Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 23 December 2015 [1]

Case C-520/14

Gemeente Borsele
v
Staatssecretaris van Financiën

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands))

(Tax legislation — Value added tax — Article 9(1) of Directive 2006/112/EC — Taxable person — Economic activity — Transport of school pupils on behalf of a municipality — Parents' financial contribution to the municipality dependent on their income)

I – **Introduction**

1. The Netherlands municipalities appear to be well administered. It is certainly the case that at least some of the authorities in those municipalities frequently make a point of coming up with ways to secure tax savings for the benefit of their citizens. Since these initiatives do not always proceed without coming into conflict with the Netherlands tax administration, the Court of Justice has already had occasion to deal with a number of requests for a preliminary ruling on the interpretation of EU law on value added tax (VAT). [2]

2. The present proceedings are concerned with the question of whether, in organising the transport of pupils to its schools, the municipality of Borsele is carrying on an activity subject to VAT. The municipality would like this to be the case. For it would like to use the right to deduct input tax associated with such an activity in order to make considerable savings on the VAT which it has paid on the services provided by transport undertakings entrusted with the provision of school transport facilities.

3. From the point of view of VAT law, it is therefore necessary to determine whether the municipality of Borsele has thus carried on an 'economic activity'. Admittedly, the Court has already looked at the definition of that term on a number of occasions, in particular in relation to public or quasi-public activities. [3] The assessment criteria laid down by case-law in this regard require further clarification, however.

1 — Original language: German.

2 — See, with regard to the deduction of input tax, the judgments in *Gemeente Leusden and Holin Groep* (C-487/01 and C-7/02, EU:C:2004:263), concerning the letting of playing fields, *Gemeente 's-Hertogenbosch* (C-92/13, EU:C:2014:2188), concerning the construction of an office building, and *Gemeente Woerden* (C-267/15), still pending, which also concerns the construction of a building; see also the judgments in *Gemeente Emmen* (C-468/93, EU:C:1996:139), concerning the tax exemption applicable to the supply of building land, and *Gemeente Vlaardingen* (C-299/11, EU:C:2012:698), concerning the taxation of the application of a sports pitch.

3 — See in this regard the judgments in *Hong-Kong Trade Development Council* (89/81, EU:C:1982:121); *Commission* v *Netherlands* (235/85, EU:C:1987:161); *University of Huddersfield* (C-223/03, EU:C:2006:124); *T-Mobile Austria and Others* (C-284/04, EU:C:2007:381); *Hutchison 3G and Others* (C-369/04, EU:C:2007:382); *Götz* (C-408/06, EU:C:2007:789); *SPÖ Landesorganisation Kärnten* (C-267/08, EU:C:2009:619); *Commission* v *Finland* (C-246/08, EU:C:2009:671); and *Saudaçor* (C-174/14, EU:C:2015:733).

II – **Legal framework**

4. The collection of VAT within the European Union is governed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[4] ('the VAT Directive'). It is true that the Sixth Directive,[5] applicable until 31 December 2006, is not directly relevant to the dispute in the main proceedings. Given, however, that its provisions are largely identical,[6] the Court's case-law on the Sixth Directive must also be taken into account in the present case.

5. In accordance with Article 2(1)(c) of the VAT Directive, 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such', inter alia, is subject to VAT.

6. Article 9(1) of the VAT Directive (formerly Article 4(1) and (2) of the Sixth Directive) defines 'taxable person' as follows:'1. '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.'

7. Article 13(1) of the VAT Directive (formerly the first to the third subparagraphs of Article 4(5) of the Sixth Directive) contains a special provision on public activities:'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.'

8. Annex I to the VAT Directive, to which the third subparagraph of Article 13(1) refers, includes, in point 5, the activity of 'passenger transport'.

III – **Dispute in the main proceedings**

9. The dispute in the main proceedings concerns the VAT owed by the Netherlands municipality of Borsele ('the municipality') for December 2008 and the payments from the Netherlands VAT Compensation Fund to which the municipality is entitled in respect of the year 2008.

4 — OJ 2006 L 347, p. 1.

5 — 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).

6 — See recital 3 of the VAT Directive.

10. In the 2008/2009 school year, the municipality organised transport to their schools for certain pupils living within the municipal area. To that end, it hired a number of transport undertakings which invoiced the municipality for the provision of those transport services, including VAT. The costs thus incurred by the municipality amounted to EUR 458 231.

11. The municipality collected contributions from the pupils' parents, who had to apply to the municipality to receive the school transport service. For distances of between 6 and 20 kilometres, the amount of those contributions was determined by how much it would have cost to take public transport to cover a distance of 6 kilometres; for distances of greater than 20 kilometres, account was also taken of the parents' income. As a result, only a third of parents paid contributions. In 2008, those contributions amounted in total to EUR 13 958.

12. The municipality takes the view that its school transport activities are subject to VAT. Consequently, it submits, it is, on the one hand, liable to pay VAT on the contributions collected from parents in the amount of EUR 13 958, and, on the other hand, entitled to deduct the input tax represented by the VAT element of the EUR 458 231 which the transport undertakings charged it for providing transport services. The net effect of this would be that the municipality would be entitled to a tax refund. The Netherlands tax administration is of the view, however, that the organisation of school transport by the municipality is not subject to VAT because it does not constitute an economic activity.

IV – **Procedure before the Court**

13. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which the dispute has now been brought, considers EU VAT law to be crucial to the resolution of the dispute, and, for that reason, on 18 November 2014 referred the following questions to the Court under Article 267 TFEU:

Should Article 2(1)(c) and Article 9(1) of the VAT Directive be interpreted as meaning that, with regard to the transport of school pupils, on the basis of an arrangement as described in the present judgment, a municipality should to this extent be regarded as a taxable person within the meaning of that directive? For the purpose of answering that question, should the arrangement as a whole be considered, or should this assessment be made for each transport operation separately? If the latter is the case, should a distinction be made according to whether pupils are transported over a distance of between 6 and 20 kilometres or over a distance exceeding 20 kilometres?

14. In the procedure before the Court, written observations have been submitted by the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the European Commission. The hearing of 26 November 2015 was also attended by the municipality.

V – **Legal assessment**

15. By its questions, the referring court wishes to ascertain to what extent the municipality in the present case, in so far as it organised school transport in the manner described, acted as a taxable person within the meaning of Article 9(1) of the VAT Directive and is thus liable to VAT.

16. According to the first subparagraph of that provision, this is subject to two conditions. First, the municipality would have to have carried out an 'economic activity' and, secondly, would have to have done so 'independently'. In the present proceedings, it is only the first of those two conditions that is called into question, that is to say whether the municipality carried out an economic activity in organising school transport.

17. The second subparagraph of Article 9(1) of the VAT Directive contains a legal definition of economic activity. This states that an economic activity is — for the purposes relevant in the present case[7] — 'any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions'.

18. At first sight, that definition seems to be very narrow for the purposes of the present case. From the point of view of its wording alone, it seems doubtful whether a municipality can be classified under one of the categories of undertakings and professions listed. The Court, however, has given the concept of 'economic activity' a broad interpretation in its settled case-law[8] and that interpretation is further confirmed in this particular case by the special rules for public activities that are contained in Article 13 of the VAT Directive.

19. After all, the first subparagraph of Article 13(1) of the VAT Directive provides that bodies governed by public law — which explicitly include, inter alia, municipalities — are not to be regarded as taxable persons in respect of the activities in which they engage as public authorities. That provision thus presupposes that the State and its various bodies governed by public law are also capable of carrying out economic activities within the meaning of Article 9(1) of the VAT Directive and, therefore, of being subject to VAT. Indeed, so far as concerns the present case of publicly-performed passenger transport, this follows directly from the third subparagraph of Article 13(1) of, in conjunction with point 5 of Annex I to, the VAT Directive. These stipulate that bodies governed by public law — even where they engage in activities as public authorities under the first subparagraph of Article 13(1) of the VAT Directive — are to be regarded as taxable persons on condition that they do not provide passenger transport on such a small scale as to be negligible.

20. It cannot be inferred from the latter provision, however, that a body governed by public law is always a taxable person where it engages in the activity of passenger transport. For the Court has repeatedly held that the application of the special rules for public activities contained in Article 13 of the VAT Directive presupposes that, in the particular case question, the State is actually carrying out an economic activity in the first place.[9] Consequently, it is only where a public body is providing passenger transport that also constitutes an economic activity within the meaning of Article 9(1) of the VAT Directive that the body itself acts as a taxable person in the supply of passenger transport as a public authority under point 5 of Annex I to, and the third subparagraph of Article 13(1) of, that directive.

21. Since the latter provision would otherwise be redundant, it must in any event be concluded from it that publicly-performed passenger transport *can* constitute an economic activity. When it is to be assumed that it does so in a particular case, however, falls to be ascertained below.

A – *Preliminary remarks on the purpose served by taxing public activities*

22. The present case provides an opportunity to give careful thought to this very issue of the circumstances in which a public activity constitutes an economic activity and may therefore be subject to VAT.

7 — The second sentence of the second subparagraph of Article 9(1) of the VAT Directive refers in particular to the 'exploitation of tangible or intangible property' as an economic activity. However, the organisation of school transport at issue here cannot under any circumstances be regarded as falling under this category.

8 — See, inter alia, the judgments in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 8); *Commission* v *Greece* (C-260/98, EU:C:2000:429, paragraph 26); *University of Huddersfield* (C-223/03, EU:C:2006:124, paragraph 47); *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraphs 34 and 37); and *Saudaçor* (C-174/14, EU:C:2015:733, paragraph 31).

9 — See the judgments in *T-Mobile Austria and Others* (C-284/04, EU:C:2007:381, paragraph 48); *Hutchison 3G and Others* (C-369/04, EU:C:2007:382, paragraph 42); *Götz* (C-408/06, EU:C:2007:789, paragraph 15); *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 53); and *Commission* v *Spain* (C-154/08, EU:C:2009:695, paragraph 99).

23. As Advocate General Jacobs previously observed in a different context, the purpose of imposing VAT on services provided by the State is not readily apparent. An arrangement whereby VAT is borne by one public body only to benefit another is ultimately no more than a circuitous way of reallocating revenue at national level.[10] That is true in this case too. The advantage or disadvantage which the municipality derives from taxing its activity is at the same time disadvantageous or advantageous to the tax revenue collected by the Netherlands tax administration. From the point of view of the Netherlands State's finances taken as a whole, therefore, it makes no difference whether the activity carried on by the municipality in the present case is subject to VAT or not.

24. As is apparent by converse inference from the special rules contained in Article 13 of the VAT Directive, however, the EU legislature has decided that public activities too are in principle subject to VAT, provided that they also constitute an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive. There are two good reasons for this.

25. First, the taxation of publicly-performed economic activities serves to prevent distortions of competition arising from VAT. Thus, where public bodies provide services which are in competition with services provided by private economic operators, the public bodies would enjoy a considerable competitive advantage if their activities were not subject to VAT too. Furthermore, that reason for taxing public activities is also taken into account in the special rules contained in Article 13 of the VAT Directive. Although the first subparagraph of that provision exempts from VAT economic activities in which the State engages as a public authority, the second and third subparagraphs then proceed immediately to restrict that exemption to the extent that there is a risk of distortion of competition on the relevant market.

26. Secondly, economic activities carried on by the State must also be taxed in order to ensure that the target of VAT taxation is captured as comprehensively as possible. In accordance with recital 5 of the VAT Directive, VAT is to be levied 'in as general a manner as possible'. Under the system by which it is collected, VAT is, in principle, levied ultimately only on final consumption,[11] and, in accordance with case-law too, it is intended to tax only the final consumer.[12] Where the State provides services culminating in such a final consumption of goods, that final consumption, which is satisfied by the State, would ultimately go at least partially untaxed if publicly-performed economic activities were not also potentially subject to VAT. The foregoing is also significant from the point of view of the European Union's own resources, which are made up in part from VAT receipts.[13]

27. The fact that the levying of VAT on public activities is not self-evident, but requires special justification, is apparent from the Court's case-law. This states that the examination of whether, in a particular case, a public or quasi-public activity constitutes an economic activity within the meaning of Article 9(1) of the VAT Directive is subject to manifestly stricter criteria than would apply in the case of an activity carried on by a private individual.[14] And with some justification. After all, such an examination should always include consideration of the two specific reasons for taxing public activities which I have just set out, so as to ensure that 'self-taxation' by the State makes sense in the context of individual cases too.

10 — See the Opinion of Advocate General Jacobs in *Landboden-Agrardienste* (C-384/95, EU:C:1997:433, point 12).

11 — See Article 1(2) of the VAT Directive.

12 — Judgments in *Lebara* (C-520/10, EU:C:2012:264, paragraph 25) and *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 34); see also the judgment in *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21 and the case-law cited), concerning the taxable person's role as mere 'tax collector for the State', and the judgment in *Profaktor Kulesza, Frankowski Jóźwiak, Orłowski* (C-188/09, EU:C:2010:454, paragraph 47 and the case-law cited), concerning the main characteristics of VAT.

13 — See Article 2(1)(b) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17).

14 — See the judgments in *T-Mobile Austria and Others* (C-284/04, EU:C:2007:381); *Hutchison 3G and Others* (C-369/04, EU:C:2007:382); *SPÖ Landesorganisation Kärnten* (C-267/08, EU:C:2009:619); and *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 53); see also the judgments in *Mohr* (C-215/94, EU:C:1996:72) and *Landboden-Agrardienste* (C-384/95, EU:C:1997:627), in relation to the taxation of State-subsidised services.

B – *Conditions for the existence of an economic activity*

28. In the light of the foregoing, it must now be clarified whether, in the present case, the organisation of school transport by a municipality constitutes an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive.

29. First, we must address the Commission's objection that the municipality cannot even potentially have acted in the context of an economic activity unless it charged the pupils' parents VAT on the organisation of school transport facilities. This, it submits, is not apparent from the information provided by the referring court.

30. However, that assessment by the Commission is based on a misunderstanding. The question of whether a person has acted in the context of an economic activity must be assessed without regard to whether or not it charged VAT. On the contrary, the examination must focus rather on whether that person was right to charge or to refrain from charging VAT, as the case may be. This specifically depends, inter alia, on whether its activity is to be classified as an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive. If that were not the case, every taxable person could evade his tax obligations simply by not charging VAT to his customers.

1. Supply of services

31. The Kingdom of the Netherlands calls into question the presence of an economic activity in this case on the ground, first, that, in its view, the municipality has not even supplied any services corresponding to the chargeable event defined in Article 2(1)(c) of the VAT Directive.

32. The Kingdom of the Netherlands is right to say that an economic activity within the meaning of Article 9(1) of the VAT cannot be said to exist where an activity does not correspond to any of the various chargeable events defined in Article 2 of the VAT Directive. The Court's repeated references to the chargeable events defined in Article 2 of the VAT Directive when interpreting Article 9 of that directive must also be understood in this way. [15]

33. It is also true that the only chargeable event potentially applicable in the present case is that provided for in Article 2(1)(c) of the VAT Directive, which stipulates that the supply of services for consideration is to be subject to VAT. Accordingly, any assumption that the municipality carries on an economic activity is subject to the essential condition that, in organising school transport, the municipality supplied services within the meaning of the definitions, applicable here, given in Articles 24 and 25 of the VAT Directive.

34. On the other hand, in so far as the Kingdom of the Netherlands disputes the existence of such services because, in organising school transport, the municipality is simply fulfilling a legal obligation, reference need only be made to Article 25(c) of the VAT Directive, which states that a service subject to VAT may also be performed 'in pursuance of the law'. For that reason, the Court has previously held that, so far as concerns any assumption as to the existence of an economic activity, the fact that an activity is conferred and regulated by law in the public interest is irrelevant. [16]

35. The Kingdom of the Netherlands has also argued, however, that the relationships characterising the supply of services in the present case are not as described by the referring court. In its submission, it is clear from Article 4 of the Netherlands Law on primary school education and the corresponding implementing provisions adopted by the municipality that the municipality does not

15 — See, for example, the judgment in *Saudaçor* (C-174/14, EU:C:2015:733, paragraph 31 and the case-law cited).

16 — Judgments in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 10) and *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 40).

provide any services to the pupils' parents. After all, the parents have no claim against the municipality for the provision of transport for their children and do not pay the municipality anything for providing that transport. The position is rather that the municipality is entitled only to ask the parents to make a contribution towards the costs which the parents themselves incur in connection with the transport of schoolchildren.

36. However, since the Court has no jurisdiction in the context of a request for a preliminary ruling to check the factual circumstances of the case before the referring court as set out in the order for reference [17] or to verify the accuracy of the interpretation of national law made by the referring court, [18] it must be assumed, for the purposes of answering the questions referred, that the relationships characterising the supply of services in question are as defined by the referring court. Accordingly, it was the municipality itself which commissioned transport services from various transport undertakings and paid them for those services. The municipality made those transport services available to the pupils' parents at the parents' request. The municipality was then entitled to obtain a contribution from the relevant parents in return for those services.

37. The information thus provided by the referring court therefore supports the conclusion that, in organising school transport facilities, the municipality supplied services within the meaning of Article 2(1)(c) of the VAT Directive. To that extent, then, the economic nature of its activity is not in question.

2. The obtaining of income

38. That said, it is the Court's case-law that an activity is to be regarded as an economic activity only if it is carried out for the purpose of obtaining income on a continuing basis. [19]

39. At times, the Court has also expressed that condition as meaning that the activity must be permanent and carried out 'in return for remuneration'. [20] Even in those cases, however, the Court expressly referred to the provision contained in the second sentence of the second subparagraph of Article 9(1) of the VAT Directive, which states that the exploitation of property constitutes an economic activity where this takes place 'for the purposes of obtaining income therefrom on a continuing basis'. For that requirement is intended to apply not only to the exploitation of property, but to all activities. [21]

40. The continuing nature of the municipality's activity is not at issue in the present case. What *is* at issue is whether the municipality organised school transport for the purpose of obtaining income or in return for remuneration within the meaning of the Court's case-law.

41. The Kingdom of the Netherlands and the Commission take the view that the assumption as to the pursuit of an economic activity on the part of the municipality falls down in any event because the municipality did not organise the school transport in return for consideration. The reason for this is that the contributions which the pupils' parents pay to the municipality are not linked to the costs of providing the service. In support of that view, they rely on a judgment concerning a dispute between

17 — See, inter alia, the judgment in *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 53).

18 — See, inter alia, the judgment in *Târşia* (C-69/14, EU:C:2015:662, paragraph 13 and the case-law cited).

19 — See the judgment in *Finanzamt Freistadt Rohrbach Urfahr* (C-219/12, EU:C:2013:413, paragraph 18).

20 — Judgments in *Götz* (C-408/06, EU:C:2007:789, paragraph 18) and *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 37); see also the judgment in *Hong-Kong Trade Development Council* (89/81, EU:C:1982:121) concerning Article 4 of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (Official Journal, English Special Edition 1967, p. 16).

21 — See the judgment in *Götz* (C-408/06, EU:C:2007:789, paragraph 18); see also the judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 37), which refers, in this regard, to the aforementioned judgment.

the Commission and Finland, in which the Court held that a public activity was not economic because the remuneration sought for that activity was, in relation to the actual value of the services provided, only a part payment the amount of which depended on the income and assets of the recipient of those services. [22]

42. The United Kingdom, on the other hand, considers that that judgment contradicts the judgment in *Hotel Scandic Gåsabäck*, in which the Court explicitly held that even a payment lower than the cost price is capable of supporting the assumption that a transaction has been effected for consideration. [23]

a) The link between consideration and the obtaining of income

43. Those differing views show that the aforementioned judgments of the Court must first be differentiated in order to ensure that they are not misconstrued.

44. A distinction must thus be drawn between the obtaining of income, as required by Article 9(1) of the VAT Directive, and the status of being effected for consideration that must attach to the supply of an individual service or the supply of goods as a condition, laid down in Article 2 of the VAT Directive, of the latter's being subject to VAT, consideration also forming the basis of assessment to VAT under Article 73 of the VAT Directive.

45. So far as concerns the determination of whether the supply of a service is effected for consideration as it must be in order to be chargeable to tax in accordance with Article 2(1)(c) of the VAT Directive, it is true that the Court stated unambiguously in the judgment in *Hotel Scandic Gåsabäck* that the supply of a service or the supply of goods is also effected 'for consideration' within the meaning of Article 2(1) of the VAT Directive where a price lower than the cost price is charged. [24] Moreover, there is no reason not to subject to VAT sales at below cost price which, in certain circumstances, are necessary and reasonable in business. Nor is pricing which is in some way based on the income or assets of a customer, such as, for example, the discounts which businesses offer for students or pensioners, eligible for exemption from VAT.

46. The same applies without question to the determination of consideration for the purposes of the basis of assessment to VAT. It is settled case-law that the 'consideration obtained', which is decisive from the point of view Article 73 of the VAT Directive, is a 'subjective value', that is to say the value actually received and not a value estimated according to objective criteria. [25] The Court thus makes the point that VAT is always assessed by reference to the consideration obtained in the particular case in question, not by reference to the 'objective' value of the service or goods supplied. This also clearly follows, by converse inference, from the provision contained in Article 80 of the VAT Directive, which allows the Member States, in certain cases, to use as the basis of assessment the objective market value of the supply [26] rather than the consideration actually obtained.

47. So far as concerns the determination of whether an activity is to be regarded as economic within the meaning of Article 9(1) of the VAT Directive, on the other hand, there are other criteria which apply.

22 — See the judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraphs 47 to 51).

23 — See the judgment in *Hotel Scandic Gåsabäck* (C-412/03, EU:C:2005:47, paragraph 22).

24 — See the judgment in *Hotel Scandic Gåsabäck* (C-412/03, EU:C:2005:47, paragraphs 22 to 24).

25 — See, inter alia, the judgments in *Coöperatieve Aardappelenbewaarplaats* (154/80, EU:C:1981:38, paragraph 13); *Hotel Scandic Gåsabäck* (C-412/03, EU:C:2005:47, paragraph 21); and *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 33).

26 — The 'open market value', which is defined in Article 72 of the VAT Directive.

48. It is true that, in the aforementioned judgment in *Commission* v *Finland*, the Court, in relation to Article 9(1) of the VAT Directive, examined the condition as to whether the State carried out its activity for remuneration and thus for the purpose of obtaining income by reference to the chargeable events defined in the current Article 2(1)(a) and (c) of the VAT Directive.[27] However, as is apparent from the wording of the French-language version of the judgment, the language in which the judgment was deliberated, the Court does not by any means assume that the concept of consideration in those two provisions is identical.[28] On the contrary, the reason the Court, when defining an economic activity, sometimes refers only to the 'consideration' for that activity is, as we have seen, that income must be derived from an activity in order for that activity to be economic. Income is not obtainable, however, if an activity is carried out exclusively free of charge.[29]

49. When, in the judgment in *Commission* v *Finland*, the Court refers to 'remuneration' in the context of Article 9(1) of the VAT Directive, it specifically does not have in mind the exact same concept as when, in the judgment in *Hotel Scandic Gåsabäck*, it interprets the term 'consideration' as used in Article 2(1) of the VAT Directive. Even though the same outcomes may often be expected, a strict separation must be observed between the determination of any consideration for the purposes of Article 2 of the VAT Directive, on the one hand, and the question of whether any income is obtained that falls to be examined in the context of Article 9 of that directive, on the other. This also settles the issue of the alleged contradictions in the Court's case-law.[30]

50. In summary, it may be said that, on the one hand, it is true that, where consideration within the meaning of the chargeable events defined in Article 2(1) of the VAT Directive is *not* sought, no economic activity is present, since no income is obtained from that activity as the second sentence of the second subparagraph of Article 9(1) of the VAT Directive requires. On the other hand, however, as the Court has consistently held, the fact that a taxable person seeks in connection with an activity consideration within the meaning of the definition of the events chargeable to VAT is not sufficient for a finding, required by Article 9(1) of the VAT Directive, that its activity is also carried out for the purposes of obtaining income or, therefore, to support the assumption that an economic activity is present.[31]

b) The obtaining of income in the present case

51. It thus remains to be examined in the present case whether the municipality organises school transport for the purposes of obtaining income.

i) 'Consideration' within the meaning of the definition of the event chargeable to VAT

52. First of all, that question cannot be answered in the negative just because the municipality did not seek any consideration within the meaning of Article 2(1)(c) of the VAT Directive for its activity. The opposite is the case.

27 — See the judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraphs 42 to 51); see also the judgment in *Commission* v *France* (C-276/97, EU:C:2000:424, paragraphs 32 to 36).

28 — See the French-language version of the judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 37), which, in the context of determining the existence of an economic activity, refers to an activity '*effectuée contre une rémuneration*' (carried out in return for remuneration), which is not the same as the expression '*à titre onéreux*' ('for consideration') used in Article 2(1)(a) to (c) of the VAT Directive; see also the judgment in *Götz* (C-408/06, EU:C:2007:789, paragraph 18).

29 — See to that effect, inter alia, the judgment in *Hong-Kong Trade Development Council* (89/81, EU:C:1982:121, paragraph 12).

30 — See points 41 and 42 above.

31 — See to that effect the judgments in *Götz* (C-408/06, EU:C:2007:789, paragraph 21) and *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 38).

53. After all, it is settled case-law that a supply for consideration within the meaning of the definition of the events chargeable to tax given in Article 2(1)(a) and (c) of the VAT Directive presupposes only that there is a direct link between the supply of goods or services and the consideration actually received by the taxable person. [32] The existence of that link is predicated only on the presence of a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, [33] as well as the reciprocal condition of performance and counter-performance. [34]

54. In so far as a third of parents had to pay a contribution towards school transport, those requirements are clearly satisfied. Moreover, as is clear from the aforementioned judgment in *Hotel Scandic Gåsabäck*, the fact that the municipality sought remuneration below the cost price it had incurred does not rule out the assumption as to the presence of consideration in those cases. [35] The municipality does not therefore organise school transport exclusively free of charge.

ii) The obtaining of income in the narrower sense

55. As I have shown, the presence of consideration within the meaning of Article 2(1)(c) of the VAT Directive is not, however, sufficient to support the finding that an activity is carried out for the purposes of obtaining income within the meaning of the second sentence of the second subparagraph of Article 9(1) of the VAT Directive.

56. The presence of an activity engaged in for the purpose of obtaining income seems questionable in the present case because, in its judgment in *Commission* v *Finland*, the Court held that public bodies operating in the field of legal aid services were not carrying on an economic activity inasmuch as they sought in return for that activity only a part payment dependent on the income and assets of the recipients of the services. The situation in the present case would appear to be similar.

57. In that judgment, however, the Court had regard primarily to the fact that the payment received only ever represented part of the fees generally set by law for legal aid services. [36] In the present case, on the other hand, there does not appear to be a general price for transport set by law.

58. A further factor in the Court's decision, however, appears to have been the fact that the amount of the payment was dependent on the income and assets of the recipient of the legal aid services. [37] Such dependence exists at least in part in the present case, in relation to the parents' income.

59. Furthermore, in that judgment, the Court took the view that the non-economic character of the activity in question was confirmed by the fact that the income obtained covered only a fraction of the costs incurred in providing the legal aid services. [38] The situation is exactly the same in the present case. In total, the municipality receives from the parents a part payment amounting to only some 3% of the costs it incurs in providing school transport.

32 — See, inter alia, the judgment in *Serebryannay vek* (C-283/12, EU:C:2013:599, paragraph 37 and the case-law cited).

33 — See, inter alia, the judgments in *Tolsa* (C-16/93, EU:C:1994:80, paragraph 14); *MKG-Kraftfahrzeuge-Factoring* (C-305/01, EU:C:2003:377, paragraph 47); and *Le Rayon d'Or* (C-151/13, EU:C:2014:185, paragraph 29).

34 — See, inter alia, the judgments in *Tolsa* (C-16/93, EU:C:1994:80, paragraphs 13 to 20) and *Fillibeck* (C-258/95, EU:C:1997:491, paragraphs 12 to 17); see also the Opinion of Advocate General Stix-Hackl in *Bertelsmann* (C-380/99, EU:C:2001:129, point 32).

35 — See the judgment in *Hotel Scandic Gåsabäck* (C-412/03, EU:C:2005:47, paragraphs 22 to 24).

36 — See the judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 47).

37 — See the judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 48).

38 — See the judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 50).

60. Although there are thus a number of unmistakeable parallels between the two cases, it none the less cannot immediately be ruled out in the present case that the purpose of the activity carried out by the municipality is — at least in part — to obtain income. For it is important in particular not to confuse the purpose of obtaining income with the intention to make a profit, which, according to case-law, is *not* a condition of assuming the presence of an economic activity. [39]

61. One consideration which the Court, in the judgment in *Commission* v *Finland*, did not make explicit but which ultimately informed its decision, however, was the absence of a specific, implicit condition that must be satisfied in order for an activity to be carried out for the purpose of obtaining income within the meaning of the second sentence of the second subparagraph of Article 9(1) of the VAT Directive: market participation.

iii) Market participation

62. The Court has thus previously held, in the judgment in *SPÖ Landesorganisation Kärnten*, that an activity was not carried out for the purpose of obtaining income within the meaning of the second sentence of the second subparagraph of Article 9(1) of the VAT Directive because the political party organisation at issue did not participate in any market in the course of its activities. [40] In other decisions, too, it has ultimately found that public bodies do not carry out an economic activity because there was no evidence of market participation. [41]

63. That requirement of market participation is confirmed and supplemented by the fact that, in order to find that an economic activity is being carried out, the Court occasionally examines whether an activity is carried out in the same way as a corresponding economic activity is usually carried out. In order to do so, it must, in particular, compare the activity at issue with the usual activities of the trades and professions referred to in the first sentence of the second subparagraph of Article 9(1) of the VAT Directive. [42]

64. There is no evidence of any such typical market participation by the municipality in the present case, however. In the course of its activity, the municipality does not offer any services on the general market in transport services. In fact, it has the appearance of itself being the final consumer of the services provided by transport undertakings, whose transport services it makes available to the parents of pupils exclusively in the public interest, even though it sometimes levies a financial contribution for so doing.

65. This is borne out in particular by the fact that the municipality recovers only a small percentage of the costs of the services it receives by levying a contribution for the services it provides. This is not the typical conduct of a market participant.

39 — See to that effect the judgment in *Finanzamt Freistadt Rohrbach Urfahr* (C-219/12, EU:C:2013:413, paragraph 25); this is also apparent from the provisions of Article 132(1)(l) and (m) and of Article 133(a) of the VAT Directive, which are specifically directed at non-profit-making bodies.

40 — Judgment in *SPÖ Landesorganisation Kärnten* (C-267/08, EU:C:2009:619, paragraphs 21 and 24).

41 — Judgments in *T-Mobile Austria and Others* (C-284/04, EU:C:2007:381, paragraph 42) and *Hutchison 3G and Others* (C-369/04, EU:C:2007:382, paragraph 36); see also to that effect the judgment in *Götz* (C-408/06, EU:C:2007:789, paragraph 19).

42 — See the judgments in *Enkler* (C-230/94, EU:C:1996:352, paragraph 28); *Słaby and Others* (C-180/10 and C-181/10, EU:C:2011:589, paragraphs 39 to 41); *Finanzamt Freistadt Rohrbach Urfahr* (C-219/12, EU:C:2013:413, paragraph 21); and *Trgovina Prizma* (C-331/14, EU:C:2015:456, paragraph 24).

66. In this regard, the Court too made it clear at an early stage that there is a certain link between the *level* of remuneration and the existence of an economic activity. [43] It was that very link which the Court also later confirmed in the judgment in *Commission* v *Finland*. [44] After all, an activity which, under the normal system of VAT, can give rise only to tax refunds, on account of the structure of the unit costs and prices connected with that activity, does not lead to any taxation of 'added value' because, structurally, no such added value can be generated.

67. Moreover, taxation of the municipal organisation of school transport is not necessary on either of the two grounds given above for bringing public activities within the scope of VAT. [45]

68. First, notwithstanding that this, as a point of fact, must ultimately be determined by the referring court, there are no indications of any distortions of competition resulting from the non-collection of VAT. In so far as parents do not use the services of private transport undertakings to have their children taken to school because of the transport services provided by the municipality, they do so not because there is no VAT but because the municipality charges them a contribution which from the outset appears to be lower than the market prices for comparable transport services, if indeed it asks them for a contribution at all. Taxing that activity would, on the contrary, make the competitive position of private operators even worse because the permanent surplus of deductible input tax inherent in the cost/price structure would enable the municipality to reduce the parents' contributions even further.

69. Secondly, the target of VAT taxation in the form of the taxation of final consumption can be adequately captured in the present case only if the activity of the municipality is *not* taxed. After all, if the organisation of school transport by the municipality, for which the latter uses external transport undertakings, were subject to VAT, the deduction of input tax would mean that VAT would ultimately be charged only on the basis of assessment formed by the contributions payable by the parents. These, however, represent only a small fraction of the market price for those transport services, since, in total, the contributions make up only 3% of the costs incurred in connection with the provision of transport services by external providers. The final consumption of those transport services would end up being largely exempt from VAT. In order to prevent this from happening and to ensure that the transport services are subject to VAT at their market price, final taxation must take place at the stage the municipality receives those services. This presupposes that the organisation of school transport by the municipality does *not* constitute an economic activity.

iv) General or case-by-case analysis

70. The United Kingdom has proposed, however, that, if a case-by-case analysis is adopted, the transport services for which the municipality receives from the parents a contribution at least approximating to a market price must in any event be regarded as constituting an economic activity.

71. It is true that the requirement of market participation on the part of a public activity must in principle be assessed in relation to the activity as a whole and does not necessitate the analysis of each individual transaction. Where public activities are taxed on the ground of preventing distortions of competition, however, it may be necessary in particular cases to split an activity into its economic and non-economic components.

43 — See the judgment in *Commission* v *France* (50/87, EU:C:1988:429, paragraph 21).

44 — See the judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 50).

45 — See points 25 and 26 above.

72. For that reason, the referring court will also have to examine to what extent, in the situation at issue here, the aforementioned non-collection of VAT is capable of giving rise to a distortion of competition in relation to private transport providers which affects particular transport services. When carrying out such an examination, it is always important to take account also of the impact of the deduction of input tax.

73. There would, however, be no need to differentiate between the economic and non-economic components of the municipality's activity if it were to be found in the present case that there is only a negligible number of particular cases in which the non-taxation of the school transport organised by the municipality would distort competition. This, after all, is consistent with the criteria arising from the special rules for public activities laid down in the second and third subparagraphs of Article 13(1) of the VAT Directive. [46]

v) Interim conclusion

74. First, however, it must be concluded, subject to the referring court's examination of the competitive position, that the purpose of the organisation of school transport by the municipality is not to obtain income within the meaning of the second subparagraph of Article 9(1) of the VAT Directive.

C – *Conclusion*

75. It must be concluded, subject once again to the referring court's examination of the competitive position, that, in organising school transport in the present case, the municipality does not therefore carry out an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive. Consequently, so far as concerns that activity, the municipality is not to be regarded as a taxable person within the meaning of the first subparagraph of Article 9(1) of the VAT Directive.

VI – **Conclusion**

76. I therefore propose that the questions referred by the Hoge Raad der Nederlanden be answered as follows:

A municipality such as that in the dispute in the main proceedings which organises transport for school pupils by calling on the services of external transport undertakings and receives from the pupils' parents contributions amounting to only 3% of the costs of providing the transport does not act as a taxable person within the meaning of Article 9(1) of Directive 2006/112/EC. If the referring court finds that there are distortions of competition affecting a not negligible number of particular transport services, the municipality acts as a taxable person to that extent.

46 — With regard to these criteria, see in particular the judgment in *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505).