Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 7 March 2013[1]

Case C-219/12

Finanzamt Freistadt Rohrbach Urfahr
v
Unabhängiger Finanzsenat Außenstelle Linz

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(VAT — Definition of 'economic activity' — Photovoltaic system installed on the roof of a private household — Electricity sold to a provider who supplies the household's electricity needs)

1. A householder has installed a photovoltaic (solar panel) system which produces electricity but has no storage capacity. Its annual production is less than the household's annual consumption. The householder has a contract with an electricity provider under which he sells electricity to that provider, who also supplies electricity to the household. Since he considers that his sale of electricity constitutes an economic activity, the householder seeks to recover the input value added tax ('VAT') paid on his system and its installation. The Verwaltungsgerichtshof (Higher Administrative Court) (Austria) wishes to know whether that is the correct approach.

The Sixth VAT Directive

2. The solar panels in question were installed in 2005, when the relevant European Union (EU) legislation was the Sixth VAT Directive.[2] The following provisions in particular are relevant.[3]

3. Under Article 2, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to VAT.

4. Article 4(1) defines a 'taxable person' as 'any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'. Under Article 4(2), economic activities are 'all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity'.

1 — Original language: English.

2 — 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 (OJ 1977 L 145, p. 1, as amended; 'the Sixth Directive'). With effect from 1 January 2007, it was repealed and replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'Directive 2006/112'), which presents the applicable VAT provisions in a recast structure and wording without, in principle, bringing about material changes.

3 — See, now, the following provisions of Directive 2006/112: Articles 1(2), 9(1), 14(1), 15(1), 16, 74, 167, 168, 168a and 281 to 291.

5. Under Article 5(1), a supply of goods is a 'transfer of the right to dispose of tangible property as owner', while Article 5(2) specifies that electric current is to be considered tangible property. Article 5(6) provides: 'The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. …'

6. Article 11A(1)(a) lays down the general rule that the taxable amount is to be 'everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies'. However, for supplies referred to in Article 5(6), Article 11A(1)(b) states that the taxable amount is to 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 of supply'.

7. Article 17[4] ('Origin and scope of the right to deduct') provides, in particular:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…'

8. Article 20 provides for the amount of deductions of input tax to be adjusted where appropriate:

'1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

…

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted …

2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured.

…'

9. Finally, Article 24 allows Member States to introduce or retain certain special schemes, including exemption or graduated tax relief for small undertakings, subject to certain conditions. In particular, Article 24(2) authorises undertakings whose annual turnover is less than a specified threshold to be exempted from VAT. Article 24(5) states: 'Taxable persons exempt from tax shall not be entitled to deduct tax in accordance with the provisions of Article 17, nor to show the tax on their invoices.'

4 — As amended by Article 28f, introduced by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

10. The relevant threshold for the purposes of Article 24(2) varies considerably as between Member States, according to the date of accession or the level of VAT thresholds applied prior to the entry into force of the Sixth Directive.[5] Some Member States do not apply a small undertakings scheme at all, while others apply a threshold of over EUR 70 000 in annual turnover. In Austria, the threshold is an annual turnover not exceeding EUR 30 000 net,[6] and it applies automatically unless a trader opts for taxation.[7]

Facts, procedure and question referred

11. According to the order for reference, Mr Fuchs, the householder concerned by the national proceedings, fitted solar panels on the roof of his house in 2005. There is no power storage capability. The total power produced is fed into the public network, the power required by the household being bought back at the same price as that at which it is fed in, namely EUR 0.181, including VAT at 20%, in both cases. Mr Fuchs purchased and fitted the system at a price of EUR 38 367.76, including VAT at 20% of EUR 6 394.63. In respect of the installation, he received a one-off grant of EUR 19 020.

12. The order for reference also states that from 2005 to 2008 Mr Fuchs's household consumed some 44 600 kWh of power and that, of the total produced and fed in by his photovoltaic system during the whole period, namely 19 801 kWh, he supplied 11 156 kWh to the general power network and directly used[8] 8 645 kWh himself. During the first five months of operation of the system, in 2005, 2 829 kWh was produced and 1 986 kWh fed into the network.

13. Finanzamt Freistadt Rohrbach Urfahr (Freistadt Rohrbach Urfahr Tax Office; 'the Finanzamt') issued Mr Fuchs with a VAT notice for 2005 which did not allow any deductions of input tax. Mr Fuchs appealed to the Unabhängiger Finanzsenat, Außenstelle Linz (Independent Finance Tribunal, Linz District; the 'Unabhängiger Finanzsenat'), which established a tax credit of EUR 6 309.29 in his favour. That figure was arrived at by offsetting input tax of EUR 6 394.63 on the cost of the system and output tax of EUR 85.34 on all the electricity produced by it (both fed into the network and consumed by the household) in 2005.

14. The Finanzamt has appealed against that decision to the referring court, which seeks a preliminary ruling on the following question:

'Is the operation of a network-connected photovoltaic installation with no independent power storage capability on or adjacent to a privately owned house used for private residential purposes, which is technically designed such that the power generated by the installation is, on a continuing basis, below the total quantity of power privately consumed by the installation operator in the privately owned house, an "economic activity" of the installation operator within the meaning of Article 4 of [the Sixth Directive]?'

15. Written observations have been submitted by the Austrian and German Governments and by the Commission. No hearing has been requested and none has been held.

5 — See, now, Articles 284 to 287 of Directive 2006/112.

6 — Paragraph 6(1)(27) of the Umsatzsteuergesetz (Law on turnover tax) 1994.

7 — Paragraph 6(3) of the same law.

8 — See further points 17 and 18 below.

Assessment

Preliminary issues

16. The question raised by the Verwaltungsgerichtshof is confined to whether the provision of electricity to the general network by a person in Mr Fuchs's situation constitutes an 'economic activity' for VAT purposes. I shall explain why I am of the view that it does. However, while that answer may serve to decide the issue in the main proceedings, there are further aspects which it may be necessary to take into account, both in Mr Fuchs's situation and in similar situations.

17. First, I note that it is not entirely clear how exactly Mr Fuchs's system operates. The order for reference states, on the one hand, that all the electricity produced is fed into the network and, on the other, that between 2005 and 2008 a portion was fed into the network and the remainder consumed directly by the household.

18. In response to a request from the Court, the Verwaltungsgerichtshof has clarified the position to some extent. It appears that the Unabhängiger Finanzsenat found as a fact that all the electricity produced was fed into the public network and that the 8 645 kWh described as consumed 'directly' by the household were consumed at the same time as an equivalent quantity of electricity was being fed into the network. The referring court has proceeded on that basis, but states that the Finanzamt disputes the Unabhängiger Finanzsenat's finding and claims that Mr Fuchs's consumption comes first from the solar panels, topped up from the network when necessary, and that only electricity surplus to the household's needs (at moments when the panels are generating more than the household is consuming) is fed into the network.

19. The Verwaltungsgerichtshof considers that the difference between the two situations is irrelevant for the purposes of the issue to be decided. I none the less consider it useful to examine the provisions of the Sixth Directive in the light of different variant scenarios.

Existence of an economic activity

20. The Court has held that the term 'economic activities' in Article 4(2) of the Sixth Directive is very wide in scope and objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity. [9]

21. According to Article 5(2) of the Sixth Directive, electricity is tangible property. By means of his solar panels, Mr Fuchs produces electricity. He supplies that electricity for consideration to his network operator. It is therefore in principle a taxable supply of goods. Production and supply are not continuous, but they take place 'on a continuing basis'. They have already continued over a period of years. For as long as the solar panels function and Mr Fuchs maintains his arrangement with the network operator, electricity will continue to be produced whenever daylight and weather conditions are suitable, and will continue to be supplied to the network in accordance with those arrangements.

22. It is also clear from the information in the order for reference that Mr Fuchs's purpose is at least in part to derive income from the supply of electricity. Even if the concrete result is merely a reduction of his electricity bill, that reduction comes from offsetting income which is due to him from the network operator against payments which are due by him to the operator, and it is that income which Mr Fuchs seeks to derive, on a continuing basis, from his supplies.

9 — Case C-246/08 *Commission* v *Finland* [2009] ECR I-10605, paragraph 37 and the case-law cited.

23. It is not, in my view, relevant in this case that, by reason of its design, the photovoltaic system covers a part of the household's needs but does not generate a systematic surplus which would always be for sale regardless of household consumption.

24. The issue of whether an activity is designed to obtain income on a continuing basis is an issue of fact which must be assessed having regard to all the circumstances of the case, which include, inter alia, the nature of the property concerned.[10]

25. In this case, Mr Fuchs uses his photovoltaic system to supply some or all (depending on the correct factual context) of the electricity produced to the network operator, and he has entered into a contract with that operator under which the supply is remunerated. That is, objectively, an economic activity. It would not, however, have been an economic activity if the system had been designed to supply only the household – with, for example, batteries to store any temporary surplus production for later use and, perhaps, a mechanism for receiving electricity from the network during temporary shortfalls but none for feeding electricity into the network.

26. In that regard, I do not agree with the Austrian Government's submission that the two types of installation are so comparable in nature that they must be treated in the same way for VAT purposes. As I have noted, the assessment is an objective one. There is an objective difference, relevant to classification as an economic activity, between a system designed to supply only domestic electricity needs and a system designed to feed some or all of its production into the electricity network in exchange for remuneration. I understand the policy arguments put forward by that government (that one type of photovoltaic system should not benefit, via deduction of input VAT, from greater public funding than another). However, I consider that such a policy could be implemented by other means, such as an exclusion from the right to opt for taxation[11] or an adjustment of the grant awarded for the installation of such systems,[12] without distorting the objective definition of an economic activity.

27. I am therefore of the view that Mr Fuchs carries out an economic activity (producing electricity and/or exploiting solar panels, for the purpose of obtaining income therefrom on a continuing basis) within the meaning of Article 4(2) of the Sixth Directive, and is consequently a taxable person within the meaning of Article 4(1).

28. Indeed, the same conclusion could be reached from the tax treatment accorded to the transactions by the Austrian tax authorities themselves. The referring court states that VAT is charged on Mr Fuchs's supplies to the network operator. Only supplies made by a taxable person acting as such are subject to VAT. It follows that, if Mr Fuchs makes taxable supplies, he must be a taxable person acting as such. The view of the tax authority as set out in the order for reference and of the Austrian Government as put to the Court (namely, that Mr Fuchs is acting in a private capacity) is not consistent with levying VAT on the electricity which he supplies.

29. Clearly, to the extent that he acts as a taxable person, Mr Fuchs is subject to all the rules of EU and national law which govern the rights and obligations of taxable persons.

Deductibility of input tax

30. The issue before the national court is not merely whether the operation of Mr Fuchs's solar panels constitutes an economic activity but, more importantly, whether Mr Fuchs is entitled to deduct the input VAT on the purchase of the panels from the output VAT on his supplies of electricity to the network operator.

10 — Case C-263/11 *Rēdlihs* [2012] ECR, paragraph 33 and the case-law cited.

11 — See points 10 above and 32 below.

12 — See point 12 above.

31. If the sole purpose of the operation were to supply electricity for consideration to the network, the answer would in principle be yes. To paraphrase Article 17(1) and (2)(a) of the Sixth Directive, Mr Fuchs, as a taxable person, would be entitled to deduct from the tax which he is liable to pay on his taxable output transactions (the supply of electricity) the input tax paid in respect of goods and services supplied to him by another taxable person (namely, the solar panels and their installation) and used for the purposes of those transactions. The right to deduct would, moreover, arise as soon as the input tax became chargeable.

32. However, it should be borne in mind that a person supplying only the quantities of electricity produced by Mr Fuchs's solar panels would be likely, in many Member States, to fall below the threshold for taxation. He would thus, in accordance with Article 24(5) of the Sixth Directive, be unable either to charge output tax or to deduct input tax. In Mr Fuchs's case, supplies fall below the threshold for taxation in Austria. However, since VAT is levied on those supplies, it must be assumed that he has opted for taxation,[13] with a corresponding right to deduct. Indeed, if the Austrian authorities have accepted that Mr Fuchs could opt for taxation, that is further evidence that they have regarded him as carrying out an economic activity, since there can be no possibility of opting for taxation in respect of an activity which falls outside the scope of VAT.[14]

33. In any event, the operation may not have as its sole purpose the supply of electricity for consideration to the network. Some 44% of the electricity produced may be consumed by Mr Fuchs's own household, perhaps without entering the network.[15] If so, that fact too must be taken into account when determining how the right of deduction is to operate.

34. In relation to the economic activity of supplying electricity, solar panels must be regarded as capital goods within the meaning of the Sixth Directive. The Court has defined capital goods for VAT purposes as those 'used for the purposes of some business activity and distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure but are written off over several years'.[16]

35. It is settled case-law that, where capital goods are used both for business and for private purposes (as may be the case here), the taxable person has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes.[17]

36. The way in which the right of deduction can be exercised in respect of solar panels whose production is used partly for private purposes (direct consumption not passing through the network) and partly for business purposes (feeding into the network for consideration) will therefore depend on, inter alia, the allocation of those panels as between the business and private assets of the person concerned.

37. First, if they are retained wholly within private assets, they are excluded entirely from the system of VAT, and no question of deduction can arise.[18] The same would apply, I would add, in the case of a freestanding photovoltaic system, unconnected to the network and supplying only household needs. In such a case, there would be no economic activity and no taxable supply.

13 — See point 10 above.

14 — See point 28 above

15 — See point 18 above.

16 — See, most recently, Case C-118/11 *Eon Aset Menidjmunt* [2012] ECR, paragraph 35 and the case-law cited.

17 — See, most recently, Case C-594/10 *Van Laarhoven* [2012] ECR, paragraph 25 and the case-law cited. However, see also point 41 below.

18 — See the Opinion of Advocate General Jacobs in Case C-434/03 *Charles and Charles-Tijmens* [2005] ECR I-7037, points 58, 75 and 76.

38. Second, if the solar panels are allocated entirely to the business assets of the householder in his capacity as a taxable person (as may be the case here), the right to deduct is unaffected, but there will be implications as regards the VAT treatment of the electricity consumed by his own household. That electricity must then be regarded as goods supplied by his business for his private use, governed by Article 5(6) of the Sixth Directive, and therefore subject to VAT.

39. That being so, the taxable amount will be, in accordance with Article 11A(1)(b), '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 of supply'. Since, on the assumption that the householder is supplying electricity to himself, the goods (namely, the electricity in question) are not purchased but produced by him, the taxable amount must be either the purchase price of similar goods (namely, of electricity purchased from the network) or the cost price determined at the time of supply. It might be queried whether, where an actual cost price can be calculated, it is appropriate to use the purchase price of similar goods, which might be higher or lower than the cost price. In the present case, the cost price would be likely to be higher, at least during the first few years. While current production costs (for example, maintenance) may be very low, account must be taken also of the cost of the panels and their installation, amortised over an appropriate period. That would be likely to increase the cost per kWh, and therefore the amounts of VAT to be accounted for on the electricity produced by the solar panels and consumed by the household during the amortisation period.

40. Third, if the solar panels are integrated into the business assets of the householder in his capacity as a taxable person only to the extent to which they are actually used for producing electricity supplied to the network operator, the right of deduction can be exercised only to the same extent. Difficulties might none the less arise if the proportion of electricity supplied to the household and that fed into the network were to vary significantly. In that case, recourse to the adjustment procedure under Article 20(2) of the Sixth Directive might be appropriate.[19]

41. I would point out, however, that the main proceedings concern the acquisition and installation of solar panels in 2005, at which time taxable persons were entitled (and indeed required) to allocate capital goods as between the private and business spheres. Since 2010, Article 168a(2) of Directive 2006/112 has allowed Member States to provide that expenditure on goods forming part of business assets is to be deductible only up to the proportion of their use for purposes of the taxable person's business.[20]

42. Finally, I would note that, to the extent that Mr Fuchs is entitled to deduct input VAT paid on the solar panels, the question might be raised as to whether the grant of EUR 19 020[21] could affect the deductible amount. If the grant fell to be treated as a payment of part of the whole VAT-inclusive price, it could be argued that Mr Fuchs himself had paid only the amount of VAT included in the remainder of that price and was entitled to deduct only that amount. However, that approach would appear to be precluded by the Court's judgment in *Commission* v *France*.[22]

19 — See point 8 above. See also Case C-72/05 *Wollny* [2006] ECR I-8297.

20 — See Council Directive 2009/162/EU of 22 December 2009 amending various provisions of Directive 2006/112/EC on the common system of value added tax (OJ 2010 L 10, p. 14).

21 — See point 12 above.

22 — Case C-243/03 [2005] ECR I-8411.

Conclusion

43. In the light of the foregoing considerations, I am of the opinion that the Court should answer the question raised by the Verwaltungsgerichtshof to the following effect:

The operation of a network-connected photovoltaic installation on or adjacent to a privately owned house used for private residential purposes constitutes an economic activity within the meaning of Article 4 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, to the extent that electricity produced by the installation is supplied to the network for consideration. In such circumstances, input tax paid on the acquisition of the installation may be deducted from output tax charged on the supply of electricity to the network, subject to all the provisions of that directive which govern such deduction.