Case C-9/20

Request for a preliminary ruling

Date lodged:

10 January 2020

Referring court:

Finanzgericht Hamburg (Germany)

Date of the decision to refer:

10 December 2019

Applicant:

Grundstücksgemeinschaft Kollaustraße 136 (Kollaustraße 136 property community)

Defendant:

Finanzamt Hamburg-Oberalster (Hamburg-Oberalster Tax Office)

Finanzgericht Hamburg (Hamburg Finance Court)

Order

In the case of

Kollaustraße 136 property community

[…] Hamburg

- Applicant -

[…]

v

Hamburg-Oberalster Tax Office

[…]

- Defendant -

concerning turnover tax 2013-2015
turnover tax prepayments 2016

the Hamburg Finance Court, […] issued, on 10 December 2019, […]

[…] **[Or. 2]**

the following order:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU):

1. Does Article 167 of Directive 2006/112/EC of 28 November 2006 on the common system of valued added tax preclude a provision of national law according to which the right of input tax deduction already arises at the time the transaction is performed, even if, under national law, the tax claim against the supplier or service provider arises only when the remuneration is received and the remuneration has not yet been paid?

2. If the first question is answered in the negative: Does Article 167 of Directive 2006/112/EC of 28 November 2006 on the common system of valued added tax preclude a provision of national law according to which the right of input tax deduction cannot be asserted for the tax period in which the remuneration has been paid if the tax claim against the supplier or service provider arises only when the remuneration is received, the service has already been provided in an earlier tax period and, under national law, due to the matter being time-barred, it is no longer possible to assert the input tax claim for that earlier tax period?

II. The proceedings are stayed until the Court of Justice of the European Union has given a ruling. **[Or. 3]**

NOTICE RELATING TO APPEALS

[…] **[Or. 4]**

A. Facts and subject matter of the dispute

1 The parties concerned are in dispute as to whether the service recipient's input tax deduction claim under point 1 of the first sentence of Paragraph 15(1) of the German Umsatzsteuergesetz (Turnover Tax Law; UStG) already arises with the performance of the service or only with the payment of the remuneration, if the service provider calculates the turnover tax on the basis of remuneration received (known as 'Ist-Versteuerer', actual tax payer).

2 The applicant, a company constituted under civil law, generated turnover by leasing a commercial property in the years at issue. The applicant had for its part

rented that property. Both the applicant and its lessor had effectively waived the tax exemption for such rental turnover and therefore opted to pay turnover tax. Both had been authorised by the fiscal authority pursuant to Paragraph 20 of the UStG to calculate the tax on the basis of the remuneration received rather than on the basis of remuneration agreed. With the rental contract, the applicant had a proper continuing invoice.

3 From 2004, the applicant's rental payments were partly deferred. That meant that the applicant made payments for the property lease in 2009 to 2012 in the years at issue, 2013 to 2016. Specifically, the payments can be assigned as follows:

2013:	€ 22 382.00 € 16 898.00 € 39 280.00	for rental period 2009 for rental period 2010
2014:	€ 14 075.98 € 25 204.02 € 39 280.00	for rental period 2010 for rental period 2011
2015:	€ 5 769.30 € 1 370.70 € 7 140.00	for rental period 2011 for rental period 2012
2016:	€ 7 140.00 € 7 140.00	for rental period 2012

[Or. 5]

4 Furthermore, the applicant was released from the remaining debt of EUR 22 462.62 by the lessor in 2016.

5 Turnover tax of 19% was included in each of the payments mentioned. Regardless of the rental period for which the payments were intended, the applicant always asserted its input tax deduction claim in the prepayment period or calendar year in which the payment was made.

6 That action was objected to in the scope of an external turnover tax audit. The auditor was of the opinion that the input tax deduction claim had already arisen with the performance of the transaction — in this case the monthly leasing of the property — and should therefore have been asserted for each corresponding period. Corresponding turnover tax notices for the years 2011 to 2015 and corresponding turnover tax prepayment notices for 2016 were subsequently issued on 15 June 2017. In those notices, the input tax was no longer calculated on the basis of the payments made in each year, but on the basis of the rent agreed for each year. This had the following tax implications for the years at issue:

- 2013: less input tax or additional tax of EUR 6 271.60

- 2014: less input tax or additional tax of EUR 6 271.60

- 2015: less input tax or additional tax of EUR 1 140.00

- 2016: less input tax or additional tax of EUR 4 726.47

7 For the years 2011 and 2012, the tax was reduced by EUR 2 759.79 and EUR 2 665.32 respectively, as the rental arrears newly accrued in those years respectively exceeded the payments made for the previous years. The notices in respect of 2011 and 2012 are therefore not the subject matter of the dispute.

8 The notices in respect of the years before 2011 were not changed, as claims were already time-barred in this respect. Those notices are likewise not the subject matter of the dispute. Consequently, this means that the turnover tax included in the rental payments from 2013 and 2014 for the rental periods 2009 and 2010 has not been taken into consideration as input tax in the case of the applicant. **[Or. 6]** The applicant did not assert this input tax in the years 2009 and 2010. It is not recognised by the defendant for the years 2013 and 2014, because the input tax deduction claim arose back in 2009 and 2010 and should have been asserted at that time.

9 On 3 July 2017, the applicant filed an objection to the notices of 15 June 2017 on turnover tax or turnover tax prepayments for the years 2013 to 2016. The objections were rejected on 8 November 2017. The applicant thereupon brought an action on 28 November 2017.

10 The applicant claims that the contested notices infringe Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive). According to that claim, the defendant's opinion that the input tax deduction right always arises with the performance of the transaction is incorrect. If the service provider calculates his tax on the basis of remuneration received, the service recipient's input tax claim instead only arises when the service recipient has paid the remuneration. The applicant was therefore right to have always only asserted its input tax claim in the year of the payment.

B. Relevant legal provisions

I. National law

11 The relevant legal provisions of the German Turnover Tax Law (UStG) read as follows:

Paragraph 13 Chargeability of tax

(1) Tax shall become chargeable

1.

on goods and services

a)

in cases where tax is calculated on the basis of remuneration agreed (first sentence of Paragraph 16(1)), upon expiry of the prepayment period in which the supplies of goods or services were made. This shall also apply to part supplies. These are present where it is agreed that certain parts of an economically divisible supply are to be paid for separately. Where **[Or. 7]** the remuneration or part remuneration is received before the supply or part supply has been made, tax shall become chargeable thereon upon expiry of the prepayment period in which the remuneration or part remuneration was received,

b)

in cases where tax is calculated on the basis of remuneration received (Paragraph 20), upon expiry of the prepayment period in which the remuneration was received, […]

Paragraph 15 Deduction of input tax

(1) The trader may deduct the following amounts of input tax:

1.

the tax lawfully payable on goods and services provided to his business by another trader. Deduction of the input tax is subject to the condition that the trader holds an invoice drawn up in accordance with Paragraphs 14 and 14a. […]

Paragraph 16 Tax calculation, tax period and individual taxation

(1) Where Paragraph 20 does not apply, the tax shall be calculated on the basis of remuneration agreed. The tax period shall be the calendar year. […]

(2) The tax deductible under Paragraph 15 which falls within the tax period shall be deducted from the tax calculated in accordance with subparagraph (1). […]

Paragraph 20 Calculation of tax on the basis of remuneration received

On application, the Tax Office may allow a trader

1.

whose total turnover (Paragraph 19(3)) in the preceding calendar year did not exceed EUR 500 000, or

2.

who is exempt from the obligation to keep accounts and to draw up annual stock inventories under Paragraph 148 of the Abgabenordnung (Tax Code), or

3.

whose turnover derives from an activity as a member of a liberal profession within the meaning of point 1 of Paragraph 18(1) of the Einkommensteuergesetz (Law on income tax),

to calculate the tax on the basis of the remuneration received rather than on the basis of the remuneration agreed (first sentence of Paragraph 16(1)). […]

II. EU law

12 In the opinion of the referring court, the following provisions of the VAT Directive are of significance for the main proceedings: **[Or. 8]**

Article 63

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

Article 66

By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

[…]

b) no later than the time the payment is received;

[…]

Article 167

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

Article 167a

Member States may provide within an optional scheme that the right of deduction of a taxable person whose VAT solely becomes chargeable in accordance with Article 66(b) be postponed until the VAT on the goods or services supplied to him has been paid to his supplier.

[…]

Article 179

The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which,

during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.

[…]

Article 180

Member States may authorise a taxable person to make a deduction which he has not made in accordance with Articles 178 and 179.

Article 226

Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

[…]

7a. where the VAT becomes chargeable at the time when **[Or. 9]** the payment is received in accordance with Article 66(b) and the right of deduction arises at the time the deductible tax becomes chargeable, the mention 'Cash accounting';

[…]

C. Grounds of the questions referred

I. First question referred

13 The first question serves for clarification as to whether the right of input tax deduction pursuant to Article 167 of the VAT Directive always arises without exception only at the time the deductible tax becomes chargeable, or whether — as the defendant believes — Member States may derogate from this principle if national law uses the optional scheme in Article 66(b) of the VAT Directive and the tax claim against the service provider under national law therefore arises only at the time the remuneration is received.

1. Legal assessment under national law

14 Under national law, the defendant's opinion proves to be correct. Pursuant to point 1 of the first sentence of Paragraph 15(1) of the UStG, the right of input tax deduction arises when the goods or services have been provided.

15 In this regard, it is irrelevant when the tax claim against the service provider arises. It is in particular unimportant whether the service provider calculates the turnover tax pursuant to the first sentence of Paragraph 16(1) of the UStG on the basis of remuneration agreed ('Soll-Versteuerer', target tax payer) or pursuant to Paragraph 20 of the UStG on the basis of remuneration received (actual tax

payer). Although the tax claim against the service provider in the cases of Paragraph 20 of the UStG (actual tax payer) pursuant to Paragraph 13(1)(b) of the UStG arises only when the service provider receives the remuneration, Paragraph 20 of the UStG has no impact on the time of the service recipient's input tax deduction […] **[Or. 10]** […].

16 Nothing different emerges from the fact that the right of input tax deduction under point 1 of the first sentence of Paragraph 15(1) of the UStG only relates to the 'tax lawfully payable'. This does not mean that the input tax claim is subject to the condition that the tax claim against the service provider must have already arisen. This feature essentially makes it clear that a transaction that is taxable and liable to tax under the UStG must exist and an incorrectly presented tax does not provide entitlement to the input tax deduction […].

17 In respect of the service recipient's input tax deduction, it is also irrelevant whether he himself is taxed on the basis of remuneration agreed or remuneration received. The German legislature did not make use of the possibility, provided for in Article 167a of the VAT Directive, of making the input tax deduction for actual tax payers dependent on the payment of the remuneration.

18 Under national law, the service recipient's input tax claim therefore already arises with the performance of the transaction even if the service provider is an actual tax payer and has not yet received the remuneration. The service recipient then acquires an input tax claim, even though the service provider does not yet owe the corresponding turnover tax.

2. Uncertainties regarding the interpretation of EU law

19 A different assessment could emerge from Article 167 of the VAT Directive. According to that article, the service recipient's input tax claim arises only at the time the deductible tax becomes chargeable.

20 a) Under Article 66(b) of the VAT Directive, Member States may provide that VAT is to become chargeable in respect of certain taxable persons only with the receipt **[Or. 11]** of the remuneration. The national legislature made use of this possibility in Paragraph 13(1)(b) of the UStG. However, even in these cases, the input tax claim under national law already arises when the goods or services have been provided. If strictly applied, Article 167 of the VAT Directive therefore contradicts national law, as the connection between tax claim and input tax claim governed in Article 167 of the VAT Directive is removed […]. As far as is apparent, the Court of Justice has not yet commented on this problem (left open in its judgment of 16 May 2013, *TNT Express Worldwide (Poland)*, C-169/12, EU:C:2013:314, paragraphs 33 et seq.).

21 In addition to the clear wording of the provision, a consistent application of Article 167 of the VAT Directive could also be supported by the new point 7a of Article 226 of the VAT Directive, which was introduced by Directive 2010/45/EU

of 13 July 2010 amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing (OJ L 189, 1 — known as the Invoicing Directive). According thereto, an invoice must contain the mention 'Cash accounting' where the VAT becomes chargeable in accordance with Article 66(b) of the VAT Directive and the right of deduction arises at the time the deductible tax becomes chargeable. Through this additional invoice indication, the recipient is informed that the service provider is taxed on the basis of remuneration received, and can take the necessary steps with regard to the input tax deduction. Legal commentators argue that point 7a of Article 226 of the VAT Directive means that the connection between tax claim and input tax claim regulated in Article 167 of the VAT Directive is now mandatory […].

22 Directive 2010/45/EU was to have been transposed into national law by 31 December 2012; nevertheless, the German legislature did not transpose point 7a of Article 226 of the VAT Directive. Against the background of the domestic legal situation, this appears logically consistent; according thereto, the invoice recipient does not require any information as to whether the invoicing party is taxed on the basis of remuneration received, as the input tax deduction is not affected thereby. **[Or. 12]**

23 b) The position under national law is, however, compatible with Article 167 of the VAT Directive if Article 167 of the VAT Directive is not a mandatory specification, but merely a 'guiding idea' […].

24 The fact that Article 167 of the VAT Directive is merely a guiding idea could emerge from the statement in the minutes of the Council and of the Commission on Article 17(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (OJ L 145, 1) […]. Article 17(1) of Directive 77/388/EEC is the identically worded predecessor provision to Article 167 of the VAT Directive. According to that statement, Member States can derogate from the principle provided for in Article 17(1) of the Directive if the supplier or provider of services is taxed on the basis of his income […].

25 It appears questionable, however, whether that statement may be used for interpreting the VAT Directive. Although such statements may fundamentally be relied on for interpreting legal acts of the European Union (see, for example, judgment of 19 June 2008, *Commission* v *Luxembourg*, EU:C:2008:350, C-319/06, paragraph 32), according to the case-law of the Court of Justice of the European Union, this does not apply where no reference is made to the content of the statement in the wording of the provision in question (judgment of 23 February 1988, *Commission* v *Italy*, C-429/85, EU:C:1988:83, paragraph 9; judgment of 26 February 1991, *Antonissen*, C-292/89, EU:C:1991:80, paragraph 18; judgment of 29 May 1997, *VAG Sverige*, C-329/95, EU:C:1997:256, paragraph 23; judgment of 3 December 1998, *Generics (UK) and Others*, C-368/96, EU:C:1998:583, paragraph 26).

26 It accordingly depends on whether the content of the statement has found its way into the provisions of the VAT Directive. The wording of Article 167 of the VAT Directive does not provide for a restriction, as can be gathered from the statement. However, the statement could have found expression in the **[Or. 13]** new provision in point 7a of Article 226 of the VAT Directive. According to its wording, the applicability of that provision depends on two conditions. Firstly, the tax must become chargeable at the time when the payment is received in accordance with Article 66(b) of the VAT Directive. Secondly, the right to deduct must arise at the time when the deductible tax becomes chargeable. The wording of Article 167 of the VAT Directive is therefore repeated with the second condition. If Article 167 of the VAT Directive were to have to be applied strictly and without exception, that second condition would be completely superfluous. Accordingly, systematic reasons which arise from the interaction of Article 167 of the VAT Directive and point 7a of Article 226 of that directive suggest that Article 167 of the VAT Directive is not a strict specification, but a guiding idea from which Member States can derogate.

3. Relevance to the decision

27 The question referred is relevant to the decision. […] [amplification]

II. Second question referred

28 The second question arises only if Member States may derogate from the provision of Article 167 of the VAT Directive as described above. It serves for clarification as to whether the trader may in any case also assert the input tax deduction right in such cases in the tax period in which the input tax deduction right would have arisen in strict compliance with Article 167 of the VAT Directive **[Or. 14]** when assertion in the earlier tax period applicable under national law is no longer possible.

1. Legal assessment under national law

29 If the trader has not made the input tax deduction, it is not possible under national law to assert the input tax deduction right for a later tax period. If retroactive assertion of the input tax is no longer possible, as in the case in the main proceedings due to the matter being time-barred, the right can no longer be exercised.

30 Pursuant to the first sentence of Paragraph 16(2) of the UStG, input tax amounts must be deducted in the tax period in which they fall. According thereto, the input tax amounts are to be deducted in the tax period in which the claim conditions apply […]. The input tax deduction can no longer be carried out in a later tax period […]. If the trader does not make the input tax deduction in the correct tax period, he can only catch up on the input tax deduction if the tax assessment for

that tax period can still be changed […]. However, it is in any case no longer permissible to change the assessment when matters for that period are already time-barred.

2. Uncertainties regarding the interpretation of EU law

31 Article 167 of the VAT Directive could require a different assessment in cases in which the national law shifts the time at which the input tax deduction right arises, by way of derogation from Article 167 of the VAT Directive, to an earlier tax period, the claim has not been asserted in that tax period **[Or. 15]** and subsequent assertion — as in the circumstances of the case in the main proceedings — is excluded under national law.

32 Following settled case-law of the Court of Justice, the input tax deduction right is a fundamental principle of the common system of VAT, which is intended to guarantee value added tax neutrality. The right of input tax deduction is an integral part of the value added tax mechanism and in principle may not be limited (judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos*, EU:C:2016:690, C-516/14, paragraphs 37 et seq.; judgment of 21 March 2018, *Volkswagen*, C-533/16, EU:C:2018:204, paragraphs 37 et seq.; and judgment of 21 November 2018, *Vădan*, C-664/16, EU:C:2018:933, paragraphs 37 and 38).

33 Pursuant to Article 179 of the VAT Directive, the input tax deduction right is also, under EU law, fundamentally to be exercised for the tax period in which it has arisen (judgment of 8 May 2008, *Ecotrade*, EU:C:2008:267, C-95/07, paragraphs 40 et seq.). Although Member States may, pursuant to Article 180 of the VAT Directive, allow an input tax deduction which has not been carried out under Article 179 of the VAT Directive, the German legislature did not make use of that possibility.

34 Nevertheless, the fundamental significance of the input tax deduction right could make it necessary to give the trader the opportunity, in circumstances such as those in the case in the main proceedings, to assert the input tax for the tax period resulting under Article 167 of the VAT Directive even if national law derogates from Article 167 of the VAT Directive. This could in any case be necessary when the assertion in the tax period applicable under national law is no longer possible, in order to ensure the neutrality of the system of value added tax also in this case. This is because the derogation from Article 167 of the VAT Directive, which is in itself advantageous to the trader, is detrimental to that trader in this situation.

3. Relevance to the decision

35 The second question referred is relevant to the decision if the first question is answered in the negative and Member States may derogate from Article 167 of the

VAT Directive in the cases of Article 66(b) of the VAT Directive as described. […] [amplification] **[Or. 16]**

D. Procedural questions of national law

36 […]

37 […]

38 […] **[Or. 17]** […]

39 […]