Qorti tal-Appell

(Kompetenza Inferjuri)

Imhallef Anthony Ellul

Appell numru: 63/2013

Cove Limited (appellata)

Vs

Direttur Generali (Taxxa Fuq il-Valur Mizjud) (appellant)

16 ta' Marzu, 2018.

1. Fl-24 ta' Jannar, 2012 is-socjeta' rikorrenti pprezentat appell quddiem il-Bord tal-Appelli dwar it-Taxxa Fuq il-Valur Mizjud, li eventwalment instema' u gie deciz mit-Tribunal ta' Revizjoni Amministrattiva, permezz ta' liema talbet li jigi ddikjarat li ghandha dritt ghad-deduzzjoni/kreditu/rifuzjoni tal-VAT fuq l-ispejjez kollha li ghamlet fil-*units* kollha, ossia hames *units* mibnija fuq art li tinsab fi Triq Santa Klara kantuniera ma' Triq Victoria Lines, Bahar ic-Caghaq, u konsegwentement jordna li l-Kummissarju tat-Taxxa fuq il-Valur Mizjud ghandu, fi zmien qasir u perentorju ffissat mit-Tribunal, jhallasha s-somma ta' €120,495, rapprezentanti r-rifuzjoni minnha pretiza, bl-imghax;

2. L-intimat wiegeb li ma kienx hemm dritt ta' *input tax*. L-intimat ibbaza ruhu fuq l-artikolu 22(2) u (3) tal-Att dwar it-Taxxa Fuq il-Valur Mizjud (Kap. 406) u jsostni li l-kreditu ghall-*input* VAT ghandu jkun daqsinsew ghall-*input* VAT ta' dik il-persuna li jkollu jhallas matul dak iz-zmien li hu attribwibbli ghall-provvisti maghmula jew mahsuba li ghandhom jintaghmlu minnha. Ghaldaqstant, isegwi li l-ligi stess trid illi l-*input tax* tkun relatata ma' *'zmien ta' taxxa partikolari'*. Zmien li skont l-artikolu 17 hu perjodu ta' tliet xhur kalendarji li jibdew fl-ewwel jum li jigi minnufih wara t-tmiem taz-zmien ta' taxxa li jkun gie qabel. Ghalhekk l-intimat jishaq li r-rikorrenti kellha taghti prova li, *"... fil-mument li hija nkorriet it-taxxa li qieghda titlob bhala input VAT, hija kienet qeghda, jew tinkorri input VAT ghall-provvista 'fil-kors jew avvanza ta' attivita' ekonomika taghha' jew fil-kors jew avvanz ta' attivita ekonomika mahsuba li tintuza"*. Ladarba l-intenzjoni tar-rikorrenti kienet li tikri numru definit ta' vilel u tbiegh l-ohrajn, hu evidenti li meta ghamlet l-izvilupp ma kellix intenzjoni li tiggestixxi attivita' ekonomika fir-rigward ta' dawk il-vilel li kellha l-intenzjoni li tbiegh. Tant hu hekk li ma talbitx ir-rifuzjoni tal-VAT.

3. B'sentenza tat-30 ta' Marzu, 2015 it-Tribunal ta' Revizjoni Amministrattiva ddecieda:

"Ghaldaqstant, ghal dawn ir-ragunijiet it-Tribunal filwaqt li jastjeni milli jiehu konjizzjoni tat-tieni talba tas-socjeta' Rikorrenti, jilqa' l-ewwel talba taghha u jiddikjara li hija ghandha dritt ghat-tnaqqis tal-input VAT minnha inkorsa in konnessjoni mal-vilel kollha, ossia hames vilel, minnha mibnija fuq il-proprjeta' sitwata fi Triq Santa Klara kantuniera ma' Triq Victoria Lines, Bahar ic-Caghaq, liema dritt ghandu jkun regolat b'dak provdut fir-Regolamenti dwar Taxxa Fuq il-Valur Mizjud (Aggustamenti li ghandhom x'jaqsmu ma' Oggetti Kapitali), Legislazzjoni Sussidjarja 406.12)".

4. B'rikors prezentat fis-17 ta' April, 2015 l-intimat appella mis-sentenza. L-aggravju hu li t-Tribunal ghamel interpretazzjoni zbaljata fir-rigward ta' tnaqqis ta' *input tax* ta' persuna taxxabbli u konsegwentement dwar l-aggustament ta' *input tax* fil-perjodu rilevanti fir-rigward ta' immobbli. Fl-aggravju regghet ghamlet riferenza ghas-sentenza ta' din il-qorti, **Aprilia Hotel Ltd vs il-Kummissarju tat-Taxxa Fuq il-Valur Mizjud** (numru 2/2011) u qalet li minnha *"... jirrizulta car li skont l-artikolu 22(3) tal-Kap. 406 id-dritt ta' input tax ta' persuna taxxabbli huwa marbut maz-zmien ta' taxxa fis-sens li tali kreditu huwa dwar input tax li tkun dovuta fuq provvisti taxxabbli li dik il-persuna taxxabbli tkun ghamlet jew tkun intenzjonata li taghmel"*.

5. Is-socjeta' appellata ma wegbitx.

6. Fis-seduta tal-20 ta' Novembru, 2017 saret trattazzjoni. Il-qorti qrat l-atti.

<u>Konsiderazzjoni</u>.

7. Il-kaz jikkoncerna talba tas-socjeta' rikorrenti biex tnaqqas *input* VAT fir-rigward ta' spejjez li ghamlet in konnessjoni ma' immobbli li zviluppat.

8. **<u>Fatti</u>**.

L-appellata akkwistat dar f'Bahar ic-Caghaq li kienet proprjeta' tad-direttur taghha, sabiex fuqha tibni hames vilel. Tlieta minnhom riedet tuzahom biex tikrihom filwaqt li t-tnejn l-ohra riedet tbieghhom bhala parti mill-finanzjament tal-progett. Il-progett sar. Fit-3 ta' Gunju, 2008 l-appellata rregistrat mad-Dipartiment tal-VAT u l-attivita' ekonomika taghha giet deskritta bhala *'property letting'*. B'ittra tal-21 ta' Frar, 2011 l-appellata talbet ghall-korrezzjoni fil-formoli tal-VAT, wara li ddikjarat li kienet iddecidiet li l-vilel kollha kienu ser jintuza ghall-kiri. Permezz ta' ittra datata 5 ta' Jannar, 2012 li l-appellant baghat lis-socjeta' appellata, filwaqt li ghamel riferenza ghas-sentenza **Aprilia Hotel Ltd vs il-Kummissarju tat-Taxxa Fuq il-Valur Mizjud** (numru 2/2011) tas-27 ta' Ottubru, 2011, gharrafha:

"In its decision the Court established that no input VAT should be claimed in connection with immovable property that was not intended initially to be used to carry out taxable supplies with the scope of VAT (e.g. renting).

In view of the foregoing, the Department considers that on the basis of the Court of Appeal decision input VAT incurred in connection with an operation which falls outside the scope of VAT cannot be claimed at a later stage on the premise of 'a change of intention'. It contended that input VAT attributable to a particular taxable supply is to be claimed in the relative period where the input tax is actually being incurred. For such purpose, you are hereby being informed that the input VAT incurred by Cove Ltd related to the construction and completion of the two housing units which had initially been intended to be sold cannot be claimed".

9. L-argument tal-appellant jidher li hu mibni fuq dak li ddecidiet din il-qorti fis-sentenza fuq imsemmija. F'dak il-kaz ghalkemm il-kumpannija ghamlet l-ispejjez fis-sena 2004, it-talba ghal kreditu ta' *input tax* saret fis-sena 2007 ghaliex kien f'dak il-perjodu li bdiet tinkera l-proprjeta'. Jirrizulta li fl-2004 il-kumpannija lanqas ma kienet registrata. Din il-qorti ghamlet riferenza ghall-artikolu 22(3)(a) tal-Kap. 406 li jipprovdi:

"il-kreditu ghall-input tax ta' zmien ta' taxxa ta' persuna registrata taht l-artikolu 10 huwa ammont li jkun daqsinsew ***ghall-input tax ta' dik il-persuna li jkollu jithallas matul dak iz-zmien li huwa attribwibbli ghall-provvisti maghmula jew mahsuba li ghandhom jintghamlu minnha****...."*

Il-qorti qalet:

"Illi minn tali disposizzjoni jirrizulta car li d-dritt ta' input tax ta' persuna taxxabbli li tkun eligibbli li tiltob lura l-input tax huwa marbut maz-zmien ta' taxxa fis-sens li tali kreditu huwa dwar input tax li tkun dovuta fuq provvisti taxxabbli li l-istess persuna taxxabbli tkun ghamlet jew tkun ser taghmel f'dak l-istess zmien ta' taxxa....".

Ghaldaqstant, din il-qorti kkonkludiet li l-*input tax* trid tkun thallset **<u>fl-istess zmien</u>** li fih tkun tat jew kien mahsub li taghti il-provvisti taxxabbli. F'dak il-kaz partikolari, is-sena li dwarha l-kumpannija ppretendiet li kien hemm dritt ghall-kreditu ta' *input tax* kien dwar sena li fiha l-kumpannija ma kinitx registrata bhala persuna taxxabbli li qeghda twettaq attivita' ekonomika.

10. Il-qorti fehmet li l-appellant qieghed joggezzjona ghall-aggustament fuq zewg vilel ghaliex meta hallset VAT ghall-provvisti fl-izvilupp taz-zewgt idjar, l-appellata kien ghad ma kellix il-hsieb li tuzahom ghall-provvista taxxabbli, cjoe' biex tikrihom bi qliegh.

11. Fl-artikolu 22(2) tal-Kap. 406 insibu definizzjoni ta' *'input tax'* ta' persuna taxxabbli, u cioe' hi t-taxxa li persuna taxxabbli jkollha thallas fuq –

"(a) provvista maghmula lilha,
(b) akkwisti maghmula minnha,
(c) importazzjonijiet maghmula minnha

Sal-limitu li l-provvisti hekk maghmula u l-oggetti hekk akkwistati jew importati jintuzaw jew ikunu mahsuba li jintuzaw kollha kemm huma fil-kors jew avvanz tal-attivita' ekonomika taghha".

12. Principju kardinali fis-sistema tal-VAT hi dik ta' *tax neutrality*. Kif intqal f'artiklu *The Right to Deduct under EU VAT* (Ad van Doesum u Ger-Jan van Norden fil-pubblikazzjoni *International VAT Monitor*, Settembru/Ottubru, 2011):

> *"Most VATs are consumption taxes. Art. 1(2) of the VAT Directive explicitly acknowledges that the EU VAT is a general tax on consumption. In this context, the term "consumption" is to be understood as "private consumption", rather than "productive consumption". However, for reasons of simplicity and neutrality, EU VAT is levied at all stages of the process of production and distribution of goods and services. Consequently, not only private consumption but also productive consumption is subject to VAT.* ***In order to achieve the goal of taxing private consumption only, persons that qualify as "taxable persons" can in principle deduct the VAT incurred on their inputs. The system of deduction of input VAT is intended to relieve taxable persons entirely of the burden of VAT incurred in the framework of their economic activities****. From this perspective, it is logical that the Court of Justice of the European Union (ECJ) has ruled that the right to deduct input tax is an integral part of the VAT system and may in principle not be limited"*.

13. Fis-sentenza **SC Gran Via Moinesti SRL** (C-257/11) tad-20 ta' Novembru, 2012, il-Qorti Ewropea tal-Gustizzja tal-Unjoni Ewropea spjegat:

> *"The deduction system is intended to* ***relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities****. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject to VAT (see Case 268/83 Rompelman [1985] ECR 655, paragraph 19; Case C-37/95 Ghent Coal Terminal [1998] ECR I-1, paragrafph 15; Gabalfrisa and Others, paragraph 44; Case C-32/03 Fini H [2005] ECR I-1599, paragraph 25; Centralan Property, paragraph 51; and Mahageben and David, paragraph 39)"*.

14. Sabiex wiehed jikkwalifika ghat-tnaqqis:

    i. fl-ewwel lok irid ikun 'persuna taxxabbli' (ara artikolu 168 tad-Direttiva 2006/112 tat-28 ta' Novembru, 2006 *'on the common system of value added tax').* Skont artikolu 9(1), *"Taxable person shall mean any person who, independently, carries out in any place any* ***economic activity****, whatever the purpose or results of that activity"*.

    ii. fit-tieni lok il-beni jew servizzi jridu jintuzaw fl-attivita' ekonomika tan-negozjant li tkun taxxabbli. Skont l-istess disposizzjoni, *"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****"*. Fis-sentenza Optigen Limited et (C-354/03, C-355/03 u C-484/03) tat-12 ta' Jannar 2006, il-Qorti tal-Gustizzja qalet:

"43. As the Court held in paragraph 26 of its judgment in Case C-260/98 Commission v Greece [2000] ECR I-6537, an analysis of the definitinos of taxable person and economic activities shows that ***the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results*** *(see also Case 235/85 Commission v Netherlands [1987] ECR 1471, paragrafph 8, and, to that effect, inter alia Case 268/83 Rompelman [1985] ECR 655, paragraph 19, and Case C-497/01 Zita Modes [2003] ECR I-14393, paragraph 38)"*.

iii. fit-tielet lok, ghat-tnaqqis tal-VAT l-oggetti jew servizzi jridu jintuzaw mill-persuna taxxabbli ***"... for the purposes of the taxed transactions of a taxable person"*** (artikolu 168 tad-Direttiva tal-VAT). Fis-sentenza **Finanzamt Offenback am Main-Land et** C-137/02 il-Qorti tal-Gustizzja qalet:

"24. As regards the right to deduct, Article 17(2) of the Sixth Directive provides that the taxable person is entitled to deduct from the tax which he is liable to pay the VAT due or paid in respect of goods or services supplied or to be supplied to him by another taxable person ***'insofar as the goods and services are used for the purposes of his taxable transactions****'. Thus, it is clear from the wording of that provision that, in order for a person to be entitled to deduct, he must be a 'taxable person' within the meaning of the Sixth Directive* ***and the goods and services in question must have been used for the purposes of his taxable transactions****"*.

M'hemmx kontestazzjoni li f'dan il-kaz il-bejgh tal-immobbli li l-appellata kellha intenzjoni li taghmel ma kinitx *taxable transaction*, tant hu hekk li fl-*initial deduction* ma nkluditx il-VAT li hallset fl-investiment li ghamlet biex inbnew iz-zewg vilel li dak iz-zmien kellha l-intenzjoni li jinbieghu.

15. M'hemmx dubju li l-kiri tad-djar jikkwalifikaw bhala attivita' ekonomika skont l-artikolu 9 tad-Direttiva tal-VAT, u ghalhekk is-socjeta' appellata kienet tikkwalifika bhala persuna taxxabbli. Meta l-appellata rregistrat mad-Dipartiment tal-VAT iddikjarat li n-negozju kien ser ikun dak ta' *property letting*, li fiha nnifisha hi attivita' ekonomika skont id-definizzjoni tal-artikolu 9(1) tal-imsemmija direttiva.

16. Ix-xiri ta' immobbli u l-izvilupp tieghu gie ddikjarat li jifforma parti mill-attivita' ekonomika (ara per ezempju sentenza tal-Qorti tal-Gustizzja fil-kaz C-97/90

Lennartz [1991]). Fis-sentenza **Uundenkaupungin kaupunki** (C-184/04) tat-30 ta' Marzu, 2006, il-Qorti Ewropea qalet:

> *"38. Pursuant to Article 17(1) of the Sixth Directive, which is entitled 'Origin and scope of the right to deduct', the right to deduct VAT arises at the time when the deductible tax becomes chargeable.* ***Consequently, only the capacity in which a person is acting at that time can determine the existence of the right to deduct*** *(Lennartz, paragraph 8).*
>
> *39.* ***The Court has also held that the use to which capital goods are put merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 of the Sixth Directive and the extent of any adjustments in the course of the following periods, but does not affect whether a right to deduct arises.*** *It follows that the immediate use of the goods for taxable supplies does not in itself constitute a condition for the application of the system of adjustment of deductions (Lennartz, paragraphs 15 and 16)……*
>
> *42. The answer to the second question must therefore be that Article 20 of the Sixth Directive must be interpreted as meaning that the* ***adjustment provided for therein is also applicable where the capital goods were first used in non-taxable activity that was not eligible for deduction and were then used in activity, subject to VAT during the adjustment period****".*

17. L-appellant jenfasizza li dik is-sentenza tapplika biss fix-xenarju partikolari ta' dak il-kaz, fejn il-persuna kellha *right of option* jekk tigix registrata bhala soggetta ghat-taxxa jew le, u liema dritt kellu jigi ezercitat fi zmien ta' sitt xhur li fih il-proprjetajiet bdew jintuzaw. Dritt li ma jezistix fil-kaz in ezami. Il-qorti ma taqbilx mal-fehma tal-appellant, meta tqis:

    i. It-tieni domanda li saret fir-riferenza preliminari lill-Qorti tal-Gustizzja kienet, *"(2) Is Article 20 of the [Sixth] Directive to be interpreted as meaning that the adjustment of deductions in accordance with that article is applicable even where the capital goods, in this case immovable property, were first used in non-taxable activity, in which case an initial deduction could not have been made at all, and only later in taxable activity during the adjustment period ?"*. Domanda generali li m'hijiex marbuta mar-*right of option* li hemm taht il-ligi nazzjonali.

    ii. Il-partijiet tas-sentenza li gew citati jipprovdu principji generali u mhux xi dikjarazzjoni partikolari ghall-fattispecje ta' dak il-kaz. It-twegiba li tat il-Qorti tal-Gustizzja ghat-tieni domanda ma tiddependix mill-fatt li l-ligi nazzjonali taghti r-*right of option*. Dan hu evidenti mis-sentenza (ara paragrafi 36 sa 42).

18. Rilevanti wkoll il-kaz ta' **Lennartz** (C-97/90) tal-11 ta' Lulju, 1991. Il-kaz kien dwar vettura li xtara l-applikant ghall-uzu privat tieghu, u li xi kultant kien

juza ghal skop ta' negozju. L-applikant kien jahdem ghal rasu part-time bhala *tax consultant*. Is-sena ta' wara li xtara l-vettura fetah ufficcju tieghu ta' *tax consultancy* u ghadda l-vettura lil dak in-negozju. Il-Qorti qalet:

> *"14. It follows from that judgment*[1] *that a person who acquires goods for the purposes of an economic activity within the meaning of Article 4 does so as a taxable person, even if the goods are not used immediately for such economic activities.*
>
> *15.Consequently,* ***it is the acquisition of the goods by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism.*** *The use to which the goods are put, or intended to be put, merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 and* ***the extent of any adjustments in the course of the following periods****".*

19. Fil-kaz ta' Lennartz dak li kien hemm differenti li l-oggett kien originarjament inxtara ghall-uzu personali. B'hekk ma kienx kaz ta' attivita' ekonomika. Fil-kaz taghna, l-assi kienu *business assets* tas-socjeta' appellata u ma kinux ghall-uzu personali. Fil-kaz ta' Lennarts l-fatt li sussegwentement l-oggett beda jintuza ghall-attivita' ekonomika ma kienx bizzejjed, minkejja li kien persuna taxxabbli. Gustament il-Qorti tal-Gustizzja qalet:

> *"9. Conversely, where the goods are not used for the taxable person's economic activities within the meaning of Article 4 but used by him for his private consumption, no right to deduct can arise".*

20. F'sentenza ohra l-istess qorti fil-kaz **Sandra Puffer vs Unabhangiger Finanzsenat** (C-460/07) tat-23 ta' April 2009, qalet:

> *"50. It follows from the scheme of Article 17 of that directive that if the taxable person chooses, when acquiring capital goods, to treat them, in their entirety, as forming part of the assets of his business, the immediate deduction of input VAT payable is permitted in relation to the part of the VAT which is proportionate to the amount relating to his taxable transactions.* ***In so far as that proportion may subsequently vary over time, Article 20 of the Sixth Directive provides for an adjustment mechanism.*** *However, if the application of Articles 17 and 20 of that directive results in the right to a partial deduction of VAT, the taxable person, like any person carrying out only taxable transactions, cannot avoid the staggered imposition of VAT on his private use of those goods".*

21. Il-Qorti tal-Gustizzja kemm-il darba fakkret li d-dritt ghal tnaqqis kontemplat fl-artikolu 168(a)[2] tad-Direttiva tal-VAT, hi parti integrali mill-iskema tat-Taxxa Fuq il-Valur Mizjud. Sistema ta' tnaqqis li l-hsieb warajha hu li n-negozjant ma

[1] Il-qorti kienet qeghda tirreferi ghas-sentenza **Rompelman vs Minister Van Financien**, C-258/83.

[2] *"In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:*

(a) *The VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person".*

jgorrx fuq spalltu il-piz tal-VAT li jkun hallas jew ikollu jhallas fil-kors tal-attivitajiet ekonomici tieghu (ara per ezempju paragrafu 44 tas-sentenza **Gabalfrisa SL u ohrajn**, C-110/98 tal-21 ta' Marzu 2000). Fis-sentenza **Hausgemeinshcaft Jorg und Stefanie Wollny** (C-72/05) tal-14 ta' Settembru 2006, il-Qorti tal-Gustizzja spjegat:

> *"20. First, according to the aim of the system introduced by the Sixth Directive, input taxes on goods or services used by a taxable person for his taxable transactions may be deducted.* ***The deduction of input taxes is linked to the collection of output taxes.*** *In so far as goods or services are used for the purposes of transactions that are taxable as outputs, deduction of the input tax on them is required in order to avoid double taxation.* ***However, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted*** *(see Case C-184/04 Uudenkaupungin kaupunki [2006] ECR I-3039, paragraph 24)".*

22. M'hemmx kontestazzjoni li l-kumpannija appellata kienet persuna taxxabbli li qeghda twettaq attivita' ekonomika u li kienu jikkonsistu f'*taxable transactions*. Ghalhekk fil-principju sa mill-bidunett kellha dritt ghal tnaqqis (*deduction*) ta' input tax. Il-fatt li inizjalment l-intenzjoni taghha kienet li tnejn mill-hames vilel jinbieghu biex jiffinanzjaw il-progett, ifisser li l-appellata ma setatx tiehu beneficcju ta' *deduction of input tax* fir-rigward tad-djar li kellha l-intenzjoni li tbiegh. Dan il-fatt kien jiddetermina l-*extent* tat-tnaqqis inizjali, liema tnaqqis il-persuna taxxabbli hu ntitolat ghalih taht l-artikolu 168 tad-Direttiva tal-VAT.

23. Fil-fehma tal-qorti favur l-argument tal-appellant hemm li:

    i. Skont artikolu 167 tad-Direttiva tal-VAT, *"A right of deduction shall arise* ***at the time the deductible tax becomes chargeable****"*. Abbinat ma' dan l-artikolu hemm l-artikolu 63, "*The chargeable event shall occur and VAT shall become chargeable* ***when the goods or the services are supplied****"*. Hu f'dak l-istadju li jitnissel id-dritt ta' persuna taxxabbli li tnaqqas l-*input vat*.

    ii. Fil-kaz ta' Lennartz, il-Qorti tal-Gustizzja ghamlitha cara li, "*12. It is apparent from the scheme of the Sixth Directive and from the actual wording of Article 20(2)*[3] *that the latter provision does no more than establish the procedure for calculating the* ***adjustments to the initial deduction****.* ***It cannot therefore give rise to any right to deduct or convert the tax paid by a taxable person <u>in respect of his non-taxable transactions</u> into a tax that is deductible within the meaning of Article 17"****.*

[3] Illum artikolu 187 (Direttiva 2006/112).

24. M'huwiex kontestat li fir-rigward taz-zewg vilel l-appellata ma kellhiex dritt ghal tnaqqis meta l-VAT saret *chargeable*, tant hu hekk li l-appellata stess m'ghamlitx it-tnaqqis. Ghaldaqstant, fil-kaz ta' dawk iz-zewg vilel *the right to deduct* qatt ma gie fis-sehh meta t-taxxa kellha tithallas mill-persuna taxxabbli, u ghalhekk ma jistax isir tnaqqis fl-istadju li l-persuna taxxabbli bidlet l-intenzjoni originali li minflok tbiegh tibda tikri wkoll iz-zewg vilel l-ohra.

25. Hi s-sentenza tal-Qorti tal-Gustizzja **Undenkaupungin kaupunki** (C-184/04) tat-30 ta' Marzu, 2006, li twassal lill-qorti biex taqbel mas-sentenza tat-Tribunal:

> *"25. The period laid down in Article 20 of the Sixth Directive for adjustment of deductions makes it possible to avoid inaccuracies in the calculation of deductions and unjustified advantages or disadvantages for a taxable person where, in particular changes occur in the factors initially taken into consideration in order to determine the amount of deductions after the declaration has been made.* ***The likelihood of such changes is particularly significant in the case of capital goods, which are often used over a number of years, during which the purposes to which they are put may alter. The Sixth Directive therefore provides for an adjustment period of five years, extendable to 20 years in the case of immovable property, with varying deductions staggered over the whole period****.*
>
> *26 The system of adjustment of deductions is an essential element of the system introduced by the Sixth Directive in that its purpose is to ensure the accuracy of deductions and hence the neutrality of the tax burden. Article 20(2) of the Sixth Directive concerning capital goods, which are relevant to the main proceedings, is moreover drafted in terms which leave no doubt as to its binding nature"*.

Ragunament li gie applikat ukoll fis-sentenza **Gmina Miedzyzdroje v Minister Finansow** tal-5 ta' Gunju, 2014 (ara paragrafi 19-27).

26. L-opinjoni tal-Avukat Generali Stix-Hackl tal-15 ta' Settembru, 2005 f'dan il-kaz ikompli jikkonvinci lill-qorti. F'dak il-kaz kien qieghed jinghad li d-dritt ta' tnaqqis kellu jigu kkunsidrat esklussivament fid-dawl tas-sitwazzjoni li kienet tezisti fiz-zmien meta servizzi kienu akkwistati. Jekk kienu akkwistat ghall-iskop ta' *'non-taxable activity'*, ma kien hemm l-ebda jedd ta' tnaqqis. F'dak il-kaz il-Kummissjoni kienet qeghda targumenta li tibdil tat-tnaqqis japplika, ghaliex skont il-gurisprudenza tal-Qorti (inkluz il-kaz ta' Lennartz), il-konsiderazzjoni deciziva kienet jekk il-beni jew servizzi ghall-investiment kapitali, kinux akkwistati minn persuna taxxabbli li kien qieghed jagixxi bhala tali. Fl-opinjoni, l-Avukat Generali qalet:

> *"35. Attention must first be drawn to the connection between the origin of the right to deduct, on the one hand, and the application of the adjustment of deductions, on the other.*

36. As the Court has held previously, it is apparent from the scheme of the Sixth Directive and from the actual wording of Article 20(2) that the latter provision does no more than establish the procedure for calculating the adjustments to the initial deduction; it cannot therefore give rise to any right to deduct or convert the tax paid by a taxable person in respect of his non-taxable transactions into tax that is deductible within the meaning of Article 17……

42. Moreover, value added tax paid in respect of goods or services is deductible only in so far as the goods and services are used for the purposes of taxable transactions.

43. In my view, however, the fact that the capital goods on which the construction and restoration work was undertaken were first used in non-taxable activity and only later in taxable activity based on the exercise of the right of option, does not preclude the right to deduct and consequently the application of an adjustment to the initial deduction.

44. As the Court held in its judgment in Lennartz, the use to which the goods or services are put, or intended to be put, is to be distinguished from their acquisition by a taxable person acting as such and merely determines the extent of the initial deduction to which the taxable person is entitled under Article 17 and the extent of any adjustments in the course of the following periods. As the Court also held in that judgment, it follows that 'the immediate use of the goods for taxable or exempt supplies does not in itself constitute a condition for the application of Article 20(2)'.

45. I therefore assume that in principle adjustment in accordance with that article is applicable even in a situation such as the present one in which capital goods were first used in non-taxable activity and only later in taxable activity, in so far as the initial acquisitions in this connection – that is, the goods and services acquired for the capital goods – were made in the capacity of taxable person".

46. Since no part of the capital goods in respect of which Uusikaupunki paid value added tax for construction and restoration work was initially used for taxable activities, no deduction was made at first. The subsequent change in the factors initially taken into account in determining the amount to be deducted, namely the use for taxable activities, was then taken into account in accordance with the available statements by way of adjustment, so as to achieve the best possible balance between the scope of the taxable activities and the deduction claimed. This solution is in line with the abovementioned objective of the rules on deduction, namely to relieve the trader entirely of the burden of the value added tax payable or paid in the course of his economic activities and thus ensure that all economic activities are taxed in a wholly neutral way.

***47. If, on the other hand, the adjustment mechanism did not apply in a situation in which capital goods were first used in non-taxable activity and later in taxable activity, the result would be that, contrary to the principle of neutrality, value added tax would effectively be payable more than once on goods and services included in the value of the capital goods**.*

48. In the light of all the foregoing, I propose that the answer to the second question should be that Article 20 of the Sixth Directive is to be interpreted as meaning that ***the adjustment is applicable even where the capital goods, in this case***

immovable property, were first used in non-taxable activity, on which no deduction could have been made, and later in taxable activity".

27. L-opinjoni tal-Avukat Generali hi cara u m'ghandha bzonn ta' ebda interpretazzjoni. Opinjoni li giet addottata mill-Qorti tal-Gustizzja (ara paragrafi 37-41 tas-sentenza) tant li fir-rigward tat-tieni domanda[4] wiegbet:

> *"42. The answer to the second question must therefore be that Article 20 of the Sixth Directive must be interpreted as meaning that* ***the adjustment provided for therein is also applicable where the capital goods were first used in non-taxable activity that was not eligible for deduction and were then used in activity, subject to VAT during the adjustment period***".

28. Ghaldaqstant, gialdarba l-appellata kienet persuna taxxabbli meta ghamlet it-tnaqqis inizjali, kellha sussegwentement fit-termini tal-artikoli 186 u 187 tad-Direttiva tal-VAT, dritt li taghmel tibdil tat-tnaqqis fir-rigward tal-ispejjez relatati maz-zewg vilel li inizjalment kellha l-intenzjoni li tuza ghal *non-taxable activity*. Ir-riferenza ghar-regolament 4(b) tar-Regolament dwar Taxxa Fuq il-Valur Mizjud (Aggustamenti li ghandhom x'jaqsmu ma' Oggetti Kapitali)[5], ma jvarja xejn. Regolament li wara kollox jirrifletti dak li jipprovdi l-artikolu 185 tad-Direttiva.

Ghal dawn il-motivi tichad l-appell bl-ispejjez kollha kontra l-appellant.

Anthony Ellul.

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[4] *"36. The second question seeks to determine whether the fact that the relevant activity was originally non-taxable and deductions were therefore totally excluded has any impact on that adjustment"*.

[5] Legislazzjoni Sussidjarja 406.12; *"L-aggustament isir meta, matul il-perjodu ta' referenza skont il-kaz: b) ikun hemm tibdil fl-elementi uzati ghall-kalkolu ta' l-input tax imnaqqsa"*. L-artikolu 185 tad-Direttiva tal-VAT tipprovdi: *"Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted,…."*