Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 March 2016[1]

Case C-229/15

Minister Finansów
v
Jan Mateusiak

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

(Tax legislation — VAT — Article 18(c) of Directive 2006/112/EC — Taxation of retention of goods on cessation of the economic activity — Effect of expiry of the adjustment period for deductions under Article 187(1) of Directive 2006/112)

I – **Introduction**

1. This Polish request for a preliminary ruling concerns a very particular chargeable event for VAT. If a taxable person ceases to carry out his economic activity, Member States can tax the business assets still retained at that time. This is provided that the taxable person previously acquired the goods concerned, forming part of the business assets, exempt from VAT by virtue of the deduction of input tax. This taxation is intended avoid a situation in which a taxable person can in effect make private use of goods exempt from VAT.

2. In the main proceedings, a taxable person is planning to cease his economic activity. His business assets include part of a building which he constructed some time ago and on which he claimed deduction of input tax. The taxable person has now raised the question whether taxation of that part of the building is precluded on the ground that its construction took place so long ago. In fact, the period allowed for subsequent adjustment of the deduction in respect of the acquisition of the part of the building concerned has already expired. However, if such an adjustment of the deduction is no longer possible, there is also no longer any reason for making that correction indirectly by taxing the part of the building in question on cessation of the activity.

3. The present case therefore concerns the different techniques for making subsequent corrections to deductions of input tax. The EU legislation governing VAT offers various systems in this context, which in some cases appear to overlap. The Court will therefore need to give its attention to defining the respective functions of those systems.

1 — Original language: German.

II – **Legal framework**

A – *EU law*

4. The levying of VAT in the European Union is governed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2] ('the VAT Directive'). [3]

5. Under Article 2(1)(a) of the VAT Directive, 'the supply of goods for consideration within the territory of a Member State by a taxable person acting as such' is subject to VAT.

6. Article 18 of the VAT Directive further provides:

'Member States may treat each of the following transactions as a supply of goods for consideration:

…

(c) with the exception of the cases referred to in Article 19, the retention of goods by a taxable person, or by his successors, when he ceases to carry out a taxable economic activity, where the VAT on such goods became wholly or partly deductible upon their acquisition … .'

7. Article 19 of the VAT Directive, to which Article 18 refers, contains an arrangement for 'a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof'.

8. In Article 168, the VAT Directive grants a taxable person a right to deduct input tax as follows:

'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 and services, carried out or to be carried out by another taxable person;

…'

9. Articles 184 to 192 of the VAT Directive lay down rules for the 'Adjustment of deductions'. Article 185(1) provides in this regard:

'1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted …'

10. Article 187 of the VAT Directive further provides:

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

…

2 — OJ 2006 L 347, p. 1.

3 — Previously, until 31 December 2006, Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) was applicable. In essence, the VAT Directive is only a recast of the Sixth Directive (see recital 3 of the VAT Directive). Consequently, regard must also be had in the present case to the case-law on the corresponding provisions of the Sixth Directive.

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

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 – *National law*

11. The Polish Law of 11 March 2004 on goods and services tax (consolidated text Dz. U. 2011, nr 177, poz. 1054, with amendments) governs the levying of VAT in the Republic of Poland. Article 14 of the law provides:

'1. Goods of a person's own manufacture … shall be subject to the tax where:

…

(2) a taxable person referred to in Article 15, who is a natural person, ceases to carry out taxable activity …

…

4. Paragraphs 1 and 3 shall apply to goods in relation to which there was a right to reduce the amount of tax due by the amount of input tax.

5. In the cases referred to in paragraphs 1 and 3, taxable persons shall be required to draw up a physical inventory of goods as at the date on which the … taxable activity was ceased … Taxable persons shall be required to attach information about the physical inventory drawn up … to the tax return …

…'

12. With regard to the adjustment of deductions, Article 91(2) of the Polish law provides for a period of 10 years in the case of immovable property.

III – **Main proceedings**

13. The subject-matter of the main proceedings is a question of interpretation concerning the VAT legislation, which Mr Mateusiak raised with the Polish tax authorities in 2013.

14. Between 1997 and 1999, Mr Mateusiak constructed a residential and commercial building. From the outset, that building was used by him in part for private purposes and in part for his activity as a notary. Mr Mateusiak claimed a right to deduct input tax only in respect of the services which he had obtained for the construction of the part of the building used for commercial purposes.

15. Mr Mateusiak now wishes to know from the Polish tax authorities whether, if he ceases his activity as a notary, he must make the part of the building used for commercial purposes subject to VAT. He takes the view in this regard that such taxation must no longer take place once the adjustment period for the correction of the deduction of input tax in respect of the building has expired. The Polish tax authorities were unable to agree with that view. Mr Mateusiak then brought an action.

IV – **Proceedings before the Court of Justice**

16. The Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) considers EU law decisive for the case and on 19 May 2015 referred the following question to the Court of Justice under Article 267 TFEU:

'Must Article 18(c) of the VAT Directive be interpreted as meaning that, on expiry of the adjustment period referred to in Article 187 of the directive, a taxable person's fixed assets upon the acquisition of which he deducted VAT, should not be subject to tax and included in the winding-up inventory at the time he ceases his activity, if the period laid down in law for adjusting the input tax on the acquisition thereof, which arises from the estimated period for using those assets in the taxable person's economic activity, has passed, or as meaning that the fixed assets are subject to tax at the time the taxable person ceases his economic activity, regardless of the adjustment period?'

17. In September 2015, Mr Mateusiak, the Hellenic Republic, the Republic of Poland and the European Commission submitted written observations on this question.

V – **Legal assessment**

18. Summarised, the referring court wishes to know by its question whether Article 18(c) of the VAT Directive must also be applied to goods constituting capital goods within the meaning of Article 187, in relation to which the period laid down in Article 187(1) has already expired, with the consequence that no adjustment of the deduction of input tax is now possible.

19. I am satisfied that the answer to that question must be in the affirmative. Expiry of the adjustment period for goods under Article 187(1) of the VAT Directive has no effect on their taxation under Article 18(c).

20. The wording of Article 18(c) of the VAT Directive contains neither any time limit for taxation nor any reference to Article 187. This is all the more significant since the second subparagraph of Article 168a(1) of the VAT Directive expressly refers to the provisions of Articles 184 to 192 for the taxation of the private use of immovable property under Article 26.

21. As I shall set out below, there is, moreover, also no reason to apply Article 187 *mutatis mutandis* in the context of Article 18(c) of the VAT Directive.

A – *Common features of the systems*

22. There are, admittedly, certain common features between the rules on the adjustment of deductions, which include Article 187, and the provisions on the taxation of the private use of goods, of which Article 18(c) forms part.

23. Both systems are in fact intended to prevent a situation in which a taxable person is able to use goods without being charged VAT on them by virtue of a deduction already granted, even though the later nature of the use does not entitle him to the deduction. According to the case-law, a taxable person should thus not obtain an unjustified advantage by comparison with a final consumer, and

both systems are designed to preserve the correspondence between deduction of input tax and charging of output tax.[4]

24. To that end, the provisions on the adjustment of deductions in Article 184 et seq. of the VAT Directive start directly from the deduction. Under Article 167 in conjunction with Article 63 of the VAT Directive, the deduction is normally allowed at the time of acquisition of goods, on the basis of their *intended* use. The uses which give rise to a right of deduction are laid down in Articles 168 and 169 of the VAT Directive. The normal condition for this is that the taxable person uses the acquired goods for the purpose of carrying out taxed transactions. According to the case-law, the rules on adjustment are then intended to enhance the precision of deductions by monitoring, after the date of the acquisition of goods, the extent to which the taxable person *actually* uses those goods for deductible purposes.[5] In the case of capital goods, under Article 187(1) of the VAT Directive, the period for that monitoring is between five and ten years.

25. In contrast, the rules on taxation of the private use of goods do not start with the right of deduction, but — without impinging on the deduction once it has been allowed — by making private use subject to VAT. In that regard, Article 26(1)(a) of the VAT Directive covers the private use of goods still forming part of the assets of a business,[6] whereas the chargeable events referred to in Article 16 and Article 18(c) concern the transfer of goods from the business to the private assets of a taxable person. In day-to-day business, it is mandatory for such transfers to be taxed as applications pursuant to Article 16 of the VAT Directive. Moreover, Article 18(c) of the VAT Directive gives Member States the option of taxing the transfer of goods from the business to the private assets which results from cessation of the economic activity.[7]

B – *Differences between the two systems*

26. However, both systems — adjustment of deductions and taxation of private use — pursue their similar aims in different ways. That is because, although the Court has ascribed the same economic effect to both systems,[8] neither their conditions for their application nor their legal consequences are identical.

27. On the one hand, I have already argued in greater detail elsewhere that the rules on the taxation of private use constitute the more special provisions as compared with those on the adjustment of deductions.[9]

4 — See judgment in *Wollny* (C-72/05, EU:C:2006:573, paragraphs 35 and 36); see also the Proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes (COM(1973) 950 final), p. 7, in regard to Article 5(3), which considers both systems to be interchangeable in certain respects.

5 — See, to that effect, judgments in *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 57); *TETS Haskovo* (C-234/11, EU:C:2012:644, paragraph 31); *Pactor Vastgoed* (C-622/11, EU:C:2013:649, paragraph 34); and *FIRIN* (C-107/13, EU:C:2014:151, paragraph 50); see, in addition, my Opinion in *TETS Haskovo* (C-234/11, EU:C:2012:352, points 27 and 28).

6 — An exception has recently become applicable to the changed private use of immovable property in mixed use from the beginning, pursuant to the second subparagraph of Article 168a(1) of the VAT Directive, which was inserted by Article 1(12) of Council Directive 2009/162/EU of 22 December 2009 amending various provisions of Directive 2006/112/EC on the common system of value added tax (OJ 2009 L 10, p. 14).

7 — Since the Republic of Poland has made use of the option referred to in Article 18(c) of the VAT Directive, there is no need in the present case to examine the question whether, notwithstanding that separate provision, Article 16 also covers applications on cessation of the economic activity; see, in this regard, the judgment in *Fischer and Brandenstein* (C-322/99 and C-323/99, EU:C:2001:280, paragraph 87) and the Opinion of Advocate General Jacobs in *Fischer and Brandenstein* (Joined Cases C-322/99 and C-323/99, EU:C:2000:700, paragraph 83).

8 — Judgment in *Uudenkaupungin kaupunki* (C-184/04, EU:C:2006:214, paragraph 30).

9 — See my Opinion in *van Laarhoven* (C-594/10, EU:C:2011:820, point 27).

28. On the other hand, the adjustment of deductions is a retroactive corrective provision, whereas the taxation of private use also covers changes in the value of the business assets between the acquisition of goods and the start of private use. That is because, under Article 74 of the VAT Directive, the taxable amount in the event of application (Article 16) and in the event of cessation of the activity (Article 18(c)) is the value of goods determined at the time of application [10] or at the time of cessation of the activity. [11]

29. This is explained by the purpose of the taxation in these cases, which extends even beyond the aim of adjusting deductions of input tax. According to the case-law, the purpose of the taxation under Article 16 of the VAT Directive is, in particular, to ensure equal treatment as between a taxable person who applies goods for his own private use and an ordinary consumer who acquires goods of the same type. [12] The Court adopts similar wording in regard to Article 18(c) of the VAT Directive: the taxation is intended to avoid a situation where the final consumption of goods is untaxed following the cessation of the taxable economic activity. [13] As a result, a taxable person who receives goods for his private final consumption from his business should be charged VAT in the same way as if he obtained such goods from another taxable person. Supply from a third party and self-supply are thus treated equally.

C – *Parallel application of the systems*

30. Against the background of those differences, both systems must therefore — as the Court has already indicated [14] — be applied parallel to, and independently of, each other.

31. Nevertheless, there is — as Advocate General Stix-Hackl has rightly pointed out [15] — some need for coordination between the two systems in order to uphold the principle of fiscal neutrality. Under that principle, double taxation in particular is to be avoided. [16]

32. It follows from this, for example, that an adjustment of the deduction of input tax where work is carried out on goods arises only in so far as that work is not already taxed in the context of the taxation of the application of goods. [17] Otherwise the taxable person would be charged VAT twice. The same also applies the other way round: taxation of the application of goods may take place only in so far as VAT was also deductible upon their acquisition and maintenance. [18]

33. In the present case, however, the principle of fiscal neutrality does not require that taxation under Article 18(c) be allowed only within the time frame of the adjustment period referred to in Article 187(1) of the VAT Directive. That is because there is no indication that double taxation is involved.

10 — Judgment in *Fischer and Brandenstein* (C-322/99 and C-323/99, EU:C:2001:280, paragraph 80).

11 — Judgment in *Marinov* (C-142/12, EU:C:2013:292, paragraph 33).

12 — See, in particular, judgments in *de Jong* (C-20/91, EU:C:1992:192, paragraph 15); *Fischer and Brandenstein* (C-322/99 and C-323/99, EU:C:2001:280, paragraph 56); and *BCR Leasing* (C-438/13, EU:C:2014:2093, paragraph 23).

13 — Judgment in *Marinov* (C-142/12, EU:C:2013:292, paragraph 27).

14 — See judgment in *Uudenkaupungin kaupunki* (C-184/04, EU:C:2006:214, paragraph 29); see also, previously, the Opinion of Advocate General Jacobs in *Charles and Charles-Tijmens* (C-434/03, EU:C:2005:48, point 54).

15 — Opinion of Advocate General Stix-Hackl in *Uudenkaupungin kaupunki* (C-184/04, EU:C:2005:557, point 26).

16 — See judgments in *Fischer and Brandenstein* (C-322/99 and C-323/99, EU:C:2001:280, paragraph 76) and *NLB Leasing* (C-209/14, EU:C:2015:440, paragraph 40).

17 — See judgment in *Fischer and Brandenstein* (C-322/99 and C-323/99, EU:C:2001:280, paragraph 95).

18 — See judgment in *Fischer and Brandenstein* (C-322/99 und C-323/99, EU:C:2001:280, paragraphs 74 to 76); see also, with regard to the taxable amount referred to in what is now Article 74 of the VAT Directive, the judgment in *Property Development Company* (C-16/14, EU:C:2015:265, paragraph 42).

34. According to the wording of the provision, taxation under Article 18(c) of the VAT Directive may take place only where goods became deductible upon their acquisition. They thus form part of the assets of the business and as such are exempt from any charging of VAT. However, in so far as the goods still have a residual value on cessation of the economic activity, they have not yet been consumed in the context of the economic activity and their subsequent private use must therefore — for the first time — be taxed, unless a VAT exemption applies. [19]

35. Moreover, that is, in principle, the same VAT charge as would undoubtedly have arisen pursuant to Article 2(1)(a) of the VAT Directive if Mr Mateusiak had sold the building at the same time. Consequently, taxation under Article 18(c) of the VAT Directive, which takes place regardless of whether or not the adjustment period under Article 187(1) has expired, also ensures the neutrality of the system of value added tax in so far as it does not influence the economic decisions of the taxable person.

VI – **Conclusion**

36. I therefore propose that the Court should answer the question referred by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) as follows:

Article 18(c) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must also be applied to goods for which, under Article 187(1) of that directive, the period for the adjustment of deductions of input tax under Article 187(1) has already expired at the time of cessation of the economic activity.

19 — For example, in the present case, under Article 135(1)(j) of the VAT Directive.