

JUDGMENT OF THE COURT (Fifth Chamber)

22 October 2015 (\*)

(Reference for a preliminary ruling — VAT — Directive 2006/112/EC — Article 168 — Right of deduction — Deduction of input VAT on the acquisition or production of capital goods — Recreational path directly intended for use by the public free of charge — Use of the recreational path as a means of carrying out taxed transactions)

In Case C-126/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court, Lithuania), made by decision of 18 February 2014, received at the Court on 17 March 2014, in the proceedings

**‘Sveda’ UAB**

v

**Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos,**

third party:

**Klaipėdos apskrities valstybinė mokesčių inspekcija,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby, A. Rosas, E. Juhász and C. Vajda (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2015,

after considering the observations submitted on behalf of:

- the Lithuanian Government, by D. Kriaušėnas, R. Dzikovič and D. Stepanienė, acting as Agents,
- the United Kingdom Government, by S. Brighthouse, J. Kraehling and M. Holt, acting as Agents, and O. Thomas, Barrister,
- the European Commission, by L. Lozano Palacios and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 April 2015,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between ‘Sveda’ UAB (‘Sveda’) and the Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos (State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania; ‘the State Tax Inspectorate’) concerning a decision refusing deduction of the input value added tax (‘VAT’) paid by Sveda in the context of the creation of a Baltic mythology recreational and discovery path (‘the recreational path’).

## **Legal context**

### *EU law*

3 Article 9(1) of the VAT Directive provides:

“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

4 Article 63 of that directive provides:

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

5 Article 167 of the directive is worded as follows:

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

6 Article 168 of the same directive provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

...’

### *Lithuanian law*

7 Article 58(1)(1) of Law No IX-751 of 5 March 2002 on value added tax is worded as follows:

‘A taxable person for VAT purposes shall have the right to deduct input and/or import VAT in respect of goods and/or services acquired and/or imported, if those goods and/or services are intended to be used for the following activities performed by that taxable person:

(1) the supply of goods and/or the provision of services on which VAT is charged’.

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

8 Sveda is a for-profit legal person whose activities consist in the provision of accommodation, food and beverages, the organisation of trade fairs, conferences and leisure activities, as well as the engineering and consultation associated with those activities.

9 On 2 March 2012 Sveda concluded a subsidisation agreement with the National Paying Agency under the Ministry of Agriculture (Nacionalinė mokėjimo agentūra prie Žemės ūkio ministerijos). Under that agreement, Sveda undertook to implement the project entitled ‘Baltic mythology recreational (discovery) path’ and to offer the public access to it free of charge. That agency committed itself to assuming a share of up to 90% of the costs of implementing the project, with the remaining expenses to be covered by Sveda.

10 Sveda deducted the VAT relating to the acquisition or production of certain capital goods as part of the construction work on the recreational path concerned and drew up a VAT declaration for the month of June 2012, in which it referred to the input tax as being deductible. However, the State Tax Inspectorate, Region of Klaipėda (Klaipėdos apskrities valstybinė mokesčių inspekcija), seized of a request by Sveda for the repayment of the VAT concerned, found that there was no justification for such a repayment, since it was not established that the goods and services acquired were intended to be used for the purposes of an activity subject to VAT. On that basis, on 24 August 2012 the State Tax Inspectorate, Region of Klaipėda, refused deduction of those amounts.

11 Sveda brought an action before the Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court) seeking annulment of the decision refusing that deduction. That action was dismissed as unfounded.

12 Sveda then brought an appeal before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court).

13 Although, in the referring court’s view, Sveda incurred the investment expenditure concerned with the intention of carrying out economic activities in the future, the referring court nevertheless is doubtful as to the deductibility of the input VAT. It questions, in that regard, whether there is a direct and immediate link between the expenses associated with the construction work carried out and the economic activities planned by Sveda, on the ground that the recreational path is directly intended for use by the public free of charge.

14 It was in those circumstances that the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Can Article 168 of the VAT Directive be interpreted as granting a taxable person the right to deduct the input VAT paid in producing or acquiring non-current assets intended for business purposes, which, as in the case in the main proceedings, are directly intended for use by members of the public free of charge, but may be recognised as a means of attracting visitors to a location where the taxable person, in carrying out his economic activities, plans to supply goods and/or services?’

### **Consideration of the question referred for a preliminary ruling**

15 By its question, the referring court essentially asks whether Article 168 of the VAT Directive

must be interpreted as granting, in circumstances such as those in the case in the main proceedings, a taxable person the right to deduct the input VAT paid for the acquisition or production of capital goods, for the purposes of a planned economic activity related to rural and recreational tourism, which are (i) directly intended for use by the public free of charge, and may (ii) be a means of carrying out taxed transactions.

16 In order to answer that question, it should, as a preliminary point, be recalled that the right of deduction provided for in Article 168(a) of the VAT Directive is an integral part of the VAT scheme and in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on input transactions (see, to that effect, judgment in *SKF*, C-29/08, EU:C:2009:665, paragraph 55 and the case-law cited).

17 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, inter alia, judgment in *Eon Aset Menidjunt*, C-118/11, EU:C:2012:97, paragraph 43 and the case-law cited).

18 It follows from Article 168 of the VAT Directive that, in so far as the taxable person, acting as such at the time when he acquires goods, uses the goods for the purposes of his taxed transactions, he is entitled to deduct the VAT paid or payable in respect of the goods (see, inter alia, judgment in *Klub*, C-153/11, EU:C:2012:163, paragraph 36 and the case-law cited).

19 As regards, in the first place, whether Sveda was acting as a taxable person during construction of the recreational path, that is to say, for the purposes of an economic transaction, within the meaning of the second subparagraph of Article 9(1) of the VAT Directive, it should be noted that goods and services may be acquired, by a taxable person, for the purposes of an economic activity within the meaning of that provision, even if the goods are not used immediately for that economic activity (see, to that effect, judgment in *Lennartz*, C-97/90, EU:C:1991:315, paragraph 14).

20 It is settled case-law that a person who incurs investment expenditure with the intention, confirmed by objective evidence, of engaging in economic activity within the meaning of Article 9(1) of the VAT Directive must be regarded as a taxable person. Acting in that capacity, he has therefore, in accordance with Article 167 et seq. of that directive, the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct (see, to that effect, judgment in *Gran Via Moine?ti*, C-257/11, EU:C:2012:759, paragraph 27 and the case-law cited). That right to deduct arises, in accordance with Articles 63 and 167 of the VAT Directive, at the time when the tax becomes chargeable, namely when the goods are delivered (judgment in *Klub*, C-153/11, EU:C:2012:163, paragraph 36 and the case-law cited).

21 Whether a taxable person acts as such for the purposes of an economic activity is a question of fact which must be assessed in the light of all the circumstances of the case, including the nature of the asset concerned and the period between the acquisition of the asset and its use for the purposes of the taxable person's economic activity (see, inter alia, to that effect, judgment in *Klub*, C-153/11, EU:C:2012:163, paragraphs 40 and 41 and the case-law cited). It is for the referring court to make that assessment.

22 In the present case, the referring court has described the expenses relating to the capital goods at issue in the main proceedings as being ultimately intended for carrying out the economic activities planned by Sveda. According to that court's findings, supported by objective evidence from the file it submitted, the recreational path concerned may be regarded as a means of

attracting visitors with a view to providing them with goods and services, such as souvenirs, food and drinks as well as access to attractions and paid-for bathing.

23 Therefore, it would appear from those findings that Sveda acquired or produced the capital goods concerned with the intention, confirmed by objective evidence, of carrying out an economic activity and did, consequently, act as a taxable person within the meaning of Article 9(1) of the VAT Directive.

24 That finding is in no way put into question by the circumstance noted by the Lithuanian Government that, under the subsidisation agreement concerned, those capital goods will have to be made available to the public at no cost for a period of five years from their acquisition, and therefore cannot be used during that same period as part of Sveda's economic activities.

25 The fact that such a subsidisation agreement does not permit, during that period, the recreational path at issue in the main proceedings to be made available in return for consideration does not prevent Sveda from carrying out the economic activities set out in paragraph 22 of this judgment. More specifically, according to the referring court, it may be considered that the recreational path is intended to attract visitors and to encourage them to buy the goods and services subject to VAT that Sveda offers. Moreover, according to the order for reference, the investment expenditure incurred by Sveda, a legal person pursuing a commercial objective, for the construction of the recreational path will be covered, at least in part, by the income from the provision of goods and services as part of those planned economic activities.

26 As regards, in the second place, whether the capital goods at issue in the main proceedings are being used by Sveda for the purposes of its taxed transactions, in accordance with Article 168 of the VAT Directive, it follows from the findings made by the referring court that the acquisition or production of those capital goods is directly intended for use by the public free of charge, but that, at the same time, it is part of the taxable person's objective of carrying out subsequent taxed transactions.

27 According to settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (see, *inter alia*, judgment in *SKF*, C-29/08, EU:C:2009:665, paragraph 57).

28 Nevertheless, as the Advocate General observed in points 33 and 34 of her Opinion, the Court has held that a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the expenditure incurred is part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such expenditure does have a direct and immediate link with the taxable person's economic activity as a whole (see, to that effect, judgments in *Investrand*, C-435/05, EU:C:2007:87, paragraph 24, and *SKF*, C-29/08, EU:C:2009:665, paragraph 58).

29 It is apparent from the case-law of the Court that, in the context of the direct-link test that is to be applied by the tax authorities and national courts, they should consider all the circumstances surrounding the transactions concerned and take account only of the transactions which are objectively linked to the taxable person's taxable activity. The existence of such a link must thus be assessed in the light of the objective content of the transaction in question (see, to that effect, judgment in *Becker*, C-104/12, EU:C:2013:99, paragraphs 22, 23 and 33 and the case-law cited).

30 The findings of the referring court establish that, in the case in the main proceedings, the expenditure incurred by Sveda as part of the construction work on the recreational path should come partly within the price of the goods or services provided in the context of its planned economic activity.

31 The referring court nevertheless harbours doubts as to whether there is a direct and immediate link between the input transactions and Sveda's planned economic activity as a whole, owing to the fact that the capital goods concerned are directly intended for use by the public free of charge.

32 In that regard, the case-law of the Court makes it clear that, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted (judgment in *Eon Aset Menidjmont*, C-118/11, EU:C:2012:97, paragraph 44 and the case-law cited). In both cases, the direct and immediate link between the input expenditure incurred and the economic activities subsequently carried out by the taxable person is severed.

33 First, in no way does it follow from the order for reference that the making available of the recreational path to the public is covered by any exemption under the VAT Directive. Second, given that the expenditure incurred by Sveda in creating that path can be linked, as is apparent from paragraph 23 of this judgment, to the economic activity planned by the taxable person, that expenditure does not relate to activities that are outside the scope of VAT.

34 Therefore, immediate use of capital goods free of charge does not, in circumstances such as those in the main proceedings, affect the existence of the direct and immediate link between input and output transactions or with the taxable person's economic activities as a whole and, consequently, that use has no effect on whether a right to deduct VAT exists.

35 Thus, there does appear to be a direct and immediate link between the expenditure incurred by Sveda and its planned economic activity as a whole, which is, however, a matter for the referring court to determine.

36 Moreover, adjustment periods for deductions do not have, as such, any effect on the origin of the right to deduction of VAT (see, to that effect, judgment in *Lennartz*, C-97/90, EU:C:1991:315, paragraphs 8 and 20), which, according to the case-law cited in paragraph 20 of the present judgment, is determined solely by the capacity in which the interested party is acting when acquiring the goods concerned. This applies, however, without prejudice to the repayment of input VAT, which the taxable person will have to effect if it subsequently proves that the acquired or produced input goods have not been used for the purposes of his economic activity.

37 Having regard to all the foregoing considerations, the answer to the question asked is that Article 168 of the VAT Directive must be interpreted as granting, in circumstances such as those in the main proceedings, a taxable person the right to deduct the input VAT paid for the acquisition or production of capital goods, for the purposes of a planned economic activity related to rural and recreational tourism, which are (i) directly intended for use by the public free of charge, and may

(ii) enable taxed transactions to be carried out, provided that a direct and immediate link is established between the expenses associated with the input transactions and an output transaction or transactions giving rise to the right to deduct or with the taxable person's economic activity as a whole, which is a matter for the referring court to determine on the basis of objective evidence.

### **Costs**

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

**Article 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as granting, in circumstances such as those in the main proceedings, a taxable person the right to deduct the input value added tax paid for the acquisition or production of capital goods, for the purposes of a planned economic activity related to rural and recreational tourism, which are (i) directly intended for use by the public free of charge, and may (ii) enable taxed transactions to be carried out, provided that a direct and immediate link is established between the expenses associated with the input transactions and an output transaction or transactions giving rise to the right to deduct or with the taxable person's economic activity as a whole, which is a matter for the referring court to determine on the basis of objective evidence.**

[Signatures]

\* Language of the case: Lithuanian.