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Gloss to the judgement of the Supreme Administrative Court composed of seven judges dated 28 October 2019, file reference I FSK 164/17 *(infrastructure lease by the commune for the symbolic rent)*

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1. Actual state

The Commune applied to the tax authority for issuance of an individual interpretation concerning value added tax within the scope of the right to deduct, by way of adjustment, the tax charged in connection with the implemented investment – Construction of the mobile seasonal playing field [...]. The application states that the Commune is an active and registered taxable person for the purpose of value added tax. The subject infrastructure was transferred for uncharged use in 2012. The investment has not been applied for taxable services due to its character. Currently, the Commune considers letting infrastructure for lease to the Municipal-Community Cultural Centre pursuant to the agreement. After transfer, the infrastructure would still be used as intended. The Commune views charging rent at the leaseholder in the amount of several hundred zloty per year. In addition, after transfer the infrastructure must perform its functions and remain public. The Commune has not deducted expenditure incurred on the infrastructure throughout its construction. All invoices documenting purchases have been issued for the Municipality and Communal Office, which is an active VAT payer. In relation to the above description, the following question is asked: "Shall the Commune obtain the right to deduct tax charged in connection with the above-mentioned investment in proportion to the remaining period of adjustment, pursuant to Article 90 et seq. of the Act on Value Added Tax of 11 March 2004[2]?".

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[2] Uniform text Journal of Laws of 2011, No. 177, item 1054, as amended; currently uniform text Journal of Laws of 2020, item 106, as amended (further: "AVAT").

2. Conduct of the proceedings prior to hearing the case before the Supreme Administrative Court

In its individual interpretation issued in 2016 the Minister of Finance decided that the Commune would not have the right to deduct the tax charged on expenditure incurred on the construction of the subject field, because it was let for uncharged use and was not applied for taxable activities.

The Commune lodged a complaint to the Voivodeship Administrative Court in Olsztyn, demanding revocation of the individual interpretation of the Minister of Finance. Taking the complaint into consideration, the first instance court assumed that if the investment implemented by the Commune, consisting in the construction of a mobile seasonal playing field, was not originally applied for the performance of activity subject to VAT, and then due to its lease to the Municipality and Communal Cultural Centre its intended use would change and it would be applied for the performance of activities subject to VAT, pursuant to Article 86 section 1 and Article 91 section 2 and 7 of the AVAT the Commune should have the right to adjustment of a part of tax charged on expenditure incurred on that investment.

The Minister of Development and Finance appealed against the above judgement in whole, accusing the Voivodeship Administrative Court in Olsztyn of infringing Article 86 section 1 in conjunction with Article 91 section 2 and section 7 of the AVAT, and Article 121 § 1 of the Tax Ordinance Act of 29 August 1997[3] in conjunction with Article 14h of this Act.

By its decision of 2 July 2019, the Supreme Administrative Court presented the following legal issue to the extended composition of the Supreme Administrative Court: "Does the commune, obligated to satisfy collective needs of the community within the framework of its own tasks, which - for this purpose, acting as a public authority, has incurred capital expenditure on the production of infrastructure and transferred it to perform these tasks for uncharged use to a separate local government organisational unit, by changing the form of this transfer from uncharged to chargeable, with determination of the symbolic payment, acts in this scope as a taxable person conducting economic activity within the meaning of Article 15 section 1 and 2 of the AVAT?". For this reason, it suspended the proceedings until answering the question raised pursuant to Article 125 § 1 item 1 of the Law on Administrative Court Proceedings.

[3] Uniform text Journal of Laws of 2015, item 613, as amended; currently Journal of Laws of 2020, item 1325, a s amended (further: "TO").

While taking into consideration the presented legal issue at its meeting on 7 October 2019, pursuant to Article 187 § 3 of the Law on Administrative Court Proceedings, the Supreme Administrative Court[4] overtook the case for consideration by a panel of seven judges.

3. Judgement of the Supreme Administrative Court

The Supreme Administrative Court accepted cassation pleas as founded and dismissed the Commune's complaint, while overruling the appealed verdict. In its justification of the voted judgement, the court of cassation formulated the following thesis:
"The Commune, obligated to satisfy needs of the community within the framework of its own tasks, which - for this purpose, acting as a public authority, has incurred capital expenditure on the production of infrastructure and transferred it to perform these tasks for uncharged use to a separate local government organisational unit, in connection with changing the form of this transfer from uncharged to chargeable, with determination of the symbolic payment, in the light of Article 15 section 1 and 2 of the Act on Value Added Tax of 11 March 2004 (Journal of Laws of 2011, no. 177, item 1054, as amended) does not act as a taxable person conducting economic activity, as there is no explicit, mutual relation between the Commune's benefit and the symbolic payment".

4. Assessment of the opinion presented in the judgement of the Supreme Administrative Code

The mentioned opinion expressed by the Supreme Administrative Court should be agreed with. The cassation court conducted a completely justified assessment of circumstances of that case, consequently resolving correctly the issue pursuant to Article 188 and Article 151 of the Law on Administrative Court Proceedings of 30 August 2020.

4.1. The Commune as an entity operating in the area of *imperium* and *dominium* and taxation with value added tax (VAT) – general remarks

Functioning of communes as bodies governed by public law has a dual identity – on the one hand, they operate authoritatively, while on the other

[4] Uniform text Journal of Laws of 2019, item 2325, as amended

hand they are economic operators according to the same principles as bodies governed by private law[5]. Accordingly, the scope of their actions remains partially beyond taxation with value added tax, while in part communes conduct economic activity, being taxable persons for purposes of this tax.

Among the commune's own tasks mentioned in Article 7 section 1 of the Local Government Law of 8 March 1990[6], there may be distinguished public tasks. They include e.g. tasks within the scope of social infrastructure (education, culture, health service, etc.). Organisational units established by the commune to perform public tasks may constitute both entities with legal personality, e.g. as a local government cultural institution in the analysed case[7] and entities without this personality. Apart from public actions, the local government unit operates also in the area of civil law, e.g. – as in the case resolved by the Supreme Administrative Court – it manages real properties through their lease. The nature of these actions basically does not allow for their exclusion from the value added tax system, therefore within the scope of civil law the local government unit operates as taxable persons for purposes of value added tax[8].

One of the most popular organisational and legal forms of budgetary economy of communes includes commune budget entities and commune budget divisions, which – while having the status of a body governed by public law under the domestic law – do not constitute VAT payers separate from the commune[9]; in this case there occurs the above-mentioned centralisation of VAT settlements in local government units[10]. That is not quite the case for activities of commune legal persons, who conduct separate economy within the funds at their disposal. Based on the analysed case, – as the Supreme Administrative Court has rightly noticed – such an activity is performed by the Community

[5] B. Rogowska-Rajda, T. Tratkiewicz, *Działalność jednostek samorządu terytorialnego jako organów władzy publicznej w świetle przepisów o podatku od towarów i usług* [Activity of Local Government Units as Public Authorities in the Light of Provisions for Value Added Tax], „Samorząd Terytorialny" 2018, issue 12, p. 64–65; judgement of the Voivodeship Administrative Court in Lublin dated 3 March 2017, file reference I SA/Lu 1/17, publ. ditto

[6] Uniform text Journal of Laws of 2020, item 713, as amended.

[7] See: Article 14 section 1 of the Act on Organisation and Conducting of Cultural Activity dated 25 October 1991, uniform text: Journal of Laws of 2020, item 194, as amended.

[8] B. Rogowska-Rajda, T. Tratkiewicz, *Działalność...*, ditto; M. Pyrz, *Gmina jako podatnik od towarów i usług* [Commune as a VAT Payer] [in:] *Z badań nad prawem, administracją i myślą polityczną*, ed. M. Sadowski, Wrocław 2015, p. 75-87.

[9] See: judgement of the Court of Justice of the European Union of 29 September 2015 on the case C-276/14 Wrocław Commune, EU:C:2015:635; resolution of the Supreme Administrative Court of 26 October 2015, file reference I FPS 4/15, ONSAiWSA 2016, issue 1, p. 3.

[10] See: T. Famulska, B. Rogowska-Rajda, *Centralizacja rozliczeń VAT w jednostkach samorządu terytorialnego – wybrane problemy* [Centralisation of VAT Settlements in Local Government Units], „Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2017, issue 485, p. 108-122.

Cultural Centre which is to conclude a lease agreement for the mobile seasonal football field with the Commune.

Provisions of Article 15 section 1, section 2 and section 6 of the Act on Value Added Tax constitute the legal basis for the determination whether the commune acts as a VAT payer in a specific situation. Pursuant to these provisions, taxable persons include legal persons, organisational units without legal personality and natural persons who, independently, carries out in any place any economic activity referred to in section 2, whatever the purpose or results of that activity. Economic activity covers any activity of producers, traders or persons supplying services, including entities acquiring natural resources, performing agricultural activities and activities of the professions. 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. Taxable persons do not include public authorities or offices serving these authorities within the scope of performed tasks imposed by separate provisions of the law, for the performance of which they have been appointed, excluding the operations performed under the concluded civil law agreements.

The correct interpretation of the above provision should be processed in accordance with the principle of indirect effect of the EU law. In the analysed case, it means that one should take into account the content and purpose of Article 9 section 1 and Article 13 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[11]. Pursuant to the first mentioned provision, the taxable person shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Economic activity shall cover any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions. Economic activity shall mean, in particular, the use of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis.

Pursuant to Article 13 of the above Act, national, regional and local authorities, as well as other bodies governed by public law are not regarded as taxable persons in connection with activities they conduct or transactions they make as bodies governed by public law, even if they charge dues, fees, contributions or payments in connection with such activities or transactions. However, when they perform such activities or transactions, they are regarded as taxable persons in reference to these activities or transactions, if their exclusion from

11 Official Journal of EU L of 2006, No. 347, item 1, as amended (further: "VAT Directive").

the category of taxable persons would lead to significant disruptions of competition. Under all circumstances, bodies governed by public law are deemed taxable persons in connection with activities specified in Annex I to the VAT Directive, unless a small scale of these activities allows for their exclusion. Member States may regard the activity of bodies governed by public law as – exempt pursuant to Article 132, 135, 136 and 371, 374–377, 378 section 2, 379 section 2 or 380–390b of the VAT Directive – as the activity conducted by these entities as public authorities.

4.2 No basis for consideration of the Frombork Commune as a taxable person for purposes of VAT

In the perspective of the above presented legal regulations, it should be assumed that the activity conducted by public authorities does not include the activity performed by these institutions under the same legal conditions as those applied to private business entities[12]. Bodies governed by public law should be treated as taxable persons in connection with activities performed as public authorities, if these activities may also be performed under a competitive process by private entrepreneurs – if treatment of these bodies as entities who are not taxable persons could lead to a significant distortion of competition[13].

In order to determine whether a local government unit acts as a taxable person, it should be established whether this entity conducts economic activity within the meaning of the Act on Value Added Tax and the VAT Directive. Activity may be deemed economic activity within the meaning of Article 15 section 2 of the Act on Value Added Tax and Article 9 section 1 paragraph 2 of the VAT Directive only when it corresponds with one of the activities specified in Article 5 section 1 and Article 2 of the VAT Directive. VAT is imposed on the following transactions: chargeable supply of goods to the member state's territory by a taxable person acting as such; chargeable intra-Community acquisition of goods on the member state's territory; chargeable provision of services on the member state's territory by a taxable person acting as such; importation of goods.

Based on an individual actual state presented in the application for interpretation, it needs to be examined whether in this case the Commune will render chargeable services, as it is required by Article 5 section 1 item 1 of the Act on

[12] See: judgement of the Court of Justice of the European Union of 12 September 2000, *Commission/Netherlands*, C-408/97, ECLI:EU:C:2000:427.

[13] See: judgement of the Court of Justice of the European Union of 15 May 1990, *Comune di Carpaneto Piacentino and others/Ufficio provinciale imposta sul valore aggiunto di Piacenza*, C-4/89, ECLI:EU:C:1990:204.

Value Added Tax and Article 2 section 1 let. a) of the VAT Directive. According to the established case-law, the supply of goods or provision of services shall be "chargeable" within the meaning of Article 5 section 1 item 1 of the Act on Value Added Tax and Article 2 section 1 let. a) or c) of the VAT Directive, so they are subject to taxation only if there is a legal relationship between the supplier or service provider and the recipient of goods or recipient of services, during which mutual benefits are exchanged and remuneration received by the supplier of goods or service provider constitutes a real equivalent of goods or service provided for the recipient of goods or recipient of services[14]. As emphasised in the case law, the form of agreement adopted by public authority itself does not determine whether it acts in the area of administration, or whether it should be perceived as an economic operator within the scope of VAT[15].

In the reality of the analysed case, it should be stated that the amount of rent for the infrastructure lease will not be calculated in proportion to the actual service costs. Calculation of the amount of rental payment shall also not depend on the amount of infrastructural expenses incurred by the Commune. The amount of rent coming to several hundred zloty per year for lease of the mobile seasonal playing field must be perceived in terms of symbolic payment – non-equivalent – that may not be regarded as remuneration[16]. Rent in the above-mentioned amount does not depend on a value in use of infrastructure or on its previous production costs.

However, in the light of the above, it should be emphasised that the condition that economic transaction is to be concluded at a price lower than production costs does not determine that the transaction will be classified as "chargeable transaction". The last concept requires only the existence of direct relationship between the supply of goods or supply of services and the mutual benefit actually received by the taxable person[17].

In order to determine whether a given supply of goods or a given supply of services is provided at a remuneration, so that such activity should be regarded

[14] See in particular judgements of the Court of Justice of the European Union: of 3 March 1994, *Tolsma*, C-16/93, EU:C:1994:80, item 14; of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, item 45; of 26 June 2003, *MKG-Kraftfahrzeuge-Factoring*, C-305/01, EU:C:2003:377, item 47.

[15] See: e.g. judgements of the Supreme Administrative Court: of 5 December 2014, file reference I FSK 1547/14; of 19 November 2014, file reference I FSK 1669/13; of 12 December 2014, file reference I FSK 1879/13; http://orzeczenia.nsa.gov.pl.

[16] B. Rogowska-Rajda, T. Tratkiewicz, *op. cit.*

[17] See: judgement of the Court of Justice of the European Union of 12 May 2016, *Borsele Commune*, C-520/14, ECLI:EU:C:2016:334, item 26. Similarly judgement of the Court of Justice of the European Union of 20 January 2005, *Hotel Scandic Gåsabäck*, C-412/03, EU:C:2005:47, item 22.

as economic activity, all circumstances under which this supply of goods or services is provided should be examined[18]. One of methods allowing to examine whether a given activity constitutes economic activity is the comparison of circumstances, under which a given entity supplies given goods or services with circumstances under which this benefit is usually provided[19]. If so, the Commune should be treated as a taxable person in order to maintain a fiscal neutrality with regard to the collection of VAT. It is mainly important whether, pursuant to the relevant provisions, private persons may conduct comparable activity[20]. Other factors, such as e.g. amount of income or number of clients, my also be considered during this examination[21].

In the analysed case, as mentioned above, if the Commune transfers infrastructure to a local government cultural institution for a payment – with determination of the symbolic payment – it shall be reimbursed only with a small part of expenditure incurred to implement the investment consisting in the construction of mobile seasonal playing field. In relation to the free market reality, the amount of rent to be charged by the Commune from the leaseholder will be significantly underestimated. Therefore, it should be concluded that the purpose of changing the form of infrastructure transfer by the Commune – from uncharged to chargeable, with determination of the symbolic payment – will not constitute "obtaining income therefrom" pursuant to Article 9 paragraph 2 of the VAT Directive ("earning" pursuant to Article 15 section 2 of the Act on Value Added Tax). So in this case the Commune will also not act under competitive conditions, therefore it will not conduct economic activity within this scope[22].

The above asymmetry between the amount of annual rent for lease and value in use of infrastructure demonstrates the lack of actual relationship between the lease service and the planned payment. Consequently, it may not be assumed that the connection between the service performed by the Commune and the equivalent to be paid by the Community Cultural Centre will be

[18] See: judgement of the Court of Justice of the European Union of 26 March 1987, *Commission/Netherlands*, 235/85, EU:C:1987:161, item 15.

[19] See: judgement of the Court of Justice of the European Union of 26 September 1996, *Enkler*, C-230/94, EU:C:1996:352, item 27.

[20] See: judgements of the Court of Justice of the European Union of 26 June 2007 in the cases: *T-Mobile Austria GmbH and others/Republic of Austria*, C-284/04, ECLI:EU:C:2007:381, item 117, and *Hutchison 3G UK Ltd and others/Commissioners of Customs and Excise*, C-369/04, ECLI:EU:C:2007:382.

[21] Judgement of the Court of Justice of the European Union of 26 September 1996, *Enkler*, C-230/94, ditto, item 29.

[22] See: A. Bartosiewicz, *Podmioty prawa publicznego jako podatnicy VAT – polska praktyka a regulacje unijne* [Bodies Governed by Public Law as VAT Taxpayers] [in:] *Polskie prawo podatkowe a prawo unijne. Katalog rozbieżności*, B. Brzeziński, D. Dominik-Ogińska, K. Lasiński-Sulecki, A. Zalasiński (ed.), Warszawa 2016, p. 97.

of direct nature required for the consideration of this equivalent as the mutual benefit constituting remuneration for this supply and for the consideration of the supply of service as economic activity within the meaning of Article 15 section 2 of the Act on Value Added Tax and Article 9 section 1 of the VAT Directive.

Moreover, it is difficult to consider that the Commune's situation is comparable to the situation of other entrepreneurs on the local market. In this case, – while transferring the infrastructure to the local government cultural centre, – the Commune will act as public authority. As mentioned above, the form of transfer – here an agreement on lease for the symbolic payment – does not matter for the determination whether the body acts in the area of administration or as an economic operator.

It should be noticed that the circumstances under which goods were supplied in that case differ from those under which the activity within the scope of infrastructure lease is usually conducted. For example, while letting water and sewage infrastructure for lease, communes usually conclude agreements with municipal companies, under which a monthly equivalent payment for this service is stipulated; every month communes are issuing invoices documenting remuneration for infrastructure lease, simultaneously introducing them to the municipal sales records. Such conditions for infrastructure lease do not result from circumstances of this case.

What is more, in the actual state (future event) indicated in the application for individual interpretation there is no mention about even the potential existence of competition under the activities indicated by the Commune. In addition, there is no information whether the Commune is to select a leaseholder of the mentioned mobile seasonal playing field according to the Public Procurement Law of 29 January 2004[23]. In the analysed case, the Commune transfers the subject infrastructure to the local government cultural centre for other purposes than the economic or gainful ones, which is demonstrated also by the mentioned disparity of the amount of rent for lease and the value in use of the provided infrastructure.

In conclusion, it should be stated that any change in the form of transfer of the subject infrastructure by the Commune to the local government cultural institution – from uncharged to chargeable, with determination of the symbolic payment – will not make the Commune commence economic activity to this extent as a VAT payer. The manner of carrying out the Commune's tasks in the area of the above-mentioned infrastructure will not change – as the actual

[23] Uniform text Journal of Laws of 2018, item 1986, as amended.

state (future event) of the case shows, the infrastructure will remain generally accessible. An obligation to pay rent in the amount of several hundred zloty per year shall not result in the chargeable supply of services by the Commune for the benefit of the mentioned local government organisational unit.

The principle of fiscal neutrality[24] is an expression of the principle of equal treatment within the scope of VAT. In the perspective of the presented factual and legal circumstances, there are no grounds to think that due to the mentioned change in the form of infrastructure transfer – from uncharged to chargeable, with determination of the symbolic payment – a lease agreement would be concluded in accordance with the principle of neutrality or equal treatment, as well as in accordance with the principle of proportionality and transparency. An assumption that under the circumstances of the analysed case the Commune acts as a taxable person conducting economic activity within the meaning of Article 15 section 1 and 2 of the Act on Value Added Tax would lead to the abuse of law by earning tax benefits by the Commune, the allocation of which would be contrary to the purpose served by the above-mentioned provisions (Article 5 section 5 of the Act on Value Added Tax).

5. Conclusion

As a result of the above-mentioned considerations, it should be concluded that under the circumstances of the case resolved by the judgement of the Supreme Administrative Court of 2 July 2019, file reference I FSK 164/17, the Commune does not act as a taxable person conducting economic activity within the meaning of Article 15 section 1 and 2 of the Act on Value Added Tax. Hence, the assessment of the first instance court was wrong, while the Commune's complaint was – unfounded. In this situation, one should fully agree with the voted judgement of the court of appeal and with the line of argument in its explanatory memorandum.

[24] See: judgement of the Court of Justice of the European Union of 8 June 2006, *L.u.P. GmbH/Finanzamt Bochum-Mitte*, EU:C:2006:380, item 48.