Case C-46/20

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:

29 January 2020

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

18 September 2019

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

Z

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

Finanzamt G

Subject matter of the main proceedings

Common system of value added tax — Directive 2006/112/EC — Deduction of VAT — Right of taxable person to allocate a mixed-use item to private assets or to the assets of the business — Admissibility of a limitation period for allocation to the assets of the business — Admissibility of a presumption of allocation to private assets in the absence of sufficient evidence to the contrary

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Does Article 168(a), read in conjunction with Article 167 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax conflict with national case-law precluding the right to deduct VAT in cases in which the trader is entitled to choose the allocation

of a supply at the time of purchase if the tax authorities have not adopted a decision on its allocation on expiry of the statutory deadline for submission of the annual VAT return?

2. Does Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax conflict with national case-law whereby allocation to private assets is assumed or presumed in the absence of (sufficient) evidence for allocation to the assets of the business?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EC of 22 December 2009, specifically Articles 167, 168, 168a, 179, 250, 252 and 273

Provisions of national law cited

Umsatzsteuergesetz (Law on value added tax, 'the UStG'), specifically Paragraphs 15 and 16

Brief summary of the facts and procedure

1 The action concerns the deduction as input tax of VAT incurred in 2014 in installing a photovoltaic system. The applicant used some of the electricity generated by the system himself and supplied the rest to a power supplier's transmission system. The supply contract concluded in 2014 provided for a remuneration plus value added tax. The defendant rejected the deduction of VAT, which the applicant claimed for the first time in his annual VAT return for 2014, submitted late, because the photovoltaic system was not allocated to the assets of the business in time. The objection and the action both failed. Now the matter has been brought before the Bundesfinanzhof (Federal Finance Court, 'the BFH') in an appeal on a point of law.

Brief summary of the basis for the reference

Preliminary remarks

2 According to Paragraph 15(1), No 1, first sentence, of the UStG, traders can deduct the VAT due by law on supplies for their business carried out by another trader. The VAT deductible in accordance with Paragraph 15 of the UStG must be deducted in the tax period in which it is incurred (Paragraph 16(2), first sentence, of the UStG).

3 Article 168(a) of Directive 2006/112/EC likewise stipulates that, in so far as the goods and services are used for the purposes of his taxed transactions, the taxable person is entitled to deduct the VAT due or paid in respect of supplies carried out by another taxable person. Under Article 167 of Directive 2006/112, the right to deduct VAT arises at the time when the deductible tax becomes chargeable.

4 According to the case-law of the BFH and the Court (see, for example, judgments of 11 July 1991, *Lennartz*, C-97/90, EU:C:1991:315; of 16 February 2012, *Eon Aset Menidjmunt*, C-118/11, EU:C:2012:97, paragraph 53 et seq.; and of 9 July 2015, *Trgovina Prizma*, C-331/14, EU:C:2015:456, paragraph 20), a trader is entitled to choose the allocation of integral goods for mixed use, that is for both private and business purposes, at the time of their purchase. The goods may be retained wholly within his private assets, allocated wholly to the business or integrated into the business only to the extent to which they are used for business purposes.

Assessment of the case on the basis of national law

5 According to national case-law, the allocation of goods in full or in part to the business requires an allocation decision by the taxable person which is documented externally and adopted in time. As the criteria established by the BFH (in particular allocation clearly recognisable by the tax authorities by expiry of the deadline for submission of the annual VAT return) are not fulfilled in this case, the VAT cannot be deducted.

The reference to the Court

6 In light of the judgment of 25 July 2018, *Gmina Ryjewo* (C-140/17, EU:C:2018:595), doubt has arisen as to whether the criteria developed and applied to date by the BFH on the exercise of the allocation choice are compatible with EU law.

Question 1

7 The first question seeks clarification as to whether a Member State may provide for a limitation period for allocation to the assets of the business. In so far as the principles formulated in the judgment in *Gmina Ryjewo* (EU:C:2018:595) can be applied to this case, the 2014 annual VAT return, the use of the photovoltaic system for business purposes or the conclusion of a supply contract might be regarded as sufficient evidence for allocation to the assets of the business.

8 (a) Although EU law expressly assumes that goods are ‘allocated’ (see Article 168a(1) of Directive 2006/112/EC), it does not regulate how or when the ‘allocation decision’ within the meaning of the case-law of the BFH or the synonymous concept of ‘acting as a taxable person’ used by the Court must be documented (see, for example, judgments in *Lennartz*, EU:C:1991:315, paragraphs 14 and 19, and in *Gmina Ryjewo*, EU:C:2018:595, paragraph 34).

9 (b) The fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions. Consequently, where the tax authorities have the information necessary to establish that the substantive requirements have been satisfied, they cannot, in relation to the right of the taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes (judgments of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos*, C-516/14, EU:C:2016:690, paragraphs 37 and 42, and of 21 November 2018, *Vadan*, C-664/16, EU:C:2018:933, paragraph 41).

10 (c) However, Article 167 and Article 179(1) of Directive 2006/112/EC permit Member States to require taxable persons to exercise their right to deduct VAT during the period in which that right has arisen (judgment of 12 July 2012, *EMS-Bulgaria Transport*, C-284/11, EU:C:2012:458, paragraph 53). Furthermore, it follows from Article 250(1) of Directive 2006/112/EC that the tax return submitted must set out all the information needed to calculate the deductions made. That includes documentation of the allocation decision adopted when the goods were acquired or manufactured, as that is a requirement for deduction of the VAT.

11 Aside from the fact that Article 252 of Directive 2006/112/EC permits the Member States to set deadlines for the submission of tax returns, Article 273 of Directive 2006/112/EC permits the Member States to impose measures in general to ensure the correct collection of tax and to prevent evasion. In particular, in the absence of provisions of EU law on that matter, the Member States have the power to choose the sanctions which seem to them to be appropriate in the event that conditions laid down by EU legislation for the exercise of the right to deduct VAT are not observed (see judgments of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 59, and of 8 May 2019, *EN.SA.*, C-712/17, EU:C:2019:374, paragraph 38 and the case-law cited). They must, however, exercise that power in compliance with EU law and its principles, inter alia the principles of proportionality and of VAT neutrality (see judgments of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 49, and in *EN.SA.*, EU:C:2019:374, paragraph 39).

12 (d) The fact that exercise of the allocation choice is a substantive requirement at the time of purchase of the supply suggests that a prompt allocation decision is compatible with EU law. That is because a supply is only purchased for the business or the trader is only acting as a taxable person at the time of purchase of a supply if, at the time of purchase, the supply is (intended) to be used for an activity exercised on a continuing basis in return for remuneration (judgment in *Lennartz*, EU:C:1991:315, paragraph 15; in *Eon Aset Menidjmunt*, EU:C:2012:97, paragraph 57; and of 22 March 2012, *Klub*, C-153/11, EU:C:2012:163, paragraph 39).

13 The fact that the allocation decision must be documented externally is justified by its characteristic as an internal fact and it therefore does not make the allocation decision a formal condition for VAT deduction. The Court has also emphasised that the intention to carry on an economic activity must be confirmed by objective evidence (judgment in *Gmina Ryjewo*, EU:C:2018:595 39).

14 (e) The documentation deadline established in BFH case-law may be based under EU law on the powers of regulation of the formal requirements for the deduction of VAT in Title XI of Directive 2006/112/EC (see judgment in *Astone*, EU:C:2016:614, paragraph 47 et seq.). This is suggested by the regulatory gap in Article 168(a), read in conjunction with Article 167 of Directive 2006/112/EC in relation to the exercise of the allocation choice.

15 (aa) Thus, the Court has already ruled that, since Directive 2006/112/EC is silent on this point, the determination of the methods and criteria for apportioning input VAT between economic and non-economic activities falls within the discretion of the Member States (judgment of 8 May 2019, *Zwiazek Gmin Zaglebia Miedziowego*, C-566/17, EU:C:2019:390, paragraph 29). Likewise, the Member States have a margin of discretion with regard to the means of achieving the objectives laid down in Article 273 of Directive 2006/112/EC (judgment of 21 November 2018, *Fontana*, C-648/16, EU:C:2018:932, paragraph 35 and the case-law cited).

16 (bb) Moreover, the Court has already ruled in respect of the regulation of deadlines permitted by Article 252 of Directive 2006/112/EC that legislation providing for a limitation period of two years for VAT deduction cannot be contested (judgments of 8 May 2008, *Ecotrade*, C-95/07, C-96/07, EU:C:2008:267, paragraph 45 et seq., and in *Astone*, EU:C:2016:614, paragraph 36 et seq.). This must also apply to a documentation deadline for the allocation decision.

17 (cc) The fact that the possibility of exercising the right to deduct without any temporal limit would be contrary to the principle of legal certainty also suggests that the allocation deadline is compatible with EU law. That is because that principle requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely (see judgments in *Ecotrade*, EU:C:2008:267, paragraph 44; in *EMS-Bulgaria Transport*, EU:C:2012:458, paragraph 48; and in *Astone*, EU:C:2016:614, paragraph 33).

18 (f) However, in its judgment in *Gmina Ryjewo* (EU:C:2018:595, paragraph 38 et seq.), the Court indicates various ways in which acting as a taxable person justifies VAT deduction, even where it is not necessarily brought to the prompt attention of the tax authorities. Moreover, it emphasises that the absence of an express declaration of allocation does not exclude the subsequent deduction of VAT (judgment in *Gmina Ryjewo*, EU:C:2018:595 47).

19 (aa) Although the judgment in *Gmina Ryjewo* (EU:C:2018:595) concerned correction to the VAT deducted, rather than the right of VAT deduction, the Court examines the concept of 'acting as a taxable person' required in order to deduct VAT in paragraph 34 of that judgment.

20 (bb) The question also arises as to whether the findings made in the judgment in *Gmina Ryjewo* (EU:C:2018:595) also apply to a private trader with an allocation choice, whereas no such allocation choice exists in the case of a non-economic activity. In any event, that is how the BFH has understood to date the findings in paragraph 35 et seq. of the judgment of 12 February 2009, *Vereniging Noordelijke Landen Tuinbouw Organisatie*, C-515/07 (EU:C:2009:88). These differences might suggest that the criteria established in the judgment in *Gmina Ryjewo* (EU:C:2018:595) do not apply.

21 (cc) However, insisting on a prompt allocation decision might infringe the principle of neutrality. That is because, if only a negative allocation decision excludes the deduction of VAT in the case of a public authority, a private sole proprietor cannot be required to make a prompt allocation, at least not in so far as there appears to be no reason to treat sole proprietors and public authorities differently.

Question 2

22 The second question concerns the legal consequences of missing the deadline.

23 The Court held as follows at paragraph 47 of the judgment in *Gmina Ryjewo* (EU:C:2018:595): 'However, although a clear and express declaration of the intention to use the goods for economic purposes at the time of their acquisition may suffice for a finding that the goods were acquired by the taxable person acting as such, the absence of such a declaration does not exclude the possibility that such an intention may be conveyed implicitly'. The question therefore arises as to whether this is compatible with the principle that allocation to the business cannot be assumed if there is no sign of any such evidence (apparent to the tax authorities).

24 The Court is of the opinion that the question of whether a person is acting as a taxable person should be interpreted broadly, taking account of various factors in each individual case (judgment in *Gmina Ryjewo*, EU:C:2018:595, paragraph 47 et seq.). In light, in particular, of the Opinion of the Advocate General to which the Court referred in that context (paragraph 54), it may be understood as meaning that a trader who acquires goods which, by their very nature, can also be used in principle for business purposes and have not been allocated solely for private use may be presumed to be 'acting as a taxable person', especially as deliberately not making a decision on the question of allocation should not give rise to any disadvantages.

25 The question arises as to whether this also applies in a case such as this, in which a person commenced an economic activity with the goods acquired and was not already registered as a taxable person for purposes of VAT on other grounds (see judgment in *Gmina Ryjewo*, EU:C:2018:595, paragraphs 43 and 50).

26 A fundamental presumption that supplies should be allocated to the assets of the business might be supported by the purpose of the allocation choice. That is because, for reasons of tax neutrality, the allocation choice is intended to prevent any residual VAT encumbrance from the acquisition or manufacture of goods initially put to private use, but later put to more extensive business use (judgment of 23 April 2009, *Puffer*, C-460/07, EU:C:2009:254, paragraph 47).

27 In any event, such a broad interpretation might rule out a fundamental presumption that unallocated goods should be allocated to private assets.

28 On the other hand, the fact that allocation is a choice of and must be exercised by the taxable person, by taking some form of action, suggests that allocation to the assets of the business cannot be assumed in the absence of evidence.

29 The fact that, according to the case-law of the Court, a person who acquires goods for the purposes of an economic activity does so as a taxable person (judgment of 29 April 2004, *Faxworld*, C-137/02, EU:C:2004:267, paragraphs 28 and 29) and preparatory acts should already be allocated to the economic activity (see judgments of 14 February 1985, *Rompelman*, C-268/83, EU:C:1985:74, paragraph 23, and of 1 March 2012, *Polski Trawertyn*, C-280/10, EU:C:2012:107, paragraph 28) suggests that this case should be treated in the same way as Case C-45/20. Thus, a person who has the intention, confirmed by objective evidence, to commence an economic activity and who incurs the first investment expenditure for those purposes must be regarded as a taxable person (judgment of 8 June 2000, *Breitsohl*, C-400/98, EU:C:2000:304, paragraph 34, and of 17 October 2018, *Ryanair*, C-249/17, EU:C:2018, 834, paragraph 18 and the case-law cited). Although the revenue authorities may require objective evidence of this (see judgment in *Rompelman*, EU:C:1985:74, paragraph 24), that is available in this case in the form of the supply contract. Moreover, consumption of some of the electricity generated for private purposes is provided for (see, with regard to economic activity in electricity generation, judgment of 20 June 2013, *Finanzamt Freistadt Rohrbach Urfahr*, C-219/12, EU:C:2013:413).