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The Impact of the Judgments of the Court of Justice of the European Union Following Preliminary Rulings on the Decisions Issued by the Supreme Administrative Court in Tax Cases[2]

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Abstract

The article analyses CJEU judgments passed as a result of preliminary rulings and their impact on the judicial decisions of the Supreme Administrative Court. Administrative courts are highly committed to and keen on referring preliminary rulings to the CJEU, which is a noteworthy fact. In assessing the implementation of the right legal instruments, the CJEU, by way of its judgments, often grants protection to taxable persons. These judgments have often resulted in legislative changes or changes in the interpretation of legal provisions. In some cases, the previous line of judicial decisions of the Supreme Administrative Court is legitimised and proven as correct.

What deserves particular attention is the CJEU's existing judicial practice of dealing with tax law abuse cases, which is used by the SAC when examining cases involving tax carousels.

Keywords: preliminary rulings, case law of the Court of Justice of the European Union, judicial decisions of the Supreme Administrative Court, abuse of rights, VAT on municipalities.

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Introduction

The twentieth anniversary of Poland's accession to the European Union is a good opportunity to analyse the impact of preliminary rulings issued in Polish cases on the judgments of the Supreme Administrative Court (hereinafther referred to as SAC). Poland's accession to the European Union following the Accession Treaty of 16 April 2004 necessitated the adaptation of the Polish tax law system to EU solutions. In particular, this concerned indirect taxes: value added tax and excise duty.[3]

It should be stressed that administrative courts in Poland, when reviewing the legality of administrative decisions and individual tax interpretations, should usually apply an interpretation that is in line with the provisions of EU law, i.e. an EU law-friendly interpretation.[4]

The judicial decisions of the Court of Justice of the European Union (hereinafter referred to as CJEU) issued so far play an important part in shaping the pro-European interpretation of law. CJEU's competence covers interpretation of treaties, meaning the primary law of EU. The second area of CJEU's competence concerns interpretation of law and covers interpretation of acts adopted by organisational units, bodies or institutions of the European Union. This means acts of all EU institutions. Most often, the subject of interpretation will be regulations, directives, and decisions, along with non-binding opinions and recommendations since they too may be of significance to national bodies' interpretation and application of law. CJEU's interpretation is actually a binding interpretation of EU laws.[5]

The Court of Justice of the European Union is qualified to answer questions referred for a preliminary ruling by national courts. The courts whose rulings are not final may – and courts of final instance should – address CJEU with preliminary inquiries if they find it necessary for the issuance of a judgment (art. 267 TEC). CJEU encourages the settlement of a dispute, but it does not decide in particular cases. It is a kind of legal cooperation through which national courts and the CJEU

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3 A. Mudrecki, *Rola sądów administracyjnych w harmonizacji podatków w Polsce*, [in:] D. Dominik-Ogińska, M. Militz, A. Mudrecki, P. Ogiński, A. Pomorska, P. Wróbel, *Harmonizacja prawa podatkowego w Unii Europejskiej*, Warszawa 2011, pp. I–34.

4 A. Mudrecki, *Wykładnia prounijna w orzecznictwie sądów administracyjnych w podatkach obrotowych*, [in:] H. Litwińczuk (ed.), *Prawo europejskie w polskim prawie finansowym*, Warszawa 2011, p. 382.

5 T. Siennicki [in:] M. Militz, D. Dominik-Ogińska, M. Bącal, T. Siennicki, *Zasady prawa unijnego w VAT*, Warszawa 2013, pp. 211–213.

contribute directly and reciprocally to a specific settlement.[6] In almost every judgment, the CJEU states that the final decision that leads to a settlement rests with the national court that is most familiar with the facts of the case and the economic reality of the business in the country concerned.[7]

The Administrative courts in Poland quite often request preliminary rulings, especially in tax matters. Such rulings tend to be highly universal, as they are submitted by other Member States and the European Commission. Only in one case did the CJEU refuse to answer and discontinue the proceedings on the grounds that the ruling concerned an event prior to Poland's accession to the European Union.[8]

In total, 113 preliminary rulings have been referred to the Court of Justice of the European Union by administrative courts in Poland, 95 of which concerned tax cases. There are currently 8 tax cases pending (*item 100: C-18/23; item 105: C-453/23; item 106: C-615/23; item 111: C-405/24; item 108: I SA/Wr 92/23; item 109: I SA/Wr 966/22; item 110: I SA/Wr 4/23, item 112: III SA/Wa 1231/24*).[9]

Due to the large number of preliminary rulings, in the remainder of this article I will limit myself to an analysis of CJEU judgments issued following the preliminary rulings and their impact on the Supreme Administrative Court's judicial decisions concerning tax carousels and VAT taxation of municipalities.

It is reasonable to assume that following the CJEU rulings, there may be legislative changes and different interpretations of the law. In some cases, the CJEU rulings prove the existing line of argumentation of the Supreme Administrative Court to be correct.

The influence of CJEU's judicial decisions regarding cases of tax abuse on the judicial practice of administrative courts in Poland

The normative acts of the European Union and the Value Added Tax Act lacked regulations dealing with legal abuse and tax carousels. Due to the occurrence of

[6] *Ibidem*, p. 210.

[7] A. Mudrecki, *Oszustwa w postaci „karuzeli podatkowych" wykorzystywane w mechanizmie odliczenia podatku naliczonego w systemie VAT*, [in:] *Regulacje prawne w zakresie obejścia i nadużycia prawa podatkowego w praktyce orzeczniczej sądów administracyjnych*, Warszawa 2019, p. 47.

[8] CJEU order of 6 March 2007, case C – 168/06, Ceramika Paradyż sp. z o.o. v Dyrektor Izby Skarbowej w Łodzi (OJ EU C 96 of 28.04.2007, p. 22).

[9] Data taken from the Curia website and the SAC website, section European law – preliminary rulings.

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value added tax extortion, the CJEU has developed a judicial practice of dealing with legal abuse.[10]

The first standpoint on abuse in tax matters comes from the CJEU judgment of 21 February 2006, Case C-255/02 Halifax plc (published in: *ZOTSiS 2006/2A-/I-1609, ECR 2006/2A-/I-1609*). In that judgment, the Court argued that transactions constitute a supply of goods or services and an economic activity within the meaning of Articles 2(1), 4(1) and (2), 5(1) and 6(1) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, if they fulfil the objective criteria on which those concepts are based – even if they are performed with the sole aim of obtaining a tax advantage and have no other economic purpose. The terms 'taxable person' and 'economic activities' and the terms 'supply of goods' and 'supply of services', which define taxable transactions under the Sixth Directive, are all objective in nature and apply without regard to the purpose or results of the transactions concerned. In that regard, an obligation on the tax authorities to carry out inquiries to determine the intention of the taxable person would be contrary to the objectives of the common system of value-added tax of ensuring legal certainty and facilitating the application of value-added tax by having regard, save in exceptional cases, to the objective character of the transaction in question. While it is true that those criteria are not satisfied where tax is evaded, for example by means of untruthful tax returns or the issue of improper invoices, the fact nevertheless remains that the question whether a given transaction is carried out for the sole purpose of obtaining a tax advantage is entirely irrelevant in determining whether it constitutes a supply of goods or services and an economic activity (see items 55-57, 59-60, and item 1 of the conclusion of the judgment).

What is more, CJEU has argued that the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, must be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice. For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. To allow taxable persons to deduct all input value-added tax even though, in the context of their normal

[10] A. Mudrecki, *Oszustwa…*, p. 48.

commercial operations, no transactions conforming with the deduction rules of the Sixth Directive or of the national legislation transposing it would have enabled them to deduct such value-added tax, or would have allowed them to deduct only a part, would be contrary to the principle of fiscal neutrality and, therefore, contrary to the purpose of those rules. As regards the second element, whereby the transactions concerned must essentially seek to obtain a tax advantage, it must be borne in mind that it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden. Where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice. In that regard, the tax authorities are entitled to demand, with retroactive effect, repayment of the amounts deducted in relation to each transaction whenever they find that the right to deduct has been exercised abusively. However, they must also subtract therefrom any tax charged on an output transaction for which the taxable person was artificially liable under a scheme for reduction of the tax burden and, if appropriate, they must reimburse any excess. Similarly, they must allow a taxable person who, in the absence of transactions constituting an abusive practice, would have benefited from the first transaction not constituting such a practice, to deduct, under the deduction rules of the Sixth Directive, the value added tax on that input transaction (see items 74-75, 80-81, 85-86, 94-98, and items 2 and 3 of the conclusion of the judgment).

In general, CJEU has developed a case law that express clearly that preventing possible tax evasion, avoidance, and abuse is an objective recognised and encouraged by Directive 2006/112 (see case Halifax cited above, item 71; judgments of 7 December 2010 in case C-285/09 R., item 36; of 27 October 2011 in case C-504/10 Tanoarch, item 50). In this regard, the Court of Justice has already held that Community law cannot be relied upon for abusive or fraudulent ends (see, especially, the judgment of 3 March 2005 in case C-32/03 Fini H, ECR, p. I-1599, item 32; the said judgments in case Halifax and others, item 68; the judgments in joined cases Kittel and Recolta Recycling, item 54 – thesis 41 of the grounds for the judgment). Therefore, the domestic administrative and judicial authorities should refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied upon for fraudulent or abusive ends (see e.g. the abovementioned judgments in case Fini H, items 33 and 34; in joined cases Kittel and Recolta Recycling, item 55; judgment of 29 March 2012 in case C-414/10 Véleclair, not yet published in ECR, item 32 – thesis 42 of the grounds for the judgment). A taxable person who

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knew or should have known that by purchasing goods or services they were taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of Directive 2006/112, be regarded as a participant in that fraud, irrespective of whether or not the person profited by the resale of the goods or services as part of the transactions (see Kittel and Recolta Recycling, cited above, item 56 – thesis 46 of the grounds for the judgment).

A counterpoise to the presented case-law doctrine of abuse of law is the developed doctrine of good faith.

One of the fundamental constructive characteristics of value-added tax is the neutrality principle, whereby a taxable person cannot be levied with this tax, as it is a consumer tax that affects the final recipient, who is not subject to VAT. A taxable person is entitled to deduct the amount of input tax resulting from an invoice issued by the supplier of goods or services from the amount of VAT due. This matter becomes more complicated when goods or services originate from unknown sources or come from a so-called tax carousel (or missing trader fraud). This raises the question of whether it is possible to restrict a taxable person's entitlement to an input tax deduction – and if so, under what circumstances this entitlement may be restricted.[11]

In the judgment of the Court of 21 June 2012 in joined cases C-80/11 and C-142/11 Mahagében kft versus Nemzeti Adó- és Vámhivatal Déldunántúli Regionális Adó Főigazgatósága and Péter Dávid versus Nemzeti Adó-és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága, the CJEU held that Articles 167, 168 (a), 178 (a), 220 (1) and 226 of Directive 2006/112 must be interpreted as precluding a national practice whereby the tax authority refuses a taxable person the right to deduct – from the VAT which they are liable to pay – the amount of the VAT due or paid in respect of the services supplied to them, on the ground that the issuer of the invoice relating to those services, or one of their suppliers, acted improperly, without that authority establishing, on the basis of objective evidence, that the taxable person concerned knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply (SIP *LEX no. 1165797*, www.eur-lex.europa.eu).

Furthermore, the CJEU stated that Articles 167, 168(a), 178(a) and Art. 273 of Directive 2006/112 must be interpreted as precluding a national practice whereby the tax authority refuses the right to deduct on the ground that the taxable person

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11 A. Mudrecki, *The Influence of "Good Faith" on the Taxable Person's Right to Deduct the Value-added Tax in the Light of the Case Law of the Court of Justice of the European Union*, [in:] M. Radvan (ed.), *System of Financial Law, System of Tax Law: Conference Proceedings*, Brno 2015, p. 332.

did not make sure that the issuer of the invoice relating to the goods in respect of which the exercise of the right to deduct is sought had the status of a taxable person, that they were in possession of the goods in question and was in a position to supply them, and that they had satisfied their obligations as regards declaration and payment of VAT, or on the ground that, in addition to that invoice, that taxable person is not in possession of other documents capable of demonstrating that those conditions were fulfilled, although the substantive and formal conditions laid down by Directive 2006/112 for exercising the right to deduct were fulfilled and the taxable person is not in possession of any material justifying the suspicion that irregularities or fraud have been committed within that invoice issuer's sphere of activity.

The legal practice developed by the CJEU was used by the Supreme Administrative Court to interpret certain cases and circumstances. In the judgment of 9 January 2018, ref. no. I FSK 835/15, the Supreme Administrative Court used the definition developed in the science of tax law when defining the concept of a tax carousel. Although "carousel trading" is not a normative term, it does function as a definition of a transaction mechanism applied to gain undue advantages by taking advantage of the structure of the tax on goods and services. Engagement in such type of trading means engagement in tax abuse practices. The purpose of a tax carousel is to gain undue tax advantages. Such an engagement may take two forms: of defaulting on payment of a due tax as a delinquent taxable person ("missing trader") and/or of unlawful deduction of input tax calculated by other entities included in a transaction chain, especially by an entity carrying out intra-Community supplies. A typical tax carousel is a multi-stage and organised scheme, with at least three entities involved in it, each performing a different role (the "missing trader", the "buffer", and the "broker"). An existing tax fraud does not mean that all participants have the same knowledge about the nature of transactions (in particular, the entity acting as the buffer is usually an actual taxable person operating a real business and paying their taxes accordingly), the goods traded are only VAT carriers, and the transactions made in a carousel scheme have no business/economic purpose from the point of view of the entire trade.[12]

In the judgment of 12 December 2017, ref. no. I FSK 435/16, SAC decided that the nature of abuse of transactions may stem from the transactions in question themselves as well as from earlier and later transactions, which makes it necessary to trace and explain the whole chain.

In another judgment, dated 3 June 2016, ref. no. I FSK 1865/15, SAC decided that if the taxable person knew or should have known that by purchasing goods

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12 W. Kotowski, *Karuzele podatkowe* [in:] I. Ożóg (ed.), *Przestępstwa karuzelowe i inne oszustwa w VAT*, Warszawa 2017, pp. 23–24.

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they were taking part in a transaction involving a VAT fraud, they must be regarded, for the purposes of Directive 2006/112, as a participant in that fraud since by doing so they aid the perpetrators of the fraud and thus become their accomplices. In a situation where such a fraud (i.e. where a taxable person does not act in good faith) is a tax carousel where the transactions made have no business purpose and are made only for VAT refund scam purposes, such a taxable person, by supplying goods purchased earlier from the previous link in the chain of entities involved in the carousel scheme to the next link in that chain, contributes knowingly to a tax fraud (i.e. acts as an accomplice in such an activity). In effect, such a "sale" is not made as part of a business activity, and so it may not be considered a supply within the meaning of art. 5, section 1, item 1 or 5 of the Goods and Services Tax Act, i.e. an activity subject to taxation pursuant to this act. The occurrence of a situation described above in circumstances of the case in question justifies the "cancellation" – on the grounds of settlement of the tax on goods and services – of both a purchase and a sale transaction (as made outside the scope of business activity). This means that purchasing goods in a carousel scheme does not result in the right to deduct tax calculated on the basis of invoices intended to document the purchase made, and the further resale of such goods should not be recorded as an activity producing certain effects on the grounds of the tax on goods and services, including as an intra-Community supply (see also: SAC judgment of 14 April 2015, I FSK 46/14, CBOSA).

In the judgment of 10 October 2017, ref. no. I FSK 97/16 (LEX no. 2388481), the SAC pointed to doubts existing in the case regarding the counterparty indicating its unreliability. It was considered that since the taxable person knew that Latvian entities often disappear from the VIES system, they should have been aware that these entities may have been unreliable or untrustworthy, which should have resulted in special control and verification of transactions with these counterparties, all the more so if they were not single, one-off transactions.

In case no. I FSK 9/16, the SAC dealt with the right to deduct VAT and the examination of the taxable person's due diligence. The SAC decided that tax authorities were entitled to refuse a taxable person the right to deduct VAT tax if there were objective reasons that proved that the taxable person knew or should have known that the transaction intended to serve as the basis for deduction involved a fraud or abuse in the scope of VAT tax. The right to VAT tax deduction may be exercised if the following conditions are met: the material condition, meaning that goods have been actually supplied or services have been actually rendered, and the formal condition, meaning having an invoice that meets the formal conditions required for VAT deduction purposes. If the said conditions are met, a taxable person may be deprived of the right to tax deduction when it has been determined,

on the basis of objective circumstances, that a supply (service) has been carried out for the taxable person who knew or should have known that by purchasing the goods (services) involved in the deal, they were taking part in a transaction made with the intention to commit a VAT fraud. Therefore, it is only in such circumstances that the taxable person's due diligence (so-called good faith) should be examined (see: judgment of 5 September 2017 ref. I FSK 9/16, *LEX no. 2361505*).

The Supreme Administrative Court, in its judgment of 25 July 2017, ref. no. I FSK 1798/15, argued that Article 86(1), Article 88(3)(4)(a) of the Goods and Services Tax Act should be interpreted to mean that a taxable person's mere adoption of procedures for verifying contracting parties does not constitute good faith and, consequently, does not allow the exercise of the right to deduct input tax on the basis of invoices that do not reflect actual economic events – if these procedures have not been followed with regard to a specific contracting party.

The quoted judgments show clearly that the CJEU's judicial decisions concerning instances of abuse of the law have allowed the SAC to effectively combat tax carousels through its rulings.

The impact of CJEU case law on the taxation of municipalities in value added tax laws

The goods and services tax raises many problems regarding its interpretation when applied in practice. The taxation of municipalities with this tax poses even more difficulties due to the not very precise definition of the subject and object of taxation, as well as the existing exemptions applied in this tax.

In its judgment of 29 September 2015, -case ref. no. C276/14 Municipality of Wrocław v Minister of Finance,[13] the CJEU expressed the view that Article 9(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 bodies governed by public law, such as the municipal budgetary units at issue in the main proceedings, cannot be considered taxable persons for the purposes of value added tax because they do not meet the criterion of independence set out in that provision.

The said CJEU judgment confirmed the Supreme Administrative Court's view expressed in its resolution of 24 June 2013, ref. I FPS 1/13. This meant that the pro-EU interpretation adopted in the aforementioned resolution was consistent with the CJEU's ruling. Thanks to the analysed judicial decisions of the CJEU and the Supreme Administrative Court, the erroneous interpretation of the provision of

[13] CLI:EU:C:2015:635.

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Article 15 of the VAT Act regarding the lack of grounds for recognising municipal budgetary units as taxpayers of value added tax was eliminated. According to D. Mączyński, the operative part of the CJEU's judgment suggested only that the flawed interpretation of the tax law be changed and that it be implemented solely at the level of application of the law. However, the CJEU ruling affected the tax legislation in the aspect of centralisation of municipal accounts.[14]

Guided by the CJEU judgment, the Supreme Administrative Court, in a landmark resolution of 26 October 2015, ref. I FPS 4/15,[15] held that it is the municipality – not the local government budgetary entity – that is an independent taxpayer of value added tax. According to the operative part of the resolution, in light of Article 15(1) and Article 86(1) of the Value Added Tax Act of 11 March 2004,[16] a municipality has the right to deduct input tax from purchase invoices related to the implementation of projects that were subsequently transferred to a municipal budgetary entities carrying out the municipality's own tasks assigned to it, if the projects are used for sales subject to value added tax.

The reasoning applied by the Supreme Administrative Court in the justification of resolution I FPS 1/13 in relation to budgetary entities is evidence that the SAC applies the same rules of interpretation in interpreting the legislation as those used by the Court of Justice of the European Union, taking into account the different language versions of EU law and, in view of its ambiguity, referring to the purpose of the provision. This reasoning takes into account the pattern of pro-EU interpretation in terms of the conditions that such entities should meet in order to be considered as independent taxpayers.[17]

Certain legislative changes were made in order to implement the said CJEU judgment. On 1 January 2016, a set of changes introduced by the Act of 9 April 2015 amending the Value Added Tax Act and the Public Procurement Law Act entered into force.[18] In particular, the provisions on the manner of calculating the ratio of input VAT deduction were amended. However, this was not the last amendment to the existing legislation in this regard. On 1 October 2016, the Act of 5 September 2016 on the specific principles of settling the tax on goods and services and making refunds of public funds allocated for the implementation of projects financed with resources from the budget of the European Union or from the Member

[14] D. Mączyński, *Wpływ orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej na stanowienie polskiego prawa podatkowego*, Warszawa 2021, pp. 232–233.

[15] "Przegląd Orzecznictwa Podatkowego" 2015, issue 6, pp. 577–584.

[16] Journal of Laws of the Republic of Poland of 2011, no. 177, item 1054 as amended.

[17] R. Wiatrowski, *Wykładnia prounijna Naczelnego Sądu Administracyjnego w zakresie przepisów dotyczących podatku od towarów i usług*, Warszawa 2021, pp. 238–339.

[18] Journal of Laws of the Republic of Poland of 2015, item 605.

States of the European Free Trade Agreement by local government units entered into force.[19]

The legal solutions adopted have allowed municipalities to recover multi-million amounts in goods and services tax.

The previous judicial practice of the Supreme Administrative Court regarding the taxation of photovoltaic panels lost its relevance after the Court of Justice of the European Union's judgment of 30 March 2023, ref. C-612/21. The CJEU ruled on the taxation of the municipality when installing renewable energy sources. In this judgment, the CJEU indicated that Articles 2(1), 9(1) and 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, RES (*renewable energy systems*) 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.

In its judgment of 30 March 2023, Case C-616/21, the CJEU dealt with the taxation of asbestos removal by a municipality. In that judgment, the Court held that Articles 2(1), 9(1) and 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as the fact that a municipality has commissioned a company to remove asbestos and collect products and waste containing asbestos for the benefit of the municipality's residents who are property owners and who so wish does not constitute a supply of services subject to value added tax where those activities are not intended to generate a regular income and do not give rise to any payment by those residents and where those activities are financed from public resources.

Consequently, it does not appear, subject to verification by the referring court that in the present case, the Municipality of L. has been carrying out economic activity within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112 (paragraph 49 of the judgment). Since the Municipality of L., in light of the considerations set forth in paragraphs 41 to 49 of this judgment, does not carry out activities falling within the scope of Directive 2006/112, there is no need to determine whether that activity would also be excluded from that scope.

The CJEU's judgments of 30 March 2023, ref. C-612/21 and C-616/21, prove that the municipality, in view of Article 15(2) of the VAT Act, will not be a taxpayer of goods and services tax in the case of removal of asbestos and installation of renewable

[19] Journal of Laws of the Republic of Poland of 2018, item 280.

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energy sources. What follows from this standpoint is that the value of the subsidy will not be included in the amount taxable under Article 29(1) of the VAT Act.

One of the most important issues related to the possibility of calculating the proportion of taxation when there occur non-taxable activities was addressed by the Supreme Administrative Court in its resolution of 24 October 2011, ref. I FPS 9/10. In its ruling, the Court argued that in light of the provisions of Article 86(1) and Article 90(1) and (2) of the VAT Act of 11 March 2004, activities not subject to value added tax may not affect the scope of the right to deduct input tax pursuant to Article 90(3) of said Act.

The CJEU departed from this view in its judgment of 8 May 2019 as a result of a preliminary ruling, reference C 566/17. According to the Court, Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national practice which allows a taxable person to deduct in full the value added tax (VAT) charged on the acquisition of goods and services for the purpose of pursuing both economic activity, subject to VAT, and non-economic activity, which falls outside the scope of VAT, in the absence of specific provisions in the relevant tax legislation on the criteria and methods of apportionment enabling the taxable person to determine the proportion of that input VAT to be regarded as relating to their economic and non-economic activities respectively.

The cited judgment gave grounds to a number of decisions of the Supreme Administrative Court. In a precedent-setting judgment of 2 July 2019, ref. I FPS 119/17, the SAC held that the provision of Article 86(1) of the Value Added Tax Act of 11 March 2004 should – in light of the CJEU's judgment of 8 May 2019 in case C-566/17 of a local government association (Związek Gmin Zagłębia Miedziowego w Polkowicach) – shall mean that the absence in the aforementioned Act of regulations on the criteria and methods of apportionment that would enable a taxable person to determine the deductible portion of input value added tax relating to their economic and non-economic activities in the legal state in force until 31 December 2015 did not grant the taxable person the right to deduct that tax in full.

The principles of the democratic state of law and legal certainty expressed in Article 2 of the Constitution of the Republic of Poland oppose situations where, in the case of accounting periods prior to 1 January 2016, taxable persons who, owing to the the absence in the Goods and Services Tax Act of regulations on the criteria and methods of apportionment that would enable a taxable person to determine the deductible portion of input value added tax relating to their economic and non-economic activities in the legal state in force until 31 December 2015, deducted this tax in full in accordance with the interpretation expressed by the Supreme Administrative Court in the Court's resolution of 7 judges, of 24 October 2011, ref.

I FPS 9/10, should bear the consequences of the above and – due to the change in the interpretation of Article 86(1) of the Goods and Services Tax Act in the manner specified in item 1 – were obliged to correct the settlements of those accounting periods in respect of which tax liabilities did not expire.

Many municipal projects intended to address the needs of local residents as part of local governments' own tasks. As a result, municipalities carrying out such projects did not have the right to deduct input tax. In this regard, the Court of Justice of the European Union made a rather bold ruling that changed the existing judicial practice. In its judgment of 25 July 2018, Ref. C-140/17,[20] the CJEU indicated that Articles 167, 168 and 184 of Council Directive 2006/112/EC of 28 November 2006. on the common system of value added tax and the principle of the neutrality of value added tax (VAT) must be interpreted as not precluding a body governed by public law from being entitled to a right to adjustment of deductions of VAT paid on immovable property acquired as capital goods in a situation, such as that at issue in the main proceedings, where, at the time of the acquisition of those goods, first, they could, by their very nature, be used both for taxable activities and for non-taxable activities but were initially used for non-taxable activities, and second, that public body had not expressly stated its intention to use those goods for a taxable activity but had also not excluded the possibility that they might be used for such a purpose, so long as it follows from an assessment of all the factual circumstances, which it is for the referring court to carry out, that the condition laid down by Article 168 of Directive 2006/112, according to which the taxable person must have acted as a taxable person at the time when it made that acquisition, is fulfilled.

The Court of Justice of the European Union in its judgment of 13 June 2018 in Case C-665/16[21] Ministry of Finance v Municipality of Wrocław. The Court held that Articles 2(1)(a) and 14(2)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a transfer of ownership of immovable property belonging to a taxable person for value added tax purposes to the Public Treasury of a Member State, carried out in accordance with the law and in return for a payment of compensation, constitutes a transaction subject to value added tax in a situation, such as that at issue in the main proceedings, where the same person simultaneously represents the expropriating authority and the municipality that is the subject of the expropriation and where the latter continues the practical management of the relevant property,

20 http://www.nsa.gov.pl/pytania-prejudycjalne-wsa-i-nsa.php
21 ECLI:EU:C:2018:431.

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even if the payment of compensation has been made only by means of an internal accounting transfer within the budget of the municipality.

The quoted ruling did not change the previous judicial practice of administrative courts.

The Court of Justice of the European Union in its judgment of 25 February 2021 ref. C-604/19 in the case of Municipality of Wrocław v Director of the National Tax Information Bureau. In the ruling, the CJEU held as follows:

1) Article 14(2)(a) 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 transformation of the right of perpetual usufruct into full immovable property ownership rights provided for by national legislation against payment of a fee constitutes a supply of goods within the meaning of that provision.
2) Directive 2006/112 must be interpreted as meaning that, where the transformation of the right of perpetual usufruct into full immovable property ownership rights provided for by national legislation takes place against payment of a fee to the municipality which owns the property, enabling it to obtain income therefrom on a continuing basis, that municipality, subject to the verifications to be made by the referring court, acts as a taxable person within the meaning of Article 9(1) of that directive, and not as a public authority for the purposes of Article 13(1) of that directive.

The ruling in question has led to an increased fiscal burden on perpetual usufructaries and further complicated enfranchisement processes for municipalities.

Conclusion

Administrative courts are highly committed to and keen on referring preliminary rulings to the CJEU, which is a noteworthy fact. In assessing the implementation of the right legal instruments, the CJEU, by way of its judgments, often grants protection to taxable persons. These judgments have often resulted in legislative changes or changes in the interpretation of legal provisions. In some cases, the previous line of judicial decisions of the Supreme Administrative Court is legitimised and proven as correct.

What deserves particular attention is the CJEU's existing judicial practice of dealing with tax law abuse cases, which is used by the SAC when examining cases involving tax carousels.

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