

62018CJ0707

JUDGMENT OF THE COURT (Eighth Chamber)

19 December 2019 (*1)

(Reference for a preliminary ruling — Taxation — Common system of value added tax — Directive 2006/112/EC — Taxable transactions — Deduction of input tax — Purchase of immovable property not registered in the national land register — First-registration costs incurred by the purchaser — Recourse to specialist third companies — Participation in a supply of services or investment expenditure carried out for the purposes of an undertaking)

In Case C-707/18,

REQUEST for a preliminary ruling under Article 267 TFEU from Tribunalul Timiș (Timiș Regional Court, Romania), made by decision of 30 October 2018, received at the Court on 13 November 2018, in the proceedings

Amrăți Land Investment SRL

v

Direcția Generală Regională a Finanțelor Publice Timișoara,

Administrația Județeană a Finanțelor Publice Timiș,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský (Rapporteur) and N. Wahl, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

—

the Romanian Government, by C.-R. Canțar, R.I. Hațieganu and L. Lițu, acting as Agents,

—

the European Commission, by L. Lozano Palacios and A. Biolan, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Articles 24, 28, 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, ‘the VAT Directive’).

2

The request has been made in proceedings between, of the one part, Am?r??ti Land Investment SRL and, of the other, the Direc?ia General? Regional? a Finan?elor Publice Timi?oara (Regional Directorate-General of Public Finances of Timi?oara, Romania) and the Administra?ia Jude?ean? a Finan?elor Publice Timi? (Departmental Administration for Public Finances of Timi?, Romania), concerning the right to reimbursement of the value added tax (VAT) on transactions by which Am?r??ti Land Investment carried out, at its own expense, the necessary steps for the first registration in the national land register (‘the Land Register’) of the land which it intended to purchase.

Legal context

EU law

3

Under Article 2(1) of the VAT Directive:

‘The following transactions shall be subject to VAT:

...

(c)

the supply of services for consideration within the territory of a Member State by a taxable person acting as such’.

4

Article 24(1) of that directive provides:

“‘Supply of services” shall mean any transaction which does not constitute a supply of goods.’

5

Article 28 of the VAT Directive is worded as follows:

‘Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.’

6

Article 167 of that directive provides:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

Article 168 of the VAT Directive, in Title X of that directive, entitled 'Deductions', is worded as follows:

'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;

...'

Romanian law

Law No 227/2015:

Article 297(4) of the Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 on the Tax Code):

'All taxable persons have the right to deduct tax relating to purchases if they are used for the purposes of the following transactions:

(a)

taxable transactions;

...'

Article 271(2) of that law provides:

'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.'

The Civil Code

Article 885(1) of the Legea nr. 287/2009 privind Codul civil al României (Law No 287/2009 on the Romanian Civil Code) (Monitorul Oficial al României, Part I, No 505, of 15 July 2011, 'the Civil Code'), is worded as follows:

'Subject to legal provisions to the contrary, real rights in immovable property included in the Land Register shall be acquired, both as between the parties and as regards third parties, only by their registration in the Land Register, on the basis of the act or fact justifying their registration.'

Article 886 of the Civil Code provides:

‘Unless otherwise provided for by law, any alteration of a real right shall be made in accordance with the rules which govern the acquisition and extinction of real rights.’

12

Under Article 888 of the Civil Code:

‘Registration in the Land Register shall be effected on the basis of a notarial act, a final court decision, a certificate of succession or other act adopted by an administrative authority where so provided for by law.’

13

Article 893 of that code states:

‘Registration of a real right may be effected only:

(a)

as against persons who, at the date of registration of the application, are registered as the holders of the rights for which the registration is to be made;

...’

14

Article 1244 of the Civil Code provides:

‘Except in such other cases as are provided for by law, agreements which transfer or create real rights that are to be registered in the Land Register shall be concluded by authentic instrument, failing which they shall be null and void.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

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Am?r???ti Land Investment was established in 2014 for the purposes of carrying out agricultural activities, and purchased land to that end.

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That land was purchased by means of a two-stage process. First, a bilateral promise to sell was concluded between the person promising to sell land (‘the promissory vendor’) and Am?r???ti Land Investment, whereby the latter acquired a claim to ownership to that land. Secondly, upon completion of the administrative formalities provided for by law for concluding the contract, that contract was signed by the parties concerned.

17

In that regard, the referring court states that Romanian law requires contracts for the sale of immovable property, such as the land at issue in the main proceedings, to take the form of authentic instruments and that, in order for those contracts to be validly concluded by authentic

instrument, the land concerned must be registered in the Land Register and the vendor recorded there as the proprietor of the land, which was not the case of the land at issue in the main proceedings.

18

In the context of its investments in land, and in order to complete the required administrative formalities before concluding the contract for the sale of that land, Am?r??ti Land Investment availed itself, at its own expense, of the services provided by third parties, such as lawyers, notaries and companies providing specialist land-registration and topographic services. In particular, it availed itself of the services of a land-registration company for the purposes of the first registration of the land in the Land Register.

19

The promises to sell the land concerned included a clause whereby the promissory vendor agreed that Am?r??ti Land Investment may carry out at its own expense all the work of gathering documentation, preparing files and authenticating and registering documents, and all the work relating to the Land Register and to the registration of the land in that register. In addition, the promissory vendor stated that it understood that all the registration procedures carried out by Am?r??ti Land Investment were absolutely necessary in order for the contract of sale to be able to be concluded by authentic instrument.

20

The costs linked to the first registration of that land in the Land Register, which the parties to the contract valued by common accord at EUR 750 per hectare, were not re-invoiced to the vendor. The promises to sell stated, in addition, that Am?r??ti Land Investment was to pay the vendor, at the time they were concluded, the full price of the land, which did not include the value of the land-registration operations.

21

Those promises to sell included moreover a clause whereby the vendor was required to pay Am?r??ti Land Investment the costs incurred to register the land concerned in the Land Register and damages in the amount of EUR 2000 per hectare if it failed to fulfil its obligation to conclude the contract of sale within the prescribed period, either through its own fault or for any other reason except for reasons attributable to Am?r??ti Land Investment.

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Following the purchase of the land, Am?r??ti Land Investment submitted, on 23 January 2017, a request for the reimbursement of VAT in the sum of 73828 Romanian lei (RON) (approximately EUR 15456), which was accepted by the tax authorities.

23

However, those authorities subsequently issued an additional VAT assessment of 41911 RON (approximately EUR 8772), on the ground that the sum of EUR 750 per hectare referred to in paragraph 20 above represented the value of the service, supplied by Am?r??ti Land Investment to the vendors, relating to the registration of the land concerned and the conclusion of the contracts of sale by authentic instrument in return for the supply of that land. Those authorities stated, in that regard, that in return for that land, Am?r??ti Land Investment had, first, paid a price and, secondly, supplied a service to the vendors, the cost of which had necessarily to be borne by

them.

24

Am?r??ti Land Investment challenged the tax assessment notice concerning the additional VAT that it was required to pay, but its appeal was dismissed by the tax authorities on the ground that Am?r??ti Land Investment had supplied the services at issue in its own name, but on behalf of the vendors, without, however, invoicing their value to the beneficiaries or collecting the relevant VAT.

25

Before the referring court, Am?r??ti Land Investment submits that the costs incurred by it valued at EUR 750 per hectare are investment-related costs incurred for the purposes of carrying out taxable transactions, for which it is entitled to deduct VAT.

26

It further submits that the amount of the costs related to the registration of the land at issue in the main proceedings in the Land Register was fixed at EUR 750 per hectare, in order to make it easier to evaluate the damage which could have been caused to it if the vendors had not fulfilled their obligation to conclude the contracts of sale for the land by authentic instrument. Am?r??ti Land Investment states that, in practice, that amount, which varied from one transaction to another, could be greater or less than EUR 750.

27

Since it considered that the case before it requires an interpretation of the provisions of EU law, Tribunalul Timi? (Timi? Regional Court, Romania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

Is [the VAT Directive], and in particular Articles 24, 28, 167 and 168(a) thereof, to be interpreted as meaning that, in the context of a transaction for the sale of immovable property which is not included in the [national register of immovable property] (Land Register) and which is not registered at the time of the supply, the purchaser, who is a taxable person and who assumes a contractual obligation to carry out, at his or her own expense, the necessary steps for its first registration in the Land Register, carries out a supply of services to the vendor, or instead a purchase of services relating to his or her investment in immovable property in respect of which he or she is entitled to deduct VAT?

(2)

Is [the VAT Directive, and in particular Articles 167 and 168(a) thereof, to be interpreted as meaning that the costs incurred by a purchaser, who is a taxable person, in connection with the first registration in the Land Register of property in respect of which the purchaser has a claim for the future transfer of ownership and which has been supplied to him by a vendor whose ownership of the property is not recorded in the Land Register, can be classified as pre-investment operations in respect of which the taxable person is entitled to deduct VAT?

(3)

Is [the VAT Directive], and in particular Articles 24, 28, 167 and 168(a) thereof, to be interpreted as meaning that the costs incurred by the purchaser, who is a taxable person, in connection with the

first registration in the Land Register of property which has been supplied to him or her and in respect of which the purchaser has a contractual claim for the future transfer of ownership from a vendor whose ownership of the property is not recorded in the register of immovable property, are to be classified as the provision of services to the vendor in a context in which the purchaser and the vendor have agreed that the price of the immovable property does not include the value of the land-registration operations?

(4)

For the purposes of [the VAT Directive], must the costs of administrative operations relating to immovable property which has been supplied in respect of which the purchaser has a claim for the future transfer of ownership from the vendor, including, but not limited to the costs of first registration in the Land Register, necessarily be borne by the vendor, or may such costs be borne, pursuant to an agreement between the parties, by the purchaser or by any other of the parties to the transaction, with the result that that person is entitled to deduct the VAT?’

Consideration of the questions referred

The fourth question

28

By its fourth question, which must be answered first of all, the referring court asks, in essence, whether the VAT Directive must be interpreted as precluding the parties to a transaction, the aim of which is to transfer the ownership of immovable property, from agreeing that the future purchaser (‘the purchaser’) will incur some or all of the costs of the administrative formalities relating to that transaction — in particular those connected with the first registration of that property in the Land Register — and as thereby precluding the purchaser from being entitled to deduct VAT.

29

In that regard, the Court notes that the VAT Directive does not include any provision restricting the freedom generally available to the parties to a property sale transaction, such as that at issue in the main proceedings, to determine by contract which of them will incur the cost of the administrative formalities linked to that transaction.

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In addition, it must be found that, as is apparent from the order for reference, the national legislation at issue in the main proceedings requires immovable property which is to be sold to be registered in the Land Register and the person who is the vendor to be recorded there as the proprietor, failing which the contract of sale will be void.

31

However, the first registration of that property in the Land Register and the entry of the proprietor’s name therein are not within the freedom of contract of the parties to a property sale, since they reflect a statutory obligation on the vendor.

32

Consequently, the insertion of a contractual clause, such as that at issue in the main proceedings, intended to make the purchaser liable for the costs linked to the first registration of the property in

question in the Land Register and to the entry of the proprietor's name there cannot derogate from the statutory nature of the obligation, incumbent upon the future vendor ('the vendor'), which gives rise to such costs, nor replace that obligation.

33

Consequently, the mere presence of such a clause in a bilateral promise for the sale of immovable property is not determinative in order to ascertain whether the purchaser is entitled to deduct the VAT relating to the payment of the costs arising from the first registration of the immovable property concerned in the Land Register.

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In the light of all the foregoing considerations, the answer to the fourth question is that the VAT Directive must be interpreted as not precluding the parties to a transaction, the aim of which is to transfer the ownership of immovable property, from agreeing a clause according to which the purchaser will incur some or all of the costs of the administrative formalities relating to that transaction, in particular those connected with the first registration of that property in the Land Register. However, the mere presence of such a clause in a bilateral promise for the sale of immovable property is not determinative in order to ascertain whether the purchaser is entitled to deduct the VAT relating to the payment of the costs arising from the first registration of the property concerned in the Land Register.

The first and third questions

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By its first and third questions, which must be examined together in the second place, the referring court asks, in essence, whether the VAT Directive, and in particular Article 28 thereof, must be understood as meaning that, in the context of a bilateral promise for the sale of immovable property not registered in the Land Register, the purchaser — a taxable person — who, as he or she contractually undertook to do with regard to the vendor in that promise, carries out the necessary steps for the first registration of the immovable property concerned in that register by having recourse to the services provided by third parties who are taxable persons, is deemed to have supplied the services in question himself or herself to the vendor, within the meaning of Article 28 of that directive, even though the parties to the contract agreed that the sale price of that property does not include the value of the land-registration operations.

36

In that regard, the Court points out that Article 28 of the VAT Directive provides that where a taxable person acting in his or her own name but on behalf of another person takes part in a supply of services, he or she is to be deemed to have received and supplied those services himself or herself.

37

Accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively, with the operator, who takes part in the supply of services and who constitutes the commission agent, being considered to have, first, received the services in question from specialist providers before providing, secondly, those services to the operator on behalf of whom it acts (judgment of 4 May 2017, *Commission v Luxembourg*, C-274/15, EU:C:2017:333, paragraph 86).

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In the light of the foregoing, and since Article 28 of Directive 2006/112 comes under Title IV of that directive, entitled ‘Taxable transactions’, it must be found that if the supply of services in which an operator takes part is subject to VAT, the legal relationship between that operator and the operator on behalf of whom it acts must also be subject to VAT (see, to that effect, judgment of 4 May 2017, *Commission v Luxembourg*, C-274/15, EU:C:2017:333, paragraph 87).

39

First, in the case in the main proceedings, it is not in dispute that, when it concluded a contract with third parties, who are taxable persons, with a view to carrying out the necessary steps for the first registration of the immovable property concerned in the Land Register, Am?r??ti Land Investment acted in its own name.

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As regards, secondly, whether, in that context, Am?r??ti Land Investment acted on behalf of the vendor of that property, it must be borne in mind that, as is apparent from paragraph 31 above, the obligation to effect the first registration of property in the Land Register reflects a statutory obligation incumbent upon the vendor, who must also be entered in that register as the proprietor of that property.

41

It follows that, if, under a contract concluded with the vendor of the property, the purchaser carries out, at his or her own expense, the necessary steps for the first registration of that property in the Land Register and the entry of the proprietor therein, in order to comply with a statutory obligation of that proprietor, those steps must be deemed to have been carried out on behalf of another person, within the meaning of Article 28 of the VAT Directive.

42

In the third place, given that the wording of Article 28 of the VAT Directive does not lay down any condition concerning whether the participation in the supply of services should be for consideration, the fact that the costs linked to the first registration of the property concerned in the Land Register were not re-invoiced to the vendor by the purchaser, so that the value of the land-registration operations was not included in the sale price of that property, is irrelevant for the purposes of applying Article 28 of that directive.

43

In the light of the foregoing considerations, the answer to the first and third questions is that the VAT Directive, and in particular Article 28 thereof, must be interpreted as meaning that, in the context of a bilateral promise for the sale of immovable property not registered in the Land Register, the purchaser — a taxable person — who, as he or she contractually undertook to do

with regard to the vendor in that promise, carries out the necessary steps for the first registration of the property concerned in that register by having recourse to the services provided by third parties who are taxable persons, is deemed to have supplied the services in question himself or herself to the vendor, within the meaning of Article 28, even though the parties to the contract agreed that the sale price of that property does not include the value of the land-registration operations.

The second question

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By its second question, the referring court asks, in essence, whether the VAT Directive, and in particular Articles 167 and 168(a) thereof, must be understood as meaning that the costs incurred by an undertaking established in order to carry out agricultural activities, which avails itself of the services of third parties who are taxable persons, for the purposes of the first registration in the Land Registry of the land which it purchases, are capable of being characterised as investment costs for the purposes of the economic activity which it intends to begin carrying out.

45

As may be seen from the request for a preliminary ruling and from the actual wording of the first question, it is apparent that the second question has been referred should the purchaser, who is a taxable person, not be deemed to have supplied the services in question himself or herself to the vendor, within the meaning of Article 28 of the VAT Directive.

46

Since the Court has held, in its answer to the first and third questions, that a purchaser such as the applicant in the main proceedings is deemed to have supplied the services in question itself to the vendor, within the meaning of Article 28 of the VAT Directive, there is no need to answer the second question.

Costs

47

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1.

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding the parties to a transaction, the aim of which is to transfer the ownership of immovable property, from agreeing a clause according to which the future purchaser will incur some or all of the costs of the administrative formalities relating to that transaction, in particular those connected with the first registration of that property in the national land register. However, the mere presence of such a clause in a bilateral promise for the sale of immovable property is not determinative in order to ascertain whether the future purchaser is entitled to deduct the value added tax relating to the payment of the costs arising from the first registration of the property concerned in the national land register.

2.

Directive 2006/112, and in particular Article 28 thereof, must be interpreted as meaning that, in the context of a bilateral promise for the sale of immovable property not registered in the national land register, the future purchaser — a taxable person — who, as he or she contractually undertook to do with regard to the future vendor in that promise, carries out the necessary steps for the first registration of the property concerned in that register by having recourse to the services provided by third parties who are taxable persons, is deemed to have supplied the services in question himself or herself to the future vendor, within the meaning of Article 28, even though the parties to the contract agreed that the sale price of that property does not include the value of the land-registration operations.

[Signatures]

(*1) Language of the case: Romanian.