Reports of Cases

ORDER OF THE COURT (Eighth Chamber)

18 May 2021 *

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Deduction of the input tax paid during the stage of construction of a building – Optional tax liability scheme – Abandonment of the initially planned activity – Adjustment of the deduction of the input tax paid – Reply to the question referred for a preliminary ruling which may be clearly deduced from existing case-law)

In Case C-248/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), made by decision of 19 May 2020, received at the Court on 9 June 2020, in the proceedings

Skatteverket

v

Skellefteå Industrihus AB,

THE COURT (Eighth Chamber),

composed of N. Wahl, President of the Chamber, F. Biltgen (Rapporteur) and L.S. Rossi, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Articles 137, 168, 184 to 187, 189 and 192 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

* Language of the case: Swedish.

2 The request has been made in proceedings between the Skatteverket (Swedish Tax Agency) and Skellefteå Industrihus Aktiebolag AB concerning the obligation imposed on the latter, following the abandonment of a property investment project, to adjust the deduction of the input value added tax (VAT) paid.

Legal context

EU law

3 Under Article 9(1) of the VAT Directive:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.'

4 Article 135(1) of that directive provides:

'Member States shall exempt the following transactions:

…

(l) the leasing or letting of immovable property.'

5 Article 137 of that directive states:

'1. Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

…

(b) the supply of a building or of parts thereof, and of the land on which the building stands, other than the supply referred to in point (a) of Article 12(1);

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

(d) the leasing or letting of immovable property.

2. Member States shall lay down the detailed rules governing exercise of the option under paragraph 1.

Member States may restrict the scope of that right of option.'

6 Pursuant to Article 168 of that directive:

‘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;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;

(e) the VAT due or paid in respect of the importation of goods into that Member State.’

7 Article 184 of the VAT Directive provides:

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

8 Article 185 of that directive states:

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

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

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

9 Article 186 of that directive provides:

‘Member States shall lay down the detailed rules for applying Articles 184 and 185.’

10 Article 187 of that directive is worded as follows:

‘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.

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.'

11 Under Article 188 of the VAT Directive:

'1. If supplied during the adjustment period, capital goods shall be treated as if they had been applied to an economic activity of the taxable person up until expiry of the adjustment period.

The economic activity shall be presumed to be fully taxed in cases where the supply of the capital goods is taxed.

The economic activity shall be presumed to be fully exempt in cases where the supply of the capital goods is exempt.

2. The adjustment provided for in paragraph 1 shall be made only once in respect of all the time covered by the adjustment period that remains to run. However, where the supply of capital goods is exempt, Member States may waive the requirement for adjustment in so far as the purchaser is a taxable person using the capital goods in question solely for transactions in respect of which VAT is deductible.'

12 Article 189 of that directive states:

'For the purposes of applying Articles 187 and 188, Member States may take the following measures:

(a) define the concept of capital goods;

(b) specify the amount of the VAT which is to be taken into consideration for adjustment;

(c) adopt any measures needed to ensure that adjustment does not give rise to any unjustified advantage;

(d) permit administrative simplifications.'

13 Article 190 of that directive provides:

'For the purposes of Articles 187, 188, 189 and 191, Member States may regard as capital goods those services which have characteristics similar to those normally attributed to capital goods.'

14 Article 191 of the VAT Directive states:

'If, in any Member State, the practical effect of applying Articles 187 and 188 is negligible, that Member State may, after consulting the VAT Committee, refrain from applying those provisions, having regard to the overall impact of VAT in the Member State concerned and the need for administrative simplification, and provided that no distortion of competition thereby arises.'

15 Under Article 192 of that directive:

'Where a taxable person transfers from being taxed in the normal way to a special scheme or vice versa, Member States may take all measures necessary to ensure that the taxable person does not enjoy unjustified advantage or sustain unjustified harm.'

Swedish law

16 In accordance with Chapter 3, Paragraph 2, of the Mervärdesskattelag (1994:200) (Law (1994:200) on value added tax) of 30 March 1994 (SFS 1994, No 200), in the version applicable to the facts in the main proceedings ('the Law on VAT'), the letting of immovable property is, in principle, exempt from VAT. However, the owner of an immovable property who leases it wholly or partly to a tenant for permanent use for a taxable activity may opt to be liable to tax under Chapter 3, Paragraph 3, of the Law on VAT and Chapter 9, Paragraph 1, thereof.

17 Although it is in principle not possible to opt to be liable to tax until after the completion of the immovable property and the commencement of the letting, it nevertheless follows from Chapter 3, Paragraph 3(3)(3), of the Law on VAT and Chapter 9, Paragraph 2, thereof that the owner of a building may opt to be liable to tax at the stage of construction of the building, provided, inter alia, that he or she intends to let the building once it has been completed.

18 Under Chapter 9, Paragraph 6(2), of that law, the tax authorities may, during the construction of the building, even before the commencement of the letting, bring the optional tax liability to an end if it becomes apparent that the conditions relating to that scheme are no longer satisfied.

19 Chapter 8 and Chapter 8a of the Law on VAT contain provisions relating, respectively, to the right to deduct the VAT charged on input transactions and to adjustments.

20 Under Chapter 8, Paragraph 3, of that law and Chapter 9, Paragraph 8, thereof, the owner of a building who has opted to be liable to tax is entitled to deduct the input VAT relating to acquisitions connected with his or her activity. The deduction may be made by means of optional tax liability during the stage of construction, by retroactive deduction, or by adjustment.

21 It is apparent from Chapter 8a, Paragraph 4, of that law that deductions must in principle be adjusted in the event of a change in the use of capital goods whose acquisition had given rise, in whole or in part, to a right to deduct input tax, with the result that the right of deduction is reduced. It is also necessary to adjust deductions in a situation where the opposite is the case, that is to say, where the purchase would not give rise to a right of deduction or would give rise to that right only in part and where, following a change of use, the right of deduction is established or becomes greater.

22 Under Chapter 8a, Paragraph 6, of that law, the deduction of input tax may be adjusted only when the use of capital goods changes or a transfer of those goods takes place within a certain time (adjustment period). In the case of immovable property, that period is set at 10 years.

23 Chapter 9, Paragraph 11, of the Law on VAT contains special provisions relating to adjustment in the event that optional tax liability is brought to an end during the stage of construction and before the commencement of a taxable letting. The adjustment must then be made only once in respect of all the time covered by the adjustment period that remains to run. In addition, the input tax relating to the period between the decision approving the optional tax liability and the end of that liability must be paid to the State, together with interest. The effect of those provisions is that any input tax deducted must be repaid immediately, together with interest.

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

24 Skellefteå Industrihus, a company incorporated under Swedish law, planned to build, on a plot of land belonging to it, a building to be used for offices, which it intended to let out, and it therefore applied for and obtained, during the construction of the building, the right to benefit from the optional tax liability scheme as from November 2012. It then deducted 966 508 Swedish krona (SEK) (approximately EUR 95 400) of the input VAT charged on purchases it had made, mainly architectural services relating to the planned building. After one of the potential future tenants announced that it was no longer interested in renting office space in the building in question, the reassessment of the costs showed that the project was not financially profitable. The defendant in the main proceedings therefore decided, in September 2013, to abandon the project, thereby bringing the optional tax liability scheme to an end.

25 In December 2013, Skellefteå Industrihus Aktiebolag repaid all the VAT deducted during the period in which it had benefited from the optional tax liability scheme. However, three years later, taking the view that the obligation to repay the input VAT deducted was not compatible with the VAT Directive, it requested that the input deduction be accepted again.

26 Since that request was rejected by the tax authorities, Skellefteå Industrihus Aktiebolag brought an action before the Förvaltningsrätten i Umeå (Administrative Court, Umeå, Sweden), which upheld that action on the ground that the applicable national legislation was not compatible with EU law. The tax authorities therefore reimbursed Skellefteå Industrihus Aktiebolag the amount of the VAT that the latter had initially repaid.

27 Following the dismissal of the appeal brought by the tax authorities, those authorities brought an appeal before the referring court, requesting that court to order Skellefteå Industrihus Aktiebolag to repay the input VAT deducted.

28 The referring court notes, first of all, that, in the present case, there was no abuse or fraud and that the purchases were not used to carry out exempt transactions. Thus, the dispute in the main proceedings relates solely to the question of the compatibility of Chapter 9, Paragraph 11, of the Law on VAT with the VAT Directive where tax liability ceases because a building construction project is abandoned before completion and no letting has therefore taken place.

29 It observes, next, that the provisions of Chapter 9, Paragraph 11, of the Law on VAT have no direct equivalent in the VAT Directive and that it is therefore necessary to determine whether, as is argued by the tax authorities, those provisions do indeed fall within the scope of the discretion

conferred on Member States by Article 137 of that directive to specify the rules governing the optional tax liability scheme that applies to the letting of immovable property. The reply to such a question cannot be deduced from the case-law of the Court of Justice and, in particular, cannot be deduced from the judgments of 12 January 2006, *Turn- und Sportunion Waldburg* (C-246/04, EU:C:2006:22); of 30 March 2006, *Uudenkaupungin kaupunki* (C-184/04, EU:C:2006:214); and of 28 February 2018, *Imofloresmira – Investimentos Imobiliários* (C-672/16, EU:C:2018:134).

30 Lastly, it states that, should the Court of Justice consider that the legislation at issue in the main proceedings is not covered by the margin of discretion afforded to the Member States, it would still be necessary to examine whether those provisions may nevertheless be allowed in the light of the rules of the VAT Directive regarding the adjustment of deductions. In this respect, the referring court considers that the case-law of the Court of Justice, in particular its judgment of 29 February 1996, *INZO* (C-110/94, EU:C:1996:67), does not provide an answer to this question either.

31 In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with the VAT Directive, in particular with Articles 137, 168, 184 to 187, 189 and 192 thereof, that a property owner, who opted for taxation of the construction of a building and who has deducted the input tax paid on the acquisitions relating to the building project, must immediately repay the total amount of input tax, together with interest, on the ground that the liability for tax ceases by reason of the discontinuance of the construction project before the building is completed and that there is therefore no letting?'

Consideration of the question referred

32 Under Article 99 of its Rules of Procedure, where, inter alia, the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to such a question admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

33 It is necessary to apply that provision in the present case.

34 By its question, the referring court asks, in essence, whether Articles 137, 168, 184 to 187, 189 and 192 of the VAT Directive must be interpreted as precluding national legislation which requires a property owner who was granted the right to benefit from the optional tax liability scheme during the construction of a building that he or she intended to let out, and who deducted the input VAT charged on the purchases relating to that building project, to repay immediately all that VAT, plus interest, on the ground that the planned project that gave rise to the right of deduction was abandoned without any taxed activity having taken place, or which, in such a situation, establishes an obligation to adjust the input VAT paid.

35 In order to answer that question, it should be noted that the facts giving rise to the case in the main proceedings do not concern a situation in which tax liability ended, but rather a situation in which there were no taxed transactions. Indeed, since, under Article 9(1) of the VAT Directive, 'taxable person' means any person who independently carries out in any place any economic activity, whatever the purpose or results of that activity (see, to that effect, judgment of

12 October 2016, *Nigl and Others*, C-340/15, EU:C:2016:764, paragraph 26 and the case-law cited), VAT liability does not automatically end when the taxable person decides to abandon a previously planned activity.

36 As regards whether the Member States may, in the exercise of the discretion granted to them under Article 137 of the VAT Directive, lay down a rule according to which the right of deduction granted following exercise of the right of option provided for in that article may be revoked retroactively where the planned economic activity has been abandoned, it must be borne in mind that, in accordance with the case-law of the Court, it is the acquisition of goods or services by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods or services are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 168 of the VAT Directive and the extent of any adjustments in the course of the following periods (judgment of 12 November 2020, *ITH Comercial Timişoara*, C-734/19, EU:C:2020:919, paragraph 33 and the case-law cited); it does not affect whether the right of deduction arises.

37 The Court has also repeatedly stated that the right of deduction, once it has arisen, is retained, in principle, even if, subsequently, the planned economic activity was not carried out and, therefore, did not give rise to taxed transactions (see, to that effect, judgments of 29 February 1996, *INZO*, C-110/94, EU:C:1996:67, paragraph 20, and of 17 October 2018, *Ryanair*, C-249/17, EU:C:2018:834, paragraph 25), or if, by reason of circumstances beyond his or her control, the taxable person did not make use of the goods and services which gave rise to a deduction in the context of taxed transactions (judgment of 12 November 2020, *ITH Comercial Timişoara*, C-734/19, EU:C:2020:919, paragraph 34 and the case-law cited).

38 Any other interpretation of the VAT Directive would be contrary to the principle that VAT should be neutral as regards the tax burden on a business. It would be liable to create, as regards the tax treatment of the same investment activities, unjustified differences between businesses already carrying out taxable transactions and other businesses seeking by investment to commence activities which will in future be a source of taxable transactions. Likewise, arbitrary differences would be established between the latter businesses, in that final acceptance of the deductions would depend on whether or not the investment resulted in taxed transactions (judgment of 12 November 2020, *ITH Comercial Timişoara*, C-734/19, EU:C:2020:919, paragraph 36 and the case-law cited).

39 It is also apparent from the case-law that, even though Article 137(2) of the VAT Directive gives the Member States a wide discretionary power to determine the rules governing the exercise of the right of option and even to withdraw it, the Member States may not use that power to infringe Articles 167 and 168 of that directive by revoking a right of deduction which has already been acquired (judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 48 and the case-law cited). A limitation of VAT deductions connected with taxed transactions, after the right of option has been exercised, would not concern the 'scope' of the right of option which Member States may restrict by virtue of Article 137(2) of the VAT Directive, but the consequences of exercising that right (judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 49 and the case-law cited).

40 Therefore, while it is open to the Member States to lay down the conditions and the rules governing the exercise of the right of option, they must not infringe the right of deduction itself and must comply with the objectives and general principles of the VAT Directive (see, to that effect, judgments of 9 September 2004, *Vermietungsgesellschaft Objekt Kirchberg*, C-269/03, EU:C:2004:512, paragraph 24; of 12 January 2006, *Turn- und Sportunion Waldburg*, C-246/04, EU:C:2006:22, paragraph 31; and of 30 March 2006, *Uudenkaupungin kaupunki*, C-184/04, EU:C:2006:214, paragraphs 45 and 46).

41 It follows that Article 137(2) of the VAT Directive must be interpreted as precluding a provision of national legislation, such as Chapter 9, Paragraph 11, of the Law on VAT, which provides, de facto, for the revocation of the right to deduct the input tax paid where that right has been granted to a taxable person in the course of the exercise, by that taxable person, of his or her right of option.

42 As regards how the principle emphasised in the judgment of 29 February 1996, *INZO* (C-110/94, EU:C:1996:67), to the effect that the right of deduction is retained even where an activity is brought to an end before it gives rise to any taxable transactions, must be combined with the rules of the VAT Directive regarding the adjustment of deductions and, in particular, whether a provision such as Chapter 9, Paragraph 11, of the Law on VAT may nevertheless be allowed in the light of those rules, it should be recalled that the Court has, first, held that the adjustment mechanism provided for in Articles 184 to 187 of the VAT Directive is an integral part of the VAT deduction scheme established by that directive and aims to establish a close and direct relationship between the right to deduct the input VAT paid and the use of the goods or services concerned for taxed output transactions (see, to that effect, judgments of 9 July 2020, *Finanzamt Bad Neuenahr-Ahrweiler*, C-374/19, EU:C:2020:546, paragraph 20, and of 17 September 2020, *Stichting Schoonzicht*, C-791/18, EU:C:2020:731, paragraph 26). Secondly, it has held that, where goods or services acquired by a taxable person are used for the purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted (judgment of 9 July 2020, *Finanzamt Bad Neuenahr-Ahrweiler*, C-374/19, EU:C:2020:546, paragraph 21 and the case-law cited).

43 Furthermore, Article 184 of the VAT Directive defines the coming into existence of an obligation to make an adjustment as broadly as possible, in so far as 'the initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled'. That wording does not exclude, a priori, any foreseeable situation of undue deductions, since the general scope of the adjustment obligation is supported by the express enumeration of the derogations provided for in Article 185(2) of that directive (see, to that effect, judgment of 17 September 2020, *Stichting Schoonzicht*, C-791/18, EU:C:2020:731, paragraphs 30 and 31).

44 Furthermore, where, by reason of circumstances beyond his or her control, the taxable person did not make use of the goods and services which gave rise to a deduction in the context of taxed transactions, it is not sufficient, in order to establish the existence of a 'change' for the purposes of Article 185 of the VAT Directive, for a property to remain empty after the termination of the lease to which it was subject, even where it has been established that the taxable person still intends to use it for a taxed activity and undertakes the necessary steps to that end, since that would be tantamount to restricting the right of deduction through the provisions applicable to adjustments (judgment of 12 November 2020, *ITH Comercial Timişoara*, C-734/19, EU:C:2020:919, paragraph 43 and the case-law cited).

45 Thus, if the taxable person no longer plans to use the goods and services in question in order to carry out taxed output transactions or uses them to carry out exempt transactions, the close and direct relationship, for the purposes of the case-law referred to in paragraph 42 above, which must exist between the right to deduct the input VAT paid and the carrying out of the planned taxed transactions is broken (see, to that effect, judgment of 12 November 2020, *ITH Comercial Timişoara*, C-734/19, EU:C:2020:919, paragraph 44).

46 Consequently, if, as is apparent from the order for reference, the situation in the main proceedings corresponds to that described in the preceding paragraph, which is a matter for the referring court to ascertain, it must result in the application of the adjustment mechanism provided for in Articles 184 to 187 of the VAT Directive.

47 As regards, more specifically, Article 187 of the VAT Directive, the Court has held that that provision does not govern the rules for adjustment that must be applied if, at the precise time of the first use of the capital goods, the deduction entitlement is higher or lower than the initial deduction (judgment of 17 September 2020, *Stichting Schoonzicht*, C-791/18, EU:C:2020:731, paragraph 43). Furthermore, the determination of the rules for the adjustment of the initial deduction at the time the capital goods in question are first used, where it becomes apparent at that time that that deduction was higher than that which the taxable person was entitled to deduct on account of the actual use of the goods, does not fall within the scope of Article 187 of the VAT Directive but within that of Articles 184 and 185 of that directive, the latter of which the Member States are responsible for determining pursuant to Article 186 of the VAT Directive (judgment of 17 September 2020, *Stichting Schoonzicht*, C-791/18, EU:C:2020:731, paragraph 48).

48 In the present case, since there has been no 'first use' or 'actual use' of the goods and services acquired, it must be concluded that the rules for the adjustment of the initial deduction of VAT provided for in Swedish law do not fall within the scope of Article 187 of the VAT Directive and cannot therefore, contrary to the suggestion of the referring court, conflict with that provision.

49 The same conclusion must be reached with regard to Article 192 of the VAT Directive, since it is clear from the wording of that provision that it allows the Member States to choose whether or not to adopt the 'measures necessary to ensure that the taxable person does not enjoy unjustified advantage or sustain unjustified harm'.

50 In the light of all those considerations, the answer to the question referred is that Articles 137, 168, 184 to 187, 189 and 192 of the VAT Directive must be interpreted as precluding national legislation which requires a property owner who was granted the right to benefit from the optional tax liability scheme during the construction of a building that he or she intended to let out, and who deducted the input VAT charged on the purchases relating to that building project, to repay immediately all that VAT, plus any applicable interest, on the ground that the planned project that gave rise to the right of deduction did not result in any taxed activity, but as not precluding national legislation which, in such a situation, establishes an obligation to adjust the input VAT paid.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Eighth Chamber) hereby rules:

Articles 137, 168, 184 to 187, 189 and 192 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation which requires a property owner who was granted the right to benefit from the optional tax liability scheme during the construction of a building that he or she intended to let out, and who deducted the input value added tax (VAT) charged on the purchases relating to that building project, to repay immediately all that VAT, plus any applicable interest, on the ground that the planned project that gave rise to the right of deduction did not result in any taxed activity, but as not precluding national legislation which, in such a situation, establishes an obligation to adjust the input VAT paid.

[Signatures]