Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

30 March 2023 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(a) and (c) – Supply of goods and services for consideration – Article 9(1) – Meanings of ‘taxable person’ and ‘economic activity’ – Municipality which organises the installation of renewable energy on its territory for its residents who own immovable property and who have expressed the wish to be equipped with renewable energy systems – Their contribution amounting to 25% of the subsidisable costs, without being able to exceed a maximum value agreed between the municipality and the interested property owner – Reimbursement of the municipality by a subsidy from the competent provincial authority of 75% of the subsidisable costs – Article 13(1) – Municipalities not subject to tax for the activities or transactions carried out as public authorities)

In Case C?612/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 16 April 2021, received at the Court on 30 September 2021, in the proceedings

Gmina O.

v

Dyrektor Krajowej Informacji Skarbowej,

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún, President of the Chamber, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Gmina O., by J. Wyrzykowski, doradca podatkowy,

– the Dyrektor Krajowej Informacji Skarbowej, by B. Ko?odziej, D. Pach and T. Wojciechowski,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by A. Armenia and U. Ma?ecka, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1), Article 9(1), Article 13(1) and of Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between the Gmina O. (Municipality of O.), located in Poland, and the Dyrektor Krajowej Informacji Skarbowej (Director of the National Treasury Information Bureau, Poland) concerning an advance tax ruling addressed to that municipality in respect of its liability to pay value added tax (VAT) concerning activities consisting, for that municipality, of entering into a contract with some of its inhabitants for the installation of renewable energy systems ('RES') on their immovable property, in return for financial consideration from those inhabitants.

Legal context

European Union law

3 Article 2(1) of Directive 2006/112 provides:

'The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…'

4 Article 9(1) of that directive states:

'"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.'

5 According to Article 13(1) of the VAT Directive:

'States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.'

6 Article 73 of Directive 2006/112 is worded as follows:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

Polish law

7 The ustawa o podatku od towarów i us?ug (Law on Tax on Goods and Services) of 11 March 2004 (Dz. U. of 2004, No 54, item 535), in the version applicable to the dispute in the main proceedings, is intended to transpose Directive 2006/112 into Polish law.

8 Article 29a(1) of that law, which concerns the taxable amount, states:

'Subject to paragraphs 2, 3 and 5, Articles 30a to 30c, Article 32, Article 119 and Article 120(4) and (5), the taxable amount shall be everything that constitutes consideration which the supplier of goods or services has received or is to receive on account of a sale from the purchaser, customer or a third party, including subsidies, subventions and other similar amounts received which have a direct effect on the price of the goods or services supplied by the taxable person.'

9 Article 400a(1) of the ustawa Prawo ochrony ?rodowiska (Environmental Protection Law) of 27 April 2001 (Dz. U. of 2001, No 62, heading 627), in the version applicable to the dispute in the main proceedings, provides:

'The financing of environmental protection and water management shall include:

…

(21) projects related to air protection;

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

…'

10 Article 403(2) of that law states:

'The municipalities' own tasks shall include financing environmental protection within the scope set out in Article 400a(1)(2), (5), (8), (9), (15), (16), (21) to (25), (29), (31), (32) and (38) to (42) in an amount not lower than the amount of revenue from the fees and penalties referred to in Article 402(4), (5) and (6) which constitutes municipal budget revenue, less the surplus of such revenue transferred to the provincial funds.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 The Municipality of O., which has a VAT registration number in Poland, entered into a partnership agreement with an urban community and two other municipalities, also located in Poland, with a view to carrying out a project for the installation of RES in those four local authorities (‘the Project’).

12 The Project is part of the regional operational programme of the provincial authority concerned for the period 2014-2020 and is intended to enable the transition to a low-carbon economy. The urban community, as Project leader, entered into, on behalf of the four local authorities concerned, an agreement on the financing of the Project with that provincial authority. Under the terms of that agreement, the Project leader receives the subsidies of the provincial authority concerned, which cover only part of the subsidisable costs, after which it transfers to its partners the share due to them. The Municipality of O. was granted funding of 75% of the total subsidisable costs.

13 Each contracting authority pays the undertaking selected at the end of the invitation to tender separately, and that undertaking therefore issues invoices specific to the contract relating to each of those authorities.

14 As regards the part of the cost which remains to be borne by the contracting authority, each contracting authority is free to decide on the arrangements for its financing. The Municipality of O. has decided to obtain from the owners of the immovable properties which will benefit from RES, at their request, a contribution amounting to 25% of the subsidisable costs, without however exceeding the maximum contractually agreed value. Furthermore, the standard contract entered into by the Municipality of O. with the owners concerned stipulates that all the RES installed will remain the property of the municipality for the duration of the Project, that is to say, for a period of five years from the date of receipt of the last payment received by the municipality for the reimbursement of its share of the subsidies paid by the provincial authority concerned. At the end of that period, ownership of the RES is transferred to the owner of the immovable property concerned.

15 It was in that context that the Municipality of O. requested an advance tax ruling from the Director of the National Treasury Information Bureau, in order to ascertain whether the contribution paid by the owners concerned and the subsidy received by it from the provincial authority concerned should be exempt from VAT.

16 In his tax ruling of 7 August 2019, the Director of the National Treasury Information Bureau took the view that the Municipality of O. should be classified as a ‘taxable person’ for the purposes of VAT in the context of the transactions at issue in the main proceedings.

17 The Municipality of O. challenged that advance tax ruling before the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland). By judgment of 10 July 2020, that court dismissed the action, holding that that municipality carried out, in the context of the transactions at issue in the main proceedings, an economic activity and that that activity was not carried out by the Municipality of O. as a public authority.

18 The Municipality of O. brought an appeal on a point of law against that judgment before the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), the referring court.

19 In the first place, that court is uncertain as to the consequences to be drawn from the fact that the Municipality of O. is a party to the contract entered into with the undertaking which won the tender and pays the sums due to it, from which it receives an invoice issued in its name, as regards the possible exercise of an economic activity by that municipality. In the second place, it

asks, on the assumption that the latter does in fact carry on such an activity, whether the transactions at issue in the main proceedings are carried out under a public law scheme. In the third place, assuming that this concerns an economic activity which is not carried out under such a scheme, the referring court raises the question of the determination of the taxable amount of those transactions.

20 It is in those circumstances that the Naczelny S?d Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must the provisions of [Directive 2006/112], in particular Articles 2(1), 9(1) and 13(1) thereof, be interpreted as meaning that a municipality (a public authority) acts as a taxable person for VAT purposes in carrying out a project whose objective is to increase the proportion of renewable energy sources by means of entering into a civil-law contract with property owners, under which the municipality undertakes to install [RES] on their property and – after a certain period of time has elapsed – to transfer the ownership of those systems to the property owners?

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

Consideration of the questions referred

The first question

21 By its first question, the referring court asks, in essence, whether Article 2(1), Article 9(1) and Article 13(1) of Directive 2006/112 must be interpreted as meaning that the fact that a municipality supplies and installs, through an undertaking, RES for its residents who own their property and who have expressed their wish to be equipped with them, where such an activity is not intended to obtain income on a continuing basis and gives rise, on the part of those residents, solely to a payment covering at most one quarter of the costs incurred, the balance being financed by public funds, constitutes a supply of goods and services subject to VAT.

22 It should be recalled at the outset that it is for the referring court, which alone has jurisdiction to assess the facts, to determine the nature of the transactions at issue in the main proceedings (judgment of 13 January 2022, *Termas Sulfurosas de Alcafache*, C?513/20, EU:C:2022:18, paragraph 36).

23 That said, it is nevertheless for the Court to provide that court with all the guidance as to the interpretation of EU law which may be of assistance in adjudicating on the case pending before it (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 35 and the case-law cited).

24 In that regard, in order to fall within the scope of Directive 2006/112, the activities carried out by a municipality in the context of the promotion of renewable energy must, first, constitute a supply of goods or services for consideration by that municipality for its residents, within the meaning of Article 2(1)(a) and (c) of that directive, and, second, have been carried out in the course of an economic activity, within the meaning of Article 9(1) of that directive, with the result that that municipality has also acted as a taxable person.

The existence of a supply of goods and a supply of services for consideration

25 According to settled case-law, in order for such transactions to be ‘for consideration’ within

the meaning of Article 2(1)(a) and (c) of Directive 2006/112, there must be a direct link between the supply of goods or services, on the one hand, and the consideration actually received by the taxable person, on the other. Such a direct link is established where there is a direct link between the provider of the supply of goods or services, on the one hand, and the recipient, on the other, a legal relationship in which there is reciprocal performance, the remuneration received by the provider of the transactions constituting the actual consideration for the service supplied to that recipient (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 36).

26 In that regard, first, it should be recalled that, in order for those transactions to be considered to be 'for consideration', within the meaning of Directive 2006/112, it is not necessary, as follows also from Article 73 of that directive, that the consideration for the supply of goods or services must be obtained directly from the recipient thereof, since it may be obtained from a third party (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 40 and the case-law cited).

27 Second, the fact that the price paid for those economic transactions is higher or lower than the cost price, and, therefore, higher or lower than the open market value, is irrelevant for the purpose of establishing whether it was a transaction for consideration, since that circumstance is not such as to affect the direct link between the transactions supplied and the consideration received or to be received, the amount of which is determined in advance and according to well-established criteria (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 43 and the case-law cited).

28 In the present case, it is apparent from the information provided by the referring court that the Municipality of O. entrusts the undertaking that won the tender with the task of delivering and installing RES on the immovable properties of the owners who have expressed an interest in participating in that initiative. In that regard, it must be stated that the transfer of ownership of such systems constitutes a supply of goods within the meaning of Article 14 of Directive 2006/112 and that making them available for use corresponds to a supply of services, within the meaning of Article 24(1) of that directive.

29 There is no doubt that the existence of a contract between the Municipality of O. and that undertaking, relating to the installation of RES and the transfer of ownership of RES to that municipality for the duration of the Project, makes it possible to consider that that undertaking is carrying out a transaction for consideration for that municipality, given that, moreover, the same municipality receives an individual invoice from the same undertaking for that purpose, which it alone pays. That transaction, in the light of the considerations set out in the preceding paragraph, includes, in part, a supply of goods to the Municipality of O., namely the RES, of which the latter becomes the owner, and, in part, a supply of services consisting of the installation of those RES on the immovable property of the residents concerned. The advantage conferred on that municipality in return for the payment lies not only in the ownership of those RES, but also in the improvement of the quality of life of its residents as a whole as a result of a more environmentally friendly method of producing energy.

30 However, it cannot be ruled out that the owners of the immovable properties on which the RES have been or will be installed are the final recipients of that supply of goods and services, which would in that case have been carried out by the Municipality of O. through the undertaking selected following the call for tenders, which it is for the referring court to determine.

31 It is common ground, first, that those residents will, under the contract entered into between each of them and that municipality, become owners of the RES at the end of the project and that

they benefit from them as soon as they are installed and, second, that they will contribute, in principle, to 25% of the subsidisable costs, without, however, that percentage exceeding an amount agreed in that contract, to the payment for the delivery of those RES and their installation, as referred to in paragraph 14 of the present judgment. In that regard, in the light of the case-law cited in paragraphs 25 to 27 of the present judgment, the fact that a third party, namely the provincial authority concerned, takes responsibility for 75% of the eligible costs by means of a subsidy paid to the Municipality of O., and the fact that the total of the amounts corresponding to those percentages of 25% and 75% are less than the cost of the contract, that is to say, the cost actually incurred by that municipality for the benefit of the undertaking which won the tender, given that both the contribution of those residents and the subsidy from the provincial authority relate only to the subsidisable costs and not to the actual costs in their entirety, are not critical.

32 If, in the light of those considerations, the referring court were to reach the conclusion that the Municipality of O. carries out for consideration for its residents, within the meaning of Article 2(1)(a) and (c) of Directive 2006/112, a supply of goods and services, it would be for that referring court to determine whether those transactions are carried out in the course of an economic activity, since, according to the case-law, an activity may be regarded as an ‘economic activity’, within the meaning of the second subparagraph of Article 9(1) of that directive, only where that activity corresponds to one of the chargeable events defined in Article 2(1) of that directive (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 32 and the case-law cited).

The supply of goods and services in the course of an economic activity

33 At the outset, it should be recalled that the analysis of the wording of Article 9(1) of Directive 2006/112, while highlighting the scope of the concept of ‘economic activity’, also clarifies the objective nature of that concept, in the sense that the activity is considered per se and without regard to its purpose or results (judgment of 25 February 2021, *Gmina Wroc?aw (Transformation of the right of usufruct)*, C?604/19, EU:C:2021:132, paragraph 69 and the case-law cited).

34 An activity is thus, in general, classified as ‘economic’ where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 47 and the case-law cited).

35 Given the difficulty of establishing a precise definition of economic activity, all the circumstances in which it is supplied have to be examined (see, to that effect, judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 29 and the case-law cited), by making a case-by-case assessment, referring to the typical conduct of an active entrepreneur in the field concerned, here, an RES installer.

36 In that regard, first, it should be noted that, while an entrepreneur aims to derive from his or her activity income of a permanent nature (see, to that effect, judgment of 20 January 2021, *AJFP Sibiu and DGRFP Bra?ov*, C?655/19, EU:C:2021:40, paragraphs 27 to 29 and the case-law cited), the Municipality of O. indicated, in its request for an advance tax ruling, as is apparent from the order for reference, that it does not intend to provide RES installation services on a regular basis and does not employ nor plan to employ workers to that end, which differentiates the present case from those in which municipal services were of a permanent nature.

37 Secondly, it is apparent from the information provided by the referring court that the Municipality of O. appears merely to propose to its residents who are owners of immovable property likely to be interested in RES, in the context of a regional programme intended to enable the transition to a low-carbon economy, to deliver and install those RES in their homes through an

undertaking selected following a call for tenders, via a contribution from them that does not exceed 25% of the subsidisable costs associated with that supply and installation, whereas that municipality remunerates the undertaking in question, for that same supply and installation, at market price.

38 The Court has already had occasion to rule that, when a municipality recovers, through the contributions it receives, only a small part of the costs which it has incurred, the balance being financed by public funds, such a difference between those costs and the amounts received in return for the services offered suggests that these contributions must be regarded more as a fee than as consideration (see, to that effect, judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 33 and the case-law cited). Consequently, even taking into account the payments made to the Municipality of O. by the provincial authority concerned, which relate to 75% of the subsidisable costs, the total sums received from the owners concerned, on the one hand, and that provincial authority, on the other, remain structurally lower than the total costs actually incurred by that municipality, as has been stated in paragraph 31 of the present judgment, which does not correspond to the approach that would have been taken, where applicable, by an RES installer, which would have endeavoured, by setting its prices, to absorb its costs and to make a profit. Conversely, that municipality bears only risks of loss, without any prospect of profit.

39 Thirdly, it does not appear to be economically viable, for such an RES installer, to make the recipients of its supplies of goods and services bear only one quarter, at most, of the costs which it has incurred, while awaiting compensation, by way of a subsidy, for the essential remaining three quarters of those costs. Not only would such a mechanism place its cash flow in a structurally loss-making situation, but, in addition, it would place an unusual uncertainty on it for a taxable person, since the question whether, and to what extent, a third party will reimburse such a significant part of the costs incurred remains in fact open until the decision of that third party, subsequent to the transactions at issue.

40 Consequently, it does not appear, subject to determination by the referring court, that the Municipality of O. carries out, in the present case, an activity of an economic nature within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112.

The absence of liability to tax arising from the performance of transactions by a body governed by public law acting as a public authority

41 Since the Municipality of O. does not carry out, in the light of the abovementioned considerations, an activity falling within the scope of Directive 2006/112, it is not necessary to determine whether that activity would also have been excluded from that scope under Article 13(1) of that directive.

42 In the light of the foregoing considerations, the answer to the first question is that Article 2(1), Article 9(1) and Article 13(1) of Directive 2006/112 must be interpreted as meaning that the fact that a municipality supplies and installs, through an undertaking, RES for its residents who own their property and who have expressed their wish to be equipped with RES, where such an activity is not intended to obtain income on a continuing basis and gives rise, on the part of those residents, solely to a payment covering at most one quarter of the costs incurred, the balance being financed by public funds, does not constitute a supply of goods and services subject to VAT.

The second question

43 Having regard to the answer given to the first question, there is no need to answer the second question.

Costs

44 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 (Seventh Chamber) hereby rules:

Article 2(1), Article 9(1) and Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as meaning that the fact that a municipality supplies and installs, through an undertaking, renewable energy systems for its residents who own their property and who have expressed their wish to be equipped with renewable energy systems, where such an activity is not intended to obtain income on a continuing basis and gives rise, on the part of those residents, solely to a payment covering at most one quarter of the costs incurred, the balance being financed by public funds, does not constitute a supply of goods and services subject to value added tax.

[Signatures]

* Language of the case: Polish.