Case C-612/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

30 September 2021

Referring court:

Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)

Date of the decision to refer:

16 April 2021

Appellant on a point of law:

Gmina O. (Municipality of O.)

Respondent:

Dyrektor Krajowej Informacji Skarbowej (Director of National Fiscal Information, Poland)

Subject matter of the main proceedings

An appeal on a point of law brought by a municipality against an advance tax ruling in which the municipality was deemed to be a taxable person for VAT purposes with respect to services consisting in the installation of renewable energy source systems.

Subject matter and legal basis of the request

Interpretation of Directive 2006/112; Article 267 TFEU

Questions referred for a preliminary ruling

1. Must the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1 as amended), in particular Articles 2(1), 9(1) and 13(1) thereof, be interpreted as meaning that a municipality (a public authority) acts as a taxable person for VAT purposes in carrying out a project whose objective is to increase the proportion of renewable energy sources by means of entering into a civil-law contract with property owners, under which the municipality undertakes to install renewable energy source systems on their property and – after a certain period of time has elapsed – to transfer the ownership of those systems to the property owners?

2. If the answer to the first question is in the affirmative, must European co-financing received by a municipality (a public authority) for the implementation of projects involving renewable energy sources be included in the taxable amount within the meaning
of Article 73 of that directive?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1): Articles 2, 9, 13

Provisions of national law relied on

1. Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on Tax on Goods and Services, *Dziennik Ustaw* (Journal of Laws) of 2018, item 2174, as amended, 'the Law on VAT')

Article 15(1). 'Taxable person' shall mean legal persons, unincorporated organisational units and natural persons which, independently, carry out economic activity as referred to in paragraph 2, regardless of the purpose or result of such activity.

Article 15(2). Economic activity is understood as all activities by producers, traders or service providers, including farmers and entities that extract natural resources as well as the activities of freelance professionals. Economic activity includes, in particular, transactions involving the use of goods or intangible assets on a continuing basis for the purpose of obtaining income.

Article 15(6). Public authorities and the offices serving those authorities shall not be considered taxable persons within the scope of tasks imposed by separate legal provisions for the performance of which they have been established, with the exception of activities carried out under civil-law contracts.

Article 29a(1). The taxable amount […] shall be everything that constitutes consideration which the supplier of goods or services has received or is to receive on account of a sale from the purchaser, customer or a third party, including subsidies, subventions and other similar amounts received which have a direct effect on the price of the goods or services supplied by the taxable person.

2. Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska (Environmental Protection Law of 27 April 2001, *Dziennik Ustaw* (Journal of Laws) of 2020, item 1219, as amended)

Article 400a(1). The financing of environmental protection and water management shall include:

21) projects related to air protection;

22) supporting the use of local renewable energy sources and the introduction of more environmentally friendly energy carriers;

Article 403(2). The municipalities' own tasks shall include financing environmental protection within the scope set out in Article 400a(1) […] (21–25) […] in an amount not lower than the amount of revenue from the fees and penalties referred to in Article 402(4), (5) and (6) which constitutes municipal budget revenue, less the surplus of such revenue transferred to the provincial funds.

Presentation of the facts and procedure and the essential arguments of the parties

1 The essence of the dispute is whether a municipality, when implementing a project concerning the installation of renewable energy source ('RES') systems, acts as a taxable person for VAT purposes and, consequently, whether the property owners' contribution and the co-financing obtained by the municipality for the implementation of that project are subject to VAT.

2 The municipality of O. ('the Appellant' or 'the Municipality') requested an advance tax ruling in a case concerning value added tax (VAT) as regards its recognition as taxable person for VAT purposes with respect to services consisting in the installation of RES systems.

3 The municipality is a local government unit registered as an active taxable person for VAT purposes. Together with three other municipalities, the Municipality entered into a partnership agreement in order to implement a project consisting in the installation of RES systems in those four municipalities ('the Project").

4 One of the municipalities, acting as Project leader, entered into a co-financing agreement with the provincial authorities. Under the partnership agreement, the

co-financing received will be transferred to the individual partners within the scope in which it is granted to them.

5 The co-financing is only intended to cover part of the eligible costs. The decision on how to fund the remaining costs of the Project is at the discretion of each municipality. The co-financing received by the Appellant covers the expenditure related to the Project and may only be used to fund the expenditure necessary for the implementation of the Project. The Municipality was granted co-financing that amounted to 75% of the total eligible costs of the Project.

6 The main objectives of the Project are to increase the share of RES in total energy production, reduce emissions of atmospheric pollutants, promote the use of solar energy and stimulate the use of RES among individual customers through the installation of environmentally friendly RES systems. Within the framework of the Project, the Municipality is implementing 'Poland's Energy Policy until 2030' adopted by the Council of Ministers on 10 November 2009, under which RES are to account for 20% of energy produced.

7 Under the Project, photovoltaic panels, air source heat pumps for domestic water heating and solar thermal collectors will be installed on properties belonging to both individuals and legal persons. The Municipality has entered into agreements with individuals (residents) as property owners. Property owners are participating in the Project voluntarily under an agreement with the Municipality.

8 According to the agreement concluded with the property owners, all RES systems will be owned by the Municipality for the duration of the Project, that is to say, for five years from the date of receipt by the Municipality of the last payment under the co-financing agreement and the partnership agreement. After that period, the ownership of the RES systems will be transferred to the property owners. For the duration of the Project, property owners will not be able to dispose of the RES systems. Also, the Municipality may not dispose of, or dismantle, the installations during that period, as this could entail having to return the co-financing received. The property owners are required to pay their contribution to the Municipality's bank account by the agreed date. They will be able to use the RES systems at no additional charge as per the terms and conditions of the agreement entered into. The Municipality has been authorised by each property owner to act on the property owner's behalf before the competent administrative authorities when applying for any permits required by law in order to construct the installation on the owner's property.

9 The Municipality has undertaken to select the contractor, set the work schedule, exercise ongoing site supervision, conduct final acceptance inspections and perform the financial settlement of the Project. The contribution paid by the property owners will be their only payment to the Municipality in connection with the implementation of the Project. That contribution represents part of the eligible costs of the specific RES system determined by the contractor, that is to say, the consideration due to the contractor for that specific system. That part is 25% of

the eligible costs, and the agreement with the property owner also lays down the maximum amount of the property owner's contribution.

10 Property owner contributions do not go towards supervision and promotional costs – those eligible costs are covered by the Municipality from its own resources and from the co-financing received. The RES systems will be installed by a contractor who will be selected by way of an open tender procedure held under public procurement regulations.

11 The contract will be concluded between five parties: the contractor and the four contracting municipalities. The contract will indicate the scope and type of RES systems to be installed for each individual municipality. Each municipality will settle accounts with the contractor separately, with the contractor invoicing each municipality in accordance with the scope of work it has contracted.

12 It will not be possible to obtain additional co-financing if the contractor's bid is higher than anticipated. However, the amount of co-financing will be lower if the price due to the contractor is lower than that assumed in the application for co-financing. The Project co-financing agreement does not impose any obligation on the Municipality to obtain contributions from the property owners and does not refer to the amount of their payments.

13 The co-financing is granted to cover part of the eligible costs (including promotion and supervision costs) incurred by the Municipality in connection with the Project and the Municipality will settle those costs with the institution providing the co-financing. The amount of co-financing is determined by the amount of eligible costs incurred by the Municipality for purchases related to the Project.

14 The Municipality asked the Dyrektor Krajowej Informacji Skarbowej (Director of National Fiscal Information, 'the tax authority') to confirm that the contribution paid by the property owners and the co-financing obtained by the Municipality would not be subject to VAT as the Municipality is not acting as a VAT taxable person with regard to the installation of RES systems. In its view, the services provided are not subject to VAT because they are performed under provisions of public law and not as part of economic activity. Consequently, the property owners' contribution and the co-financing obtained do not constitute consideration for the taxable services rendered.

15 However, in the advance tax ruling dated 7 August 2019, the tax authority found that the Municipality's position was incorrect. It indicated that the Municipality would be acting as a VAT taxable person with respect to the activities in question. Neither the fact that the Municipality is performing its own tasks nor the purpose of the Project could result in the absence of taxation for VAT purposes, since the performance of the activities in question must also be subject to specific public-law regulations which pertain to the exercise of public authority.

16 In the opinion of the tax authority, the services described are provided under civil-law contracts, are rendered for consideration and concern the activity area (type of services) within which other entities operate in the market whose activities are not excluded from the scope of the Law on VAT. In the transaction described, the Municipality acts in a similar role to other economic operators, and therefore, in light of Article 15(6) of the Law on VAT and the Court's case-law, the transaction is subject to VAT under general rules.

17 In the opinion of the tax authority, there will be a direct link (equivalence) between the performance provided by the Municipality and the payments made by the property owners. Thus, those payments will constitute consideration for the services rendered by the Municipality.

18 Additionally, the tax authority pointed out that pursuant to Article 29(1) of the Law on VAT, the taxable amount would include both the payments made by the property owners and the amount of co-financing received by the Municipality from a third party for the performance of services consisting in the construction of RES systems, said services being subject to VAT pursuant to Article 5(1)(1) of the Law on VAT.

19 The court of first instance dismissed the Municipality's action.

20 The court did not share the Municipality's view according to which the Municipality did not engage in economic activity within the meaning of Article 15(2) of the Law on VAT due to the parties' performances not being equivalent. In the court's view, the non-equivalence of contributions is essentially a feature of all civil-law relationships in which the price of goods or services is subsidised. The court likewise did not share Municipality's view according to which the purpose of the activities undertaken is not to achieve profit, but rather to increase the share of RES in total energy production. In the court's view, the achievement of the second objective does not preclude the achievement of the first. The Municipality is reimbursed by the property owners for 25% of the eligible costs incurred, and thus the installation involves the financial participation of the property owners. The fact that the Municipality does not make a profit likewise does not affect the assessment of whether those activities fall within the scope of economic activity.

21 In the opinion of the court of first instance, the fact that the Municipality is performing a public task (environmental protection and nature conservation) does not exempt it from taxation either.

22 The court held that the relationship between the Municipality and the property owner is a civil-law relationship, which arises from the agreement they entered into. Therefore, the Municipality is not acting as a public authority in this case.

23 With respect to the infringement of Article 29a(1) of the Law on VAT, in the court's view, there was no doubt that in the case at issue, the subsidy was granted

in order to finance the installation of RES systems by a specific property owner, and the installation of an RES system is subject to VAT.

24 The Municipality brought an appeal on a point of law against the above judgment.

Succinct presentation of the reasoning in the request for a preliminary ruling

25 The referring court takes the view that before examining whether a transaction is carried out in the exercise of public authority, it is necessary to ascertain whether the Municipality engages in economic activity. It should be noted that, as the Court has consistently held, it is clear from Article 13(1) of Directive 2006/112, when examined in the light of the aims of that directive, that two conditions must both be fulfilled for the rule of treatment as a non-taxable person to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (see the judgment of 25 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733, paragraph and the case-law cited therein).

26 In order to ascertain whether the Municipality engages in economic activity within the scope in question, it must be verified whether the activities are performed for consideration. The possibility of classifying a supply of services as a transaction for consideration requires only that there be a direct link between that supply and the consideration actually received by the taxable person. Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the recipient (see the judgment of 25 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733, paragraph 32 and the case-law cited therein).

27 According to settled case-law, a supply of services is effected ‘for consideration’, within the meaning of Article 2(1)(c) of Directive 2006/112, and is therefore taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (see, in particular, the judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C-520/14, EU:C:2016:334, paragraph 24 and the case-law cited therein). The Municipality is of the view that it does not engage in economic activity within the meaning of Article 15(2) of the Law on VAT since the contribution made by the owner of the property is not equivalent to the performance provided by the Municipality. It is emphasised in the case-law of the Court that whether the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a ‘transaction effected for consideration’. The latter concept requires only that there be a direct link between the supply of goods or the provision of services and the consideration actually

received by the taxable person (judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C-520/14, EU:C:2016:334, paragraph 25).

28 However, it should be noted that in essence, the Municipality funds the Project from the subsidy received, so the Municipality's own contribution is also not equivalent to the installation costs. The non-equivalence of contributions is essentially a feature of all civil-law relationships in which the price of goods or services is subsidised. The actual costs of RES system installation are borne neither by the Municipality nor by the property owner from their own resources, which results from the fact that a subsidy has been received and is not related to the fact that the installation service is provided by the Municipality.

29 In Case C-520/14, the Court drew attention to the lack of symmetry between the amounts paid for the transport of children and the cost of that transport and also to the fact that the transport of children was not provided under the conditions in which passenger transport services are usually provided.

30 The referring court wonders whether such a lack of symmetry also exists in the present case. The amount of the payment made by the property owner is calculated as part of the eligible costs of a specific RES system determined by the contractor. The manner in which the property owner's contribution is calculated demonstrates that it is not equivalent to the performance provided by the Municipality (25% of the eligible costs of installation). Moreover, the costs of supervision and promotion are covered by the Municipality from its own resources and from the co-financing it receives.

31 The referring court would also like to draw attention to the terms of the transaction, which are different from market terms. The property owners have made available to the Municipality part of their property necessary for the installation of the RES system. The Project is to be supervised by an inspector selected by way of an open tender procedure. In fact, it is not the property owner who is the end customer (consumer), but rather the Municipality. The above may lead to the conclusion that the Municipality is the beneficiary of the services provided, and the property owners' payments are just an additional source of financing.

32 In such a case, there is no question of setting the price for the performance. Indeed, no reciprocal performance can be identified at all. It follows from the Court's case-law that Article 11A(1)(a) of the Sixth Directive is intended to take account of the consideration paid for the supply of goods or services in such a way as to reflect the full value of the supply or the provision of services. To that end, that provision includes in the taxable amount, as consideration, subsidies directly linked to the price of those supplies (judgment of 9 October 2019, *C (VAT and agricultural subsidies)*, C-573/18 and C-574/18, EU:C:2019:847, paragraphs 32, 33 and the case-law cited therein). There can be no reciprocal performance if the resident of the municipality is not the project's beneficiary. It should be noted that the installation of equipment is not a service provided to individual residents, but

rather to the Municipality, which at this stage acquires, under a contract entered into with the contractor, the title to the equipment installed on the properties made available by the residents. As the referring court has held in its case-law, the benefits of the project will accrue to the community as a whole rather than just to the residents of the properties on which the solar thermal collectors will be installed.

33 The fact that the Municipality does not engage in economic activity is also supported by the fact that it does not intend to provide the installation of RES systems on a regular and continuous basis.

34 Even if it is assumed that the transaction in question is carried out in the course of economic activity, this does not necessarily mean that it is subject to taxation. The Municipality has indicated that in implementing the Project, it is fulfilling its statutory tasks under the Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (Law of 8 March 1990 on Municipal Local Government) and under the Environmental Protection Law. Article 403(2) of the Environmental Protection Law, read in conjunction with Article 400a(1)(21) and (22), stipulates that the financing of environmental protection within the scope of projects aimed at air protection and support for the use of local renewable energy sources and the introduction of more environmentally friendly energy carriers is included in a municipality's own tasks.

35 On the other hand, it appears that the performance of the activities described in the application is not subject to any special public-law regulations. Since such tasks may also be performed by entities which are not local government units, this means that they are essentially not carried out using legal means typical of the exercise of public authority. On the other hand, competition rules dictate that the fact that those tasks are carried out by public or non-public bodies should not mean that they are assessed differently from the point of view of taxation.

36 If the answer to the first question is in the affirmative, the referring court wonders whether the European subsidies received by the Municipality for the implementation of RES projects should be included in the taxable amount within the meaning of Article 73 of Directive 2006/112.

37 The fact that the Municipality engages in economic activity which is not exempt from VAT does not necessarily mean that the entire amount due from property owners is subject to taxation, as the part covered by financing may not be subject to taxation where it is not included in the taxable amount.

38 The Court's case-law stresses that for a subsidy to be directly linked to the price of the transaction in question, it must first be paid specifically to the subsidised operator to enable it to supply particular goods or services. Only in that case can the subsidy be regarded as consideration for the supply of goods or services and therefore be taxable (judgment of 15 July 2004, *Commission/Germany*, C-144/02, EU:C:2004:444, paragraphs 27 and 28; judgment of 9 October 2019, *C GmbH &*

Co. KG/Finanzamt Z, C-573/18 and C-574/18, EU:C:2019:847, paragraph 31). Moreover, it is also necessary to verify that the purchasers of the goods or services benefit from the subsidy granted to the beneficiary. The price payable by the purchaser must be fixed in such a way that it diminishes in proportion to the subsidy granted to the seller or supplier of the goods or services, which therefore constitutes an element in determining the price demanded by the latter. It must also be ascertained whether, objectively, the fact that a subsidy is paid to the seller or supplier allows the latter to sell the goods or supply the services at a price lower than he would have to demand in the absence of subsidy. Furthermore, the consideration represented by the subsidy must be identifiable (judgment of 9 October 2019, *C GmbH & Co. KG/Finanzamt Z*, C-573/18 and C-574/18, EU:C:2019:847, paragraphs 32, 33 and the case-law cited therein).

39 However, the facts of the present case do not allow it to be concluded that any price has been set which is directly influenced by the subsidy granted. On the contrary, an analysis of the facts suggests that the subsidy in question is based on cost. In order to determine whether the subsidies in question are taxable or not, it is important to determine the terms and conditions under which they are granted in order to determine the purpose of the subsidy. Therefore, the criterion for considering a subsidy taxable is that the subsidy must be intended to finance a specific transaction subject to VAT. Conversely, subsidies which cannot be linked to specific taxable transactions do not constitute the taxable amount within the meaning of Article 73 of Directive 2006/112.

40 The position that the subsidy is not included in the taxable amount of the thermal efficiency improvement service provided is also supported by the fact that this would lead to an infringement of Article 69(3)(c) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320), which stipulates that VAT, except where it is non-recoverable under national VAT legislation, shall not be eligible for a contribution from the European Structural and Investment Funds, that is to say, cannot be reimbursed by way of a grant.

41 Including subsidies in the taxable amount will mean that part of those funds will be used not for the purpose for which they were granted under the EU fund, but rather to pay tax to the central budget.

42 Additionally, the purpose of those projects is to implement tasks related to environmental protection and improvement in air quality within the municipality, which are included in the municipality's own tasks referred to in Article 7(1)(1) and (3) of the Law on Municipal Local Government. This confirms that the

subsidy received under the agreement signed with the institution which provides co-financing is a targeted subsidy, that is to say, it is intended to subsidise the costs of local government projects as a general subsidy covering the costs of the tasks implemented. Nor is that subsidy calculated on a per-unit basis as in the case of specific-purpose subsidies intended to subsidise certain types of products and services.