Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 February 2017 [1]

Case C-36/16

Minister Finansów
v

Posnania Investment SA

(Request for a preliminary ruling — Tax law — Common system of value added tax — Taxable transactions — Supply for consideration — Taxable person acting as such — Taxability of the transfer of property in lieu of payment in discharge of a tax debt)

I. **Introduction**

1. Is the transfer of property in lieu of payment in settlement of tax debts a transaction that is subject to VAT where the tax debtor is at the same time also a taxable person within the meaning of the law on VAT? This hitherto unresolved question forms the basis of the present request for a preliminary ruling.

2. In the main proceedings, a company availed itself of such a possibility of settling arrears of tax by means of benefits in kind, allowed under the Polish law of tax procedure, by transferring the ownership of a plot of land to the State. However, that company also operated as, among other things, a dealer in immovable property.

3. The question whether a tax settlement transaction can be taxed again does seem odd, however. Even in the light of the indirect nature of VAT, in which the tax burden is intended to be passed on to the customer — in this case the State — it appears strange to assume that a liability for VAT arises.

II. **Legal framework**

A. **EU law**

4. The framework for the case under EU law is provided by Article 2(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2] ('the VAT Directive'). Under that provision, the following is to be subject to VAT:

'the supply of goods for consideration within the territory of a Member State by a taxable person acting as such …'.

1 — Original language: German.
2 — OJ 2006 L 347, p. 1.

5. Article 9(1) of the VAT Directive defines a taxable person as follows:

‘“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.’

6. Article 16(1) of the VAT Directive further provides:

‘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.’

B. **National law**

7. The requirements of the VAT Directive have in this respect been implemented by the Polish legislature. Moreover, according to the referring court, Article 66(1) of the Tax Code adopted as the Law of 29 August 1997 allows the taxable person the possibility of settling arrears of tax debt by the transfer of ownership to the State Treasury or, inter alia, a municipality, in so far as the latter benefits from the corresponding tax revenue. Under Article 66(2) of the Polish Tax Code, that transfer and the associated discharge of the tax debt take place on the basis of a contract between the municipality (or the State Treasury, etc.), the terms of which lay down more detailed rules for the application of Article 66(2) and (3) of the Polish Tax Code. Under Article 66(4) of the Polish Tax Code, the time when the tax debt becomes discharged is the moment when the passage of ownership of the transferred property occurs.

III. **The main proceedings**

8. The appellant in the main proceedings, Posnania Investment SA (‘the company’ or ‘the appellant’) is a company governed by Polish law whose business consists, inter alia, in dealing in immovable property. In order to settle arrears of tax, it availed itself of the possibility provided for in Article 66(1) of the Polish Tax Code and, on 5 February 2013, concluded with the relevant municipality a contract for the transfer of ownership of a plot of unbuilt land. This resulted in a partial discharge of the tax debt.

9. The company subsequently submitted a question to the Minister for Finance, asking whether the transfer of ownership to the municipality was subject to VAT. In its view, that could not be the case. In that regard, it cited, in particular, the case-law of the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), according to which the transfer of ownership to the State Treasury in settlement of arrears of tax in the case of taxes constituting State budget revenues is not subject to VAT.

10. By contrast, the Minister for Finance, in his information of 10 May 2013, took the view that the transfer of ownership on the part of the company was a supply that is subject, in principle, to VAT. The company brought an action against that.

11. By judgment of 13 February 2014, the court of first instance annulled the information issued by the Minister for Finance by reference to the abovementioned case-law of the Naczelny Sąd Administracyjny (Supreme Administrative Court). In particular, the approach adopted by the tax administration infringed the 'principle of building confidence'. The Minister for Finance appealed in cassation against that judgment.

IV. **Request for a preliminary ruling and procedure before the Court**

12. By order of 21 September 2015, the Naczelny Sąd Administracyjny (Supreme Administrative Court) now hearing the case referred the following question to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'Does the transfer of ownership of land (tangible property) by a person taxable for VAT purposes to:

(a) the State Treasury — in settlement of tax arrears in respect of taxes constituting State budget revenues, or

(b) a municipality, district or regional authority — in settlement of tax arrears in respect of taxes constituting their budget revenues,

resulting in the discharge of tax liabilities, constitute a transaction that is subject to tax (supply of goods for consideration) within the meaning of Article 2(1)(a) and Article 14(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax?'

13. The Republic of Poland and the European Commission submitted written observations on this question in the proceedings before the Court of Justice.

V. **Legal assessment**

14. Article 2(1)(a) of the VAT Directive contains five prerequisites for VAT to become chargeable. There must be a supply or service (1) which a taxable person (2) acting as such (3) carries out for consideration (4) within the territory of a Member State (5). Of those prerequisites, three are indisputably present. The transfer of a plot of land is a supply. That supply was also carried out by a taxable person and within the territory of a Member State.

15. According to Article 2(1)(a) of the VAT Directive, the answer to the question referred therefore presupposes an examination of whether, in this case, a supply 'for consideration' can be assumed to exist (see A below), in which the taxable person acted 'as such' (see B below).

A. **Supply for consideration within the territory of a Member State by a taxable person**

16. In agreement with the Commission and the Republic of Poland, the handing over of the plot of land in the context of settlement of tax took place for consideration within the meaning of Article 2(1)(a) of the VAT Directive. The release from a pecuniary liability arising from a supply cannot be treated differently from the establishment of a pecuniary claim on account of a supply.

17. It could at most be questionable whether the supply and the release from the tax debts are based upon a bilateral legal relationship. Such a relationship has indeed been regarded as necessary by the Court in its judgments. A supply of goods is effected 'for consideration' within the meaning of Article 2(1)(a) of the VAT Directive only if there is a legal relationship between the supplier of the goods and the recipient pursuant to which there is reciprocal performance, the remuneration received by the supplier of the goods constituting the value actually given in return for the goods supplied to

the recipient.[3]

18. The fact that the supply of the plot of land and the discharge of the tax debts are based on a proper legal relationship in the present case already follows from Article 66(1) of the Polish Tax Code. That article lays down a legal relationship as a rule. Such a relationship is also confirmed by the public-law contract provided for in Article 66(2) of the Polish Tax Code. It is at most questionable whether, in the case of a discharge of the tax debt by law (Article 66(4) of the Polish Tax Code) on account of the transfer of property in lieu of payment, there is actually a bilateral or only a unilateral legal relationship. However, that question can ultimately remain open.

19. VAT is a *general* tax on consumption[4] which taxes the recipient's expenditure on receiving a consumable benefit (supply of goods or services). The concept of a legal relationship deemed necessary for that purpose must therefore be construed very widely. It can depend neither on the validity in civil law nor on the basis in civil or public law nor on the reciprocity of that basis. The sole decisive factor is whether the recipient expends assets on a consumable benefit (a supply of goods or services) which is bestowed on him by a taxable person.[5] The relevant feature is therefore the reciprocity between the expenditure and the consumable benefit and not the reciprocity of the basis in civil or public law.

20. In the present case, on that wide construction required under the law governing taxes on consumption, a supply for consideration must — in agreement with the Commission and the Republic of Poland — be affirmed. This applies even if the tax debts are discharged by operation of the law upon transfer of the ownership of the plot of land (Article 66(4) of the Polish Tax Code).

B. **A taxable person acting as such**

1. *Payment of tax debts as economic activity?*

21. Moreover, it must be clarified whether a taxable person for the purposes of VAT, who pays his taxes not in money but in kind, in that respect also acts as a taxable person for the purposes of VAT, that is, 'as such' within the meaning of Article 2(1)(a) of the VAT Directive.

22. A taxable person acts in that capacity ('as such') only where he carries out transactions in the course of his taxable activity.[6] Furthermore, as is evident from Article 9 of the VAT Directive, an activity for consideration alone is not sufficient for that purpose. Rather, the Directive demands a certain standard, namely, an economic activity at the moment of acting.

23. Consequently, the crucial question here is whether the settlement of tax debts constitutes a tax debtor's economic activity within the meaning of Article 9 of the VAT Directive. If the answer to that question is in the negative, it would still need to be asked whether that is altered in any way if the tax debts are settled, not in money, but in kind.

3 — Judgments of 21 November 2013, *Dixons Retail* (C-494/12, EU:C:2013:758, paragraph 32); of 20 June 2013, *Newey* (C-653/11, EU:C:2013:409, paragraph 40); of 23 March 2006, *FCE Bank* (C-210/04, EU:C:2006:196, paragraph 34); of 17 September 2002, *Town & County Factors* (C-498/99, EU:C:2002:494, paragraph 18); and of 3 March 1994, *Tolsma* (C-16/93, EU:C:1994:80, paragraph 14).

4 — Judgments of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19), and of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 34); and order of 9 December 2011, *Connoisseur Belgium* (C-69/11, not published, EU:C:2011:825, paragraph 21).

5 — Even the tip given unilaterally and of one's free will after the contract to provide food and drink in a restaurant has been performed therefore constitutes consideration for provision of a service.

6 — See, to that effect, the judgments of 4 October 1995, *Armbrecht* (C-291/92, EU:C:1995:304, paragraph 17 et seq.); of 29 April 2004, *EDM* (C-77/01, EU:C:2004:243, paragraph 66); and of 12 January 2006, *Optigen and Others* (C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 42).

24. According to the second sentence of Article 9(1) of the VAT Directive, the term 'economic activity' covers any activity of producers, traders or persons supplying services and, according to the case-law, comprises all stages of production, distribution and the provision of services.[7]

25. The second sentence of Article 9(1) of the VAT Directive uses occupational images to describe the economic activities. On closer examination, this is a typological description, since types (occupational images) of undertakings are listed. In contrast to an abstract definition, a typological description is more open. Whether a particular thing belongs to the type does not have to be determined by logical/abstract subsumption, but can be determined according to the degree of similarity to the prototype (pattern). The characteristic features of the type do not all have to be present, but one or other feature can be absent in an individual case. The individual case to be assessed is only assigned to the type by way of an evaluative comparison for similarity. That assignment demands a view of the overall picture in each individual case, taking into account the generally accepted standards and based on the degree of similarity to the type (prototype).

26. Even though the concept of economic activity is to be interpreted widely,[8] the payment of tax debts is no such economic activity. On the contrary, the payment of tax is simply the discharge of a personal duty under public law, which exists for any person liable to pay tax, even if they are not a taxable person for the purposes of VAT. That remains the case even where the taxes concerned arise from an economic activity — such as, for example, the payment of VAT debts.

27. Nothing in that finding is altered even where the tax debt is paid in kind. The transfer of the benefits in kind ultimately constitutes only a particular form of payment in the context of tax collection. As in a normal tax procedure, the lawfully incurred tax debt is paid, instead of in money, by means of a benefit in kind in the amount of its objective value — and not in the amount of a purchase price. Such an act in the context of public-law tax collection cannot therefore be described as economic activity. The transfer of assets in payment of a person's own tax debt is not remotely comparable with the activity of a typical taxable person for the purposes of VAT within the meaning of Article 9(1) of the VAT Directive (for example, with a trader who buys goods in order to sell them).

28. The public-law contract provided for in the Polish Tax Code also alters nothing in that regard. It merely secures the agreement of the parties to that particular form of payment. The tax creditor thereby merely agrees that the tax debt can be settled by means of those benefits in kind.

29. Moreover, the request for a preliminary ruling also contains no indication that national law would allow the State Treasury to approach the tax debtor and offer him the possibility that, instead of paying the tax by means of money, it might be better if he were to transfer ownership of a particular plot of land which would otherwise have to be acquired by purchase. The decision whether to pay his taxes in kind and by means of which benefits in kind he wishes to pay them lies solely with the tax debtor. The State Treasury can then, at most, agree to that choice, but cannot demand such a payment.

30. In particular, the tax debt becomes discharged by operation of law upon the transfer in the amount of the value of the property. It is not dependent on the will or negotiation of the parties to the contract governed by public law. The value of the property in a State of taxation governed by the rule of law is probably determined on the basis of abstract valuation standards which are applicable to all persons liable for tax. Based on those premisses — which must however be reviewed by the referring court — the payment of tax debts by transfer of property cannot, in principle, be described as a (typical) economic activity.

7 — See, inter alia, judgments of 4 December 1990, *van Tiem* (C-186/89, EU:C:1990:429, paragraph 17); of 26 June 2003, *MKG-Kraftfahrzeuge-Factoring* (C-305/01, EU:C:2003:377, paragraph 41); and of 12 January 2006, *Optigen and Others* (C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 41).

8 — Judgments of 12 September 2000, *Commission* v *United Kingdom* (C-359/97, EU:C:2000:426, paragraph 39); of 26 June 2003, *MKG-Kraftfahrzeuge-Factoring* (C-305/01, EU:C:2003:377, paragraph 42); of 26 June 2007, *T-Mobile Austria and Others* (C-284/04, EU:C:2007:381, paragraph 35); and of 20 June 2013, *Fuchs* (C-219/12, EU:C:2013:413, paragraph 17).

2. *Exception on account of close connection to the principal taxable activity*

31. However, in this instance, the transfer of the plot of land was effected, not by a lawyer or a doctor, for example, but by dealer in real estate. That being the case, some degree of closeness in the connection of the activity concerned (transfer of the plot of land in lieu of payment) to the economic activity pursued (dealing in real estate) cannot be denied.

32. The Court was concerned with a similar situation in *Kostov*.[9] In that case, a taxable person (a self-employed bailiff) had concluded individual contracts of agency to purchase plots of land at auction on behalf of third parties, contracts which were to some extent close in subject matter to his principal activity (auctioneering). The Court affirmed that they were taxable.

33. The Court held 'that Article 9(1) of the VAT Directive is to be interpreted as meaning that a natural person who is already a taxable person for VAT purposes in respect of his activities as a self-employed bailiff must be regarded as a "taxable person" in respect of any other economic activity carried out occasionally, provided that that activity constitutes an activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive'.[10]

34. However, that cannot be construed to the effect that all acts of a taxable person performed for consideration are suddenly also performed in his capacity as a taxable person. In the specific case on which the ruling was given, there was in fact a close relationship between the bailiff's 'sideline' and his taxable principal activity. Consequently, on the required type-based classification approach, the agency business for unconnected third parties which was engaged in only occasionally and was at issue in that case was indeed also an economic activity.

35. By contrast, on a type-based view of classification, no economic activity within the meaning of second subparagraph of Article 9(1) of the VAT Directive is involved where a real estate dealer's tax debts are settled by the transfer of a plot of land in lieu of payment.

36. It is true that the requirement of neutrality as regards competition — as the Commission points out by way of analogy — demands that all competing suppliers to consumers be subject to VAT in the same way. However, in the case of payment of tax debts in kind, no situation of competition with other persons liable for tax is involved at all. Nor is a person liable for tax who pays his tax debt competing at that moment with other taxable persons for the purposes of VAT (other real estate dealers, for example). He does not in fact possess any negotiating power in terms of the 'purchase price discovery' of the property to be transferred. On the contrary, in the context of tax collection, the valuation of the plot of land to be transferred is bound to be made according to objective criteria. In that way, any competition on price definitely cannot take place.

37. In that respect, the transfer of an asset in settlement of tax debts takes place outside of any market. This applies to 'normal' taxpayers in the same way as to taxpayers who at the same time are also taxable persons for the purposes of VAT. Nor does the State, as the customer, have any option as to whether it 'acquires' that plot of land or another. It has only the choice of whether, in lieu of money, it will also accept, in settlement of tax, benefits in kind in the amount of their objective value.

9 — Judgment of 13 June 2013 (C-62/12, EU:C:2013:391).

10 — Judgment of 13 June 2013, *Kostov* (C-62/12, EU:C:2013:391, paragraph 31).

38. Accordingly, the Court holds that even a transaction which is indisputably economic and for consideration (the sale of drugs) is not taxable where all (lawful) competition within an economic sector is precluded.[11] That concept can usefully be applied to the combination of circumstances in the present case. Where a personal tax debt is discharged by the transfer of ownership of benefits in kind to the tax creditor (that is to say, in the course of tax collection), all competition amongst the taxpayers themselves is likewise precluded.

39. The decisive factor is whether national law (in this case concerning the public-law contract provided for) allows the parties, in the context of a tax collection procedure governed by public law, to determine by agreement the property to be transferred and the price, as with a purchase. As long as that is not the case, the taxable person for the purposes of VAT is not acting in the context of his economic activity when settling his tax debt. He is then not acting 'as such' within the meaning of Article 2(1)(a) of the VAT Directive. That also applies where the taxable person for the purposes of VAT is a dealer in real estate and, instead of money, transfers ownership of a plot of land in lieu of payment.

3. *Nature of VAT*

40. The nature of VAT as an indirect tax on consumption confirms that conclusion. The VAT is to be borne by the final consumer,[12] the taxable person acting 'only' as tax collector for the State.[13] In the present case, this further militates against the assumption that an economic activity is involved. Economic activity within the meaning of Article 9 of the VAT Directive is clearly based on the premiss that the taxable person, by means of his consideration — which he negotiates with the other party to the contract — can pass on the burden of VAT to the customer and collect it from him. That concept is not compatible with a tax debt being discharged by operation of law and with the fact that the recipient State wishes to collect tax and not to bear further taxes (in this case, the VAT burden to be passed on to it).

4. *Danger of advantaging the State as 'consumer'?*

41. I cannot, moreover, see the objections to that argument which are raised by the Commission as regards the danger of advantaging the person liable for tax and/or the State. The person liable for tax obtains no advantage, since the transfer of property for the purpose of paying tax would not be affected by a liability for VAT. Such a liability would operate as follows: if a person liable for tax owes tax in the amount of X, the plot of land has a value of X and the transaction is taxable, then the tax in the amount of X would become discharged and the State would still, in addition, have to pay the VAT to the person liable for tax debtor, so that the person liable for tax could pay it (back to the State). The State, on the other hand, would also not save any VAT, since it receives the benefits in kind regardless of its own consumer needs and therefore does not save other items of expenditure on which VAT is charged.

11 — See, inter alia, judgments of 29 June 1999, *Coffeeshop "Siberië"* (C-158/98, EU:C:1999:334, paragraphs 14 and 21); of 29 June 2000, *Salumets and Others* (C-455/98, EU:C:2000:352, paragraph 19); of 12 January 2006, *Optigen and Others* (C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 49).

12 — Judgments of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19), and of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 34); and order of 9 December 2011, *Connoisseur Belgium* (C-69/11, not published, EU:C:2011:825, paragraph 21).

13 — Judgments of 20 October 1993, *Balocchi* (C-10/92, EU:C:1993:846, paragraph 25), and of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21).

42. Contrary to the view taken by the Commission, there is, rather, the danger that the assumption of a taxable event makes possible the deduction of input tax even in the case of the acquisition of assets for private use because these may possibly at some time have to be used to satisfy tax debts. [14]

43. Even the differential treatment of the tax payment — according to whether the taxes are paid in money (no tax charge) or in kind (full tax charge) — would not be plausible. The same applies to the differential treatment of tax payments in kind, according to whether they are made by taxable or non-taxable persons for the purposes of VAT. In terms of the level of tax revenue (from the other types of tax from which tax debts arise), such a classification under VAT law cannot have any relevance.

44. In this respect, only the danger of an untaxed final consumption ultimately remains if the transfer of benefits in kind in lieu of payment were not to be regarded as economic activity. However, that danger exists only if the supplier (in this case, the company) had already made a deduction of input tax in relation to the transferred property by virtue of his status as a taxable person for the purposes of VAT.

45. However, the provisions of Article 16 (and also Article 26) of the VAT Directive preclude such a danger in conformity with the system. If the payment of taxes by means of benefits in kind is not economic activity, then the goods forming part of the business assets, when transferred in lieu of payment, are being applied for purposes other than those of the business. By application of Article 16 of the VAT Directive, any deduction made is then corrected and thus any untaxed final consumption prevented. The taxable person for the purposes of VAT is then treated in the same way as a private individual who surrenders property to the State in settlement of tax debts. In effect, that ensures equal treatment of all tax payments made by all persons liable for tax, regardless of whether they are also, at the same time, (more or less coincidentally) taxable persons for the purposes of VAT.

5. *Conclusion*

46. In conclusion, the transfer of property forming part of the assets of the taxable person in settlement of his tax debts in lieu of payment is not economic activity in which the taxable person acts ‘as such’ within the meaning of Article 2(1)(a) of the VAT Directive. This applies even where he transfers property in which he would normally deal for the purposes of his business. In that respect, there is no transaction subject to VAT within the meaning of Article 2(1)(a) of the VAT Directive.

VI. **Proposed answer**

47. I therefore propose that the question referred by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) be answered as follows:

The transfer of ownership of a plot of land by the taxable person for the purposes of VAT to the tax creditor, resulting in the discharge of the tax debt by operation of law, does not constitute a transaction that is subject to VAT within the meaning of Article 2(1)(a) of the VAT Directive. In that respect, the taxable person is not acting as such. However, a deduction of input tax made in relation to the transferred property must be corrected in accordance with Article 16 of the VAT Directive.

14 — In particular, leisure activities of taxpayers which are permanently loss-making (in regard to income tax, this frequently concerns self-employed lawyers and doctors owning vineyards, horse-breeding facilities, private yachts, etc.) may be very effectively engaged in thanks to the deduction of input tax at public expense.

The prerequisite is that the possibility of settling taxes by means of benefits in kind in lieu of payment is available only to the tax debtor and is only executed by the public-law contract provided for. In that respect, the parties must not have any influence on the 'purchase price'. On the contrary, the latter must be determined according to objective valuation standards, which is a matter for the referring court to verify.