Joined Cases C-180/10 and C-181/10

Jaros?aw S?aby

v

Minister Finansów

and

Emilian Ku? and Halina Jeziorska-Ku?

v

Dyrektor Izby Skarbowej w Warszawie

(References for a preliminary ruling from

the Naczelny S?d Administracyjny)

(Taxation – Value added tax – Directive 2006/112/EC – Meaning of taxable person – Sale of building land – Articles 9, 12 and 16 – No deduction of input VAT)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Economic activities for the purposes of Article 12 of Directive 2006/112 – Definition

(Council Directive 2006/112, Arts 9(1), 12(1) and 295(1)(3))

The supply of land designated for development must be regarded as subject to value added tax under the national legislation of a Member State if that Member State has availed itself of the option provided for by Article 12(1) of Directive 2006/112 on the common system of value added tax, irrespective of whether the transaction is carried out on a continuing basis or whether the person who effected the supply carries out an activity of a producer, a trader or a person supplying services, to the extent that that transaction does not constitute the mere exercise of the right of ownership by its holder.

A natural person who carried out an agricultural activity on land that was reclassified, following a change to urban management plans which occurred for reasons beyond his control, as land designated for development must not be regarded as a taxable person for value added tax for the purposes of Articles 9(1) and 12(1) of Directive 2006/112 when he begins to sell that land if those sales fall within the scope of the management of the private property of that person.

If, on the other hand, that person takes active steps, for the purpose of concluding those sales, to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112, that person must be regarded as carrying out an ‘economic activity’ within the meaning of that article and must, therefore, be regarded as a taxable person for value added tax.

The fact that that person is a ‘flat-rate farmer’ within the meaning of Article 295(1)(3) of Directive

2006/112 is irrelevant in this respect.

(see para. 49, operative part)

JUDGMENT OF THE COURT (Second Chamber)

15 September 2011 (*)

(Taxation – Value added tax – Directive 2006/112/EC – Meaning of taxable person – Sale of building land – Articles 9, 12 and 16 – No deduction of input VAT)

In Joined Cases C?180/10 and C?181/10,

REFERENCES for a preliminary ruling under Article 267 TFEU, from the Naczelny S?d Administracyjny (Poland), made by decisions of 9 March 2010, received at the Court on 9 April 2010, in the proceedings

Jaros?aw S?aby

v

Minister Finansów (C-180/10),

and

Emilian Ku?

Halina Jeziorska-Ku?

v

Dyrektor Izby Skarbowej w Warszawie (C-181/10),

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev (Rapporteur), U. Lõhmus, A. Ó Caoimh and P. Lindh, Judges,

Advocate General: J. Mazák,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

– Mr Ku? and Mrs Jeziorska-Ku?, by W. Modzelewski, radca prawni,

– the Polish Government, by M. Szpunar, acting as Agent,

– the European Commission, by D. Triantafyllou and K. Herrmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 April 2011,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 4(1) and (2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129) ('the Sixth Directive'), and of Articles 9(1), 16 and 295(1)(3) 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 2006/138/EC of 19 December 2006 (OJ 2006 L 384, p. 92) ('the VAT Directive').

2 The references have been made in two sets of proceedings, between (i) Mr S?aby and the Minister Finansów (Minister for Finance) (Case C-180/10) and (ii) Mr Ku? and Mrs Jeziorska-Ku? ('Mr and Mrs Ku?') and the Dyrektor Izby Skarbowej w Warszawie (Director of the Fiscal Chamber, Warsaw) (Case C-181/10) concerning the issue whether the disposal of several plots of land designated for development must be subject to value added tax ('VAT').

Legal context

European Union law

3 The VAT Directive repealed and replaced from 1 January 2007, pursuant to Articles 411 and 413 thereof, European Union law on VAT, in particular the Sixth Directive. According to recitals 1 and 3 in the preamble to the VAT Directive, the recasting of the Sixth Directive was necessary to ensure that the provisions on the harmonisation of the laws of the Member States relating to VAT are presented in a clear and rational manner in a revised structure and wording while, in principle, not making material changes. The provisions of the VAT Directive are therefore identical, essentially, to the corresponding provisions of the Sixth Directive.

4 According to Article 2(1)(a) of the VAT Directive, which essentially repeats the wording of Article 2(1) of the Sixth Directive, 'the supply of goods for consideration within the territory of a Member State by a taxable person acting as such' 'shall be subject to VAT'.

5 Article 9(1) of the VAT Directive, which is worded in terms which are essentially similar to those of Article 4(1) and (2) of the Sixth Directive, provides:

'"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.'

6 Article 12(1) and (3) of the VAT Directive, which essentially repeats the wording of Article

4(3) of the Sixth Directive, contains the following provisions:

‘1. Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions:

…

(b) the supply of building land.

…

3. For the purposes of paragraph 1(b), “building land” shall mean any unimproved or improved land defined as such by the Member States.’

7 The first paragraph of Article 16 of the VAT Directive, which essentially corresponds to Article 5(6) of the Sixth Directive, is worded as follows:

‘The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.’

8 Article 295(1)(1) and (3) of the VAT Directive, like the first and third indents of Article 25(2) of the Sixth Directive, defines a ‘farmer’, for the purposes of Chapter 2 of Title XII, as a ‘taxable person whose activity is carried out in an agricultural, forestry or fisheries undertaking’, and a ‘flat-rate farmer’ as a ‘farmer covered by the flat?rate scheme provided for in [that] Chapter’.

9 Article 296(1) of the VAT Directive, to which Article 25(1) of the Sixth Directive corresponds, provides:

‘Where the application to farmers of the normal VAT arrangements, or the special scheme provided for in Chapter 1, is likely to give rise to difficulties, Member States may apply to farmers, in accordance with this Chapter, a flat-rate scheme designed to offset the VAT charged on purchases of goods and services made by the flat-rate farmers.’

National legislation

10 Article 15(1)(2)(4) and (5) of the Law on the tax on goods and services of 11 March 2004 (‘the Law on VAT’) provides:

‘1. “Taxable persons” shall mean legal persons, organisational entities without legal personality and natural persons who, independently, carry out one of the economic activities referred to in paragraph 2, whatever the purpose or results of that activity.

2. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as an economic activity, even where the activity concerned was carried out only once in circumstances indicating an intention to perform that activity repeatedly. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall also be regarded as an economic activity.

…

4. In the case of natural persons carrying out exclusively an activity in an agricultural, forestry or fisheries undertaking, taxable persons shall mean any persons who have filled out an application for registration as referred to in Article 96(1).

5. Paragraph 4 shall apply *mutatis mutandis* to natural persons carrying out exclusively an agricultural activity in circumstances other than those mentioned in that paragraph.'

11 Article 43(1)(3) and (9) of the Law on VAT provides:

'1. The following transactions shall be exempt from tax:

…

(3) the supply by a flat-rate farmer of agricultural products resulting from his agricultural activity and the supply of agricultural services by a flat-rate farmer;

…

(9) the supply of land which has not been built on other than building land designated for development'.

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

Case C-180/10

12 In 1996 Mr S?aby purchased, as a natural person not carrying out an economic activity, land designated, in accordance with the urban management plan in force at the time, for agricultural purposes. He used that land for the purposes of an agricultural activity between 1996 and 1998, ceasing that activity in 1999.

13 In 1997, the urban management plan in question was changed, and the land in question was henceforth earmarked for a holiday home development. Following that change, Mr S?aby divided the land into 64 plots which, from 2000, he gradually began to sell to natural persons.

14 On 17 September 2007, Mr S?aby requested that the Minister Finansów give an individual interpretation as to whether, in the light of Article 15(1) of the Law on VAT, the division of land into plots, followed by the sale of those plots to various purchasers, must be regarded as transactions which are subject to VAT.

15 In the individual interpretation of 13 December 2007, the Minister Finansów stated that those transactions constituted an economic activity, given that under the Law on VAT a farmer is a taxable person carrying out an economic activity, and that the scale and scope of the planned transactions and the division of the land into plots indicated Mr S?aby's intention to make repeated sales.

16 Mr S?aby brought an action against that interpretation. The Wojewódzki S?d Administracyjny w Warszawie rejected the interpretation of the Minister Finansów and held that it was not apparent from the factual circumstances of the case that Mr S?aby carried out or intended to carry out an economic activity in the area of property transactions, but that he carried out an agricultural activity, which was not subject at the time to VAT. According to that court, there is nothing to prove that the land was purchased with the intention of reselling it, given that it was purchased for the purposes of an agricultural activity and that it was used as such. The division and the sale of the plots was the consequence of a change to the urban management plan which

was not attributable to Mr S?aby. Therefore, according to that court, the applicant in the main proceedings did not act as a trader when purchasing the land in question.

17 The Minister Finansów brought an appeal in cassation against that judgment before the referring court. The Minister claims that since the land in question was purchased for the purposes of agricultural production, it was not used exclusively for the private use of Mr S?aby, but formed part of his agricultural undertaking and was therefore used to carry out an economic activity.

18 In those circumstances the Naczelny S?d Administracyjny decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is a natural person who carried out an agricultural activity on land and subsequently, on account of a change to urban management plans which occurred for reasons beyond his control, ceased that activity and reclassified his property as private property, divided it into smaller parts (land designated for a holiday home development) and began to dispose of it, on that basis a taxable person for VAT for the purposes of Article 9(1) of the VAT Directive and Article 4(1) and (2) of Sixth Directive 77/388/EEC who is liable for payment of VAT on the basis of a trading activity?’

Case C-181/10

19 Mr and Mrs Ku? have been the owners since 1996 of an agricultural undertaking purchased as agricultural land not permitted for development. Until the end of 2006, they used that land for agricultural purposes, namely to keep horses, and subsequently to grow fodder for their animals.

20 After receiving an interpretation from the tax authorities in 2004, Mr and Mrs Ku? registered as taxable persons for VAT even though, in their view, their undertaking is part of their personal property.

21 Following a change to the urban management plan, according to which the land in question was henceforth earmarked for residential and service development, they began to sell, on an occasional and non?organised basis, certain parts of their undertaking. Those supplies were subject to VAT.

22 According to Mr and Mrs Ku?, those supplies should not have been subject to VAT, since they concern their personal property. They requested a written interpretation on this point from the Head of the Tax Office in Wo?omin. In his individual interpretation of 13 June 2008, the head of that tax office took the view that the sale of that land constituted a supply of goods for consideration and was subject to VAT. That interpretation was upheld by the Dyrektor Izby Skarbowej w Warszawie.

23 Mr and Mrs Ku? brought an action against that interpretation before the Wojewódzki S?d Administracyjny w Warszawie. According to the latter, the supplies of the building land in question must be subject to VAT on the ground, first, that that land was part of the agricultural undertaking of Mr and Mrs Ku? and, second, that Mr and Mrs Ku? effected those supplies as traders. According to the Wojewódzki S?d Administracyjny w Warszawie, those two circumstances, independently of one another, form a basis for making those transactions subject to VAT.

24 The Naczelny S?d Administracyjny, before which Mr and Mrs Ku? appealed in cassation, observes first that they benefited, as farmers, from the flat?rate scheme for imposition of VAT. Consequently, that court raises the question whether the sale of the land in question can be regarded as a disposal of goods which are part of their personal property, when the purchase of that land did not give rise to deduction of VAT. That court points out, moreover, that the land in question was used not only to supply agricultural products, but also for the private purposes of the

farmer and the members of his family.

25 In those circumstances, the Naczelny S?d Administracyjny decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is a flat-rate farmer within the meaning of Article 295(1)(3) of [the VAT Directive] who sells plots of land used for his agricultural activity which are designated in a municipality’s urban management plan for residential and service development and were purchased as agricultural land (VAT-free) covered by Article 16 of that directive, which regards the application of business assets for the taxable person’s private use or for purposes other than those of his business as a supply of goods for consideration only where the tax on those assets was wholly or partly deductible?

2. [If so], must a flat-rate farmer within the meaning of Article 295(1)(3) of [the VAT Directive] who sells plots of land previously used for his agricultural activity which are designated in a municipality’s urban management plan for residential and service development and were purchased as agricultural land (VAT-free) be regarded as a taxable person who is required to account for VAT on that sale under the general rules?’

Consideration of the questions referred

26 By its questions, which it is appropriate to examine together, the referring court asks the Court, in essence, whether a natural person who carried out an agricultural activity on land purchased VAT-free that was reclassified, following a change to urban management plans which occurred for reasons beyond his control, as land designated for development must be regarded as a taxable person for VAT when he begins to sell that land. Moreover, the referring court asks whether, in such circumstances, a ‘flat-rate farmer’, within the meaning of Article 295(1)(3) of the VAT Directive, must be regarded as a taxable person who is required to account for VAT under the general rules and whether Article 16 of that directive is applicable to him.

27 It should be pointed out at the outset that it is apparent from the cases in the main proceedings that some of the sales relate to a tax period prior to the accession of the Republic of Poland to the European Union. However, the Court of Justice has jurisdiction to interpret European Union law only as regards its application in a new Member State with effect from the date of that State’s accession to the European Union (see, inter alia, order of 6 March 2007 in Case C?168/06 *Ceramika Parady?*, paragraph 22). The following considerations therefore relate solely to the transactions carried out after the date of the Republic of Poland’s accession to the European Union.

28 It must also be observed that the disputes in the main proceedings relate to a period during which the Sixth Directive and the VAT Directive were applicable in succession. There is however no need, for the purpose of the answers to the questions referred, to distinguish between the provisions resulting from those directives, as their scope is to be regarded as identical in substance for the purpose of the interpretation which the Court is required to give in the present case.

29 On the substance of the case, it is apparent from the orders for reference that the land in question in the main proceedings was reclassified, following a change to urban management plans which occurred for reasons beyond the control of Mr S?aby and Mr and Mrs Ku?, as land designated for development.

30 Article 12(1) of the VAT Directive enables Member States to regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to

in the second subparagraph of Article 9(1) of the VAT Directive and in particular a single supply of building land.

31 The Polish Government submits that it availed itself of the possibility afforded by that provision by introducing, in its national legislation, Article 15(2) of the Law on VAT, according to which ‘any activity of producers, traders or persons supplying services ... shall be regarded as an economic activity, even where the activity concerned was carried out only once in circumstances indicating an intention to perform that activity repeatedly ...’.

32 However, it is not clear from the orders for references, or indeed from the wording of Article 15(2) of the Law on VAT, whether the Republic of Poland did actually avail itself of Article 12(1) of the VAT Directive. It is for the referring court to determine this.

33 In this respect, it should be noted that Article 12(1) of the VAT Directive provides for an option and not an obligation for the Member States. It follows that, in order to use the option provided for by that provision, the Member States are required to make a choice to rely on it (see, by analogy, Case C-102/08 *SALIX Grundstücks-Vermietungsgesellschaft* [2009] ECR I?4629, paragraphs 51 and 52).

34 According to the settled case-law of the Court, the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner (see, by analogy, *SALIX Grundstücks-Vermietungsgesellschaft*, paragraph 40).

35 If the referring court finds that the Member State in question has availed itself of the option provided for in Article 12(1) of the VAT Directive, the supply of building land must be regarded as subject to VAT under the national legislation, irrespective of whether the transaction is carried out on a continuing basis or whether the person who effected the supply carries out an activity of a producer, a trader or a person supplying services, to the extent that that transaction does not constitute the mere exercise of the right of ownership by its holder.

36 It is clear in this respect from the case-law that the mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity (see Case C-155/94 *Wellcome Trust* [1996] ECR I?3013, paragraph 32).

37 The Court would point out that the number and scale of the sales carried out in the present case are not in themselves decisive. As the Court has already held, the scale of the sales cannot constitute a criterion for distinguishing between the activities of an operator acting in a private capacity, which fall outside the scope of the VAT Directive, and those of an operator whose transactions constitute an economic activity. The Court has pointed out that a large volume of sales may also be carried out by operators acting in a private capacity (see, to that effect, *Wellcome Trust*, paragraph 37).

38 Similarly, the fact that, prior to the disposal, the party concerned proceeded to divide the land into plots in order to obtain a higher overall price from that land is not, in itself, decisive, and nor is the period of time over which those transactions take place or the level of income derived therefrom. Indeed, all those circumstances could fall within the scope of the management of the personal property of the party concerned.

39 That is not however the case where the party concerned takes active steps to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of the VAT

Directive.

40 Such active steps may consist, inter alia, in the carrying out on that land of preparatory work to make development possible, and the deployment of proven marketing measures.

41 Since those initiatives do not normally fall within the scope of the management of personal property, the supply of land designated for development in such a situation cannot be regarded as the mere exercise of the right of ownership by its holder.

42 In the event that the referring court finds that the Republic of Poland has not availed itself of the option provided for by Article 12(1) of the VAT Directive, it will be necessary to examine whether the transaction in question in the main proceedings is taxable under Article 9(1) of the VAT Directive.

43 That provision defines ‘taxable person’ by reference to the term ‘economic activity’. It is the existence of such an activity which establishes the status of ‘taxable person’ (see Case C?32/03 *Fini H* [2005] ECR I-1599, paragraph 19).

44 In this respect, it should be recalled that ‘economic activity’ is defined in the second subparagraph of Article 9(1) of the VAT Directive as encompassing all activities of producers, traders and persons supplying services and, in particular, transactions comprising the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis.

45 According to settled case-law, the simple acquisition and the mere sale of an asset cannot amount to exploitation of an asset intended to produce income on a continuing basis within the meaning of Article 9(1) of the VAT Directive, as the only consideration for those transactions consists of a possible profit on the sale of that asset. As a rule, such transactions cannot, by themselves, constitute economic activities within the meaning of that directive (see Case C-77/01 *EDM* [2004] ECR I-4295, paragraph 58, and Case C-8/03 *BBL* [2004] ECR I?10157, paragraph 39).

46 The criteria set out in paragraphs 37 to 41 of this judgment are applicable.

47 As regards Article 16 of the VAT Directive, it should be pointed out that it is applicable, as is clear from its wording, where the VAT on the goods in question or the component parts thereof was wholly or partly deductible. It is apparent in this respect from the orders for references that the applicants in the main proceedings purchased the land in question free of VAT. The purchase of that land could not therefore have given rise to any deduction of VAT. It follows that Article 16 is not applicable in a situation such as that in the cases in the main proceedings.

48 Moreover, the fact that the applicants in the main proceedings in Case C-181/10 registered themselves for VAT subject to the flat-rate scheme in respect of their agricultural activity is irrelevant in the light of the foregoing considerations. As the Polish Government and the European Commission rightly point out, transactions other than the supply of agricultural products and agricultural services within the meaning of Article 295(1) of the VAT Directive provided by the flat-rate farmer within the framework of agricultural undertakings remain subject to the general scheme under that directive (see Case C-321/02 *Harbs* [2004] ECR I?7101, paragraphs 31 and 36, and Case C-43/04 *Stadt Sundern* [2005] ECR I-4491, paragraph 20).

49 In the light of the foregoing, the answer to the questions referred is that the supply of land designated for development must be regarded as subject to VAT under the national legislation of a Member State if that State has availed itself of the option provided for by Article 12(1) of the VAT

Directive, irrespective of whether the transaction is carried out on a continuing basis or whether the person who effected the supply carries out an activity of a producer, a trader or a person supplying services, to the extent that that transaction does not constitute the mere exercise of the right of ownership by its holder.

50 A natural person who carried out an agricultural activity on land that was reclassified, following a change to urban management plans which occurred for reasons beyond his control, as land designated for development must not be regarded as a taxable person for VAT for the purposes of Articles 9(1) and 12(1) of the VAT Directive when he begins to sell that land if those sales fall within the scope of the management of the private property of that person.

51 If, on the other hand, that person takes active steps, for the purpose of concluding those sales, to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of the VAT Directive, that person must be regarded as carrying out an 'economic activity' within the meaning of that article and must, therefore, be regarded as a taxable person for VAT.

52 The fact that that person is a 'flat-rate farmer' within the meaning of Article 295(1)(3) of the VAT Directive is irrelevant in this respect.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Second Chamber) hereby rules:

The supply of land designated for development must be regarded as subject to value added tax under the national legislation of a Member State if that State has availed itself of the option provided for by Article 12(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2006/138/EC of 19 December 2006, irrespective of whether the transaction is carried out on a continuing basis or whether the person who effected the supply carries out an activity of a producer, a trader or a person supplying services, to the extent that that transaction does not constitute the mere exercise of the right of ownership by its holder.

A natural person who carried out an agricultural activity on land that was reclassified, following a change to urban management plans which occurred for reasons beyond his control, as land designated for development must not be regarded as a taxable person for value added tax for the purposes of Articles 9(1) and 12(1) of Directive 2006/112, as amended by Directive 2006/138, when he begins to sell that land if those sales fall within the scope of the management of the private property of that person.

If, on the other hand, that person takes active steps, for the purpose of concluding those sales, to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112, as amended by Directive 2006/138, that person must be regarded as carrying out an 'economic activity' within the meaning of that article and must, therefore, be regarded as a taxable person for value added tax.

The fact that that person is a ‘flat-rate farmer’ within the meaning of Article 295(1)(3) of Directive 2006/112, as amended by Directive 2006/138, is irrelevant in this respect.

[Signatures]

* Language of the case: Polish.