

Implementation of Environmentally Friendly Investments by Municipalities and VAT Status

Judgment of the Court of Justice of the European Union of 30 March 2023, C-612/21

When implementing renewable energy projects, municipalities that have received subsidies for the implementation of such projects do not act as VAT taxpayers and thus the activities performed by them remain outside the scope of VAT taxation.

Łukasz Kielin

University of Gdańsk, Poland

kielin.lukasz1994@gmail.com

ORCID: 0000-0003-0046-9477

<https://doi.org/10.26881/gsp.2024.1.13>

Commentary

The Court of Justice of the European Union, in the judgment of 30 March 2023¹ (Case: C-612/21), ruled that a municipality implementing pro-ecological projects for the installation of renewable energy systems (RES) does not act as a VAT taxpayer and thus the activities it performs are not subject to the aforementioned tax. In the author's opinion, the Court standpoint is correct.

The judgment under review was delivered in response to a preliminary question posed by the Supreme Administrative Court,² which sought to determine whether the provisions of the VAT Directive³ and, in particular, Articles 2(1), 9(1) and 13(1) of that Directive, should be interpreted as meaning that a municipality (a public authority) acts as a VAT payer when carrying out a project the objective of which is to increase the proportion of renewable energy sources by committing itself, by means of a contract concluded with the owners of immovable property, to a project aimed at increasing the proportion of renewable energy sources.

¹ CJEU judgment of 30 March 2023, C-612/21.

² Order of the Supreme Administrative Court of 16 April 2021, I FSK 1645/20.

³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (Official Journal of the EU L series of 2006 No. 347/1, as amended).

In the case in question, the municipality of O. installed RES on behalf of its residents (with the involvement of a specialist company) as part of a regional operational programme project aimed at transitioning to a low-carbon economy. Seventy-five percent of the costs of the project were financed by a public subsidy, and 25% by the owners of the properties on which the RES were installed. Under the terms of the project contracts between the municipality and the residents, the systems supplied were to be owned by the municipality for five years.

In the opinion of the municipality, which applied for an individual tax ruling, it does not act as a VAT taxpayer with regard to the projects implemented, so that the contribution paid by individual property owners and the subsidy obtained by the municipality are not subject to VAT. However, the director of National Fiscal Information⁴ and the Provincial Administrative Court in Warsaw⁵ disagreed with this position. On appeal, the case was brought before the Supreme Administrative Court, which referred questions to the CJEU.

Responding to the questions referred for a preliminary ruling, the CJEU held that, in the present case, the municipality did not perform the economic activity of installing renewable energy systems and thus was not acting as a taxable person for VAT. In the Court's view, this is because the municipality of O. does not intend to provide the installation of RES on a regular basis and does not employ or intend to employ personnel. At the same time, as noted by the Court, the municipality of O. limits itself to offering its residents the supply and installation of RES (through a company selected by tender) in exchange for a share of no more than 25% of the subsidisable costs associated with the supply and installation of the systems, whereas the municipality pays the company concerned remuneration for the same supply and installation at the market price. In addition, in the Court's view, it does not seem economically viable for an installer of RES to charge the recipients of its supply of goods and provision of services only at most a quarter of the costs it incurs, while expecting to be compensated by subsidy for the bulk of the remaining three quarters of these costs.

Undoubtedly, the judgment under review constitutes an extremely important decision from the point of view of the implementation of pro-environmental projects implemented by municipalities. Indeed, to date, the practice in similar cases has not been uniform. For example, in the individual interpretation of 12 December 2018 (0114-KDIP4.4012.737.2018.2.AKO), the director of National Fiscal Information stated that a municipality acts as a VAT taxpayer when implementing projects to install RES, and the subsidy received should be included in the VAT tax base.⁶ However, there are in jurisprudence practice positions to the contrary.⁷

⁴ Individual interpretation by the Director of the KIS dated 7 August 2019, 0112-KDIL4.4012.277.2019.2.MB.

⁵ Judgment of the Voivodship Administrative Court in Warsaw of 10 July 2020, III SA/Wa 2252/19.

⁶ In a similar vein, the Director of the KIS expressed his opinion in individual interpretations of 21 May 2021, 0111-KDIB3-1.4012.254.2021.2.ASY and of 25 May 2021, 0111-KDIB3-1.4012.251.2021.2.MSO.

⁷ Individual interpretation by the Director of the KIS of 17 May 2021, 0114-KDIP4-1.4012.168.2021.2.AK; see in more detail: A. Wesołowska, *Gminne inwestycje w OZE i usuwanie azbestu bez VAT. Omówienie wyroków TS z dnia 30 marca 2023 r., C-612/21 (Gmina O.) i C-616/21 (Gmina L.)*, LEX/el. 2023.

Taking this into account, it should be pointed out that the judgment under review should undoubtedly contribute to unifying, and above all changing, the practice to date of tax authorities and administrative courts on a key sustainable development issue, which is undoubtedly the development of RES. Interpretations to date have undoubtedly had a negative impact on the implementation of similar projects. When analysing the judgment under review, it is necessary, first of all, to agree with the position expressed by the Court that municipalities, when implementing pro-environmental projects aimed at the installation of RES, do not engage in economic activity and, consequently, do not act as VAT taxpayers.

It should be underlined that in light of Article 15(1) of the VAT Act,⁸ taxpayers are legal persons, organisational units without legal personality and natural persons who conduct business activity independently, regardless of the purpose or result of such activity. Pursuant to Article 15(2) of the aforementioned Act, economic activity includes any activity of producers, traders or service providers, including natural resource extraction entities and farmers, as well as the activity of liberal professionals. Economic activity includes, in particular, activities involving the use of goods or intangible assets on a continuous basis for gainful purposes.

These provisions reflect Article 9(1) of the VAT Directive, according to which a taxable person is any person who conducts independently in any place any economic activity, whatever the purpose or results of that activity, and economic activity includes any activity of producers, traders or suppliers of services, including mining, agricultural activities and activities of professions or those recognised as such. In particular, the use, on a continuing basis, of tangible or intangible property in order to obtain income therefrom shall be regarded as economic activity.

According to the provisions of the Constitution of the Republic of Poland and the Act On The Municipal Government⁹ municipality is the basic unit of local government, with legal personality and financial independence. The basic role of the municipality is to conduct tasks of a public nature, which it performs on its own behalf and at its own responsibility; however, a more complex issue is the tax status of municipalities in the light of the VAT Act.¹⁰ The national provisions, similarly to the VAT Directive, treat public authorities in a special way¹¹. In the light of Article 15(6) of the VAT Act, public authorities shall not be deemed to be taxpayers within the scope of the tasks imposed by separate provisions of law, for the performance of which they have been established, with the exclusion of activities performed on the basis of concluded civil-law contracts. The above provision mirrors Article 13 of the VAT Directive.

The provisions of the VAT Act do not contain a definition of public authorities, so in this respect it is necessary to refer to the jurisprudence of administrative courts and

⁸ Value Added Tax Act of 11 March 2004 (Journal of Laws 2022.931; hereinafter: VAT Act).

⁹ The Act of 8 March 1990 on The Municipal Government (Journal of Laws 2023.40).

¹⁰ T. Bedyga, *Gmina jako podatnik VAT – aspekty podmiotowe* [in:] *VAT w gminach*, eds. *idem et al.*, LEX/el. 2014.

¹¹ K. Różycki, *Podatnicy podatku od towarów i usług – organy władzy publicznej*, LEX/el. 2021.

the Constitutional Tribunal.¹² In the jurisprudence of the Constitutional Tribunal,¹³ administrative courts¹⁴ and the doctrine,¹⁵ local government units should be qualified as organs of public authority regardless of whether they perform their own tasks or those of government administration.

Thus, when analysing the above provisions, it should be concluded that the municipality, when performing its own tasks or tasks within the scope of government administration, should not be considered a VAT taxpayer. In this context, it should be noted that, as indicated by the applicant, in the light of Article 403(2) in conjunction with Article 400a(1), (21) and (22) of the Environmental Protection Act,¹⁶ financing environmental protection in the field of air protection projects and support for the use of local renewable energy sources and the introduction of more environmentally friendly energy carriers is the municipality's own task. The position of the municipality, which, as the applicant, indicated that it was fulfilling its own statutory tasks in the subject matter, is therefore correct in this respect; the project was conducted in the interest of the entire population by ensuring clean air and improving health conditions.¹⁷

Notwithstanding, first of all, it is necessary to share the view expressed by the Court in the judgment under review that the municipality, when implementing projects concerning the installation of RES, is not conducting economic activity. As indicated in the doctrine, it should be assumed that, in principle, economic activity is only that which is performed professionally (in a professional manner), whereas performing certain activities incidentally, outside the sphere of conducted economic activity, does not make it possible to consider a given entity as a VAT taxpayer with regard to these activities.¹⁸

In this context, it should be noted that the implementation of this type of project by the municipality is only incidental. As a general rule, local authorities do not implement projects for the installation of RES on a regular basis, as evidenced, for example, by the fact that the municipality of O. did not intend to employ specialised personnel to perform this type of service. The Court therefore rightly pointed out that the municipality's implementation of projects for installing RES is not of a permanent nature. It should be also taken into consideration that another criterion for assessing an activity as an economic activity involving the use of one's property is its profit-making nature. Taking into account the above, as indicated in the background of the case, the owners of the property only participate in the costs of its implementation and their contribution covers only part of the eligible expenditure. It is therefore impossible to consider that the projects implemented by the municipalities are of a profit-making nature.

¹² *Ibid.*

¹³ See judgment of the TK of 4 December 2001, SK 18/00.

¹⁴ Judgment of the Supreme Administrative Court of 25 November 2011, I FSK 145/11.

¹⁵ A. Derkacz, *Podmiotowość podatkowa jednostki samorządu terytorialnego na gruncie ustawy o VAT, "Municipal Finance" 2009, no. 3, p. 43.*

¹⁶ Act of 27 April 2001, Environmental Protection Law (Journal of Laws 2002.2556, as amended).

¹⁷ Individual interpretation by the Director of the KIS dated 7 August 2019, 0112 KDIL4.4012.277.2019.2.MB.

¹⁸ A. Bartosiewicz, *Article 15 [in:] VAT. Komentarz*, 16th edition, Warszawa 2022.

Taking into account the above, the Court has rightly held that municipalities implementing projects for the installation of RES should not treat the activities performed as part of these projects as subject to VAT. It should be underlined that the municipalities, when implementing projects concerning the installation of RES, do not conduct economic activity; the implementation of this type of project is only incidental. Additionally, in the author's opinion, the position of the municipality, which indicated that it was fulfilling its own statutory tasks is correct in this respect. The project was implemented in the interest of the entire population by ensuring clean air and improving health conditions.

At the same time, it should be noted that this judgment means that municipalities will not be entitled to deduct VAT from invoices documenting purchases of goods and services used for the purposes of such projects and programmes. Undoubtedly, however, this judgment should contribute to the unification of the line of jurisprudence and thus simplify the implementation of similar projects in the future. The judgment thus undoubtedly represents a certain breakthrough in previous practice, and it is hoped that it will contribute to the development of the installation of RES.

Literature

- Bartosiewicz A., *Article 15* [in:] *VAT. Komentarz*, 16th edition, Warszawa 2022.
- Bełdyga T., *Gmina jako podatnik VAT – aspekty podmiotowe* [in:] *VAT w gminach*, eds. *idem et al.*, LEX/el. 2014.
- Derkacz A., *Podmiotowość podatkowa jednostki samorządu terytorialnego na gruncie ustawy o VAT*, "Municipal Finance" 2009, no. 3.
- Różycki K., *Podatnicy podatku od towarów i usług – organy władzy publicznej*, LEX/el. 2021.
- Wesołowska A., *Gminne inwestycje w OZE i usuwanie azbestu bez VAT. Omówienie wyroków TS z dnia 30 marca 2023 r., C-612/21 (Gmina O.) i C-616/21 (Gmina L.)*, LEX/el. 2023.

Summary

Łukasz Kielin

Implementation of Environmentally Friendly Investments by Municipalities and VAT Status

The article deals with the judgment of the CJEU in case C-612/21 which answered an important question. Namely, under what circumstances can a public body be considered a taxable person for VAT. This case concerns a Polish municipality which organized the installation of renewable energy systems (RES) on its territory for its residents who own immovable property and who expressed a desire to be equipped with RES. The municipality was reimbursed with a subsidy of 75% of the subsidisable costs from the competent provincial authority. The CJEU ruled that in this specific case, the public body would not be carrying out economic activity and, therefore, should not be considered a taxable person for VAT.

Keywords: business activity, municipality, renewable energy sources, VAT.

Streszczenie

Łukasz Kielin

Realizacja proekologicznych inwestycji przez gminy a status podatnika VAT

Tematem glosy jest wyrok Trybunału Sprawiedliwości Unii Europejskiej z dnia 30 marca 2023 r. (C-612/21), w którym TSUE odpowiedział na ważne pytanie – tj. w jakich okolicznościach podmiot publiczny może zostać uznany za podatnika VAT? Powyższa sprawa dotyczyła polskiej gminy, która realizowała projekt instalacji systemów energii odnawialnej na swoim terytorium dla mieszkańców, którzy posiadają nieruchomości oraz wyrazili chęć wyposażenia ich w systemy energii odnawialnej. Zwrot kosztów przez gminę polegał na dotacji od właściwego organu wojewódzkiego w wysokości 75% kosztów podlegających dofinansowaniu. W glosowanym wyroku TSUE orzekł, że w konkretnym przypadku podmiot publiczny nie prowadziłby działalności gospodarczej, a zatem nie powinien być uznany za podatnika VAT.

Słowa kluczowe: działalność gospodarcza, gmina, OZE, VAT.