Case C-207/23

Request for a preliminary ruling

Date lodged:

29 March 2023

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

22 November 2022

Defendant, appellant on a point of law and respondent in the appeal on a point of law:

Finanzamt X

Applicant, respondent in the appeal on a point of law and appellant on a point of law:

Y KG

[…] **BUNDESFINANZHOF**

(Federal Finance Court)

ORDER

In the case of

Finanzamt X (Tax Office X),

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

v

Y KG,

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

[…]

in relation to turnover tax for 2008

The XIth Chamber

has decided as follows in its sitting of 22 November 2022, on the basis of the hearing held on 9 November 2022:

Operative part of the order

I. The following questions regarding the interpretation of Article 16 and Article 74 of Council Directive 2006/112/EC on the common system of value added tax (the VAT Directive) are referred to the Court of Justice of the European Union (ECJ) for a preliminary ruling:

1. If a taxable person makes heat from its company available to another taxable person for the latter's economic operations free of charge (in this case: allocation of heat from the cogeneration plant of an electricity provider for the benefit of an agricultural company for the purpose of heating asparagus fields), is this to be regarded as an 'application by a taxable person of goods forming part of his business assets' in the form of a 'disposal free of charge' within the meaning of Article 16 of the VAT Directive?

Is the answer to this question dependent on whether the taxable person receiving the heat uses it for purposes that would entitle that person to a deduction of input tax?

2. In the case of an application of goods (within the meaning of Article 16 of the VAT Directive), is the cost price within the meaning of Article 74 of the VAT Directive to be calculated solely on the basis of those costs that are subject to input tax?

3. Does the cost price include only direct production or generation costs, or does it also include only indirectly attributable costs such as financing costs?

II. […].

Grounds

I.

1 The applicant, appellant on a point of law and respondent in the appeal on a point of law (applicant) operates a biogas plant that produces biogas from biomass. In 2008 (the relevant year), the biogas produced was used for decentralised electricity and heat generation in a connected cogeneration plant, where it was supplied to a combustion engine that powered a generator.

2 The majority of the electricity generated in this way was supplied to the general electricity grid and paid for by the operator of that grid.

3 The heat also produced as a by-product of this process was partially reused in the production process. However, in the relevant year the applicant supplied most of the heat to Company A 'free of charge' as per a contract concluded on 29 November 2007 for the drying of wood in containers and to B GbR (Company B) as per a contract concluded on 29 July 2008 for the heating of asparagus fields. Both contracts specified that the level of remuneration was to be determined on an individual basis according to the economic situation of the recipient of the heat, and was not to be specified in the contracts themselves.

4 In the relevant year, in return for supplying 6 714 247 kWh of electricity, the applicant received from the grid operator, in addition to a minimum feed-in tariff of EUR 1 054 337.85 in accordance with Paragraph 8(1) of the German Gesetz für den Vorrang Erneuerbarer Energien (Law prioritising renewable energy; 'the EEG'), as amended on 7 November 2006 (BGBl. (Federal Law Gazette) I 2006, 2550), an additional amount in accordance with Paragraph 8(3) of the EEG ('cogeneration bonus') as the electricity generated by the applicant was considered to be electricity generated within the meaning of Paragraph 3(4) of the German Gesetz für die Erhaltung, die Modernisierung und den Ausbau der Kraft-Wärme-Kopplung (Law on the preservation, modernisation and expansion of combined heat and power; 'the KWKG'), as amended on 19 March 2002 (BGBl. I 2002, 1092). This cogeneration bonus, which amounted to EUR 85 070.66, was included by the defendant, appellant on a point of law and respondent in the appeal on a point of law (the Finanzamt (Tax Office)) in the basis for calculation of taxable transactions in accordance with the VAT return filed by the applicant.

5 As the applicant did not charge a fee to the recipients of the heat, the auditor commissioned to carry out an external audit of the applicant considered this to be a disposal of heat free of charge within the meaning of Paragraph 3(1b), first sentence, third indent, of the German Umsatzsteuergesetz (Law on turnover tax; 'the UStG') for the benefit of A and B. Given the absence of a purchase price for the heat, the auditor used the cost price to determine the taxable amount for this application of goods in accordance with Paragraph 10(4), first sentence, first indent, of the UStG. Of the overall costs listed in the profit and loss statement amounting to EUR 1 104 453.35, the auditor calculated that the amount of EUR 384 791.55 (= 34.84%) was attributable to the supplied heat. On the basis of this taxable amount, the auditor determined that turnover tax in the amount of EUR 73 110.29 was due.

6 The Tax Office followed up the results of the audit with a VAT notice for 2008, which was issued on 17 November 2011. An appeal was lodged against this notice, but this was rejected by the Tax Office as unfounded in its appeal decision of 1 August 2012.

7 In its original action the applicant invoked, inter alia, the fact that the cogeneration bonus was a consideration from a third party. The Finanzgericht (Finance Court) upheld the action filed by the applicant in first-instance proceedings. Upon appeal by the Tax Office, the Bundesfinanzhof (Federal Finance Court) set aside the ruling issued by the Finance Court in its judgment of 31 May 2017 – XI R 2/14 (Collection of Decisions of the Federal Finance Court [BFHE], 258, 191, Bundessteuerblatt (Federal Tax Gazette) [BStBl] II 2017, 1024) and referred the case back to the Finance Court. It did not consider the cogeneration bonus paid by the electricity grid operator to the applicant to be remuneration for the heat provided by the applicant 'free of charge'. Instead, it took the view that the remuneration received from the electricity grid operator should be regarded as consideration for the electricity supplied to it by the applicant. The Federal Finance Court concluded that a ruling could not yet be handed down in the case as it was not possible to decide how much tax should be applied to the disposal of goods free of charge by the applicant. It argued that this tax rate is to be calculated on the basis of Paragraph 10(4), first sentence, first indent, of the UStG in accordance with the principles of the Federal Finance Court judgments of 12 December 2012 – XI R 3/10 (BFHE 239, 377, BStBl II 2014, 809) and 16 November 2016 – V R 1/15 (BFHE 255, 354, BStBl II 2022, 777). Thus, the Finance Court was called upon to produce the necessary findings.

8 In the proceedings at second instance the applicant appealed against the calculation made by the Tax Office in relation to the taxable amount for the heat supplied, inter alia on the ground that the amount of the application of goods should be calculated in accordance with Paragraph 10(4), first sentence, first indent, of the UStG on the basis of the cost price. The Finance Court upheld the action in part in the second instance. It reduced the amount of VAT owed, concluding that the VAT for the goods disposed of free of charge should be calculated in accordance with Paragraph 10(4), first sentence, first indent, of the UStG on the basis of their cost price, which is to be calculated using the so-called market value method, taking account of the market values of electricity and heat in the applicant's specific location.

9 In their appeals on points of law, the applicant and the Tax Office invoke a breach of substantive law.

II.

10 […]. [Stay of proceedings, referral]

11 **1. Legal context**

12 **(a) EU law**

13 **Article 16 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) provides as follows:**

‘The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.

However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.’

14 **Article 74 of the VAT Directive provides:**

‘Where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in Articles 16 and 18, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.’

15 **Article 289 of the VAT Directive is worded as follows:**

‘Taxable persons exempt from VAT shall not be entitled to deduct VAT in accordance with Articles 167 to 171 and Articles 173 to 177, and may not show the VAT on their invoices.’

16 **Article 302 of the VAT Directive provides:**

‘If a flat-rate farmer is entitled to flat-rate compensation, he shall not be entitled to deduction of VAT in respect of activities covered by this flat-rate scheme.’

17 **(b) National law**

18 **Paragraph 3(1b) of the UStG provides:**

‘The following shall be regarded as a supply of goods for consideration:

1. the removal of an asset by a taxable person from his business for purposes other than those of that business;

2. the contribution of goods without consideration by a taxable person to his employees for their private use, unless it is a token of appreciation;

3. any other contribution of goods without consideration, with the exception of gifts of small value and samples of goods made for the purposes of the business. The precondition is that the goods or the component parts thereof were the subject of an input VAT deduction, in full or in part.’

19 **Paragraph 10(4) of the UStG provides:**

‘The transaction is assessed as follows in the case of

1. a transfer of own goods within the meaning of Paragraph 1a(2) and Paragraph 3(1a), as well as in the case of a supply of goods within the meaning of Paragraph 3(1b), on the basis of the purchase price plus ancillary costs for the goods or for comparable goods or in the absence of a purchase price based on the production cost, in each case as at the transaction date;

…'

20 **Paragraph 8 of the EEG provides:**

'(1) For electricity generated in plants with an output of up to and including 20 megawatts that exclusively use biomass within the meaning of the legal measure referred to in subparagraph 7, the remuneration shall amount to […]

(3) The minimum remuneration in accordance with subparagraph 1, first sentence, shall increase by 2 cents per kilowatt hour in the case of electricity within the meaning of Paragraph 3(4) of the Law on Cogeneration provided that the grid operator receives corresponding evidence thereof […]. In the case of mass-produced cogeneration plants with an output of up to 2 megawatts, manufacturer documentation indicating the thermal and electrical output thereof as well as the CHP coefficient may be provided in place of the evidence referred to in the first sentence.'

21 **Paragraph 3(4) of the KWKG is worded as follows:**

'(4) Electricity generated through cogeneration is the mathematical product of useful heat and the CHP coefficient of the cogeneration plant. In the case of cogeneration plants that do not have a system for the extraction of waste heat, the entire net electricity output shall be regarded as electricity generated through cogeneration.'

22 **2. Concerning the first question referred**

23 **(a) Subject matter of the question referred in comparison with other potential cases**

24 The first question referred concerns the interpretation of Article 16 of the VAT Directive. This provision corresponds to the former Article 5(6) of 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 (Directive 77/288/EEC). Consequently, the present Chamber presumes that the ECJ case-law concerning Article 5(6) of Directive 77/388/EEC must also be taken into account for the purpose of interpreting Article 16 of the VAT Directive.

25 Article 16, first sentence, of the VAT Directive provides that the application by a taxable person of goods forming part of his business assets constitutes a supply of goods for consideration in four scenarios. These scenarios are all forms of

application. Namely, ‘application …for his private use [scenario 1] or [application] for [the use] of his staff [scenario 2], disposal free of charge [scenario 3] or [application] for purposes other than those of his business [scenario 4]’.

26 In the case in question, the applicant has constructed a plant in respect of which input tax may be deducted and which generates electricity that the applicant, as a taxable person, supplies for consideration in a taxable manner. At the very least, the applicant was entitled to a full input tax deduction on the construction and operating costs since the output of the plant was fully assigned to the company. […]

27 However, it is not clear what the legal consequences are for the additional heat produced by the plant. This heat can be used in various ways. For example, the taxable person who supplies the electricity for consideration in a taxable manner and has deducted input tax on the plant in full could allow the heat to escape unused (scenario A), use it as a natural person (sole trader) to heat his/her home (scenario B), provide it to staff for use in their private residences free of charge (scenario C), use it for its own sovereign purposes as a public law institution, for instance, to heat offices and thus for the activities in which it engages as a public authority within the meaning of Article 13(1), first subparagraph, of the VAT Directive (scenario D), supply it to nearby residents free of charge for use in their private residences (scenario E), or supply it to another taxable person free of charge for the purposes of that person’s business, whereby a further distinction could also be drawn between a situation where the recipient uses the goods in connection with business activities that entitle him/her/it to deduct input VAT in accordance with Article 168 of the VAT Directive, and a situation in which this entitlement arises as a result of Article 169 of the VAT Directive (scenario F).

28 It is straightforward to determine how most of these scenarios should be treated under tax law. For example, in scenario A there is no application of goods, meaning that Article 16, first sentence, of the VAT Directive does not apply. In scenarios B and C, on the other hand, the criteria for application of Article 16, first sentence, scenarios 1 and 2, are met, although in the event of full assignment of the goods to the company there is no restriction on VAT deduction. On the basis of the ECJ judgment of 12 February 2009 in Case C-515/07, *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, EU:C:2009:88, application of goods for purposes other than those of the business within the meaning of Article 16, first sentence, scenario 4, of the VAT Directive can be ruled out, which would likely lead to a restriction of the amount of VAT deductible on the construction and operating costs of the plant. In scenario E, the Federal Finance Court affirms that this is an example of disposal free of charge in accordance with Article 16, first sentence, scenario 3, of the VAT Directive which is subject to deduction of input tax in full, as otherwise this would result in untaxed final consumption (Federal Finance Court judgment of 25 November 2021 – V R 45/20, BFHE 275, 392, paragraph 18).

29 However, it is not clear how scenario F, which corresponds to the present case, should be treated. The question arises as to whether in such a case an application of goods should be regarded as a 'disposal free of charge' within the meaning of Article 16, first sentence, of the VAT Directive, scenario 3.

30 **(b) Prior case-law of the ECJ on Article 16 of the VAT Directive**

31 The ECJ has already handed down numerous rulings on individual elements of Article 16 of the VAT Directive (Article 5(6) of Directive 77/388/EEC).

32 For example, an application of goods is deemed to have occurred if an oil company disposes of goods to a purchaser of fuel in exchange for vouchers that the latter has obtained in varying quantities as part of a promotional campaign, depending on the volume of fuel purchased, on payment of the full retail price for fuel from the pump (ECJ, judgment of 27 April 1999 in Case C-48/97, *Kuwait Petroleum*, EU:C:1999:203, response to the second question regarding Article 5(6) of Directive 77/388/EEC). This pertains to application in the form of disposal free of charge in accordance with Article 16, first sentence, scenario 3, of the VAT Directive, as is clear from paragraph 24 of that judgment. In paragraph 22 of that judgment, the ECJ justifies the presence of an application of goods in particular on the ground that goods can still be deemed to have been applied even if they are disposed of for business purposes.

33 As regards samples within the meaning of Article 16, second sentence, of the VAT Directive (and thus as regards Article 16, first sentence, of the VAT Directive, scenarios 1 and 2), the ECJ has previously ruled that equal treatment must be ensured between a taxable person who applies goods for his private use or for that of his staff and a final consumer who acquires goods of the same type, and that the taxation of such application of goods is designed to prevent situations in which final consumption is untaxed (ECJ, judgment of 30 September 2010 in Case C-581/08, *EMI Group*, EU:C:2010:559, paragraphs 17 and 18 with regard to Article 5(6) of Directive 77/388/EEC).

34 Finally, the ECJ has ruled that works carried out by a taxable person for the benefit of a municipality for the extension of a municipal road used both by the public and by the taxable person do not constitute a supply of goods for consideration (ECJ, judgment of 16 September 2020 in Case C-528/19, *Mitteldeutsche Hartstein-Industrie*, EU:C:2020:712, response to the third question concerning Article 5(6) of Directive 77/388/EEC). With reference to its judgments in the cases of *Kuwait Petroleum* (EU:C:1999:203) and *EMI Group* (EU:C:2010:559), the ECJ ruled that application for purposes other than those of the business (within the meaning of Article 16, first sentence, of the VAT Directive, scenario 4) could be ruled out as the works had been carried out for the purposes of the taxable person, although it conceded that this does not preclude the application of other provisions (paragraph 64). Moreover, the ECJ ruled that, although the use of the extended road by public traffic does not preclude application of goods, the works for the extension of the road were carried out to

meet the needs of the taxable person in order to support heavy goods traffic (paragraph 65). In that case, the ECJ concluded there was no untaxed final consumption (paragraph 66), referring to the 'actual end-use' of the road which is primarily used by the taxable person, as compared with the 'immaterial' use by public traffic (paragraph 67 and paragraph 37).

35 **(c) Possible response to the first question referred**

36 **(aa) Confirmation of application of goods on the basis of a literal interpretation**

37 On the basis of the wording of Article 16, first sentence, of the VAT Directive (scenario 3), disposal of goods free of charge has occurred in the case in question. The applicant has applied goods within the meaning of Article 15(1) of the VAT Directive, namely heat, which form part of its business assets. As the applicant was entitled to deduct input VAT on the taxable supply in return for consideration of electricity generated by the plant that also produced the heat, it was also entitled to deduct input tax on the heat generated.

38 Moreover, the criteria for disposal are also met. 'Disposal' is to be defined as the transfer of goods being disposed of to another person under conditions that would otherwise constitute a supply of goods (Article 14(1) of the VAT Directive). This corresponds to the supply of heat for use by the recipient.

39 The goods were also disposed of free of charge, as the heat was transferred to A and B without payment, contrary to the contractual agreements […].

40 **(bb) Significance of final consumption**

41 It is unclear whether application of goods in the form of disposal free of charge is to be restricted by a further criterion that goes beyond the actual wording of Article 16, first sentence, of the VAT Directive (scenario 3), as this form of application could also serve to prevent untaxed final consumption (see II.2.b above). In that case, application in the form of disposal free of charge would presuppose a situation of untaxed final consumption. Such a restriction could be deduced from the ECJ judgment of 16 September 2020 in Case C-528/19 , *Mitteldeutsche Hartstein-Industrie*, EU:C:2020:712. Moreover, such a restriction would be supported by the principle of equal treatment in relation to Article 16, first sentence, of the VAT Directive (scenarios 1 and 2).

42 However, such a restrictive interpretation raises the question of whether untaxed final consumption should be ruled out merely when the beneficiary of the disposal, being a taxable person, uses the goods disposed of for business purposes, or whether the goods disposed of must also be used for business purposes giving rise to an entitlement to deduct input VAT in accordance with Article 168 or Article 169 of the VAT Directive. An argument in favour of the latter interpretation is that otherwise the goods disposed of that entitled the disposing entity (in this case, the applicant) to deduct input VAT could be used by the

recipients (in this case, A and B) for purposes that do not give rise to an entitlement to deduct input VAT.

43 The present Chamber has based its assessment of the first question referred on the assumption that the ECJ judgment of 16 September 2020 in Case C-528/19, *Mitteldeutsche Hartstein-Industrie*, EU:C:2020:712, does not definitively support a restrictive interpretation of the provision in the form of an additional requirement. Namely, the reason for which scenario 3 of Article 16, first sentence, of the VAT Directive was ruled out in that judgment may have been that the extension of the municipal road to accommodate heavy goods vehicles owned by the taxable person might be regarded as self-disposal by the taxable person, meaning that there was no disposal for the benefit of another person in any event.

44 Another argument against a restrictive interpretation of the wording of the provision is that, in its judgment in Case C-48/97 (*Kuwait Petroleum*, EU:C:1999:203), the ECJ affirmed the existence of a disposal free of charge although the disposal was for the disposing party's own business purposes (ECJ, judgment in Case C-48/97, *Kuwait Petroleum*, EU:C:1999:203, paragraph 22). Conversely, this could mean that disposal free of charge is deemed to have taken place even when the recipient thereof uses the goods for its business purposes. Moreover, the ECJ has ruled that the provision 'does not draw any distinction on the basis of the tax status of the recipient of samples' (ECJ, judgment of 30 September 2010 in Case C-581/08, *EMI Group*, EU:C:2010:559, paragraph 52).

45 Finally, account should be taken of the fact that application of goods in the form of disposal free of charge in accordance with Article 16, first sentence, of the VAT Directive (scenario 3) was designed by the EU legislature to have an independent function in comparison with private application in accordance with scenarios 1 and 2 of the first sentence of the same article. Consequently, it is doubtful whether disposal free of charge is subject to the same restrictions as private application, as applying the criterion of untaxed final consumption to scenario 3 of Article 16, first sentence, of the VAT Directive could undermine the independent function of this type of application.

46 **(cc) Consideration of the legal consequences**

47 It is also necessary to consider the legal consequences of the confirmation or rejection of a restrictive interpretation of the wording of the provision.

48 **(1) Restrictive interpretation**

49 If disposal free of charge within the meaning of scenario 3 of Article 16, first sentence, of the VAT Directive is not deemed to have taken place unless the criterion of untaxed final consumption has been met, then it falls to the disposing party to determine whether such final consumption is occurring on the part of the recipient. The disposing party therefore bears the risk of making an incorrect appraisal in this regard, as illustrated by the case in question. Namely, the

applicant was due to receive remuneration for supplying heat, whilst the heat was to be used by recipients A and B for specific purposes related to their business activities. The first part of this contract was not implemented as no payments were made for the supply of heat in either case. Moreover, there is also a possibility (at least in abstract terms) that the recipients (in this case, A and B) could use the service provided free of charge (in this case, heat) for purposes other than their business purposes, contrary to what had been agreed contractually. Consequently, the applicant bears the fundamental risk that sole trader A and business B might use the heat for their private residences, for example, which would represent a breach of contract. If the application of scenario 3 of Article 16, first sentence, of the VAT Directive depends on the use of the goods by the recipient (potentially in a manner giving rise to an entitlement to deduct input VAT), the disposing party would have to bear the risk of incorrectly appraising the situation.

50 As such, it could be argued that the assessment of whether disposal free of charge has occurred should be based solely on the nature of the disposal and whether or not it was free of charge, in accordance with the wording of scenario 3 of Article 16, first sentence, of the VAT Directive, without further restricting this scenario by requiring untaxed final consumption to have taken place.

51 **(2) Literal application**

52 It is also necessary to consider the legal consequences of a literal application of the provision. In light of the principle of neutrality (see, for example, ECJ, judgment of 13 March 2014 in Case C-204/13, *Malburg*, EU:C:2014:147, paragraph 41), it could be regarded as inappropriate to classify an act of application as a disposal of goods free of charge if the taxable person receiving the goods uses them for business purposes that give rise to an entitlement to deduction of input VAT. The transfer of heat is subject to VAT even if the recipient of the service is not entitled to deduct this as input VAT. Hence, a breach of the neutrality principle could arise if taxation of the disposing party for the application of goods did not then give rise to a right to deduct VAT on the part of the recipient of the goods.

53 However, it is unlikely that the recipient would not have been entitled to deduct VAT in this case. Article 16, first sentence, of the VAT Directive states that application is to be treated as a supply of goods for consideration. If the taxable person who is the recipient of the goods disposed of uses those goods in accordance with scenario 3 of Article 16, first sentence, of the VAT Directive for the purposes listed in Article 168 or Article 169 of the VAT Directive as if these goods were supplied to them, the substantive requirements for the deduction of VAT are met. As regards the additional requirement of an invoice in accordance with Article 178(a) of the VAT Directive, the disposing party could be regarded as being authorised to issue an invoice in accordance with Article 226 of the VAT Directive. This invoice would indicate in particular the taxable amount (Article 226(8) of the VAT Directive), the cost price of the application in accordance with Article 74 of the VAT Directive and the VAT amount payable on

that application (Article 226(10) of the VAT Directive). The invoice is not required to include a request for payment. Thus, deduction of VAT can be regarded as disposal free of charge in the case of application of goods without a payment having been made by the recipient of the goods to the disposing party. This is because, in the case of a disposal that is free of charge from the outset, the criteria of 'non-payment …after the supply takes place' specified in Article 90 of the VAT Directive is not met. This still applies even if the recipient of the goods disposed of pays the tax due on the application of goods, as such payment of tax is not classed as a consideration.

54 Finally, in order to confirm that the recipient was entitled to deduct input VAT, it would be necessary to regard the VAT owed on the application as 'VAT due or paid' within the meaning of Article 168(a) of the VAT Directive (see ECJ, judgment of 13 January 2022 in Case C-156/20, *Zipvit*, EU:C:2022:2, paragraph 37).

55 **(d) Relevance of the first question referred to the outcome of proceedings**

56 Paragraph 3(1b) of the UStG is based on Article 16 of the VAT Directive, and corresponds to this provision (see Federal Finance Court, judgments of 16 October 2013 – XI R 39/12, BFHE 243, 77, BStBl II 2014, 1024, paragraph 27 and of 21 May 2014 – V R 20/13, BFHE 246, 226, BStBl II 2014, 1029). Both provisions stipulate that disposal free of charge is to be treated as a supply of goods for consideration if the VAT on these goods or components thereof was deductible in full or in part (Paragraph 3(1b), first sentence, third indent, and second sentence of the UStG; Article 16, first sentence, of the VAT Directive). In the present case, the heat supplied to A and B may be regarded as goods disposed of free of charge in this sense as the applicant was entitled to deduct VAT in full on the operation of the cogeneration plant and biogas plant.

57 The Finance Court has not made any factual statements with regard to whether A and B are entitled to deduct VAT in full. It cannot be ruled out that A and B are SMEs or are beneficiaries of flat-rate compensation for agricultural and forestry producers.

58 **3. Concerning the second question referred**

59 (a) Significance of the chargeable event for the taxable amount

60 Article 74 of the VAT Directive serves to realise the act of application of goods referred to in Article 16, first sentence, of the VAT Directive as it provides how the taxable amount for such application of goods is to be calculated. In the opinion of the present Chamber, this means that the objectives pursued by Article 16 of the VAT Directive should also be taken into account when interpreting Article 74 of that directive.

61 **(b) Objectives of taxation on the application of goods**

62 With regard to the act of application of goods, the ECJ has previously ruled that the purpose of this provision is ‘to ensure equal treatment as between a taxable person who withdraws goods from his business and an ordinary consumer who buys goods of the same type. In pursuit of that objective, Article 5(6) [of Directive 77/388/EEC] prevents a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping payment of VAT when he transfers those goods from his business for private purposes and from thereby enjoying advantages to which he is not entitled by comparison with an ordinary consumer who buys goods and pays VAT on them’ (ECJ, judgment of 17 May 2001 in Joined Cases C-322/99 and C-323/99, *Fischer and Brandenstein*, EU:C:2001:280, paragraph 56). Therefore, it would ‘run counter to the objective of equal treatment’ if the provision on application of goods were to be interpreted as meaning that ‘where goods are allocated for the private purposes of the taxable person, the goods and the parts which have been incorporated in them were to be taxed as a whole, even though no input VAT was deductible when the goods were initially acquired and only the input VAT on the component parts acquired after purchase was deductible’ (ECJ, judgment of 17 May 2001 in Joined Cases C-322/99 and C-323/99, *Fischer and Brandenstein*, EU:C:2001:280, paragraph 75).

63 **(c) Significance of the chargeable event for the taxable amount**

64 If the objective pursued by the provision on application of goods of ensuring that ‘the taxable person does not enjoy any advantage to which he is not entitled by comparison with an ordinary consumer’ (ECJ, judgment of 17 May 2001 in Joined Cases C-322/99 and C-323/99, *Fischer and Brandenstein*, EU:C:2001:280, paragraph 76; see also ECJ, judgment of 16 June 2016 in Case C-229/15, *Mateusiak*, EU:C:2016:454, paragraph 39) is also to be applied to Article 74 of the VAT Directive, this could mean that, in the calculation of the cost price, only taxable costs are to be taken into account since ordinary consumers who produce goods would also pay VAT only on these costs. This interpretation leads to the conclusion that a taxable person who produces goods does not enjoy an advantage to which they are not entitled by comparison with an ordinary consumer who produces goods in the event that costs not subject to input VAT (e.g., the costs of tax-free credit within the meaning of Article 135 of the VAT Directive) are not included in the calculation of the cost price.

65 However, it is also necessary to take into account the purchase price, which according to Article 74 of the VAT Directive takes precedence over the cost price. In this case, it may not be appropriate to divide the purchase price into a taxable component and a non-taxable component. Moreover, the present Chamber points out that the tax administration operates on the assumption that costs not subject to input VAT are to be included in the calculation of the cost price (in accordance with Paragraph 10.6(1), fifth sentence, of the Umsatzsteuer-Anwendungserlass (German VAT Implementing Decree). This has been criticised in the legal literature ([…]). The Federal Finance Court has left this question open to date (see, for example, Federal Finance Court judgments in BFHE 275, 392,

paragraphs 34 and 35; judgment of 15 March 2022 – V R 34/20, BFHE 276, 369, paragraph 26).

66 **(d) Relevance of the second question referred to the outcome of the proceedings**

67 The second question is also relevant to the outcome of the proceedings, since Article 74 of the VAT Directive provides that the taxable amount for goods or similar goods is to be only the cost price in the absence of a purchase price for similar goods (see ECJ, judgment of 23 April 2015 in Case C-16/14, *Property Development Company*, EU:C:2015:265, paragraph 37, and ECJ, judgment of 28 April 2016 in Case C-128/14, *Het Oudeland Beheer*, EU:C:2016:306, paragraph 48). According to the case-law of the Federal Finance Court, this is the position in the present dispute since A and B are not connected to a heating network that would have allowed heat to be obtained from third parties for consideration (see Federal Finance Court, judgments in BFHE 239, 377, BStBl II 2014, 809, paragraph 39, and in BFHE 276, 369, paragraph 16). Consequently, the cost price as specified in Article 74 of the VAT Directive is relevant to the outcome of the proceedings. If only those costs that are subject to input VAT are to be included in the cost price, this reduces the taxable amount for the application of heat and would result in the claim being upheld in part.

68 **4. Concerning the third question referred**

69 **(a) Subject matter of the third question referred**

70 The third question referred seeks clarification as to whether the cost price includes only direct production or generation costs, or whether it also includes indirect costs (such as financing costs).

71 The existing lack of clarity in this regard stems from the remarks made by the ECJ in its judgment of 23 April 2015 in Case C-16/14, *Property Development Company*, EU:C:2015:265, paragraph 40, regarding interest on borrowed capital. According to this judgment, it is irrelevant whether the purchase price (which takes precedence over the cost price) of similar buildings includes interim interest which may have been paid during their construction. This is justified with the argument that, unlike the criterion of cost price, the criterion of the purchase price of similar goods enables the tax authority to base its calculation on the market price of that type of goods at the time at which the application of the building at issue was made, without having to examine in detail which components of the value gave rise to those prices.

72 This suggests that when using the cost price, on the other hand, it is necessary to determine which components of the value gave rise to this price. Therefore, unlike when determining the purchase price, when calculating the cost price it may be relevant whether, for example, there is interest on borrowed capital that may need to be taken into account. This interpretation is unlikely to be upheld, however, given how difficult it would be to take account of indirect costs (such as

administrative overheads) in the cost price. The inclusion of such costs (e.g. financing costs) therefore runs counter to the objective that the present Chamber believes should be pursued, namely simplifying the calculation of the value of applications of goods.

73 **(b) Relevance of the third question referred to the outcome of the proceedings**

74 As in the case of the second question referred, the third question referred is relevant to the outcome of the proceedings. If financing costs are not to be included in the cost price, this reduces the taxable amount for the application of heat and therefore results in a smaller tax burden for the applicant and in the applicant's claim being partially upheld.

75 […] **[Procedural information]**

76 […]