Anonymised version

Case C-374/19

Request for a preliminary ruling

Date lodged:

13 May 2019

Referring court:

Bundesfinanzhof (Federal Finance Court, Germany)

Date of the decision to refer:

27 March 2019

Appellant in the appeal on a point of law:

HF

Respondent in the appeal on a point of law:

Finanzamt Bad Neuenahr-Ahrweiler (Bad Neuenahr-Ahrweiler Tax Office)

[...]

FEDERAL FINANCE COURT

[...]

ORDER

In the case of

HF, [...],

applicant and appellant in the appeal on a point of law,

[...]

v

Finanzamt Bad Neuenahr-Ahrweiler, [...]

defendant and respondent in the appeal on a point of law,

concerning turnover tax from 2009 to 2012

the 5th Chamber

[...]

made the following order on 27 March 2019: **[Or. 2]**

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling:

Does a taxable person who produces an investment object with regard to taxable use with entitlement to input tax deduction (in this case: construction of a building for the operation of a cafeteria) have to adjust the input tax deduction under Article 185(1) and Article 187 of the VAT Directive if he ceases the sales activity justifying the input tax deduction (in this case: operation of the cafeteria) and the investment object now remains unused in the scope of the previously taxable use?

II. The proceedings are stayed until the Court of Justice of the European Union has given a ruling.

Grounds

I.

The applicant and appellant in the appeal on a point of law (applicant) is the parent company of a limited liability company which operates a retirement and care home with exemption from taxation. In 2003, the limited liability company constructed in an annex a cafeteria which was accessible to visitors through an outside entrance and to residents through the care home's dining room.

The applicant initially assumed that it would use the cafeteria exclusively for taxable transactions. According to an audit opinion of the defendant and respondent in the appeal on a point of law (Finanzamt, 'the FA') referred to by the Finance Court (Finanzgericht, 'the FG'), no separate records were kept in the cafeteria as, according to the applicant's indications, the **[Or. 3]** residents of the home never frequented the cafeteria. The vast majority were so physically impaired that a visit to the cafeteria was out of the question. Only few would receive visits from relatives, friends and acquaintances, and would even then stay in the recently extended dining room, as that also served as a sitting room where coffee and sometimes cakes were also provided free of charge. The cafeteria itself had been intended for outside guests only, who were ideally not supposed to sit next to a resident in slippers and dressing gown. According to the opinion, these

were arguments which the FA could not ignore in the scope of the special turnover tax audit. Nonetheless, it seemed unlikely to the FA that absolutely no residents frequented and used the cafeteria with their visitors. It was thereupon agreed to assume tax-exempt use of the cafeteria at 10%. This led to the assumption of an adjustment under Paragraph 15a of the Umsatzsteuergesetz (Turnover Tax Law; 'UStG') for the years from 2003.

Following an external audit, the FA assumed that the limited liability company had no longer carried out goods transactions in the cafeteria in the years at issue (2009 to 2012). In February 2013, the business in this regard had been deregistered. This had led to a further adjustment under Paragraph 15a UStG, as there was now absolutely no use for transactions with entitlement to input tax deduction.

The objection and action before the FG were unsuccessful. In its [...] judgment, the FG assumed a cessation of operation in the years at issue. Although premises standing empty was not a transaction and did not give rise to a change in **[Or. 4]** circumstances, account was to be taken of the intended use. This had changed, as the intended use for taxable hospitality transactions no longer applied. The cafeteria had not stood completely empty, but had now been used exclusively, with tax exemption, by the residents. As use by outside visitors, which was subject to turnover tax, had been discontinued, the proportions of use had inevitably changed to the effect that there is now 100% use by residents. There is no use for purposes other than those with turnover tax exemption.

The applicant opposes this by way of the appeal on a point of law. If there was no longer use of an object of the company assets without a private use option, there was no change in use which led to an input tax adjustment under Paragraph 15a UStG. The cafeteria was a bad investment. Account had been taken of the possible use by the retirement home. A bad investment should not lead to an input tax adjustment for reasons of fiscal neutrality. The cafeteria was fully functional. The use by the residents was still restricted to 10%. The assumption of further use was contrary to the actual circumstances. For reasons of traffic safety and accident prevention, the access to the cafeteria had been closed. The refusal of a write-off to the lower going-concern value proved that there was still an intention for use. The FA counters this by stating that the use had changed, as there was no longer an intention to carry out taxable transactions. There was therefore still use only for tax-exempt transactions.

II.

This Chamber refers the question set out in the operative part to the Court of Justice of the European Union (Court of Justice) for interpretation of Council Directive **[Or. 5]** 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) and stays the proceedings until the Court of Justice has given a ruling.

1. Legal context

a) EU law

Article 185(1) of the VAT Directive states:

‘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.’

Article 187 of the VAT Directive reads 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.’

b) National law

Paragraph 15a(1) UStG stipulates:

‘If, in the case of an asset that is not only used once for executing transactions, the circumstances valid for the original deduction of input tax should change within a period of five years from the date of its first use, an offset is to be made for each calendar year of the change by adjusting the deduction of the input tax amounts attributable to the acquisition or production costs. In the case of immovable property, including the essential parts thereof, **[Or. 6]** entitlements governed by provisions of civil law relating to immovable property and buildings on a third party’s land, a period of ten years shall be substituted for the period of five years.’

2. The question referred

a) Lack of success beyond the taxable person’s control

There is a need for clarification and, in the opinion of this Chamber, a ruling by the Court of Justice as to whether a lack of success, beyond the taxable person’s

control, which leads to mere non-use of capital goods brings about a change in the factors used to determine the input tax deduction amount (Article 185(1) of the VAT Directive).

aa) The input tax deduction relieves the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. This ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT (judgment, in *Centralan Property*, of 15 December 2005, C-63/04, EU:C:2005:773, paragraph 51, and *Imofloresmira — Investimentos Imobiliariós*, of 28 February 2018, C-672/16, EU:C:2018:134, paragraph 38).

bb) In this case, the right to deduct remains acquired even where the taxable person has subsequently been unable to use the goods and services which gave rise to a deduction in the context of taxed transactions by reason of circumstances beyond his control (judgment in *INZO*, of 29 February 1996, C-110/94, EU:C:1996:67, paragraph 20; *Ghent Coal Terminal* judgment of 15 January 1998, C-37/95, EU:C:1998:1, paragraphs 19 and 20, and *Imofloresmira — Investimentos Imobiliariós*, EU:C:2018:134, paragraphs 40 and 42). There would otherwise be the establishment, contrary to the **[Or. 7]** principle of neutrality, of arbitrary differences, in that final acceptance of the deductions would depend on whether investments resulted in taxable transactions (*INZO*, EU:C:1996:67, paragraph 22, and *Imofloresmira — Investimentos Imobiliariós*, EU:C:2018:134, paragraph 43). It is therefore incompatible with the principle of fiscal neutrality to make the final acceptance of the VAT deductions dependent on the results of the taxable person's economic activity. This would create, as regards the tax treatment of identical investment activities, unjustified differences between undertakings with the same profile and carrying on the same activity (*Imofloresmira — Investimentos Imobiliariós*, EU:C:2018:134, paragraph 44).

b) Equivalence of non-use without intent and non-use with intended taxable use

Non-use, beyond the trader's control, without further intended use may have to be equated with non-use despite the intention of taxable use, as forming the basis for the Court of Justice's judgment in *Imofloresmira — Investimentos Imobiliariós* (EU:C:2018:134).

If the trader has produced an asset with the intention of use justifying the deduction of input tax and he is unable sustainably to realise the intended use due to a lack of success beyond his control, the lack of any use and any intention of use resulting therefrom would not bring about a change in the circumstances which leads to an input tax adjustment. **[Or. 8]**

3. Relevance of the question referred for a preliminary ruling.

According to the findings of the FG [...] which are binding for the adjudicating chamber, the closure of the operation of the cafeteria, which had already taken

place in the years at issue, was due to the lack of economic viability and therefore to the lack of success of the applicant, which did not in itself establish a change in circumstances.

The closure of the operation of the cafeteria did not lead to exclusively tax-exempt use by the residents. This is because the closure did not change the scope of the tax-exempt use by the residents. Rather, this instead remained unchanged in consideration of the circumstances which, according to the audit opinion referred to by the FG, led to the assumption of tax-exempt co-use. The use for the taxable operation of the cafeteria was discontinued without replacement, without increased use by the residents substituting that previous use. Therefore, alongside the unchanged use by the residents, instead of the earlier operation of the cafeteria, there was a now inactive operation with premises that are unused in this respect. It could be legally erroneous to interpret this lack of use as meaning that there is now exclusive use for tax-exempt purposes.

There are no other circumstances which could lead to an input tax adjustment. [Further comments on this subject with regard to national law]

[...] **[Or. 9]** [...]

4. Legal basis of the reference

The reference is based on Article 267 of the Treaty on the Functioning of the European Union.

[Procedural Matters]

[...]