes. Those situations must be distinguished from that at issue here, since the purchaser is a taxable person who specifically did not make any express decision.

35 In this connection, the Court frequently refers to a *tax exemption* — judgments of 13 December 2007, *Götz* (C-408/06, EU:C:2007:789, paragraph 41); of 12 September 2000, *Commission* v *United Kingdom* (C-359/97, EU:C:2000:426, paragraph 55); and of 26 March 1987, *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraphs 20 and 21) — which is to be interpreted narrowly.

36 Judgment of 2 June 2005, *Waterschap Zeeuws Vlaanderen* (C-378/02, EU:C:2005:335).

37 Judgment of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315).

57. In the case of a taxable person who acquires goods which, by their nature, may also be used by him for economic purposes and who cannot yet rule out that those goods will be used some day within the period laid down in Article 187 of the VAT Directive to generate taxable revenue, it may, however, be presumed that, at the time of acquisition, he acquired the goods as a taxable person and with the intention that they may subsequently be put to economic use. This is in any event the case where that person has not expressly allocated those goods to his non-economic activities and thus removed them from the scope of VAT law.[38]

58. The amended wording of the second subparagraph of Article 187(2) of the VAT Directive, as compared with Sixth Directive 77/388/EEC (see, in this regard, in greater detail, point 36 and 37 above), is likewise an argument in favour of this approach, since that wording now also takes account of the goods' first-time use after acquisition ('or, where applicable, used for the first time').

59. Accordingly, taking into account the wording of the second subparagraph of Article 187(2) of VAT, the right to deduct input tax on acquisition can also arise on the basis merely of a potential intended use if that intention is later confirmed. However, given the initially, specifically planned use for non-economic purposes, the right exists at first merely in principle (and thus in the amount of EUR 0 only). If the use subsequently changes within the period for the input tax adjustments, Article 184 and 185 of the VAT Directive then allow a precise, subsequent adjustment of the input tax deduction *ex nunc* and per annum in the corresponding amount.

60. The presumption of such a potential intention of future use does not thus allow a taxable person to claim an immediate deduction of input tax, but merely gives the option of claiming a pro rata deduction at a later date, provided that the goods are still used for taxable purposes within the period for input tax adjustments. In this way, both an unjustified advantage and an unjustified disadvantage for a taxable person are also avoided.

VI. Conclusion

61. I therefore propose that the questions referred by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) be answered as follows:

Pursuant to Articles 167, 168, 184, 185 and the second subparagraph of Article 187(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and in the light of the principle of neutrality, a municipality has the right to deduct input tax on its investment expenditure by effecting an adjustment if it carries out taxable transactions with the investment. This is also the case where the capital goods produced or acquired were initially used for non-taxable purposes, but the use to which the capital goods are put has changed within the period provided for in Article 187 of the VAT Directive and the goods are now also used by the municipality to carry out taxable transactions.

In that connection, it is irrelevant whether, at the time of the production or acquisition of goods, an intention was indicated to use those goods in future to carry out taxable transactions.

Nor is it relevant to the answer to the first question that the capital goods are used for the purpose of carrying out both taxable and non-taxable transactions or that it is not possible to ascribe specific investment expenditure to one of the abovementioned transaction categories. This is relevant solely to the question of the apportionment of the amount of the input tax deduction and not to the input tax adjustment as such.

38 This is, in the Court's view, the consequence of an acquisition as a non-taxable person – see, inter alia, judgment of 15 September 2016, *Landkreis Potsdam-Mittelmark* (C-400/15, EU:C:2016:687, paragraph 33).