Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

12 November 2020 *

(Request for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Deduction of input tax – Abandonment of the activity initially intended – Adjustment of deductions of input VAT – Real estate activity)

In Case C-734/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Bucureşti (Regional Court of Bucharest, Romania), made by decision of 27 September 2019, received at the Court on 4 October 2019, in the proceedings

ITH Comercial Timişoara SRL

v

Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice Bucureşti,

Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice Bucureşti – Administrația Sector 1 a Finanțelor Publice,

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 regard to the written procedure,

after considering the observations submitted on behalf of:

– the Romanian Government, by E. Gane and A. Rotăreanu, acting as Agents,

– the European Commission, by R. Lyal and A. Armenia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Romanian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 28, 167, 168, 184 and 185 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').

2 The request has been made in proceedings between ITH Comercial Timișoara SRL ('ITH'), on the one hand, and the Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București (National Tax Administration Agency – Regional Directorate-General of Public Finances, Bucharest, Romania) and the Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București – Administrația Sector 1 a Finanțelor Publice (National Tax Administration Agency – Regional Directorate-General of Public Finances, Bucharest – Public Finance Administration, Sector 1, Bucharest, Romania) concerning the deduction of input VAT on expenditure connected with construction projects which were ultimately abandoned.

Legal context

European Union law

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

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

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

4 Article 28 of the VAT Directive provides:

'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.'

5 Article 63 of the VAT Directive reads as follows:

'The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

6 Article 167 of the VAT Directive states:

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

7 Under Article 168 of the VAT 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.'

8 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.'

9 Article 185 of the VAT 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.'

Romanian law

Tax Code

10 Under Article 125a(1)(28) of Legea nr. 571/2003 privind codul fiscal (Law No 571/2003 establishing the Tax Code; 'the Tax Code'), the tax levied is 'the tax on the taxable supply of goods and/or services, carried out by a taxable person, and the tax on transactions in respect of which the recipient is required to pay the tax in accordance with Articles 150 to 151a'.

11 Article 126 of the Tax Code is worded as follows:

‘1. For the purposes of VAT, transactions which satisfy all of the following conditions shall be taxable in Romania:

(a) transactions which, for the purposes of Articles 128 to 130, constitute, or are treated as, a supply of goods or services, subject to VAT, for consideration;

(b) the place where goods or services are supplied is considered to be in Romania, pursuant to the provisions of Articles 132 and 133;

(c) the supply of goods or services is carried out by a taxable person, as defined in Article 127(1), acting as such;

(d) the supply of goods or services is the result of one of the economic activities referred to in Article 127(2).’

12 Under Article 128(1) of the Tax Code, ‘supply of goods’ shall mean the transfer of the right to dispose of goods as owner’.

13 Article 129 of the Tax Code states:

‘1. “Supply of services” shall mean any transaction which does not constitute a supply of goods as defined in Article 128.

2. Where a taxable person acting in his or her own name but on behalf of another person takes part in a supply of services, he or she shall be deemed to have received and supplied those services him- or herself.

3. The supply of services shall include transactions such as:

(a) the letting or making available of goods under a financial leasing contract.

…’

14 Article 145(2) of the Tax Code provides:

‘All taxable persons shall be entitled to deduct the tax relating to purchases if those purchases are used for the purposes of the following:

(a) taxable transactions;

…’

15 Article 148(1) of the Tax Code provides:

‘Where the rules relating to supply to oneself do not apply, the initial deduction shall be adjusted in the following cases:

(a) the deduction was higher or lower than that to which the taxable person was entitled;

(b) where, after the return is made, some change occurs in the factors used to determine the amount to be deducted, including in the cases provided for in Article 138;

(c) the taxable person loses the right to deduct the tax on movable property that has not been supplied and unused services in the case of events such as legislative changes, changes in the object of the activity, allocation of the goods or services to transactions granting the right to deduction and, subsequently, the allocation of those goods and services to transactions not granting the right to deduction, and missing goods.'

16 Article 150(1) of the Tax Code reads as follows:

'The taxable person who supplies the goods or services shall be liable for [VAT] where it is due under the provisions of this title, save in the cases in which the recipient is liable for payment of the tax under paragraphs 2 to 6 and under Article 160.'

The Implementing rules for the Fiscal Code

17 Paragraph 30 of the Normele metodologice de aplicare a Legii nr. 227/2015 privind codul fiscal (Implementing rules for Law No 227/2015 establishing the Tax Code) of 6 January 2016 states:

'Where contracts are terminated before their expiration date, the value of tangible or intangible fixed assets under construction which, pursuant to the authorisation or decision to terminate the contract, are left unfinished, withdrawn from the inventory and charged as expenditure, and the residual value of investments made with fixed assets that have been licensed, leased or placed under management shall constitute non-deductible expenses unless their value has been realised through their sale or scrappage.'

18 Under paragraph 45(6) of the Implementing rules for the Tax Code, of 22 January 2004, as revised, which implements Article 145(2) of the code:

'In the case of fixed assets under construction which are left unfinished, pursuant to a decision to abandon capital development works, and are withdrawn from the inventory and charged as expenditure, the taxable person may retain his or her right to deduct exercised pursuant to Article 145(2) of the Tax Code, irrespective of whether those fixed assets are disposed of as such or after their scrappage if, as a result of circumstances beyond his or her control, the taxable person never uses those goods/services for the purposes of his or her economic activity, as is apparent from the judgment of 15 January 1998, *Ghent Coal Terminal* (C-37/95, EU:C:1998:1). The right to deduct may also be retained in other situations where goods/services in respect of which that right was exercised pursuant to Article 145(2) of the Tax Code are not used for the purposes of the taxable person's economic activity, for objective reasons beyond his or her control, as is apparent from the judgment of 29 February 1996, *INZO* (C-110/94, EU:C:1996:67). In the case of the purchase of land with buildings constructed on it, the taxable person shall be entitled to deduct [VAT] on that purchase, including on buildings to be demolished, if he or she proves with objective evidence his or her intention to continue to use the area on which buildings were constructed for the purposes of his or her taxable transactions, such as, for example, the construction of other buildings for the purposes of taxable transactions, as is apparent from the judgment of 29 November 2012, *Gran Via Moineşti* (C-257/11, EU:C:2012:759).'

The main proceedings and the questions referred for a preliminary ruling

19 In 2006 and 2007, ITH concluded contracts for the purchase of immovable property and agreements with third parties and initiated two investment projects involving the construction of several buildings for which various permits were required.

20 More specifically, in 2006 ITH purchased land and several old buildings from a lift manufacturer. ITH made that purchase with a view to carrying out a project to construct an office block and shopping centres which it intended to let out subsequently ('the first project'). ITH agreed with the lift manufacturer that it would seek and develop production premises which it would let to the lift manufacturer for at least 10 years. Therefore, in 2007, ITH, first, started to take steps relating to that project with a view to obtaining a permit to destroy the existing buildings and a construction permit for the office building and shopping centres. Second, it launched the project known as 'Dragomirești Val' ('the second project') relating to the construction of production premises for the lift manufacturer (for the letting of which ITH exercised the tax option), signed consultancy contracts with a view to obtaining the construction permit and began setting out the buildings.

21 Expenditure connected with those activities was recorded in the accounts as 'investment in progress', and ITH exercised the right to deduct the corresponding VAT. Subsequently, and, in particular, against the backdrop of the 2008 economic crisis, the two projects were suspended. The related investments were later written off and charged as expenditure for the 2015 financial year.

22 During two tax inspections which took place in 2009 and 2013 and covered the period from March 2006 to June 2012, the tax authorities found that VAT had been correctly deducted and collected for the period in question and that the economic and financial situation had not allowed ITH to continue with its planned investment project.

23 During a tax inspection which took place in 2016 and covered the period from July 2012 to June 2016, the tax authorities took the view that ITH had not correctly deducted or collected the VAT relating to the two projects and the company was requested to pay additional VAT of 239 734 Romanian lei (RON) (approximately EUR 49 316).

24 In particular, the tax authorities took the view that the right to deduct VAT had to be refused because ITH had been aware, since the launch of the first project, of factors likely to prevent its completion, in so far as a local urban development plan had already been approved and ITH had assumed the risks arising from the failure of its project to comply with that plan.

25 As regards the second project, the tax authorities took the view that the services had been purchased by ITH on behalf of the lift manufacturer and reclassified the transaction so that the commission agent mechanism would apply. Thus, ITH should have re-invoiced all the costs to the lift manufacturer and charged the relating VAT.

26 Since the administrative complaint against the tax assessment issued on the basis of the inspection report was dismissed, ITH brought the matter before the Tribunalul București (Regional Court, Bucharest, Romania), claiming that the tax assessment notice was contrary to the VAT Directive.

27 The defendants in the main proceedings submit that ITH was aware of factors which might lead to the non-completion of the projects and had assumed the risks thereof. More specifically, in relation to the second project, VAT should have been collected from the co-contracting party on whose behalf the acquisitions had been made.

28 In those circumstances, the Tribunalul Bucureşti (Regional Court, Bucharest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Do the provisions of [the VAT Directive] in particular Articles 167 and 168 thereof, and the principles of legal certainty, the protection of legitimate expectations, non-discrimination and tax neutrality preclude, in the case in which a planned investment is subsequently abandoned, a taxable person from forfeiting the right to deduct VAT in relation to certain investment expenditure which the latter incurred with the intention of allocating that expenditure for the purpose of carrying out of a taxable transaction?

(b) Do those same provisions and principles preclude the right of deduction being challenged, in the event that the investment is abandoned, even in circumstances other than those where the taxable person is guilty of abuse or fraud?

(c) Do those same provisions and principles preclude an interpretation to the effect that the circumstances in which the right of deduction may be challenged in the event that the investment is abandoned include:

– the subsequent materialisation of a risk that the investment project will not be completed, which the taxable person was aware when incurring the investment expenditure, such as the fact that a public authority has not approved an urban development plan necessary for the completion of the investment project;

– a change in economic circumstances over time, such that the planned investment is no longer viable as it was when the project was commenced?

(d) Are [the VAT Directive] and the general principles of EU law to be interpreted as meaning that, in the event that investment is abandoned:

– there is a presumption of abuse or fraud justifying the calling into question of the right of deduction, or must the tax authorities demonstrate such abuse or fraud, and

– such abuse or fraud may be demonstrated by simple presumption, or is objective evidence required?

(e) Do the provisions of [the VAT Directive] and the general principles of EU law permit, in the event that the investment is abandoned, findings of abuse or fraud being made justifying the challenge to the right of deduction, in circumstances where the taxable person is unable to make any use whatsoever, not even private use, of the goods or services in respect of which it has deducted VAT?

(f) Are the provisions of [the VAT Directive] and the general principles of EU law to be interpreted as meaning that, in the event that the investment is abandoned, circumstances arising subsequent to the taxable person's incurring expenditure, such as (i) an economic crisis (ii) the materialisation of a risk that the investment project will not be completed that was present at the time the investment expenditure was incurred (for example, the fact that a public authority has not approved an urban development plan necessary for the completion of the investment project) or (iii) a change in the viability

projections for the investment, are circumstances beyond the control of the taxable person which may be taken into consideration in determining whether the taxable person acted in good faith?

(g) Must the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 184 and 185, and the principles of legal certainty, the protection of legitimate expectations, non-discrimination and tax neutrality to be interpreted as meaning that the abandonment of the investment project constitutes a case requiring the adjustment of VAT?

In other words, where the right to deduct VAT relating to certain investment expenditure which the taxable person has incurred with the intention of allocating it to the carrying out of a taxable transaction is challenged, in the event that the investment is subsequently abandoned, should the VAT adjustment mechanism be applied?

(h) Do the provisions of [the VAT Directive] preclude national legislation which provides that the right to deduct VAT relating to investments that are abandoned is retained in two cases only, those cases being identified by summary reference to two judgments of the Court of Justice: (i) where, because of circumstances beyond the control of the taxable person, the taxable person never uses the goods or services for the purposes of its economic activity, as the Court ruled in its judgment in Case C-37/95, *Belgian State* v *Ghent Coal Terminal NV*, and (ii) in other cases in which purchased goods or services in respect of which the right of deduction has been exercised are not used for the purposes of the taxable person's economic activities for objective reasons beyond the taxable person's control, as the Court ruled in Case C-110/94, *Intercommunale voor zeewaterontzilting (INZO)* v *Belgian State*?

(i) Do the provisions of [the VAT Directive], the principle of legal certainty and the principle of the protection of legitimate expectations preclude the tax authorities from withdrawing approvals, contained in previous tax inspection reports or in previous decisions on administrative tax appeals, recognising that:

– an individual has purchased goods or services with the intention of using them for the purposes of a taxable transaction;

– the suspension or abandonment of an investment project was brought about by a particular set of circumstances beyond the control of the taxable person?

(2) (a) Do the provisions of [the VAT Directive], in particular Article 28 thereof, permit or preclude the application of the mechanism imposing the rules governing commissioning other than in the case of an agency agreement without representation?

(b) Are the provisions of [the VAT Directive], in particular Article 28 thereof, to be interpreted as meaning that the mechanism imposing the rules governing commissioning is applicable where a taxable person constructs a building in accordance with the specifications and business requirements of another legal person, with the intention of retaining ownership of the building and merely letting it once it is finished to the other legal person?

(c) Are the same provisions to be interpreted as meaning that, in the situation described above, the builder must invoice the investment expenditure relating to the construction of the building to the legal person to which it is to let the building once it is finished and must collect the corresponding VAT from that legal person?

(d) Are the same provisions to be interpreted as meaning that, in the situation described above, the builder is under an obligation to invoice the investment expenditure and collect the corresponding VAT even if it stops the construction work definitively because of a drastic reduction in the economic activity of the person to which the building was to have been let, resulting from the latter's imminent insolvency?

(e) Are the provisions of [the VAT Directive] and the general principles of EU law to be interpreted as meaning that tax authorities may reclassify transactions carried out by a taxable person without having regard to the terms of the contracts which it has concluded, even if the contracts in question are not colourable?

(f) Do the provisions of [the VAT Directive] and, in particular, the principle of legal certainty and the principle of the protection of legitimate expectations, permit tax authorities to withdraw approvals, contained in previous tax inspection reports or in previous decisions on administrative tax appeals, of a taxable person's right to deduct VAT, or do they preclude them from doing so?'

Consideration of the questions referred

Question 1(a) to (i)

29 By parts (a) to (i) of its first question, the referring court asks, in essence, whether Articles 167, 168, 184 and 185 of the VAT Directive must be interpreted as meaning that the right to deduct input VAT on goods – in the present case immovable property – and services acquired for the purpose of carrying out taxable transactions is maintained where the investment projects initially planned have been abandoned or whether a VAT adjustment needs to be performed in such a case.

30 As a preliminary point, it should be recalled that for an interested party to have the right of deduction, first, it must be a 'taxable person' within the meaning of the VAT Directive and, second, the goods and services in question must be used for the purposes of its taxed transactions (judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 33 and the case-law cited). In the main proceedings, the status of ITH as a taxable person does not appear to be disputed.

31 Furthermore, under Article 167 of the VAT Directive, a right of deduction arises at the time the deductible tax becomes chargeable. Consequently, only the capacity in which a person is acting at that time can determine the existence of the right to deduct (see, to that effect, judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 35 and the case-law cited).

32 The Court has ruled that, once the tax authorities have accepted, on the basis of information provided by a business, that it should be accorded the status of a taxable person, that status cannot, in principle, subsequently be withdrawn retroactively on account of the fact that certain events have or have not occurred, save in cases of fraud or abuse (judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 36 and the case-law cited).

33 Thus, 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 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 39 and the case-law cited).

34 In that regard, the Court has repeatedly held that the right of deduction is retained in principle, in particular, even if subsequently, by reason of circumstances beyond his or her control, the taxable person does not make use of the goods and services which gave rise to a deduction in the context of taxed transactions (judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 40 and the case-law cited).

35 As regards circumstances beyond the taxable person's control, the Court's case-law makes plain that it is not for the tax authorities to assess the soundness of the taxable person's reasons for abandoning the economic activity initially planned, since the common system of VAT ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, inter alia, judgments of 14 February 1985, *Rompelman*, 268/83, EU:C:1985:74, paragraph 19, and of 17 October 2018, *Ryanair*, C-249/17, EU:C:2018:834, paragraph 23).

36 The assumption that the existence of circumstances beyond the taxable person's control cannot be established when the taxable person knew that there was a risk, relating to the failure of a public authority to approve a zoning plan necessary to make the investment in question or the loss of profitability of the investment project as a result of altered economic circumstances, that the planned activity could not be carried out, cannot be accepted since it is apparent from the Court's case-law that such an interpretation of the VAT Directive would contravene the principle of neutrality of VAT in respect of a firm's tax burden. It would be liable to create, as regards the tax treatment of similar 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 (see, inter alia, judgments of 29 February 1996, *INZO*, C-110/94, EU:C:1996:67, paragraph 22; of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 43; and of 17 October 2018, *Ryanair*, C-249/17, EU:C:2018:834, paragraph 25).

37 It is thus sufficient that the taxable person truly intended to use the goods and/or services in question to carry out the economic activities in respect of which he or she exercised his or her right to deduction (see, inter alia, judgments of 14 February 1985, *Rompelman*, 268/83, EU:C:1985:74, paragraph 24; of 29 February 1996, *Inzo*, C-110/94, EU:C:1996:67, paragraph 17; of 8 June 2000, *Breitsohl*, C-400/98, EU:C:2000:304, paragraph 39, and of 17 October 2018, *Ryanair*, C-249/17, EU:C:2018:834, paragraph 18).

38 It is true that the tax authorities may request a taxable person to prove that his or her intention is borne out by objective evidence and may claim repayment of the sums deducted retroactively on the ground that those deductions were made on the basis of false declarations in cases of fraud or abuse in which the taxable person, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his or her private assets goods in respect of which a deduction could be made (see, inter alia, judgments of 14 February 1985, *Rompelman*, 268/83,

EU:C:1985:74, paragraph 24; of 29 February 1996, *Inzo*, C-110/94, EU:C:1996:67, paragraphs 23 and 24, and of 8 June 2000, *Breitsohl*, C-400/98, EU:C:2000:304, paragraph 39 and the case-law cited).

39 However, and even though preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive (see, inter alia, judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 51), that possibility cannot lead the tax authorities to establish, where the investment is abandoned, rules of evidence, such as the presumption of the existence of abuse or fraud, the effect of which would be to make it virtually impossible or excessively difficult for taxable persons to exercise the right to deduct VAT, which is a fundamental principle of the common system of VAT.

40 In the present case, and subject to review by the referring court, which alone has jurisdiction to assess the facts in the main proceedings, it must be held, first, that it is not apparent from the request for a preliminary ruling that there was fraudulent conduct or a risk of abuse on the part of ITH. Second, neither does it appear to be disputed that ITH's initial intention to use the goods and services at issue in the main proceedings for its taxable transactions is borne out by objective evidence.

41 As regards the question whether, in a situation such as that at issue in the main proceedings, an adjustment of the input VAT deducted should be carried out, it must be noted 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. It is intended to enhance the precision of deductions so as to ensure the neutrality of VAT, so that transactions effected at an earlier stage continue to give rise to the right of deduction only to the extent that they are used to make supplies subject to VAT. That mechanism thus aims to establish a close and direct relationship between the right to deduct input VAT and the use of the goods or services concerned for taxed output transactions (judgment of 9 July 2020, *Finanzamt Bad Neuenahr-Ahrweiler*, C-374/19, EU:C:2020:546, paragraph 20).

42 Under the common system of VAT, only the input VAT on goods or services used by a taxable person for his or her taxed transactions may be deducted. The deduction of input VAT is linked to the collection of output taxes. 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 deducted (judgment of 9 July 2020, *Finanzamt Bad Neuenahr-Ahrweiler*, C-374/19, EU:C:2020:546, paragraph 21).

43 The Court has, moreover, stated that where, due to circumstances beyond his or her control, the taxable person does not use the goods and services giving rise to the deduction for the purposes of taxable transactions, it is not sufficient, in order to establish the existence of '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, due to circumstances outside the owner's control, even where it has been established that the owner still intends to use it for a taxed activity and undertakes the necessary steps to that end, as that would be tantamount to restricting the right of deduction through the provisions applicable to adjustments (see, to that effect, judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 47).

44 It is only if the taxable person no longer intended to use the goods and services in question to carry out taxable output transactions, or used them to carry out exempt transactions, that the close and direct relationship, within the meaning of the case-law cited in paragraph 41 above, which must exist between the right to deduct input VAT and the performance of planned taxable transactions, would be broken.

45 It follows that, if, as is apparent from the request for a preliminary ruling, the taxable person still intends to use the goods and services acquired to carry out taxable transactions, which it is for the referring court to ascertain, it cannot be held that there has been a subsequent change in the factors used to determine the amount of VAT to be deducted, as referred to in Article 185 of the VAT Directive. A situation such as that at issue in the main proceedings does not, therefore, fall within the scope of Articles 184 and 185 thereof, as regards the adjustment of the input VAT deducted.

46 In the light of all the foregoing considerations, the answer to parts (a) to (i) of the first question is that Articles 167, 168, 184 and 185 of the VAT Directive must be interpreted as meaning that the right to deduct input VAT on goods, in the present case immovable goods, and services acquired with a view to carrying out taxable transactions, is maintained where the investment projects initially planned have been abandoned owing to circumstances beyond the taxable person's control, and there is no need to adjust that VAT if the taxable person still intends to use those goods for the purposes of a taxable transaction.

Question 2(a) to (f)

47 By parts (a) to (f) of its second question, the referring court asks, in essence, whether the VAT Directive, in particular Article 28 thereof, must be interpreted as meaning that, where a contract of agency without representation has not been concluded, the commission agent mechanism is applicable when a taxable person carries out a construction project in accordance with the needs and requirements of another person who is expected to rent that construction.

48 To answer that question, it must be borne in mind, first of all, that, under the Court's settled case-law, consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (judgment of 22 November 2018, *MEO – Serviços de Comunicações e Multimédia*, C-295/17, EU:C:2018:942, paragraph 43 and the case-law cited).

49 Next, Article 28 of the VAT Directive, which provides that where a taxable person acting in his or her own name but on behalf of another person takes part in a supply of services, he or she is to be deemed to have received and supplied those services himself or herself, creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, first, received the services in question from the operator on behalf of whom he or she acts, who constitutes the principal, before, second, himself or herself providing those services to the client (judgment of 4 May 2017, *Commission* v *Luxembourg*, C-274/15, EU:C:2017:333, paragraphs 85 and 86 and the case-law cited).

50 Finally, the Court has held that the same reasoning applies as regards the acquisition of goods pursuant to a contract under which commission is payable on purchase, under Article 14(2)(c) of the VAT Directive, which also comes under Title IV of that directive, entitled 'Taxable

transactions'. That provision thus creates the legal fiction of two identical supplies of goods made consecutively, which fall within the scope of VAT (judgment of 4 May 2017, *Commission* v *Luxembourg*, C-274/15, EU:C:2017:333, paragraph 88).

51 It follows that two conditions must be satisfied in order for those provisions to be applicable: first, that there is an agency in performance of which the commission agent acts, on behalf of the principal, in the supply of goods and/or services and, second, that the supplies of goods and/or services acquired by the commission agent and the supplies of goods and/or services sold or transferred to the principal are identical.

52 As regards the first of those conditions, which is the one specifically mentioned by the referring court, it must be observed that the VAT Directive does not, admittedly, provide in what form, written or oral, the agency must be given. However, since Article 14(2)(c) of that directive expressly uses the term 'contract' and Article 28 of that directive states that the taxable person must act 'on behalf of another person', the Court concludes that there must be an agreement between the commission agent and the principal for the purpose of granting the agency concerned.

53 It is not apparent from the information in the file submitted to the Court that such an agreement existed in the main proceedings. However, it is ultimately for the referring court, which alone has jurisdiction to assess the facts of the case before it, to determine whether that is indeed the case.

54 As regards the second condition, relating to the identical nature of the transactions at issue, it suffices to state that both Article 14(2)(c) and Article 28 of the VAT Directive provide that the goods and/or services supplied to the commission agent are to be transferred to the principal. Not only does this require, as is apparent from the Court's case-law, that the transactions in question must be the same, but also that, where appropriate, the corresponding right of ownership must be transferred.

55 In a situation such as that at issue in the main proceedings, in which a taxable person acquires goods and services in its own name and on its own behalf, and not on behalf of another person, so as to be able to supply services adapted to the particular needs of a given client, the second condition identified in paragraph 48 of the present judgment is plainly not met since there is no transfer of the right of ownership between the alleged commission agent and the alleged principal.

56 In the light of all the foregoing considerations, the answer to parts (a) to (f) of the second question is that the VAT Directive, in particular Article 28 thereof, must be interpreted as meaning that, in the absence of a contract of agency without representation, the commission agent mechanism is not applicable where a taxable person carries out a construction project in accordance with the requirements and specifications of another person who is expected to rent that building.

Costs

57 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Articles 167, 168, 184 and 185 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the right to deduct input value added tax (VAT) on goods, in the present case on immoveable property, and on services purchased in order to carry out taxed transactions must be retained where the investment projects initially planned were abandoned due to circumstances beyond the control of the taxable person and that it is not necessary for that VAT to be adjusted if the taxable person still intends to use those goods for the purposes of a taxed activity.**

2. **Directive 2006/112, in particular Article 28 thereof, must be interpreted as meaning that, in the absence of an agency agreement without representation, the mechanism imposing the rules governing commissioning is not applicable where a taxable person constructs a building in accordance with the specifications and requirements of another person expected to lease that building.**

[Signatures]