EUROPEAN COMMISSION
DIRECTORATE GENERAL
REGIONAL AND URBAN POLICY

The Deputy Director-General

Brussels,
JP/*regio.dga2.h.2(2016)**3463989***

Subject: Eligibility of the value-added tax (VAT) in solid waste, wastewater and water supply projects within Polish Operational Programmes (OPs) in 2007-2013

Dear Minister

Thank you for your letter ref. *DKF.IV.8517.32.2015.GB.2* of 20 January 2016, in which you provided further explanation concerning the issue of eligibility of value-added tax (VAT) in solid waste, wastewater and water supply projects within the Polish OPs in 2007-2013 programming period.

In this letter, you point out that the analysis of VAT eligibility should take account of the status of the company that owns or manage the infrastructure - whether it is a taxable person or not. This is irrespective of the functional solutions applied by the beneficiaries.

Three types of companies are analysed as regards the management of the infrastructure:

(1) Municipal budgetary entities

(2) Municipal budgetary establishments

(3) Municipal companies

Your letter concludes that, in the case of the two first types of companies, VAT can be considered ineligible since in the light of the VAT Directive municipal budgetary entities and municipal budgetary establishments cannot be considered as "taxable persons" for the purpose of VAT, as confirmed by the judgment of the European Court of Justice C-276/141 for municipal budgetary entities and by the resolution I FPS 4/15 of the Supreme Administrative Court for municipal budgetary establishments. I take note that for these two cases the managing authorities will correct the statements of expenditure by decertifying the amounts of VAT concerned. In January 2016 you estimated these amounts at PLN 633.8 million. However, as indicated in your letter, the assessment was finalised only for thirteen programmes, and I believe that by now you have a complete overview of the situation. I am therefore looking forward to receiving

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the latest figures of VAT, which will be decertified with a breakdown by each programme concerned.

As regards the third case mentioned in your letter i.e. where the infrastructure was transferred to a municipal company you point out that it is not justified to consider VAT as ineligible expenditure, as the beneficiary is not entitled to recover VAT paid at the construction phase. In this specific case, you refuse to apply a financial correction.

The Commission departments cannot agree with your position. Where infrastructure was transferred to municipal companies, the judgment of the European Court of Justice C-276/141 has no impact on the issue of eligibility of VAT. The ruling of the Court dealt with the interpretation of Article 9(1) of the VAT Directive with regard to the issue of taxable / non-taxable status of municipalities and its municipal entities and not about VAT recoverability under cohesion policy. The only conclusion the judgement draws is that "municipal entities" are the same as the municipalities themselves and are treated in the same way as municipalities for VAT purposes.

VAT recoverability in solid waste, wastewater and water supply projects implemented in 2007-2013 programming period shall therefore be determined according to cohesion policy rules, as outlined in our earlier correspondence *ref. Ares (2015)2736827 of 30 June 2015* and *Ares (2015)4888193 of 6 November 2015* and irrespective of the determination of the taxable or non-taxable status of beneficiaries under tax law.

According to ERDF and Cohesion Fund regulations for the 2007-2013 programming period, VAT is not eligible whenever (VAT is) recoverable. "Recoverable" is a wider concept that that of the VAT Directive, to which the judgment of the European Court of Justice C-276/141 refers and which uses the terms such as "refund" and "deduct" to allow for recovering VAT on input by offsetting it against VAT on output. "Recoverable" covers all mechanisms, even those outside the refund and deduction mechanism of the VAT system, which allows for alleviating the beneficiary from the economic burden of paying VAT (on "input"). In addition, for revenue generating projects, the construction and exploitation phases of a project cannot be seen in isolation from one another but as an inseparable whole. This means that the question whether VAT should be considered recoverable or not for the body constructing an infrastructure under cohesion policy rules should be examined in parallel with the question whether VAT is charged on the revenues in the operation phase, irrespective of the set up chosen by the Member State. Therefore, the Member State should not be entitled to maintain that VAT is a non-recoverable expenditure when it is paid by beneficiaries who transfer exploitation tasks of co-financed projects to other entities that will charge VAT on revenues.

If considerations such as the ones suggested in your letter were taken into account and had an impact on eligibility of VAT (i.e. distinction between constructor and operator following the legally and economically distinct status of those bodies), Member States would be allowed to always artificially render VAT irrecoverable and thus eligible. In this respect, we consider that where VAT is charged on the revenues in the operation phase of an infrastructure VAT on construction should always be considered as recoverable and therefore ineligible irrespective of the status of the entities owning and managing the infrastructure under tax law.

On the basis of the above assumptions, the Commission departments maintain the position expressed in our earlier correspondence ref. *Ares (2015)2736827 of 30 June 2015* and *Ares (2015)4888193 of 6 November 2015,* and, as in consequence, I invite you

to re-assess the eligibility of VAT expenditure in solid waste, wastewater and water supply projects co-funded under Polish programmes in the 2007-2013 period by:

- Completing, for all programmes, your assessment of the projects, in which the infrastructure constructed was or is going to be transferred to municipal budgetary entities or municipal budgetary establishments;

- including in the afore-mentioned assessment the projects where the infrastructure was transferred to a municipal company.

The information should be provided, as outlined in Annex I to our letter *Ares (2015)2736827 of 30 June 2015* by 15 October 2016 at the latest (also attached to this letter for your convenience).

I would also be grateful to you for informing us whether any of the VAT amounts have already been decertified, and if yes, under which payment claim (date and number). The remaining amounts should be decertified from the next interim payment claims or the final payment claim.

Yours faithfully,

Normunds Popens

Copy: Directorate-General Regional and Urban Policy:
Mr Sébert, Mr Grant, Mr Gilland, Ms van den Abeele

Annexes: Assessment table