Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

16 September 2020 (*)

(Reference for a preliminary ruling – Directive 2006/112/EC – Common system of value added tax (VAT) – Article 9(1) – Article 193 – Concept of ‘taxable person’ – Joint activity agreement – Partnership – Allocation of an economic transaction to one of the partners – Determination of the taxable person liable for the tax)

In Case C?312/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 10 April 2019, received at the Court on 16 April 2019, in the proceedings

XT

v

Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, A. Prechal (Rapporteur), President of the Third Chamber, and F. Biltgen, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Lithuanian Government, by K. Dieninis and V. Vasiliauskien?, acting as Agents,

– the European Commission, by R. Lyal and J. Jokubauskait?, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 9(1), Article 193 and Article 287 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2013/43/EU of 22 July 2013 (OJ 2013 L 201, p. 4) (‘Directive 2006/112’).

2 The request has been made in proceedings between XT and the Valstybin? mokes?i?

inspekcija prie Lietuvos Respublikos finans? ministerijos (State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania) concerning an order issued to XT by the Vilniaus apskrities valstybin? mokes?i? inspekcija (Vilnius District State Tax Inspectorate, Lithuania; 'the Vilnius tax authority') requiring payment of value added tax (VAT) together with default interest and of a fine following undeclared property transactions.

Legal context

EU law

3 Article 9(1) of Directive 2006/112 is worded as follows:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

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.'

4 Article 14 of Directive 2006/112 states:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

…

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.

3. Member States may regard the handing over of certain works of construction as a supply of goods.'

5 As provided in Article 28 of Directive 2006/112:

'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 193 of Directive 2006/112 provides:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199b and Article 202.'

7 Article 226 of Directive 2006/112 states:

'Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(5) the full name and address of the taxable person and of the customer;

…’

8 Article 287 of Directive 2006/112 is worded as follows:

‘Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession:

…

(11) Lithuania: EUR 29 000;

…’

9 Article 1 of Council Implementing Decision 2011/335/EU of 30 May 2011 authorising the Republic of Lithuania to apply a measure derogating from Article 287 of Directive 2006/112 (OJ 2011 L 150, p. 6) provides:

‘By way of derogation from Article 287(11) of Directive [2006/112], the Republic of Lithuania is authorised to exempt from VAT taxable persons whose annual turnover is no higher than the equivalent in national currency of EUR 45 000 at the conversion rate on the day of its accession to the European Union.’

Lithuanian law

The Law on VAT

10 As provided in Article 2 of the Lietuvos Respublikos prid?tin?s vert?s mokes?io ?statymas (Law of the Republic of Lithuania on VAT) (Žin., 2002, No 35?1271), in the version in force for the 2010 to 2013 tax years (‘the Law on VAT’):

‘…

2. “Taxable person” shall mean a taxable person of the Republic of Lithuania or of a foreign State.

…

15. “Taxable person of the Republic of Lithuania” shall mean a legal or natural person of the Republic of Lithuania carrying out economic activities of any type, as well as a collective investment undertaking established in the Republic of Lithuania which does not have the status of legal person and acts as an investment fund.

…’

11 Article 71 of the Law on VAT is worded as follows:

‘1. The obligation to register for VAT and calculate VAT and pay it into the budget shall be owed by taxable persons supplying goods and services in the territory of the country … A person liable to register for VAT must submit an application for registration for VAT.

2. Notwithstanding paragraph 1 of this article, a taxable person of the Republic of Lithuania

shall not be required to submit an application for registration for VAT and to calculate VAT and pay it into the budget … where the total annual amount of consideration within the last 12 months for goods and/or services supplied in the territory of the country while carrying out economic activities has not exceeded 155 000 litai [(LTL), approximately EUR 45 000)]. VAT shall be begun to be calculated from the month when that limit has been exceeded. No VAT shall be calculated in respect of the goods and services supplied the consideration for which did not exceed the specified amount of [LTL] 155 000 …

…

4. Failure to submit an application for registration for VAT shall not exempt a taxable person from the obligation to calculate VAT in respect of the goods and/or services supplied by him or her … and to pay it into the budget …'

12 Article 79(1) and (5) of the Law on VAT provides:

'1. A taxable person … shall document the supply of goods or services that has taken place by means of a VAT invoice …

…

5. In the manner and in cases determined by the Government of the Republic of Lithuania or an institution authorised by it, goods or services supplied jointly by several VAT payers may be documented in one invoice.'

The Civil Code

13 Article 6.969(1) of the Lietuvos Respublikos Civilinis kodeksas (Civil Code of the Republic of Lithuania), in the version resulting from Law No VIII?1864 of 18 July 2000 ('the Civil Code'), provides:

'By a joint activity (partnership) agreement two or more persons (partners), co-operating by means of their property, work or knowledge, undertake to act jointly for a certain goal which does not contravene the law or for a certain activity.'

14 Article 6.971 of the Civil Code states:

'1. The property contributed by the partners, which was previously in their ownership, as well as the production during joint activities and the income and fruits from them, shall be in the joint partial ownership of all the partners, unless otherwise established by law or the joint activity agreement.

…

3. One of the partners, designated by joint agreement of all the partners, shall be responsible for the accounting of the joint property.

4. The joint property shall be used, possessed and disposed of by joint agreement of all the partners. In the event of a dispute, those arrangements shall be established by a court at the request of any of the partners. …'

15 Article 6.972(1) and (2) of the Civil Code states:

'1. While managing joint affairs, each of the partners shall be entitled to act on behalf of all the

partners, unless the joint activity agreement provides that joint affairs shall be managed by one of the partners or all the partners together. If affairs may be managed only by all the partners together, the conclusion of each transaction shall require the consent of all the partners.

2. In the case of relations with third parties, the right of a partner to conclude the transactions on behalf of all the partners shall be affirmed by a power of attorney issued by the remaining partners, or by the joint activity agreement.'

16 Article 6.974 of the Civil Code, headed 'Joint expenses and joint losses', is worded as follows:

'1. The allocation of joint expenses and joint losses related to the joint activity shall be established by the joint activity agreement. If there is no such arrangement, each partner shall be liable for joint expenses and joint losses in proportion to the amount of his or her share.

2. An arrangement which releases one of the partners fully from coverage of joint expenses or joint losses shall be invalid.'

17 Article 6.975(3) of the Civil Code provides:

'If the joint activity agreement is related to commercial activity of the partners, all the partners shall be jointly and severally liable under the joint obligations, irrespective of the basis upon which those obligations arise.'

18 Under Article 6.976(1) of the Civil Code, 'the profit obtained from the joint activity shall be distributed among the partners in proportion to the value of the contribution of each of them to the joint activity, unless otherwise provided in the joint activity agreement'.

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

19 On 19 February 2010, XT and another natural person ('the partner') concluded a joint activity agreement ('the agreement at issue') – as envisaged in Article 6.969(1) of the Civil Code under the designation 'partnership' – which was concerned with working together for the purpose of constructing a residential property ('the partnership at issue').

20 On 25 April 2010, XT and his partner decided to purchase a plot of land in the District of Vilnius (Lithuania). On 27 April 2010, XT alone signed the contract of sale with the plot's owners. He contributed 30% of the transaction price and the partner 70%, by passing his contribution to XT. It was decided that only XT would be entered in the land register as owner of the plot.

21 On 5 May 2010, XT and his partner decided to construct a set of five buildings, to make XT responsible for the administrative formalities necessary for construction and to entrust a property development company in which XT held the position of director with the execution of the construction works. A property development agreement with that company was concluded on 22 May 2010, in which XT was both the client and that company's representative.

22 On 2 November 2010, XT obtained, in his name, a construction permit for the construction of five buildings on the plot of land in question.

23 On 2 December 2010, XT and his partner decided to sell the first building with a part of the plot of land and to use the funds obtained for future construction. The contract of sale in respect of the first building was signed on 14 December 2010 by XT and the purchasers, who were natural persons.

24 On 10 January 2011, XT and his partner concluded an agreement terminating the partnership at issue and dividing up assets and liabilities. It was agreed thereunder to grant the partner the right to certain produced assets, namely the fourth and fifth buildings. XT also undertook to pay to his partner by 2017 the sum of LTL 300 000 (approximately EUR 86 886) to compensate for the difference between their respective contributions and the difference between the shares of the joint assets falling to them. The first, second and third buildings were allocated to XT under that agreement.

25 On 15 February 2011, the property development company drew up an invoice that indicated a sum payable by way of VAT, for construction of the first four buildings. For the construction of the fifth building, it drew up on 11 February 2013 an invoice that indicated a sum payable by way of VAT.

26 By contracts concluded between XT and natural persons, the second and third buildings were sold on 30 May 2011 and 13 November 2012.

27 On 1 February 2013, XT and his partner signed a deed for the transfer (division) of assets, in which it was stipulated that, having regard to the agreement concluded on 10 January 2011, XT transferred the fourth and fifth buildings to his partner.

28 On 6 February 2013, XT and his partner decided, pursuant to the agreement at issue, that XT would sell the fifth building, for which he was entered in the land register as owner, and transfer the sum obtained to his partner. That sale took place on 13 February 2013.

29 Since XT and his partner did not consider that the sales of the buildings to third parties (‘the supplies at issue’) constituted an economic activity subject to VAT, the invoices payable by the purchasers did not have VAT added to them. Nor did XT and his partner declare or pay VAT or deduct the input tax paid.

30 After carrying out a tax inspection in respect of XT regarding income tax and VAT for 2010 to 2013, the Vilnius tax authority found that the activity in the context of which the supplies at issue were made and the supplies at issue themselves had to be regarded as constituting together a single economic activity for the purposes of VAT. Since the Vilnius tax authority considered XT to be a ‘taxable person’, liable for performance of the VAT obligations, it ordered him to pay the VAT on those transactions, together with default interest, and to a pay a tax fine, while accepting, however, a deduction of the input tax paid by him, in accordance with the invoices drawn up by the property development company.

31 That decision was then upheld by the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania, by the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s (Tax Disputes Commission under the Government of the Republic of Lithuania) and by the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania). XT has asked the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) to set aside that court’s judgment.

32 In examining that action, the referring court has doubts as to whether the party liable for VAT should be determined as being XT or as being the partnership at issue, that is to say, both partners of the entity set up by the agreement at issue, in the light of the fact that Lithuanian law does not accord legal personality to a partnership.

33 Those doubts are brought about by the referring court’s findings that, on the one hand, (i) that partnership was not called into question by the Vilnius tax authority, (ii) the agreement at issue

states that XT acts in the name of both partners in relations with third parties and (iii) the various decisions taken by XT and his partner in implementation of that agreement form the basis of the acts carried out by XT, so that there is reason to think that, in the light of the facts set out, XT did not independently carry out an economic activity. The partnership at issue, by contrast, fulfils the criteria set out in Article 9(1) of Directive 2006/112.

34 The referring court finds, on the other hand, that, in relations with third parties, including as regards the supplies at issue, it was only XT who participated, as his partner essentially did no more than provide part of the finance for the purchase of the plot of land, and that the purchasers involved in those supplies were unaware of the partner's existence.

35 Should the Court hold that the partnership at issue is to be regarded as liable for VAT, the referring court seeks, by its second question, to ascertain how the tax obligations are allocated. The referring court is uncertain, in that respect, whether each partner is to be regarded as obliged individually to pay VAT in proportion to his share of the consideration received for the properties supplied in the course of the economic activities, and what the basis should be when calculating the VAT exemption provided for in Article 287 of Directive 2006/112.

36 In those circumstances, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 9(1) and Article 193 of [Directive 2006/112] to be interpreted as meaning that, in circumstances such as those in the case under consideration, a natural person such as the applicant cannot be regarded as having "independently" carried out the (economic) activity in question and as having to pay by him or herself the [VAT] on the contested supplies, that is to say, for the purposes of Article 9(1) and Article 193 of Directive [2006/112], is the taxable person liable for the obligations at issue to be taken to be the joint activity/partnership (the participants in the joint activity collectively; in the instance under consideration, the applicant and his business partner collectively) – which under national law is not regarded as a taxable person and does not enjoy legal personality – and not solely a natural person such as the applicant?

(2) If the first question is answered in the affirmative, is Article 193 of Directive [2006/112] to be interpreted as meaning that, in circumstances such as those in the case under consideration, VAT is paid individually by each of the participants (in the instance under consideration, the applicant and his business partner) in the joint activity/partnership – which joint activity/partnership is, under national law, not regarded as constituting a taxable person and does not enjoy legal personality – on the part of each payment by way of consideration that is received by them (or is receivable by or owed to them) for the taxable supplies of immovable property? Is Article 287 of Directive [2006/112] to be interpreted as meaning that, in circumstances such as those in this case, the annual turnover referred to in that provision is established by taking into account the entire revenue of the joint activity (received collectively by the participants in the joint activity)?'

Consideration of the questions referred

The first question

37 By its first question, the referring court asks, in essence, whether Article 9(1) and Article 193 of Directive 2006/112 must be interpreted as meaning that a natural person who has concluded with another natural person a joint activity agreement setting up a partnership, which lacks legal personality and is characterised by the fact that the first person is empowered to act in the name of the partners as a whole, but participates alone and in his or her own name in relations with third parties when performing acts that form the economic activity pursued by that partnership, carries

out that activity independently and must accordingly be regarded as a ‘taxable person’ within the meaning of Article 9(1) of Directive 2006/112 and as having sole liability for the VAT payable under Article 193 of that directive.

38 Article 9(1) of Directive 2006/112 provides that ‘“taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity’. In accordance with Article 193 of that directive, VAT is payable by any taxable person carrying out a supply of goods, except where it is payable by another person in the cases referred to in Articles 194 to 199b and Article 202 of the directive. It is clear from the order for reference that the exceptions referred to in the latter provisions are not applicable in the main proceedings.

39 According to settled case-law of the Court, the terms used in Article 9 of Directive 2006/112, in particular the term ‘any person who’, give to the notion of ‘taxable person’ a broad definition focused on independence in the pursuit of an economic activity, to the effect that all persons – natural or legal, both public and private, and entities devoid of legal personality – who, in an objective manner, satisfy the criteria set out in that provision must be regarded as being taxable persons for the purposes of VAT (judgment of 12 October 2016, *Nigl and Others*, C?340/15, EU:C:2016:764, paragraph 27 and the case-law cited).

40 In order to determine who, in circumstances such as those at issue in the main proceedings, must be regarded in respect of the supplies at issue as a ‘taxable person’ for the purposes of VAT, it must be established who has independently carried out the economic activity referred to. As the Advocate General has explained, in points 33, 45 and 46 of her Opinion, the criterion of independence concerns allocation of the transaction concerned to a particular person or entity, whilst also guaranteeing that the customer can exercise any right of deduction with legal certainty in that he or she will have the full name and address of the taxable person in question, in accordance with Article 226(5) of Directive 2006/112.

41 To that end, it is necessary to examine whether the person concerned carries out an economic activity in his or her own name, on his or her own behalf and under his or her own responsibility, and whether he or she bears the economic risk associated with the carrying out of those activities (judgment of 12 October 2016, *Nigl and Others*, C?340/15, EU:C:2016:764, paragraph 28 and the case-law cited).

42 It is apparent from the request for a preliminary ruling that, in the present instance, after the partnership at issue had been entered into with a view to carrying out a building project and XT’s partner had passed his contribution to XT, the plot of land was purchased by XT alone, in his own name. XT applied to the competent authorities for the construction permit, and obtained it, in his name. It was also XT, alone and in his name, who concluded the property development agreement. The partners decided that it would be XT who would be entered in the land register as sole owner. XT concluded in his own name the contracts of sale relating to all the buildings and to the plots of land appurtenant thereto, both before and after the decision to terminate the partnership at issue.

43 Notwithstanding the fact that the agreement at issue contained a clause designating XT as the person who, in relations with third parties, acted in the name of both parties to the agreement, the referring court states, inter alia as regards the supplies at issue, that only XT participated in those relations, and that he did not mention the partner’s identity or the partnership at issue, so that it is, according to the referring court, highly likely that the persons to whom the supplies were made were unaware that a partner existed.

44 It follows that XT acted in his own name and on his own behalf, assuming by himself the

economic risk associated with the taxable transactions at issue.

45 It is clear from the foregoing factors that, in circumstances such as those at issue in the main proceedings, the economic activity cannot be allocated to the entity set up by the joint activity agreement, as the partners have not acted together in their relations with third parties and the person empowered to act in the name of the partners as a whole has not been involved in those relations in accordance with the rules governing representation that are established by that agreement, so that that entity cannot be regarded as having carried out the taxable transactions at issue in the main proceedings. As the partner has not carried out any transaction himself, it is clear from all those factors that, in the present instance, only a person such as XT is to be regarded as having acted independently and therefore as a taxable person.

46 That conclusion is not affected either by the fact that the partner provided significant finance for the purchase of the plot of land and that it was decided, when the partnership came to an end, to divide up the liabilities and the assets produced or by the fact that the decisions relating to the economic activity which is at issue in the main proceedings – and in the context of which the supplies at issue were made – such as the purchase of the plot of land and the decision to pursue a building project by using the sums obtained from selling the first building, were taken by the partners together. In the light of the fact that in the relations with third parties only XT was present, and that he did not mention the partnership at issue or the identity of his partner, the acts resulting from those decisions were carried out, as the Advocate General has observed, in essence, in point 54 of her Opinion, not by or for that partnership, but by XT, on his own behalf.

47 Consequently, the participation of a partner such as XT’s partner in the decisions preceding the acts carried out by a person such as XT cannot affect that person’s status as a taxable person.

48 The formal existence of an agreement such as that setting up the partnership at issue therefore does not preclude independence of a person such as XT when carrying out the economic activity.

49 Furthermore, as regards the requirement laid down by the Court’s case-law referred to in paragraph 41 of the present judgment that the person concerned must have acted on his or her own behalf, it follows from the provisions of Directive 2006/112, in particular Article 14(2)(c) and Article 28 thereof, that, as the Advocate General has explained in point 56 of her Opinion, classification as a ‘taxable person’ is not precluded by having acted on behalf of another person, as a commission agent. Indeed, even though a person acts in his or her own name, but on behalf of another person, he or she is considered to be the taxable person, by means of the fiction established by that directive that he or she, first, received the goods in question before, secondly, making the supply thereof him or herself (see, by analogy, judgment of 14 July 2011, *Henfling and Others*, C?464/10, EU:C:2011:489, paragraph 35).

50 That rule could apply, in the present instance, in respect of the sale of the fifth building, which XT carried out in his own name, under a contract of sale concluded on 13 February 2013, although that building had been allocated and then transferred to the partner in pursuance of the deed of division that was concluded on 1 February 2013 in implementation of the decision taken on 10 January 2011 to terminate the partnership at issue. It is, however, for the referring court to establish whether that can be the case under national law, given that it is apparent from the request for a preliminary ruling that XT was still entered in the property register as owner of that building on the date of its sale.

51 It follows from all the foregoing that a person in a situation such as that of XT must be regarded as the ‘taxable person’, within the meaning of Article 9(1) of Directive 2006/112, in so far as he or she has acted on his or her own behalf or on behalf of another person.

52 In the light of all the foregoing considerations, the answer to the first question is that Article 9(1) and Article 193 of Directive 2006/112 must be interpreted as meaning that a natural person who has concluded with another natural person a joint activity agreement setting up a partnership, which lacks legal personality and is characterised by the fact that the first person is empowered to act in the name of the partners as a whole, but participates alone and in his or her own name in relations with third parties when performing acts that form the economic activity pursued by that partnership, must be regarded as a ‘taxable person’ within the meaning of Article 9(1) of Directive 2006/112 and as having sole liability for the VAT payable under Article 193 of that directive, since he or she acts on his or her own behalf or on behalf of another person as a commission agent as provided for in Article 14(2)(c) and Article 28 of that directive.

The second question

53 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

54 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:

Article 9(1) and Article 193 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 natural person who has concluded with another natural person a joint activity agreement setting up a partnership, which lacks legal personality and is characterised by the fact that the first person is empowered to act in the name of the partners as a whole, but participates alone and in his or her own name in relations with third parties when performing acts that form the economic activity pursued by that partnership, must be regarded as a ‘taxable person’ within the meaning of Article 9(1) of Directive 2006/112 and as having sole liability for the value added tax payable under Article 193 of that directive, since he or she acts on his or her own behalf or on behalf of another person as a commission agent as provided for in Article 14(2)(c) and Article 28 of that directive.

[Signatures]

* Language of the case: Lithuanian.